Campbell Law Review

Volume 8
Issue 3 *Summer 1986*

Article 2

January 1986

Unfair and Deceptive Legislation: The Case for Finding North Carolina General Statutes Section 75-1.1 Unconstitutionally Vague as Applied to an Alleged Breach of a Commercial Contract

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Recommended Citation
Thomas A. Farr, *Unfair and Deceptive Legislation: The Case for Finding North Carolina General Statutes Section 75-1.1 Unconstitutionally Vague as Applied to an Alleged Breach of a Commercial Contract*, 8 Campbell L. Rev. 421 (1986).

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UNFAIR AND DECEPTIVE LEGISLATION: THE CASE FOR FINDING NORTH CAROLINA GENERAL STATUTES SECTION 75-1.1 UNCONSTITUTIONALLY VAGUE AS APPLIED TO AN ALLEDGED BREACH OF A COMMERCIAL CONTRACT

THOMAS A. FARR*

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I. INTRODUCTION

One of the fundamental principles of due process of law is fair notice to an ordinary person of what is prohibited.[1] "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at

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1. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

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its meaning and differ as to its application, violates the first essential of due process of law."[2] Due process requires that laws provide standards to prevent arbitrary and discriminatory enforcement.[3] "[L]aws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to . . . judges, and juries for resolution on an *ad hoc* and subjective basis . . . ."[4]

The North Carolina General Assembly enacted the Unfair and Deceptive Trade Practices Act in 1969.[5] The original purpose of the act was to protect consumers from predatory business practices.[6] Nonetheless, the North Carolina Supreme Court has sanctioned an expanded application of the act to cases involving sophisticated commercial parties.[7] This article will attempt to demonstrate that it is poor public policy to apply section 75-1.1 to cases based upon an alleged breach of a commercial contract and that in at least those instances section 75-1.1 is unconstitutionally vague.

II. The Case History of Section 75-1.1

Private parties have been granted a cause of action under section 75-1.1 provided they can prove injury caused by a violation of the act.[8] Section 75-1.1 is based upon section 5(a)(1) of the Federal Trade Commission Act.[9] State courts have therefore looked to fed-

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2. *Id.*

3. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

4. *Id.* at 108-09; *see also* Giaccio v. State of Pennsylvania, 382 U.S. 399, 402-03 (1966) (a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case).

5. N.C. Gen. Stat. § 75-1.1 (1969) (hereinafter, "the act" or "section 75-1.1").

6. 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 L. Rev. 1 (1969).

7. Johnson v. Phoenix Mutual Life Ins. Co., 300 N.C. 247, 261-62, 266 S.E.2d 610, 620 (1980).

8. N.C. Gen. Stat. § 75-16 (1985); *see also* Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 184, 268 S.E.2d 271, 273-74 (1980) (statute provided remedy for unfair trade practices in insurance industry); Mayton v. Hiatt's Used Cars Inc., 45 N.C. App. 206, 211-12, 262 S.E.2d 860, 864 (1980) (in order to be prevailing party within meaning of attorney fee provision, plaintiff must prove violation of statute and actual injury).

9. Morgan, *supra*, note 6, at 19; 15 U.S.C. § 45(a)(1) (1971) (hereinafter, "FTC Act").

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eral decisions for guidance in construing section 75-1.1.[10]

The leading North Carolina case construing the substantive scope of section 75-1.1 is *Johnson v. Phoenix Mutual Life Ins. Co.*[11] In *Johnson*, the court pronounced that the act cannot be "limited to precise acts and practices" and that whether a practice violates the act "depends upon the facts of each case and the impact the practice has on the market place."[12] The court adopted carte blanche principles used to define unfair and deceptive acts under the FTC Act:

> The concept of "unfairness" is broader than and includes the concept of "deception". 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.
>
> . . . .
>
> . . . An act or practice is deceptive . . . if it has the capacity or tendency to deceive. Proof of actual deception is unnecessary. Though words and sentences may be framed so that they are literally true, they may still be deceptive. In determining whether a representation is deceptive, its effect on the average consumer is considered.[13]

The *Johnson* court synthesized these "principles" by concluding that the "essence" of an unfair trade practice is "conduct which amounts to an inequitable assertion of . . . power or position."[14] This summary arguably describes the conduct by the respondents in all of the FTC cases cited in *Johnson*. In *Spiegel, Inc. v. FTC*,[15] a catalogue retailer was ordered to cease and desist from using a long arm statute to obtain jurisdiction over nonresidents to collect on retail accounts. In *Goodman v. FTC*,[16] the petitioner was ordered to cease and desist from recruiting students for a home study course by distributing ads found by the FTC to be misleading. In *Trans World Accounts v. FTC*,[17] a debt collection

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10. State *ex rel.* Edmisten v. J. C. Penny Co., 292 N.C. 311, 315, 233 S.E.2d 895, 898 (1977).
11. 300 N.C. 247, 266 S.E.2d 610 (1980).
12. *Id.* at 262-63, 266 S.E.2d at 621.
13. *Id.* at 263, 265-66, 266 S.E.2d at 621-22 (citations omitted).
14. *Id.* at 264, 266 S.E.2d at 622.
15. 540 F.2d 287 (7th Cir. 1976).
16. 244 F.2d 584 (9th Cir. 1957).
17. 594 F.2d 212 (9th Cir. 1979).

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agency was ordered to cease and desist from debt collection practices found by the FTC to have an intimidating effect on debtors. In the other eight cases cited in *Johnson*,[18] companies were ordered to cease and desist from running advertisements after the FTC had concluded that the ads tended to deceive or mislead consumers.

The FTC cases cited in *Johnson* have several common threads. All of the cases pitted consumers against corporations. In all of the cases, consumers were practically unable to protect their interests due to a perceived imbalance of economic power. All of the cases but two concerned efforts to solicit purchases of relatively inexpensive products or services from consumers through misleading mass advertising. In all of the cases, the average consumer lacked the ability to verify claims made in advertisements. In short, all of the cases involved obvious corporate "conduct which amount[ed] to an inequitable assertion of its power or position" over individual consumers.[19]

All of the corporations defending in the FTC cases cited in *Johnson* lost their appeals in the federal circuit courts. Yet, in not one of those cases was the losing corporation ordered to pay a penalty. The corporations were instead merely ordered to cease and desist from engaging in a *specific* practice which was clearly identified in an FTC cease and desist order.

In contrast, under section 75-1.1, defendants can face treble damages of millions of dollars in excess of compensatory damages merely due to a possible breach of contract or a breach of warranty.[20] Courts have responded to the inequitable effect of huge

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18. Regina Corp. v. FTC, 322 F.2d 765 (3d Cir. 1963); United States Retail Credit Assn. v. FTC, 300 F.2d 212 (4th Cir. 1962); Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944); FTC v. Hires Turner Glass Co., 81 F.2d 362 (3d Cir. 1935); Resort Car Rental System, Inc. v. FTC, 518 F.2d 962 (9th Cir.), *cert. denied sub nom.*, MacKenzie v. United States, 423 U.S. 827 (1975); Koch v. FTC, 206 F.2d 311 (6th Cir. 1953); FTC v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942).

19. *Johnson*, 300 N.C. at 264, 266 S.E.2d at 622; *see also* Coble v. Richardson Corp. of Greensboro, 71 N.C. App. 511, 520, 322 S.E.2d 817, 824 (1984) (oral representations by developer in sale of residence to plaintiff); Libby Hill Seafood Restaurants, Inc. v. Owens, 62 N.C. App. 695, 700, 303 S.E.2d 565, 569, *cert. denied*, 309 N.C. 321, 307 S.E.2d 164 (1983) (corporate purchaser knew land it bought had been trash dump, but conducted no independent land investigation).

20. One example is the case of Village Cable, Inc. v. Oak Communication, Inc., No. C-82-805-D, (M.D.N.C. July 11, 1984), *aff'd*, No. 84-2221, (4th Cir. June 6, 1985). The plaintiff in *Oak* purchased cable television converter-decoders from

treble damage awards by fashioning theoretical limits to the act. The North Carolina Court of Appeals has stated that a breach of express or implied warranties standing alone does not constitute a violation of section 75-1.1.[21] In a similar vein, the Fourth Circuit Court of Appeals has found that "substantial aggravating circumstances" must be present to justify an award of treble damages when a violation is based upon an alleged breach of contract.[22]

Judicial efforts to restrict the act's sweep run counter to the ruling by the state supreme court in *Marshall v. Miller*.[23] In *Marshall*, the court ruled that good faith is not a defense to an unfair trade practice claim and that plaintiffs are not required to prove scienter by the defendant.[24] The ruling in *Marshall* eliminates the possibility of meaningful distinction of cases involving mere breaches of contract from cases involving "substantial aggravating circumstances." The reported cases consistently lack any substantive analysis.[25] Courts typically recite the facts of each case and then offer a conclusion as to whether the defendant has violated the act.[26]

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the defendant for use in the plaintiff's cable television operations. The plaintiff's claims were based upon an alleged breach of warranty. The plaintiff also alleged claims for fraud and unfair trade practices. The district court granted defendant's motion for summary judgment on the unfair trade practice claim on the ground that defendant's conduct had not been shown to be "substantially aggravating." *Id.*, slip op. at 17. Had the court denied defendant's motion, defendant faced the prospect of alleged damages of $10,000,000 in compensatory damages and $30,000,000 in treble damages.

21. Coble v. Richardson Corp., 71 N.C. App. 511, 520, 322 S.E.2d 817, 824 (1984); Wachovia Bank and Trust Co. v. Smith, 44 N.C. App. 685, 691, 262 S.E.2d 646, *cert. denied*, 300 N.C. 379, 268 S.E.2d 685 (1980).

22. United Roasters, Inc. v. Colgate Palmolive Co., 649 F.2d 985, 992 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981); Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 715-16 (4th Cir.), *cert. denied*, 464 U.S. 848 (1983).

23. 302 N.C. 539, 276 S.E.2d 397 (1981).

24. 302 N.C. at 546, 276 S.E.2d at 401.

25. Comment, *The Trouble with Trebles: What Violates § 75-1.1*, 5 CAMPBELL L. REV. 119, 127-32 (1982).

26. *Id.*; More recent decisions are equally inconsistent and conclusory. Levine v. Parks Chevrolet, 76 N.C. App. 44, 331 S.E.2d 747 (1985) (seller of truck with incorrect odometer reading guilty of unfair trade practice); Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985) (builder's receipt of funds prior to time set by contract for payment did not constitute an unfair trade practice); Cockman v. White, 76 N.C. App. 387, 333 S.E.2d 54 (1985) ("misunderstanding" between insurance agent and insured regarding extent of coverage is not an unfair trade practice) *accord* Canady v. Hardin, 71 N.C. App. 156, 321 S.E.2d 474 (1984); Winston Realty Co., Inc. v. G.H.G. Inc., 70 N.C. App. 374, 320 S.E.2d 286, *aff'd*, 314

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III. The Ambiguity of Section 75-1.1 Renders It Unconstitutional as Applied in Commercial Cases

A. *Section 75-1.1 Is Unconstitutional Whether It Is Viewed as a Penal Statute or Economic Legislation*

The vagueness doctrine has its widest scope in two areas: (1) cases involving first amendment freedoms,[27] and (2) cases involving statutes that are penal in nature.[28] A lower standard of judicial review applies to legislation that is strictly economic in nature.[29]

Under section 75-1.1, it is the responsibility of the fact finder to ascertain the facts and the responsibility of the court to determine whether the defendant has violated the statute.[30] Because section 75-1.1 allows courts to decide from case to case whether particular conduct is prohibited, the act *expressly* "delegates basic policy matters . . . to judges . . . for resolution on an *ad hoc* and subjective basis."[31]

The act's delegation of policy-making authority to courts has resulted in "arbitrary and discriminatory" application.[32] Obedient to the mandate from the North Carolina Supreme Court that the sweep of section 75-1.1 not be limited to "precise acts," the North Carolina Court of Appeals has stated that "[t]he breadth and scope [of section 75-1.1] *requires no elaboration* . . . ."[33] As so construed, the act is at least as vague as numerous statutes

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N.C. 90, 331 S.E.2d 677 (1985) (personnel agency committed an unfair trade practice by failing to check references as warranted); Kim v. Professional Business Brokers, Ltd., 74 N.C. App. 125, 328 S.E.2d 296 (1985) (purchaser of hotel entitled to treble damages based upon a finding of fraud); Cathy's Boutique v. Winston-Salem Joint Venture, 72 N.C. App. 641, 325 S.E.2d 283 (1985) (publication of unfavorable cartoon in advertising supplement is not an unfair trade practice); Strickland v. A & C Mobile Homes, Inc., 70 N.C. App. 768, 321 S.E.2d 16 (1984) (seller of mobile homes committed unfair trade practice by falsely warranting to pay moving expenses); Hall v. T. L. Kemp Jewelry, Inc., 71 N.C. App. 101, 322 S.E.2d 7 (1984) (seller's failure to properly appraise jewelry is not an unfair trade practice).

27. Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

28. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

29. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982).

30. Hardy v. Toler, 288 N.C. 303, 310, 218 S.E.2d 342, 345 (1975).

31. *Grayned*, 408 U.S. at 108-109.

32. *Id.*; *see supra* note 25.

33. Winston Realty Co., Inc. v. G.H.G., Inc., 70 N.C. App. 374, 381, 320 S.E.2d 286, 291 (1984) (emphasis supplied).

stricken by the United States Supreme Court in recent years.[34]

The vagueness of section 75-1.1 and the resulting unfairness to defendants is accentuated in those cases where application of the treble damage remedy has a severely penal effect. The penal effect of huge treble damage awards under section 75-1.1 cannot be logically distinguished from cases that preclude the award of stipulated or liquidated damages. Liquidated damages may be collected, but a penalty will not be enforced.[35] Liquidated damages must be reasonably proportionate to the damages actually caused by a breach of contract or a reasonable estimate of the damage.[36] Stipulated damages are an unenforceable penalty when the sum "is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach . . . ."[37]

The limits on stipulated damages are consistent with the common law rule which prohibits the award of punitive damages for a breach of contract.[38] Punitive damages are not designed to compensate the plaintiff, but are intended to punish the defendant and to deter others.[39] Punitive damages may be awarded only where the wrong is done willfully or in reckless and wanton disregard of a plaintiff's rights.[40]

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34. Colautti v. Franklin, 439 U.S. 379, 394-96 (1979) (statute required doctors performing abortions to adhere to prescribed standard of care for an aborted fetus if "there is sufficient reason to believe that the fetus may be viable."); Kolender v. Lawson, 461 U.S. 352 (1983) (vagrancy statute requiring individuals to provide "credible and reliable" identification when requested by a police officer); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (regulation required doctors performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner."); Smith v. Goguen, 415 U.S. 566 (1974) (statute prohibited the treatment of the American flag in a "contemptuous" manner); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (ordinance prohibited persons from assembling on sidewalks and conducting themselves "in a manner annoying to persons passing by . . . .").

35. City of Kinston v. Suddreth, 266 N.C. 618, 620, 146 S.E.2d 660, 662 (1966); Ledbetter Brothers, Inc. v. N. C. Dept. of Transportation, 68 N.C. App. 97, 105, 314 S.E.2d 761, 767 (1984).

36. Knutton v. Cofield, 273 N.C. 355, 361, 160 S.E.2d 29, 34 (1968).

37. *City of Kinston*, 266 N.C. at 620, 146 S.E.2d at 662 (quoting C. McCormick, Damages § 146 (1935)).

38. Newton v. Standard Fire Ins. Co., 291 N.C. 105, 111, 229 S.E.2d 297, 301 (1976).

39. Oestreicher v. American National Stores, Inc., 290 N.C. 118, 134, 225 S.E.2d 797, 807 (1976).

40. Hardy v. Toler, 288 N.C. 303, 306-07, 218 S.E.2d 342, 345 (1975); *see also*

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The United States Supreme Court has stated that "the very idea of treble damages reveals an intent to punish past and to deter future, unlawful conduct . . . ."[41] The North Carolina Supreme Court has conceded that the award of treble damages under section 75-1.1 "clearly serves as a deterrent to future violations" and that section 75-1.1 is at least "partially" punitive in nature.[42] Unlike the traditional restrictions on punitive damages, under section 75-1.1 plaintiffs can recover millions above compensatory damages without proving bad faith by the defendant. It is anomalous for plaintiffs to recover enormous treble damage awards in breach of contract cases where public policy prohibits defendants from *voluntarily consenting* to stipulated damages above actual damages.

The penal effect of section 75-1.1 in cases based upon a breach of a commercial contract should render the statute unconstitutional under the strict standard of judicial review applicable to penal statutes. This heightened standard has been applied to numerous misdemeanor statutes which were significantly less penal than the potential payout of millions of dollars in treble damages.[43] The Supreme Court has also applied the heightened standard of review to strike statutes in cases where the financial "penalty" was substantially less than the millions that can be awarded under section 75-1.1. In *Connally v. General Construction Co.*,[44] a state fair labor standards law was found to be unconstitutionally vague despite the fact that it authorized fines of only $50 to $500. Similarly, the statute stricken in *Giaccio v. State of Pennsylvania*[45] required the defendant to pay court costs of $230.95 following his acquittal on a criminal offense. Like the statute in *Giaccio*, section 75-1.1 "contains no standards at all, nor does it place any conditions of any kind upon the [court's] power to impose" treble damages. [46]

"The degree of vagueness that the Constitution tolerates— as well as the relative importance of fair notice and fair enforcement—depend in part on the nature of the enactment."[47] Accordingly, a more liberal standard of review applies if section 75-1.1 is

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Ervin, *Punitive Damages in North Carolina*, 59 N.C.L. REV. 1255 (1981).

41. Texas Industries Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981).

42. Marshall v. Miller, 302 N.C. 539, 546, 276 S.E.2d 397, 402 (1981).

43. *See supra* note 34.

44. 269 U.S. 385 (1926).

45. 382 U.S. 399 (1966).

46. 382 U.S. at 403.

47. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

viewed as non-penal "economic" regulation. The Supreme Court has articulated four principles applicable to economic regulation challenged on the ground of vagueness:

> [E]conomic regulation is subject to a less strict vagueness test [1] because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. [2] Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. [3] The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. [4] And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.[48]

The act does not pass constitutional muster even under these more liberal principles. First, the vagueness of section 75-1.1 makes it impossible for defendants in breach of contract cases to regulate their conduct by consulting either the statute or court decisions.[49] Second, defendants have no resort to an administrative agency. Third, the consequences of violating section 75-1.1 cannot be said to be purely civil, but are instead in some cases severely penal. Fourth, the vagueness of section 75-1.1 is not mitigated by a requirement that plaintiffs prove "scienter" to recover treble damages.[50]

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48. *Id.* at 498-99.

49. Section 75-1.1 does exclude from its coverage "professional services rendered by a member of a learned profession." N.C. GEN. STAT. § 75-1.1(b). The phrase "learned profession" applies to physicians, attorneys and related professionals. Opinion of Attorney General to Representative R. L. Framer, 47 N.C. Atty. Gen. 118 (1977). The act also contains a qualified exemption for the media. N.C. GEN. STAT. § 75-1.1(c). The following areas have been excluded through case law: (1) landlord-tenant relationships—Threatt v. Hiers, 76 N.C. App. 521, 333 S.E.2d 772 (1985); (2) securities transactions—Skinner v. E. F. Hutton & Co., Inc., 314 N.C. 267, 333 S.E.2d 236 (1985) (citing Linder v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985)); (3) employer-employee relationships—Buie v. Daniel International Corp., 56 N.C. App. 445, 289 S.E.2d 118, *cert. denied*, 305 N.C. 759, 292 S.E.2d 574 (1982). The North Carolina Court of Appeals has also held that the act does not create a cause of action against the State. Sperry Corp. v. Patterson, 73 N.C. App. 123, 325 S.E.2d 642, 645 (1985).

50. Marshall v. Miller, 302 N.C. 539, 546, 276 S.E.2d 397, 401 (1981).

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B. The Vagueness of Section 75-1.1 Is Not Ameliorated by Decisions "Interpreting" the FTC Act

Conventional wisdom holds that the body of case law interpreting the FTC Act will insulate section 75-1.1 from claims of vagueness.[51] A vague statute can survive constitutional scrutiny when it has been limited by judicial construction.[52] However, fundamental distinctions between the two acts render futile any attempt to define the scope of section 75-1.1 simply by reference to FTC case law.

Unlike section 75-1.1, the FTC Act confers no private right of action.[53] The sole means of enforcement of the FTC Act is through the Federal Trade Commission ("Commission").[54] The Commission is composed of five commissioners who are appointed by the President of the United States with the advice and consent of the United States Senate.[55]

The FTC Act is enforced by the Commission through the issuance of administrative complaints.[56] A complaint may be issued only where a proceeding by the Commission "would be in the interest of the public."[57] Following an administrative hearing the Commission may issue a cease and desist order that is based upon the allegations in the complaint. An order may issue upon proof that an act or practice has the capacity or tendency to deceive, that it offends public policy, or that it is substantially injurious to consumers.[58]

A party aggrieved by a cease and desist order may seek review in an appropriate federal court of appeals.[59] Cease and desist orders are directed to specific respondents named in the administrative complaint and direct those respondents to cease and desist from specific acts found by the Commission to be "unfair" or "deceptive".[60] Respondents are thus given actual notice of the types of

51. Morgan, *supra* note 6, at 19-20.
52. *Village of Hoffman Estates*, 455 U.S. at 494 n.5.
53. FTC v. Klesner, 280 U.S. 19, 25-26 (1929).
54. 15 U.S.C. § 45(a) (1976).
55. 15 U.S.C. § 41 (1976).
56. 15 U.S.C. § 45(b) (1976).
57. *Id.*
58. Spiegel v. FTC, 540 F.2d 287, 293 (7th Cir. 1976). An identical standard was adopted for § 75-1.1 in Johnson v. Phoenix Mutual Life Ins. Co., 300 N.C. 247, 263, 265-66, 266 S.E.2d 610, 621-22 (1980).
59. 15 U.S.C. § 45(c) (1976).
60. *Id.*

practices that violate the FTC act.[61] Parties injured by violations of the FTC act are not entitled to compensatory or punitive damages. Parties guilty of *knowingly* violating a final cease and desist order or a Commission rule may be required to pay a fine of $10,000 for each violation.[62]

Cases interpreting the FTC Act, including those cited in *Johnson*, are no more precise than the broad and ambiguous statutory language. The FTC Act creates an "elusive" standard of conduct which courts have been unable to define with any specificity.[63] Because of the elusive statutory standards, the Commission sits "like a court of equity" and "considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[64]

The "elusive" standard of conduct proscribed by the FTC Act does not render it unconstitutional for at least two reasons. First, the only consequences facing respondents in FTC enforcement actions are cease and desist orders. The FTC Act is therefore strictly "remedial" and "civil" in nature.[65] Second, respondents in FTC enforcement actions may resort to an extensive administrative process containing numerous procedural protections.[66]

When enacting section 75-1.1, the North Carolina General Assembly adopted the "elusive" standards of the FTC Act and case law, but rejected the FTC Act's procedural safeguards and added remedies that can be extremely penal. Like the Commission, North Carolina courts have been delegated the authority to sit like a court of equity and review "the facts of each case and the impact the practice has in the marketplace" in determining whether particular conduct violates section 75-1.1.[67] Unlike the discretionary authority given the Commission to fashion equitable remedies,

61. Cease and desist orders have been vacated by the courts of appeal on the ground of vagueness. Trans World Accounts, Inc. v. FTC, 594 F.2d 212, 216-17 (9th Cir. 1979).

62. 15 U.S.C. § 45(l)-(m) (1976).

63. FTC v. Sperry and Hutchinson Co., 405 U.S. 233, 244 (1972).

64. *Id.*

65. Sears, Roebuck & Co. v. FTC, 258 F. 307, 311 (7th Cir. 1919) (rejecting vagueness attack on FTC Act); *see also* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

66. *Village of Hoffman Estates*, 455 U.S. at 498.

67. *Johnson*, 300 N.C. at 262-63, 266 S.E.2d at 621.

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North Carolina courts are required to award treble damages against a defendant deemed by the court to have violated the act.[68]

C. Fifteen of the Sixteen State Unfair Trade Practice Acts That Authorize the Award of Multiple Damages Possess Features That Ameliorate Their Punitive Effect or Give Regulated Parties Notice of the Type of Conduct Prohibited.

Numerous other states have adopted unfair trade practice statutes based on the FTC Act. Under many of these statutes, private civil actions are authorized. However, with one exception, all of the other statutes possess features not present in section 75-1.1 that ameliorate their penal effect or give notice of the type of conduct prohibited.

At least sixteen state unfair trade practice statutes other than section 75-1.1 authorize both private actions and the award of multiple damages.[69] At least five of these statutes have survived claims of vagueness.[70] Of those five decisions, only one involved a private action where the award of treble damages was at issue.[71]

Eight of the state statutes contain a "laundry list" of specifically identified violations.[72] A statutory laundry list "fairly ap-

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68. Marshall v. Miller, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981).

69. Leaffer and Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Use of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521 (1980).

70. ALASKA STAT. § 45.50.471 (1980), State of Alaska v. O'Neill Investigation, Inc., 609 P.2d 520 (Alaska 1980); 73 PA. CONS. STAT. ANN. §§ 201-1 to 201-4 (Purdon 1971), Commonwealth v. Pennsylvania Apsco System, Inc., 10 Pa. Commw. 138, 309 A.2d 184 (1973); TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Supp. 1986), Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980); WASH. REV. CODE ANN. § 19.86.020 (1965), State v. Readers Digest Assn., 81 Wash.2d 259, 501 P.2d 290 (1972), *appeal dismissed*, 411 U.S. 945 (1973); WIS. STAT. ANN. §§ 100.18-100.30 (West 1973), Carpets by the Carload, Inc. v. Warren, 368 F. Supp. 1075 (E.D. Wis. 1975).

71. Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980). Three of the other decisions, *Pennsylvania Apsco Systems*, 10 Pa. Commw. 138, 309 A.2d 184 (1973), *Readers Digest Assn.*, 81 Wash.2d 259, 501 P.2d 290 (1972), *appeal dismissed*, 411 U.S. 945 (1973), and *O'Neill Investigation*, 609 P.2d 520 involved enforcement actions by the state. The third, *Carpets by the Carload*, 368 F. Supp. 1075 (E.D. Wis. 1975) was a declaratory judgment action brought by the plaintiff after an enforcement action had been initiated against it by the state attorney general.

72. (1) ALASKA STAT. § 45.50.471 (1980); (2) D.C. CODE ANN. § 28-3904 (1981); (3) GA. CODE ANN. § 10-1-393(b) (1982); (4) OHIO REV. CODE ANN. § 1345.02 (Page 1979); (5) 73 PA. CONS. STAT. ANN. § 201-2(4) (Purdon 1971); (6) TENN. CODE ANN. § 47-18-104(b) (1984); (7) TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 1980);

prise[s]" a potential defendant of the type of conduct prohibited by the statute,[73] and thus serves to satisfy the notice requirements of due process.[74]

Twelve of the state statutes expressly or by implication make scienter an issue in the determination of whether multiple damages are proper.[75] Statutes that make scienter an element of plaintiff's case possess an attribute that has been found to insulate economic regulation from vagueness attacks.[76]

Eight of the state statutes grant private actions only to traditional consumers and not to corporations.[77] Statutes that limit pri-

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(8) WIS. STAT. ANN. § 100.18 (West 1973).

73. Pennington v. Singleton, 606 S.W.2d 682, 689 (Tex. 1980).

74. Similar to the "laundry list" concept, Ohio also restricts the award of treble damages to cases where the practice (1) was declared to be deceptive or unconscionable by the attorney general *prior* to the allegedly unlawful act by the defendant or (2) was determined to be lawful by a court and committed by the defendant *after* the court decision has been made available for the public inspection. OHIO REV. CODE ANN. § 1345.09(B) (Page 1979).

75. (1) ALASKA STAT. § 45.50.531 (1980) (treble damages for "willful" violations); (2) GA. CODE ANN. § 10-1-399(c) (1982) (treble damages for "intentional" violations); (3) LA. REV. STAT. ANN. § 51:1409A (West Supp. 1986) (treble damages if unfair act "knowingly used, after being put on notice by the director [of consumer affairs]."); (4) MASS. GEN. LAWS ANN. ch. 93A §§ 9(3), 11 (West 1985) (treble damages for willful or knowing violation or bad faith refusal to make tender of settlement); (5) OHIO REV. CODE ANN. § 1345.11 (Page 1979) (defendant can limit recovery to actual damages upon proof that violation caused by good faith error); (6) 73 PA. CONS. STAT. ANN. § 201-9.2(a) (Purdon 1971) (court may, in its discretion, award up to three times the actual damage); (7) S.C. CODE ANN. § 39-5-140 (Law. Co-op. 1985) (treble damages if violation willful or knowing); (8) TENN. CODE ANN. § 47-18-109(a)(3)-(4) (1984) (treble damages for "knowing and willful" violation; court may consider defendant's "good faith"); (9) TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 1980) (three times actual damage where defendant's conduct was "knowingly" committed); (10) VT. STAT. ANN. tit. 9 § 2461 (1984) (a court may award *exemplary* damages up to three times the value of the consideration given by the consumer); (11) WASH. REV. CODE ANN. § 19.86.090 (1965) (treble damages may be awarded by the court in the exercise of its discretion); and (12) WIS. STAT. ANN. § 100.18(11)(b)(2) (West 1973) (multiple damages may be awarded in a private action after defendant has violated an injunction obtained by the state).

76. *Village of Hoffman Estates*, 455 U.S. at 499. Two states also allow a defendant to limit the damages recovered by the plaintiff to the amount offered by the defendant at the commencement of the lawsuit as a good faith tender of settlement. GA. CODE ANN. § 10-1-399(b); MASS. GEN. LAWS ANN. ch. 93A § 9(3).

77. (1) D.C. CODE ANN. §§ 28-3901(a)(2), 3905(k) (1981); (2) GA. CODE ANN. §§ 10-1-392(a)(2)-(3), -399(a) (1982); (3) MONT. CODE ANN. § 30-14-133(1) (1985); (4) N.J. STAT. ANN. §§ 56:8-1 to :8-12 (West Supp. 1985), Neveroski v. Blair, 141 N.J.

vate actions for multiple damages to consumers are less penal in effect "[g]iven the small dollar amounts involved in such suits . . . ."[78] Treble damages are also more "remedial" in the consumer context since, "it makes more economically feasible the bringing of an action where the possible money damages are limited . . . ."[79]

Under all of the multiple damage statutes except for North Carolina and Hawaii,[80] some attempt has been made to limit the scope of the statute, to reduce the penal nature of the statute, or to give defendants reasonable notice of what is prohibited. Only section 75-1.1 and the Hawaii act give courts unbridled power to make ad hoc decisions, which can potentially result in millions of dollars in punitive damages.[81]

Super. 365, 358 A.2d 473, 480 (1976); (5) OHIO REV. CODE ANN. §§ 1345.01(A), (D), 1345.09 (Page 1979); (6) 73 PA. CON. STAT. ANN. § 201-9.2(a) (Purdon 1971); (7) VT. STAT. ANN. tit. 9 §§ 2451(a), 2461 (1984); (8) American Building Co. v. Norton, 640 S.W.2d 569, 575 (Tenn. 1982). In practical effect, the Washington statute also limits private actions to consumers by placing a ceiling of $10,000 on the total amount that can be awarded in treble damages. WASH. REV. CODE ANN. § 19.86.090 (1965).

78. Marshall v. Miller, 302 N.C. 539, 549, 276 S.E.2d 397, 403 (1981).

79. *Id.* North Carolina courts may also find useful a related limitation fashioned by the Washington courts. Under the Washington act, a private plaintiff must prove that defendant's conduct violates a separate state statute (and is therefore contrary to an articulated public policy) or that defendant's conduct "impacts the public interest." McRae v. Bolstad, 101 Wash. 2d 161, 165, 676 P.2d 496, 499 (1984). "A breach of a private contract . . . whether the breach be *negligent or intentional,* is not an act or practice affecting the public interest." Lightfoot v. MacDonald, 86 Wash.2d 331, 334, 544 P.2d 88, 90 (1976) (emphasis supplied). To satisfy this element, a plaintiff must prove that defendant's deceptive acts have the potential for repetition through evidence that others have been injured by similar deceptive representations. *McRae*, 101 Wash. 2d at 165-66, 676 P.2d at 499-500.

80. HAWAII REV. STAT. § 480-1 (1976). The author has been unable to locate a decision commenting on the constitutionally of the Hawaii act.

81. At least five other state unfair trade practice acts have survived vagueness attacks. People *ex rel.* Dunbar v. Gym of America, Inc., 177 Colo. 97, 493 P.2d 660 (1972); Department of Legal Affairs v. Rogers, 329 So.2d 257 (Fla. 1976); Scott v. Association for Childbirth at Home, Ltd., 88 Ill.2d 279, 430 N.E.2d 1012 (1981); State v. Koscot Interplanetary, Inc., 212 Kan. 668, 512 P.2d 416 (1973); and Dare to be Great, Inc. v. Commonwealth *ex rel.* Hancock, 511 S.W.2d 224 (Ky. 1974). All five of the challenged statutes authorized private actions, but did not authorize awards of multiple damages. All of the cases construing the respective acts involved enforcement actions by public officers similar to FTC administrative actions and not private actions where damages were awarded. The Colorado act (COLO. REV. STAT. § 6-1-105 (1974)) and the Kansas act (KAN. STAT. ANN.

V. CONCLUSION

The delegation of broad authority to the Federal Trade Commission to enjoin "deceptive" or "unfair" mass advertising has survived judicial review at least in part because of the strictly remedial consequences that face respondents in FTC proceedings. It does not necessarily follow that an identical delegation of policy-making authority to the North Carolina courts should survive constitutional scrutiny in all cases given the mandatory penal effect of section 75-1.1.

One state superior court has found section 75-1.1 to be unconstitutional.[82] Several other courts have commented on the vagueness of section 75-1.1.[83] To show that a statute is facially invalid, a party must carry the heavy burden of demonstrating that "the law is impermissibly vague in all of its applications." [84] There may be

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§ 50-626(b) (1984)) contain extensive "laundry lists" of specific violations. Finally, under the Kansas and Florida acts, private actions may be brought only by consumers and not corporations. *See respectively*, KAN. STAT. ANN. §§ 50-624(b), -634 (1984); Packaging Corp. International v. Travenol Laboratories, 566 F. Supp.. 1480, 1482 (S.D. Fla. 1983).

82. United Virginia Bank v. Air-Lift Associates, Inc., No. 82CVS8786, slip. op. at 6 (Wake County Super. Ct. Dec. 18, 1984). The judgment entered by the superior court was affirmed on alternative grounds by the North Carolina Court of Appeals. The court of appeals found it unnecessary to address the constitutionality of § 75-1.1 and struck that portion of the superior court's opinion as "surplusage." United Virginia Bank v. Air-Lift Associates, Inc., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

83. The Fourth Circuit Court of Appeals has observed that "whatever the limit of their reach . . . the words [of § 75-1.1] must mean something more than an ordinary contract breach." United Roasters, Inc. v. Colgate Palmolive Co., 649 F.2d 985, 992 (4th Cir. 1981), *cert. denied*, 454 U.S. 1054 (1981). One panel of the North Carolina Court of Appeals has stated that the language of the statute is "so broad and vague . . . as to render the treble 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 [constitutional] validity." Hammers v. Lowes Co., 48 N.C. App. 150, 154, 268 S.E.2d 257, 260 (1980). Another court has commented that the act "is vague, has been the subject of widely varying judicial interpretations, and is of questionable constitutionality." Terry's Floor Fashions v. Burlington Indus., 568 F. Supp. 205, 216 (E.D.N.C. 1983), *aff'd*, 763 F.2d 604 (4th Cir. 1985). Finally, the Chief Judge of the United States District Court for the Middle District of North Carolina has written that "[t]he constitutionality of [§ 75-1.1] is by no means certain." Village Cable Inc. v. Oak Communications, Inc., No. C-82-805-D, slip op. at 18 (M.D.N.C. July 11, 1984) (Ward, C.J.), *aff'd*, No. 84-2221, slip op. (4th Cir. June 6, 1985).

84. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497, (1922).

circumstances where section 75-1.1 can be constitutionally applied to commercial parties.[85] It is also apparent that the treble damage remedy does not automatically render the act unconstitutional.[86] However, as a result of *Marshall v. Miller*, it is impossible to distinguish cases involving mere breaches of contract from cases involving so-called "aggravating circumstances." Should the act survive constitutional review in breach of contract cases, similar sets of facts in different cases could easily result in different findings by different courts on the issue of liability. Where the result of arbitrary enforcement means millions of dollars to the unlucky defendant who draws a consumer oriented judge, the gross unfairness of the act becomes readily apparent.

The unfairness of section 75-1.1 should result in its amendment by incorporating one or more of the restrictions found in the unfair trade practice statutes of our sister states. Treble damages may serve the interests of justice when a consumer would otherwise be unable to finance litigation against a corporation. However, treble damages are an injustice when they result in huge windfalls to commercial plaintiffs at the expense of commercial defendants who, despite having breached a contract, may have acted with the best of intentions and in good faith.[87]

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85. The Fourth Circuit Court of Appeals has ruled that proof of a Sherman Act violation is sufficient to prove a violation of § 75-1.1. Itco Corp. v. Michelin Tire Corp., 722 F.2d 42, 48 (4th Cir. 1983) *aff'd on rehearing*, 742 F.2d 170 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985). On remand of the *Itco* case, the district court rejected the contention that § 75-1.1 is facially unconstitutional. Itco Corp. v. Michelin Tire Corp., No. 78-0004-CIV-8, slip op. at 10, 11 (E.D.N.C. July 9, 1985). The court apparently concluded that the act was not unconstitutional as applied since the defendant was charged with Sherman Act violations and thus had fair notice of what was prohibited by § 75-1.1. *Id.* In contrast, when a violation of the act is based upon an alleged breach of contract, defendants have *no* notice of what distinguishes a mere breach from "substantially aggravating circumstances".

86. Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275, 3283, (1985) (commenting on the civil treble damage remedy available under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-68 (1982)).

87. A statute that imposes a penalty without a scienter requirement "is little more than 'a trap for those who act in good faith.' " Colautti v. Franklin, 439 U.S. 379, 395 (1979) (quoting United States v. Ragen, 314 U.S. 513, 524 (1942)).