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Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Treble Damages and the Void-for-Vagueness Doctrine

North Carolina General Statutes section 75-1.1[1] has been the "centerpiece" of the law of unfair trade practices since its enactment in 1969.[2] Unlike its federal counterpart, section 5 of the Federal Trade Commission Act,[3] section 75-1.1 is enforceable in a private damage action brought by an aggrieved competitor or consumer,[4] and damages awarded in a private action brought pursuant to section 75-16 are trebled automatically.[5] To establish a violation of section 75-1.1, a plaintiff must prove that the defendant engaged in "unfair methods of competition" or "unfair or deceptive acts or practices" in or affecting commerce.[6] Rather than enumerating a list of illegal acts, practices, and

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1. N.C. GEN. STAT. § 75-1.1(a) (1981) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." The original version of § 75-1.1(a) provided that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Act of June 12, 1969, ch. 833, § 1, 1969 N.C. SESS. LAWS 930. This version was amended in 1977. Act of June 27, 1977, ch. 747, §§ 1-2, 1977 N.C. SESS. LAWS 984. This amendment conformed § 75-1.1 to the exact wording of § 5 of the Federal Trade Commission Act. 15 U.S.C. § 45(a)(1) (1976). Although the justification for the amendment was not made explicit, the timing of the amendment suggests that the legislature was responding to the North Carolina Supreme Court's decision in State *ex. rel.* Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977), which had distinguished the scope of the North Carolina and Federal Trade Commission Act provisions. *See* Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C.L. REV. 207, 210 (1982); *see also* Comment, *The North Carolina Consumer Protection Act of 1977*, 56 N.C.L. REV. 547, 548 nn.7-8 (1978).

2. Aycock, *supra* note 1, at 210-11.

3. 15 U.S.C. § 45(a)(1) (1982).

4. *See* N.C. GEN. STAT. § 75-16 (1981). Section 75-16 expressly provides a private cause of action to any person, firm, or corporation injured as a result of any act in violation of § 75-1.1.

> If any person shall be injured or the business of any person, firm, or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

A private cause of action under § 5 of the Federal Trade Commission Act has been rejected by a great majority of the courts. *See* Dreisbach v. Murphy, 658 F.2d 720 (9th Cir. 1981); Fulton v. Hecht, 580 F.2d 1243 (5th Cir. 1978), *reh'g denied*, 585 F.2d 520, *cert. denied*, 440 U.S. 981 (1979); Alfred Dunhill, Ltd. v. Interstate Cigar Co., 499 F.2d 232 (2d Cir. 1974); Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973). *See also* 4 CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES, § 24.01 n.22 (1983). *But cf.*, Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582 (N.D. Ind. 1976).

5. *See* N.C. GEN. STAT. § 75-16 (1981). For text of § 75-16, see *supra* note 4. In Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981), the court stated:

> Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages to be automatic once a violation is shown. To rule otherwise would produce the anomolous result of recognizing that although G.S. 75-1.1 creates a cause of action broader than traditional common law actions, G.S. 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie.

Id. at 547, 276 S.E.2d at 402.

6. N.C. GEN. STAT. § 75-1.1(a) (1981). For text of § 75-1.1(a), see *supra* note 1. The statute has two components: an unfair-methods-of-competition component and an unfair-or-deceptive-

methods of competition, the general assembly decided "that the most useful tool that could be made available . . . to stop fraud and deception was the operative language of Section 5."[7] Thus, the general assembly followed Congress' definition, "advisedly adopt[ing] a phrase which . . . does not 'admit of precise definition but the meaning and application of which must be arrived at by what [the Supreme Court] elsewhere has called "the gradual process of judicial inclusion and exclusion." ' "[8]

Because of the potential for enormous liability under this mandatory treble damage provision and the uncertainty surrounding the precise boundaries of section 75-1.1, a number of defendants have challenged the constitutionality of section 75-16 as applied to section 75-1.1 on the grounds of the void-for-vagueness doctrine.[9] This note will analyze the application of the

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acts-or-practices component. To understand the analysis applied by the courts when interpreting a claim under § 75-1.1, "[t]he unfair-method-of-competition component should be examined separately from the unfair-or-deceptive-acts-or-practices component." Aycock, *supra* note 1, at 217. The unfair-method-of-competition component derives its meaning from interpretations of § 5 of the Federal Trade Commission Act and the North Carolina common law. In Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 400, 248 S.E.2d 739, 744 (1978), *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979), the court of appeals stated that, "the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others." The court cautioned putative defendants "to exercise care not to step over the *necessarily vague* but nonetheless real boundary line dividing fair conduct from foul which the court from time to time may be called upon to draw." *Harrington*, 38 N.C. App. at 404, 248 S.E.2d at 745 (emphasis added).

Although unfair methods of competition historically have been the most fertile ground for litigation, the rise in the consumer movement and increased state consumer protection activities have focused increasing attention on the unfair-or-deceptive-acts-or-practices component. *See* Comment, *The Trouble with Trebles: What Violates G.S. 75-1.1?*, 5 CAMPBELL L. REV. 199 (1983). In Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981), a consumer action alleging misrepresentation concerning services to be provided to lessees in a mobile home park, the North Carolina Supreme Court gave the statute a broad reading and attempted to outline "what, as a matter of law, makes a trade practice 'unfair or deceptive.' " *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403.

> Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. As also noted in *Johnson*, [300 N.C. at 265, 266 S.E.2d at 622,] under section 5 of the FTC Act, a practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. Consistent with federal interpretations of decisions under Section 5, state courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the states' unfair and deceptive practices act.

Id. The court concluded that "[u]nfairness and deception are gauged by consideration of the effect of the practice on the marketplace . . . and the effect of the actors's conduct on the consuming public." *Id.*

7. Morgan, *The People's Advocate in the Marketplace—The Role of The North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRA. L. REV. 1, 19 (1969).

8. Federal Trade Comm'n v. R.F. Keppel & Bros., 291 U.S. 304, 312 (1934), (quoting Federal Trade Comm'n v. Raladam Co., 283 U.S. 643, 648 (1931)). In *Keppel*, the Supreme Court discussed the purpose of § 5 of the Federal Trade Commission Act and the Senate Committee on Interstate Commerce's rejection of a specific enumeration of acts deemed unfair. *Id.* at 310-12 nn.1-2.

9. In L.M. Hammers v. Lowe's Cos., 48 N.C. App. 150, 268 S.E.2d 257 (1980), Judge Parker recognized the constitutional question but was not required to reach the issue on the record before the court.

> Admittedly, the language of [the] statute, proscribing as it does "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or

treble damage provision to section 75-1.1 and the constitutional requirement that a statute "convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[10]

The applicable standard for determining whether a given statute is unconstitutionally vague in violation of the due process clause of the fourteenth amendment to the United States Constitution depends on whether the statute is penal or criminal and whether it is considered civil legislation or economic regulation.[11] If the mandatory treble damages are judged by the standard applicable to penal statutes, the statute "must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation."[12] If the statute is considered economic regulation and the mandatory trebles predominantly remedial, however, "greater leeway is allowed,"[13] and "[a] finding of vagueness will . . . result only where 'the exaction of obedience to a rule or standard . . . was so vague and indefinite as really to be no rule or standard at all,' . . . or where . . . men of common intelligence must necessarily guess at its meaning and differ as to its application."[14] Although the nature of the vagueness inquiry under these standards and the ultimate decision whether the statute is "too vague" or "sufficiently definite" to pass constitutional scrutiny is not readily apparent, the practical effect of the selection of a given standard may be determinative.

Whether the stricter standard of definiteness applicable to penal statutes should apply to the North Carolina statute depends on the legislative intent behind section 75-1.1 and its effect on putative defendants. Section 75-1.1 was enacted in response to a growing need for state legislation to supplement section 5[15] "so that local business interests could not proceed with impunity, se-

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affecting commerce," is extremely broad, so broad and vague, indeed, as to render the triple damage penalty provided by G.S. 75-16 in a private action brought for violation of the vague language of G.S. 75-1.1 at least of questionable validity. On the present record, however, we do not reach that constitutional question.

L.M. Hammers, 48 N.C. App. at 154, 268 S.E.2d at 259-60.

More recently, the United States District Court for the Eastern District of North Carolina cited Judge Parker's skepticism and once again raised the issue. *See* Terry's Floor Fashions v. Burlington Indus., 568 F. Supp. 205, 216 (E.D.N.C. 1983).

The North Carolina statute is vague, has been the subject of widely varying judicial interpretations, and is of questionable constitutionality. The North Carolina appellate courts have yet to provide a clear and consistent interpretation of the provisions of this act. Indeed, defendants argue very persuasively that the act is unconstitutionally vague, and at least one panel of the North Carolina Court of Appeals has indicated its skepticism as to the constitutional validity of § 75-1.1.

Id. at 216. Because the court dismissed the action on jurisdictional grounds, the constitutional question was not resolved.

10. United States v. Petrillo, 332 U.S. 1, 7-8 (1947).

11. *See infra* notes 47-49 and accompanying text.

12. Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952). *See also* United States v. National Dairy Prods. Corp., 372 U.S. 29, 32-33 (1963); United States v. Petrillo, 332 U.S. 1, 7-8 (1947).

13. Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972).

14. Horn v. Burns, 536 F.2d 251, 254 (8th Cir. 1976) (citations omitted).

15. *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400. *See also* Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission*

cure in the knowledge that the dimensions of their transgressions would not merit federal action."[16] Rather than placing the entire burden of business regulation on the Attorney General or creating a North Carolina commission to enforce section 75-1.1, the general assembly decided to place primary responsiblity for the enforcement of the statute on private parties. Treble damages were extended to claims under section 75-1.1 for the purposes of encouraging private enforcement by making it economically feasible to bring an action in which possible money damages were nominal, and increasing the incentive for reaching a settlement.[17] As such the private enforcement provisions are more analogous to section 4 of the Clayton Act[18] than section 5 of the Federal Trade Commission Act.[19]

The North Carolina Supreme Court in *Marshall v. Miller*[20] considered the purpose of the State's unfair and deceptive trade practices act[21] and the role of the treble damage provision.[22] The court concluded that the "[l]egislature intended to establish an effective private cause of action for aggrieved consumers in this State."[23] As such, the court reiterated its earlier characterization of 75-16 as a "hybrid."

> [I]t is an oversimplification to characterize G.S. 75-16 as punitive.

Jurisprudence, 48 GEO. WASH. L. REV. 521 (1980). The various state consumer protection acts passed during the 1960s and 1970s to supplement § 5 of the Federal Trade Commission Act "had their genesis in various forms suggested to the states by the Federal Trade Commission." *Id.* at 521 n.2. *See generally* Lovett, *State Deceptive Trade Practices Legislation*, 46 TULANE L. REV. 724, 730-31 (1972); Lovett, *Private Actions for Deceptive Trade Practices*, 23 AD. L. REV. 271, 275 (1970); COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION C4-C5 (1970).

16. *Marshall*, 302 N.C. at 549, 276 S.E.2d at 403.

17. *Id.* at 550, 276 S.E.2d at 403-04. *See* 2 P. AREEDA & D. TURNER, ANTITRUST LAW 149-50 (1978); Comment, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896, 900 (1970).

It could be argued that the incentive provided by treble damages is not needed in the context of an unfair-methods-of-competition claim, and thus that this component should not be subject to mandatory treble damages. Because the plaintiffs and the defendants in an unfair-methods-of-competition claim usually are competing businessmen and the amount in controversy is likely to be greater than an unfair-or-deceptive-acts-or-practices claim, the plaintiff has more incentive to bring a private action whether or not treble damages are available. This view, however, ignores the small businessman whose actual damages, like the consumer, might be small relative to the sales revenues of his larger competitor or supplier. The existence of an effective private cause of action may mean the difference between continued operations or bankruptcy. Moreover, the continuing "unfair methods of competition" may have a secondary effect, effectively passing on the damage to the ultimate consumer in the form of higher prices or misleading advertising. Thus, under the better view, both components of § 75-1.1 and the corresponding treble damage provisions should be viewed as part of a broader scheme to maintain the legitimacy and integrity of competition and ethical standards in the marketplace.

18. 15 U.S.C. § 15(a) (1982). Section 15 provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

19. *Marshall*, 302 N.C. at 542, 276 S.E.2d at 399. *See also Survey of North Carolina Law, 1980—Commercial Law*, 59 N.C.L. REV. 1070, 1073 (1981).

20. 302 N.C. 539, 276 S.E.2d 397 (1981).

21. *Id.* at 543, 549-50, 276 S.E.2d at 400, 403-04.

22. *Id.* at 546-47, 276 S.E.2d at 403-04.

23. *Id.* at 543, 276 S.E.2d at 400.

> The statute is partially punitive in nature in that it clearly serves as a deterrent to future violations. But it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties. It is, in effect, a hybrid.[24]

Whereas the legislature's primary focus appears to be remedial, the effect on a defendant convicted for a violation of section 75-1.1 is more akin to a penalty.[25] The individual defendant is not concerned whether his treble damage payment is exacted for the remedial purpose of maintaining fair and ethical standards of competition or for the purpose of punishing his past transgressions; he cares only that his liability is three times the actual damages proved by the plaintiff. Since there is no limit to the treble damage award, putative defendants face enormous potential liability and the possibility of financial ruin.[26]

In light of these conflicting views concerning the nature of the treble damage provision as applied to section 75-1.1, it is important to consider the application of the remedy by the North Carolina courts and the federal courts' interpretation of the similar treble damage provision under the federal antitrust laws. In *Marshall* the supreme court rejected defendants' contention that bad faith was an essential element of a section 75-1.1 treble damage claim .[27] This holding follows directly from the court's conclusion that "unfairness and deception are gauged by consideration of the effect of the practice on the marketplace,"[28] and supports the "remedial" purpose of the statute. If, for example, the statute primarily was punitive or penal in nature, the treble damage remedy would be inappropriate in actions asserting an unwitting violation of section 75-1.1. Since the defendant would not have been aware that his business practices were in violation of the statute, he could not have taken steps to comply with the statutory proscriptions. Thus, the *Marshall* holding supports the "remedial" nature of section 75-16.[29]

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24. *Id.* at 546, 276 S.E.2d at 402.

25. *See* Singleton v. Pennington, 568 S.W.2d 367, 376 (Tex. Civ. App. 1978), *rev'd*, 606 S.W.2d 682 (Tex. 1980). *See also* Note, *Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Are Both Treble and Punitive Damages Available for Violations of Section 75-1.1?*, 62 N.C.L. REV. 1139 (1984).

26. *See* Singleton v. Pennington, 568 S.W.2d at 376, *rev'd*, 606 S.W.2d 682 (Tex. 1980).

27. 302 N.C. at 546, 276 S.E.2d at 401.

28. *Id.* at 548, 276 S.E.2d at 403. *Marshall* involved a consumer challenge under the unfair-or-deceptive-acts-or-practices component. .A similar "effect-on-the-marketplace" test was espoused by the court of appeals with reference to the unfair-methods-of-competition component in Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).

> Unfair competition has been referred to in terms of conduct "which a court of equity would consider unfair." *Extract Co. v. Ray*, 221 N.C. 269, 273, 20 S.E.2d 59, 61 (1942). Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged . . . by determining its intended and actual effects upon others.

Id. at 400, 248 S.E.2d at 744.

29. This distinction is clarified by § 75-15.2, which provides for a civil penalty at the discretion of the presiding judge if certain specified conditions are satisfied. By making the penalty provisions for § 75-15.2 discretionary and maintaining the mandatory treble damages provision, the legislature has indicated the disparate purposes and functions of these sections. *See* Holley v.

Further support for the proposition that the paramount concern of the treble damages provision is maintenance of the integrity of the marketplace rather than punishment of past violations is found in the federal courts' interpretations of the nature of the federal, antitrust, treble damages under the Clayton Act.[30] In *Pfizer, Inc. v. India*[31] the United States Supreme Court noted that, "[i]n light of the law's expansive remedial purpose, the Court has not taken a technical or semantic approach in determining who is a 'person' entitled to sue for treble damages,"[32] and reiterated its previous conclusion that the provision had two purposes: "to deter violators and deprive them of 'the fruits of their illegality' and to compensate victims of antitrust violations for their injuries."[33] As such, the great majority of the courts have held that the primary purpose of this provision is compensatory and remedial.[34] Thus, the plaintiff is representing not only his personal interests, but the public interest as well.[35]

A number of decisions in Texas and Illinois support the conclusion that the treble damage provision is primarily remedial. In *Singleton v. Pennington*[36] the Texas Court of Civil Appeals and the Texas Supreme Court

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Coggin Pontiac, Inc., 43 N.C. App. 229, 237-38, 259 S.E.2d 1, 6-7, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

30. Prior to the enactment of N.C. GEN. STAT. § 75-1.1 (1980), § 75-16 provided for treble damages for violation of § 75-1, North Carolina's "little Sherman act." As such, § 75-16 was modeled after the federal, antitrust, treble damage provision, 15 U.S.C. § 15 (1984). Logic dictates that the decision to incorporate § 75-1.1 in Chapter 75 of the General Statutes in 1969, and therefore subject § 75-1.1 violations to mandatory treble damages (note the wording and operation of § 75-16), indicated that the purpose of the treble damage provision as applied to § 75-1.1 was identical to the purpose as applied to § 75-1. Otherwise the same statutory provision would have divergent purposes, depending on which section was violated.

31. 434 U.S. 308 (1978).

32. *Id.* at 313.

33. *Id.* at 314. *See also* American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982); Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).

34. *See* Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506, 509 (D. Colo. 1952) and cases cited therein. Also, in John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495 (9th Cir. 1977), the United States Court of Appeals for the Ninth Circuit summarized the nature of the treble damages.

> On the other hand, § 4 is basically a remedial provision. It provides treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." While § 4 does play an important part in penalizing and deterring wrongdoing, . . . it was designed primarily as a remedy.

Id. at 498 (citations omitted). *See also* Vold, *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?*, 28 KY. L.J. 117, 147-59 (1940).

In Herald Co. v. Harper, 410 F.2d 125 (8th Cir. 1969), the United States Court of Appeals for the Eighth Circuit was faced with an action to enjoin the operation of the Clayton Act's treble damages provision. Plaintiff alleged ten separate constitutional infirmities with the provision. Herald Co. v. Harper, 293 F. Supp. 1101, 1102 n.1 (E.D. Mo. 1968). The court dismissed the action "for want of a substantial constitutional question," *Herald Co.*, 410 F.2d at 131, and thus rejected plaintiff's contention that the provision should be treated as if it were a criminal statute. The court stated that, "[a]ssuming arguendo that the statute is punitive in nature, 'this is not enough to label it as a criminal statute,' to which all the constitutional safeguards of a criminal proceeding attach." *Id.* at 130.

35. *See* Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276, 279-80 (9th Cir. 1976). This view has been expressed with regard to N.C. GEN. STAT. §§ 75-1.1, 75-16 (1981) by a commentator. *See* Comment, *supra* note 17, at 900.

36. 568 S.W.2d 367 (Tex. Civ. App. 1978), *rev'd*, 606 S.W.2d 682 (Tex. 1980).

considered the Texas Deceptive Trade Practices Act[37] in the context of an "innocent misrepresentation by a seller of second-hand goods who [was] not in the business of selling such goods."[38] The court of civil appeals rejected plaintiff's contention that the statute was remedial rather than punitive[39] and stated that "[f]rom the point of view of the seller, any exaction over and above that necessary to compensate the buyer for his loss is punitive."[40] Because of this punitive element and the potential for draconian liability, especially in the context of class actions, the court of appeals applied the "due process requirement applicable to criminal penalties."[41] To construe the statute to comport with the due process standard of reasonable notice, the court interpreted the act to require a showing of intent to deceive.[42]

On appeal, however, the Texas Supreme Court overruled the court of civil appeals and construed the statute as remedial economic regulation.[43] Although the court noted that "[t]he fact that a statute limits punishment to acts done 'knowingly' or requires specific intent as a prerequisite to punishment has been given weight by courts rejecting challenges made on the ground of vagueness,"[44] the court concluded that the requirement of specific intent merely would make the statute more restricted, not necessarily more specific.[45]

In *Scott v. Association for Childbirth at Home*[46] defendant contended that section 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act was unconstitutionally vague because it affected rights protected by the first and fourteenth amendments and because it was a penal statute.[47] Although the statute did not provide for multiple damages, a civil penalty of up to $50,000 could be imposed.[48] The court applied the economic regulation

37. TEX. BUS. & COM. CODE ANN. §§ 17.41 to .63 (Vernon Supp. 1977).

38. *Singleton*, 568 S.W.2d at 369.

39. *Id.* at 376. At the time of this case, the Texas statute provided for mandatory treble damages. *See* Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977). The Texas statute declared that "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce," were unlawful. TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1977). Subsection (b) enumerated a "laundry list" of specific violations in addition to the general proscription of § 17.46(a). The court of civil appeals addressed the constitutional claim in *Singleton* under the assumption that defendant was not guilty of a § 17.46(a) per se violation, but was guilty only under the § 17.46(a) "umbrella" provision. *But see infra* note 43.

40. *Singleton*, 568 S.W.2d at 376.

41. *Id.*

42. *Id.* at 381.

43. Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980). The Texas Supreme Court concluded that defendant violated two of the specified per se violations enumerated in TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon Supp. 1977), and that, therefore, it did not have to decide whether the language of § 17.46(a) was unconstitutionally vague. *Pennington*, 606 S.W.2d at 688. Since the same treble damages provision was being applied, however, the supreme court's rejection of the court of civil appeals' characterization of the effect of the statute as primarily penal is applicable equally to § 17.46(a).

44. *Pennington*, 606 S.W.2d at 689.

45. *Id.* The court added that "[i]t is unquestionably true that deception is more reprehensible when done intentionally and that liability for treble damages is less harsh when intent is present. The necessity or reasonableness of specific enactments, however, is a matter of legislative discretion." *Id.* at 689-90.

46. 88 Ill. 2d 279, 430 N.E.2d 1012 (1981).

47. *Id.* at 285-86, 430 N.E.2d at 1016.

48. *Id.* at 288, 430 N.E.2d at 1017.

vagueness standard and held that the terms " 'unfair methods of competition' and 'unfair acts or practices' have a sufficiently definite and well-established meaning to overcome the allegation of vagueness."[49]

The general assembly's intent in enacting section 75-1.1 and the corresponding treble damages provision make it apparent that the primary purpose of the North Carolina scheme is economic regulation. Both the state and federal courts have recognized that although the treble damages remedy is partially punitive,[50] the statute is not penal.[51] Although the statute can be interpreted as punitive from the standpoint of the defendant who is forced to pay a damage award exceeding the amount necessary to compensate the plaintiff,[52] the remedial and private enforcement objectives of section 75-16 cannot be ignored.[53] Thus, the proper "fair notice" test required by the due process requirement of the fourteenth amendment is the test applied to regulatory statutes governing business activity. Because North Carolina's statute is primarily for economic regulation, the courts should not invalidate the statute on the grounds of vagueness unless it does not convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[54]

The determination of whether section 75-1.1 is unconstitutionally vague in light of the mandatory treble damage remedy must begin with sound principles of statutory construction. Since section 75-1.1 does not implicate constitutionally protected first amendment freedom,[55] the statute must be interpreted in light of the facts of each particular case.[56] Furthermore, acts of the legisla-

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49. *Id.* at 290-91, 430 N.E.2d at 1018.

50. *See supra* notes 24 and 33 and accompanying text.

51. *Marshall*, 302 N.C. at 546, 276 S.E.2d at 402; Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 237-39, 259 S.E.2d 1, 6-7, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979). *See also* United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049, 1058 n.5 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981).

52. *See Singleton*, 568 S.W.2d at 376.

53. *See Marshall*, 302 N.C. at 546, 276 S.E.2d at 402; *Holley*, 43 N.C. App. at 237-39, 259 S.E.2d at 6-7.

54. United States v. Petrillo, 332 U.S. 1, 8 (1947).

55. *See Scott*, 88 Ill. 2d 279, 285-88, 430 N.E.2d 1012, 1015-17 (1981).

> [T]he Supreme Court has repeatedly emphasized that the first amendment is not a bar to State regulation prohibiting false, misleading or deceptive commercial speech. "By definition, commercial speech is linked inextricably to commercial activity: while the First Amendment affords such speech 'a limited measure of protection,' it is also true that 'the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.' " Thus the investigation and regulation of unfair or deceptive business practices under the Act does not, because it cannot, impinge upon constitutionally protected speech. Since the Act prohibits only such speech as amounts to a fraudulent or deceptive practice, *i.e.*, false or misleading advertising, it can affect only speech that is by definition outside the ambit of first amendment protection, and within the scope of permissible State regulation.

Id. at 287, 430 N.E.2d at 1016 (citations omitted).

56. *See* United States v. Mazurie, 419 U.S. 544, 550 (1975). *See also* United States v. National Dairy Prods. Corp., 372 U.S. 29, 32-33 (1963); State v. Covington, 34 N.C. App. 457, 460, 238 S.E.2d 794, 796 (1977).

In *National Dairy* the Supreme Court repeated the distinction between vagueness challenges to statutes that arise under the first amendment and those concerning economic regulation.

ture are presumed to be constitutional,[57] and therefore, "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language."[58]

Although section 75-1.1 admittedly is phrased in broad language, it is not so vague as to be no rule or standard at all[59] or so indefinite as to require "men of common intelligence . . . [to] guess at its meaning and differ as to its application."[60] When section 75-1.1 was enacted the phrases "unfair methods of competition" and "unfair or deceptive acts or practices" had a long history of case-by-case interpretation under section 5 of the Federal Trade Commission Act. The North Carolina courts have stated repeatedly that Federal Trade Commission decisions and judicial interpretations of section 5 may be used as a guide in determining the scope and meaning of the statute.[61] In addition, claims under section 75-1.1 must be construed with reference to the numerous legislative inclusions that have been added as per se violations since 1969.[62] Given section 75-16's remedial purpose and role in the maintenance of ethical standards of fair dealing in the marketplace, there is no reason to treat sections 75-1.1 and 75-16 differently than section 5 of the Federal Trade Commission Act for the purpose of a vagueness challenge. Thus, the opinion of the United States Court of Appeals for the Seventh Circuit in *Sears, Roebuck & Co. v. Federal Trade Commission*[63] is equally relevant to the North Carolina scheme.

> [T]he phrase [unfair methods of competition] is no more indefinite than "due process of law." The general idea of that phrase as it appears in constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based on accumulating experience. If the expression, "unfair methods of competition," is too uncertain for use, then under the same condemnation would fall the

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> In this connection we also note that the approach to "vagueness" governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute "on its face" because such vagueness may in itself deter constitutionally protected and socially desirable conduct. No such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable. We are thus permitted to consider the warning provided by § 3 not only in terms of the statute "on its face" but also in the light of the conduct to which it is applied.

National Dairy, 372 U.S. at 36.

57. *See* Mitchell v. Financing Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968). *See also National Dairy*, 372 U.S. at 32.

58. *National Dairy*, 372 U.S. at 32. The constitutionality of the Sherman Act was upheld by the Supreme Court in Nash v. United States, 229 U.S. 373 (1913), against an attack on vagueness grounds. Mr. Justice Holmes' oft-quoted remark is particularly relevant in this instance. "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong not only may he incur a fine or a short imprisonment . . . ; he may incur the penalty of death." *Id.* at 377.

59. *See* A.B. Small Co. v. American Sugar Ref., 267 U.S. 233, 239 (1925).

60. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). *See* Horn v. Burns, 536 F.2d 251, 254 (8th Cir. 1976).

61. *Marshall*, 302 N.C. at 542, 276 S.E.2d at 399.

62. *See supra* note 1 and accompanying text.

63. 258 F. 307 (7th Cir. 1919).

> innumerable statutes which predicate rights and prohibitions upon "unsound mind," "undue influence," "unfaithfulness," "unjust discrimination," and the like. This statute is remedial and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of "rebates or concessions," or of "schemes to defraud," without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted.[64]

Although it is conceivable that a given interpretation could make the statute unconstitutionally vague,[65] section 75-1.1 as applied is sufficiently definite to withstand constitutional scrutiny. Given the predominantly remedial purpose of section 75-16 and the extensive body of law that has developed under the aegis of section 5 of the Federal Trade Commission Act, section 75-1.1 is no more vague than many of the other terms which the law has accepted, interpreted, and refined over the years. Although commentators and defendants might quarrel with the necessity and reasonableness of the treble damages provision[66] or prefer a different formulation of the definition of an unfair trade practice, these considerations are a matter of legislative discretion.

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64. *Id.* at 311.

65. If, for example, the North Carolina courts were to extend N.C. GEN. STAT. § 75-1.1 (1981) and the treble damages of § 75-16 to a simple breach of contract between two private citizens not engaged in business for profit, it is conceivable that § 75-1.1 and the mandatory treble damage provision of § 75-16 would be deemed unconstitutionally vague as applied.

66. *See* Aycock, *supra* note 1, at 264. Professor Aycock notes that "the treble damage provision might be a double-edged sword." *Id.* at 223.