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The Trouble with Trebles: What Violates G.S. 75-1.1?

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COMMENTS

THE TROUBLE WITH TREBLES: WHAT VIOLATES G.S. § 75-1.1?*

I. INTRODUCTION

At first glance the North Carolina Unfair and Deceptive Trade Practices Act[1] appears to be a broad, almost unconstitutionally

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1. As originally adopted, N.C. GEN. STAT. § 75-1.1 (1969) read:
(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

vague[2] statute. Its federal counterpart, the Federal Trade Commission Act,[3] evoked similar responses when it was first enforced.[4] Like the FTC Act, North Carolina General Statute § 75-1.1 has taken shape through judicial interpretation and legislative modification. (North Carolina General Statutes hereinafter referred to as G.S.). As this process has proceeded over the last decade or so, many aspects of the scope and application of the statute have been determined. No general answer, however, has been given to the question of just what does violate the statute. The boundary be-

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(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

Act of June 12, 1969, Ch. 833, 1969 N.C. Sess. Laws, Ch. 930. In response to the *J.C. Penney* case, *infra* notes 39 and 40, the General Assembly amended paragraphs (a) and (b), effective 27 June 1977, to read:

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For the purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

Act of June 27, 1977, Ch. 747, §§ 1-2, 1977 N.C. Sess. Laws, Ch. 984.

2. *See* the passing comment of Judge Parker in Hammers v. Lowe's Co., 48 N.C. App. 150, 154, 268 S.E.2d 257, 260 (1980). *But see* Aycock, *N.C. Law on Antitrust and Consumer Protection*, 60 N.C.L. REV. 207, 223 n.129 (1982) [hereinafter cited as Aycock (1982)]. The constitutionality of N.C. GEN. STAT. § 75-1.1 was challenged in a motion to dismiss under N.C.R. CIV. P. 12(b)(6) in Kinsey v. Constructors, Inc., No. 81CVS0166 (Super. Ct. Harnett County, Feb. 15, 1982)(motion to dismiss denied).

3. 15 U.S.C. 41 (1976).

4. 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, 19-20 (1969).

tween a simple breach of contract, rendering one liable for at most simple damages, and an unfair trade practice, rendering one liable for treble damages and attorney's fees, remains ill-defined. The significance of the question is clear, both to the used car dealer and his customer arguing over an $800 automobile, and to the businessman whose $8,000,000 deal falls through. This problem is highlighted, but not illuminated, by the conflict of analytical processes between the Supreme Court of North Carolina[5] and the U.S. Court of Appeals for the Fourth Circuit.[6] This conflict is evidence of uncertainty in the objectives of the statute and uncertainty among the judiciary as to the basic desirability of the statutory remedy.[7]

A. The Subject Matter of North Carolina General Statute § 75-1.1

The definitions of "unfair methods of competition," "deceptive trade practices," and "unfair trade practices," particularly the latter, are the focal point of this discussion. The General Assembly took these expressions verbatim from Section Five of the FTC Act as amended.[8] Unfair methods of competition form a broader class of wrongful acts injuring competitors than the common law's "unfair competition" tort. The distinction was intentional.[9] In addition to acts analogous to traditional common law wrongs, unfair methods of competition are those methods which permit a competitor "to reap where it has not sown."[10] Deceptive and unfair trade

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5. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980), *rev'g* 44 N.C. App. 210, 261 S.E.2d 135 (1979); Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981), *modifying* 47 N.C. App. 530, 268 S.E.2d 97 (1980).

6. United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir. 1981), *aff'g* 485 F. Supp. 1049 (E.D.N.C. 1980).

7. The mandatory nature of the treble damages provision of Chapter 75, N.C. GEN. STAT. § 75-16, seems to upset judges. United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d at 992; Hammers v. Lowe's Co., 48 N.C. App. at 154, 268 S.E.2d at 260. "[A] plaintiff's attorney should be mindful that in the gray area the treble damage provision might be a double-edged sword. A trial judge in a close case might choose to find that G.S. 75-1.1 has not been violated rather than subject the defendant to treble damages." Aycock (1982), *supra* note 2, at 223.

8. *Compare* N.C. GEN. STAT. § 75-1.1(a) (1981) *with* 15 U.S.C. § 45(a)(1) (1976); *see* Aycock (1982), *supra* note 2, at 210.

9. Aycock (1982), *supra* note 2, at 217; Note, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896, 901 (1970) [hereinafter cited as Note, *1969 Legislation*], *citing* H.R. Rep. No. 1142, 63d Cong. 2d Sess. 19 (1914); 51 Cong. Rec. 12, 142-45 (1914).

10. International News Serv. v. Associated Press, 248 U.S. 215, 239 (1918).

practices are discussed in detail *infra*. Generally, an act is deceptive if it has the capacity to deceive a reasonable person in the market to which it is directed.[11] An act is unfair if it offends public policy or abuses economic, information-created or relationship-created power.[12] While unfair methods of competition necessarily concern problems among businessmen, identified *infra* as "commercial" cases, unfair and deceptive trade practices are found in both commercial and consumer contexts. This broad scope troubles some judges, who question whether the General Assembly intended the same law to apply to *both* contexts.[13] This breadth distinguishes G.S. § 75-1.1 from the other substantive sections of Article One of Chapter 75[14] and their federal counterparts,[15] which are generally restricted to commercial contexts. As the histories of the FTC Act and G.S. § 75-1.1 show, the limitation of existing statutory remedies to anti-competitive acts and practices was a principle motivating factor in the creation of these new remedies.

B. The Origins of North Carolina General Statute § 75-1.1

The roots of G.S. § 75-1.1 lie in the history of the FTC Act.[16] In 1914, Congress passed the original Act,[17] creating the Federal Trade Commission, hoping to nip in the bud new varieties of anticompetitive activity through quasi-injunctive relief.[18] Congress intended that the FTC go beyond common law unfair competition, but did not give it specific standards. The economic world was changing so rapidly and human ingenuity was so vast that Con-

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11. *See infra* text accompanying note 150.

12. *See infra* text accompanying note 142 *et seq.*

13. *See, e.g.*, United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 992 (4th Cir. 1981), discussed *infra* at text accompanying note 255 *et seq.*

14. N.C. GEN. STAT. §§ 75-1 (conspiracy in restraint of trade), 75-5 (specific conspiracy and abuse of economic power provisions) (1981).

15. Sherman Act, 15 U.S.C. §§ 1-2 (1976); Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13a (1976); Clayton Act, 15 U.S.C. §§ 13-14 (1976).

16. 15 U.S.C. §§ 41-58 (1976). For a discussion of the beginnings of the FTC Act, *see* P. AREEDA, ANTITRUST ANALYSIS 46-48 (2d ed. 1974). The Act's evolution is described *id.*, 1017 n.14; Lovett, *State Deceptive Trade Practice Legislation*, 46 TULANE L. REV. 724, 728-29 (1972); Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of F.T.C. Jurisprudence*, 48 GEO. WASH. L. REV. 521, 524-31 (1980).

17. 38 Stat. 717 (1914) (amended 1938, 1952, 1973).

18. Leaffer & Lipson, *supra* note 16, at 524; Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C.L. REV. 199, 249 (1972) [hereinafter cited as Aycock (1972)].

gress could not identify unfair practices one by one and ever hope to catch up.[19]

In response to a Supreme Court case limiting FTC jurisdiction to anti-competitive activities,[20] Congress amended the FTC Act to allow the Commission to protect consumers from "unfair or deceptive acts or practices."[21] G.S. § 75-1.1 was enacted as a result of a political response to increasing "consumerism" in the 1960's,[22] and in part from the encouragement of state legislation by the FTC after it realized it could not accomplish its missions alone.[23] North Carolina adopted the broadest of the three alternative forms suggested by the FTC and the Council of State Governments.[24] The General Assembly, on the recommendation of the Attorney General, declined to limit the statute to acts affecting consumers or to deceptive practices only.[25] The General Assembly went further than the FTC recommendations and added a second paragraph setting out the purpose of the statute.[26] This addition, and its subsequent repeal, have caused much of the confusion over just what G.S. § 75-1.1 is all about.

II. EARLY DEVELOPMENT

The issue of what violated G.S. § 75-1.1 appeared first at the appellate level[27] in *Hardy v. Toler*.[28] This was a consumer action

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19. *See* FTC v. Keppel & Bros., 291 U.S. 304 (1934); Note, *1969 Legislation, supra* note 9, at 901; Aycock (1972), *supra* note 18, at 249.

20. FTC v. Raladam Co., 283 U.S. 643 (1931).

21. The Wheeler-Lea Amendment of 1938, Act of March 21, 1938, Ch. 49, § 3, 52 Stat. 111, *amending* 15 U.S.C. 41 and 44; Lovett, *supra* note 16, at 728-29.

22. *See* Morgan, *supra* note 4; Note, *1969 Legislation, supra* note 9, at 898; Lovette, *supra* note 16, at 728-29.

23. FTC v. Bunte Bros, 312 U.S. 349 (1941). *See also* Leaffer & Lipson, *supra* note 16, at 522.

24. Marshall v. Miller, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981); Lovett, *supra* note 16, at 732, discussing Council of State Governments, 1970 SUGGESTED STATE LEGISLATION 142 (1970).

25. Morgan, *supra* note 4, at 19; the alternative legislative proposals are described in Lovett, *supra* note 16, at 732-33.

26. N.C. GEN. STAT. § 75-1.1(b), *replaced* 27 June 1977. *See supra* note 1 for text of statute.

27. N.C. GEN. STAT. § 75-1.1 was interpreted earlier in Brown v. Bonanza Int'l Inc., No. C-74-125-G (M.D.N.C. Oct. 24, 1974), as discussed in Note, *Trade Regulation—N.C. Gen. Stat. 75-1.1—Unfair or Deceptive Acts or Practices in the Conduct of Trade or Commerce*, 12 WAKE FOREST L. REV. 484, 487 (1976).

28. 288 N.C. 303, 218 S.E.2d 342, *modifying* 24 N.C. App. 625, 211 S.E.2d 809 (1975).

alleging a deceptive trade practice. Although the court offered limited substantive guidance, the central issue in *Hardy* was *who* rather than *what*. The court held that the trial judge was to determine as a matter of law whether the circumstances found by the jury constituted an unfair trade practice.[29] Some guidance for the judge was given in the opinion: two law review articles were cited for "general comment,"[30] FTC Act jurisprudence was invoked,[31] and a Massachusetts case reviewing a similar statute was examined.[32] The court went on to discuss the facts as stipulated in the case at the bar.[33] The court pointed out a guideline that was right on point for this case, but which misled lower and federal courts for years: "Proof of fraud would necesarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true."[34] If this statement had been placed after the stipulated facts had been set-out, it would have been taken as *a fortiori* argument because the facts admitted actionable fraud. Placed as it was, as an introduction to these facts, it was cited for years as requiring fraud for the existence of an unfair trade practice.[35]

When comparing *Hardy* with later court of appeals and federal court opinions, it is important to note that no allegations of bad faith, insult, malice, oppression or bad motives were made warranting the award of punitive damages.[36] Four of seven justices of the *Hardy* court upheld the award of treble damages under G.S. § 75-16 without comment;[37] three concurring justices held that the treble damages provision was itself punitive, but justified in this

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29. *Id.* at 310, 218 S.E.2d at 346-47.

30. *Id.* at 308, 218 S.E.2d at 345, *citing* Morgan, *supra* note 4 and Note, *1969 Legislation, supra* note 9.

31. *Id.*

32. *Id.* at 308, 218 S.E.2d at 346, *citing* Commonwealth v. DeCotis, 366 Mass. 234, 316 N.E.2d 748 (1974).

33. Defendant used-car dealer represented a car to plaintiff as having only one previous owner and as being under warranty. Defendant's salesman knew that the car had been sold twice previously by the defendant, that the warranty could not be transferred, and that the car had been wrecked in a collision. *Id.* at 310-11, 218 S.E.2d at 347.

34. *Id.* at 309, 218 S.E.2d at 346.

35. *See infra* text accompanying notes 80-104.

36. 288 N.C. at 306, 218 S.E.2d at 344. Defendant claimed that the misrepresentation was "an honest mistake."

37. *Id.* at 311, 218 S.E.2d at 348.

case.[38] This confusion over the nature of the treble damage provision led to confusion over substantive aspects of G.S. § 75-1.1 itself.

G.S. § 75-1.1 next appeared in *State ex rel Edmisten v. J.C. Penney Company, Inc.*,[39] a civil action by the Attorney General to enjoin certain debt collection activities and make restitution for their prior use. The trial court found an injunction improper because debt collection activities were not part of "trade or commerce," regulated by the statute.[40] In its discussion of "trade or commerce," the opinion of the Supreme Court of North Carolina stressed that G.S. § 75-1.1 is a consumer protection statute,[41] that since it can impose treble damages it is in part punitive,[42] and that it is part of a trade regulation scheme very different from that of the FTC Act since private actions were available.[43] Unfortunately, *J.C. Penney* offered no insight into just what did constitute an unfair trade practice, except to incorporate a list from then Attorney General Morgan's 1969 article.[44]

Reported decisions outside the consumer protection field began to appear[45] within a month of *J.C. Penney*. Only one non-consumer case,[46] *Harrington Manufacturing Co. v. Powell Manufacturing Co.*, reached the North Carolina Court of Appeals before December of 1979.[47] Before looking at *Harrington Manufacturing*, a quick glance at the federal court opinions[48] reported during this

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38. *Id.* at 311-12, 218 S.E.2d at 348.

39. 292 N.C. 311, 233 S.E.2d 895 (1977).

40. *Id.* at 313, 233 S.E.2d at 899. Analysis of the Court's definition of the words "trade or commerce" is beyond the scope of this comment. The narrow interpretation was quickly repudiated by the General Assembly by its replacement of paragraph (b). *See supra* note 1. This restrictive definition does apply, however, to N.C. GEN. STAT. § 75-1.1 cases filed before 27 June 1977, thereby cramping their precedential usefulness.

41. 292 N.C. at 318, 233 S.E.2d at 899.

42. *Id.* at 319, 233 S.E.2d at 900.

43. *Id.* at 319-20, 233 S.E.2d at 901.

44. *Id.* at 318, 233 S.E.2d at 899-900, *citing* Morgan, *supra* note 4, at 20.

45. Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977).

46. 38 N.C. App. 393, 248 S.E.2d 739 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979); discussed *infra* at text accompanying note 55.

47. Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), *rev'd on other grounds*, 300 N.C. 247, 266 S.E.2d 610 (1980).

48. Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977); CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978); Pinehurst Airlines, Inc. v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

period is in order. Two of these give little guidance.[49] *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, on the other hand, lies at the heart of the conflict over the application of G.S. § 75-1.1 to non-consumer breaches of contract without bad faith.[50] In addition to arguments repeated in *United Roasters Inc. v. Colgate-Palmolive Co.*, three years later,[51] the court used the narrow application of G.S. § 75-1.1 in *J.C. Penney* to support its holding that the defendant's refusal to purchase available natural gas supplies that would enable it to meet later contractual commitments did not "surround," "affect," or "induce" a sale.[52] While bluntly holding that the plain language of the statute imposed its application in other than consumer contexts,[53] the court limited the range of forbidden activities to deception and acts injuring competition.[54]

The exceptional North Carolina state court non-consumer case during this time, *Harrington Manufacturing*,[55] concerned anti-competitive activity similar to that covered by common law commercial causes of action. There was no question that G.S § 75-1.1 applied to unfair methods of competition as well as to relationships between buyers and sellers.[56] Two practices were alleged to be unfair. Each party alleged false, disparaging and deceptive advertising by the other, arising out of claims of exclusive technology and product superiority.[57] The defendant also claimed that the plaintiff had incorporated one of defendant's products into plaintiff's demonstration equipment and had claimed it as plaintiff's own.[58] Judge Parker identified the standard for identifying unfair conduct in competition as that "which a court of equity would consider unfair."[59] He emphasized that unfairness is not an abstract

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49. *Ray*, *supra* note 48, discusses the applicability of N.C. GEN. STAT. § 75-1.1 to a regulated industry. *Pinehurst Airlines*, *supra* note 48, permitted a claim by one airline against another airline, a county board, and a county airport committee to survive a Rule 12(b)(6) motion without discussion, 476 F. Supp. at 559. Neither opinion cites any case law on the subject.

50. 448 F. Supp. 475, at 483-86.

51. *See supra* text accompanying note 39 *et seq.*

52. 448 F. Supp. at 484.

53. *Id.* at 484-85, n.7.

54. *Id.* at 485.

55. 38 N.C. App. 393, 248 S.E.2d 739 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).

56. *Id.* at 396, 248 S.E.2d at 742.

57. *Id.* at 399-400 and 401, 248 S.E.2d at 744 and 745.

58. *Id.* at 403-04, 248 S.E.2d at 745-46.

59. *Id.* at 400, 248 S.E.2d at 744, *citing* Carolina Aniline & Extract Co. v.

concept, but should "be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others."[60] Applying this standard to the false advertising claims, the court found a certain amount of "puffing" to be normal, even though it may be slightly disparaging. How much puffing one can do without being unfair depends on the audience. In this case, both parties were selling harvesters costing more than $16,000 to substantial and experienced farmers who were not going to rely on newspaper, magazine or broadcast advertisements to make purchase decisions. In context, therefore, neither party's advertising constituted unfair competition nor a deceptive act within the meaning of G.S. § 75-1.1.[61]

The defendant's other counterclaim required a different analysis. Plaintiff had received a license to use a patented cutting blade assembly on 15 November 1974, from the patent holder. Defendant had been licensed to use the blade and had produced the same assembly since 1962. The defendant alleged that in September and October of 1974, plaintiff bought one of the defendant's assemblies, installed it on one of plaintiff's own harvesters, and demonstrated it publicly in North Carolina and Virginia as plaintiff's own.[62] The court noted that this was not common law "passing off" of another's goods as one's own at sale, since the plaintiff never sold the demonstrator.[63] But, like "passing off," the acts alleged involved "the misappropriation of the benefits which flow from the quality of a competitor's product."[64] Speaking generally, the court enunciated an underlying principle of the statute:

> No precise definition of the term "unfair methods of competition" as used in G.S. 75-1.1 is possible. Perhaps it is not even desirable that there be one. This is so because the acts to which the term should properly be applied are ever changing in character as social and business conditions change.[65]

Between *J.C. Penney*, in early 1977, and the North Carolina Supreme Court's decision in *Johnson v. Phoenix Mutual Life Insurance Co.*, in mid-1980, the North Carolina Court of Appeals

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Ray, 221 N.C. 269, 273, 20 S.E.2d 59, 61 (1942).

60. *Id.*
61. *Id.* at 401 and 403, 248 S.E.2d at 744 and 745.
62. *Id.* at 398-99 and 403, 248 S.E.2d at 743 and 745-46.
63. *Id.* at 405, 248 S.E.2d at 746.
64. *Id.*
65. *Id.* at 404, 248 S.E.2d at 746.

reached G.S. § 75-1.1 issues several times without giving much guidance as to what constituted a violation. All but three cases[66] were consumer complaints or defenses; all but two[67] were filed before the 1977 amendments; none were reversed by the court of appeals on the interpretation of the statute.[68] *State ex rel Edmisten v. Zim Chem. Co.*,[69] one of the non-consumer cases, was an enforcement action by the Attorney General, similar to *J.C. Penney*. The antifreeze labelling statute,[70] found violated here, described such violations as misbranding—branding falsely or in a misleading manner.[71] The court made it clear that good faith—an "honest mistake" claim—was no defense to enforcement by the Attorney General.[72] This was the first explicit mention of "good faith" in the interpretation of G.S. § 75-1.1; this case was not mentioned in *Marshall v. Miller*.

Eleven Court of Appeals decisions on consumer-related claims approached, but did not solve, the problem of interpreting the statute. The statute was held applicable, but not necessarily violated, in landlord-tenant disputes,[73] homeowner's insurance sales,[74]

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66. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979); Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), *rev'd*, 300 N.C. 247, 266 S.E.2d 610 (1980); State *ex rel.* Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980) (violation of antifreeze labeling statute).

67. Vickery v. Olin Hill Const. Co., 47 N.C. App. 98, 266 S.E.2d 711 (1980) (fraud); Spinks v. Taylor, 47 N.C. App. 68, 266 S.E.2d 857 (1980), *modified on other grounds*, 303 N.C. 256, 278 S.E.2d 501 (1981) (conversion). The 1977 amendments are not relevant to these cases.

68. Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), *rev'd*, 300 N.C. 247, 266 S.E.2d 610 (1980) (reversed, Supreme Court finding no fraud); Spinks v. Taylor, 47 N.C. App. 68, 266 S.E.2d 857 (1980), *modified on other grounds*, 303 N.C. 256, 278 S.E.2d 501 (1981) (N.C. GEN. STAT. § 75-1.1 issue affirmed).

69. State *ex rel.* Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

70. N.C. GEN. STAT. § 106-571 (1975), *repealed*, Act of July 1, 1975, 1975 N.C. Sess. Laws, Ch. 719.

71. 45 N.C. App. at 607, 263 S.E.2d at 851.

72. *Id.* at 607-08, 263 S.E.2d at 851-52.

73. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977); Spinks v. Taylor, 47 N.C. App. 68, 266 S.E.2d 857 (1980), *modified on other grounds*, 303 N.C. 256, 278 S.E.2d 501 (1981); Taylor v. Hayes, 45 N.C. App. 119, 262 S.E.2d 383, *vacated*, 48 N.C. App. 738, 269 S.E.2d 735 (1980), *discr. rev. improvidently granted*, 302 N.C. 627, 276 S.E.2d 369 (1981).

74. Greenway v. N.C. Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978) (*arguendo*); Burgess v. N.C. Farm Bureau Mut. Ins. Co., 44

sale of residential realty,[75] sale of a used car,[76] and sale of a mobile home.[77] The statute was held *not* to apply to commodities trading, where extensive federal regulation indicated preemption,[78] nor to the residential vendor of a home, who is not classified as being in "trade or commerce."[79]

Once the statute was found to apply, there was either shallow, unimaginative analysis of what constituted a violation or no analysis at all. Three of the six cases where violations were found were cases of fraud.[80] In each of these cases,[81] the court merely cited the language in *Hardy*, that "[p]roof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts. . . ."[82] Two cases went slightly further.[83] Both opinions cited the original G.S. § 75-1.1(b), declaring that the purpose of the statute was "to maintain ethical standards of dealings" in business, and, without further discussion, held the statute had been violated.[84]

N.C. App. 441, 261 S.E.2d 234 (1980).

75. Stone v. Paradise Park Homes, 37 N.C. App. 97, 245 S.E.2d 801 (1978); Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979) (against real estate agent); Vickery v. Olin Hill Const. Co., 47 N.C. App. 98, 266 S.E.2d 711 (1980).

76. Holley v. Coggin Pontiac, 43 N.C. App. 229, 259 S.E.2d 1 (1979) (statute of limitations question); Mayton v. Hiatt's Used Cars, 45 N.C. App. 206, 262 S.E.2d 860 (1980).

77. Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980).

78. Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978).

79. Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979).

80. Stone v. Paradise Park Homes, 37 N.C. App. 97, 245 S.E.2d 801 (1978); Vickery v. Olin Hill Const. Co., 47 N.C. App. 98, 266 S.E.2d 711 (1980); Holley v. Coggin Pontiac, 43 N.C. App. 229, 259 S.E.2d 1 (1979).

81. Stone v. Paradise Park Homes, 37 N.C. App. 97, 105, 245 S.E.2d 801, 807; Holley v. Coggin Pontiac 43 N.C. App. 229, 242, 259 S.E.2d 1, 9; Vickery v. Olin Hill Const. Co. 47 N.C. App. 98, 102, 266 S.E.2d 711, 714.

82. 288 N.C. 303, 309, 218 S.E.2d 342, 346.

83. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977); Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979). The sixth case was ultimately vacated. Taylor v. Hayes, 45 N.C. App. 119, 262 S.E.2d 383, *vacated*, 48 N.C. App. 738, 269 S.E.2d 735 (1980), *discr. rev. improvidently granted*, 302 N.C. 627, 276 S.E.2d 369 (1981).

84. Love v. Pressley, 34 N.C. App. at 517, 239 S.E.2d at 583; Rosenthal v. Perkins, 42 N.C. App. at 454, 257 S.E.2d at 67. *Love* upheld a trial court determination that a landlord's trespass on his tenants' leasehold and conversion of his tenants' goods, by locking them out and "cleaning up" before the end of their term, violated G.S. § 75-1.1. 34 N.C. App. at 517, 239 S.E.2d at 583. *Rosenthal*

The six decisions holding practices *not* to be unfair or deceptive are no more helpful. The most recent of these,[85] in which a landlord locked out a wrongful holdover, was distinguished quickly from a previous landlord-tenant case[86] and dismissed without discussion.[87] In two cases where clauses in homeowner's insurance policies were challenged,[88] analysis was limited to a finding that there were no fraudulent or deceitful acts,[89] nor misrepresentations made, nor "duty" violated.[90] *Mayton v. Hiatt's Used Cars, Inc.*[91] a well reasoned and thorough analysis of the treble damages and attorney's fees sections of Chapter 75,[92] does not discuss just what constitutes a violation of G.S. § 75-1.1, except that actual damages proximately caused are a necessary element.[93] In *Stone v. Paradise Park Homes, Inc.*,[94] the plaintiffs appealed the trial court's denial of treble damages under G.S. § 75-16, alleging that defendant's

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reversed a Rule 12(b)(6) dismissal of a G.S. § 75-1.1 cause of action where the defendant had made misrepresentations short of fraud in the sale of a residence. A fraud count failed when the plaintiffs offered no proof of the defendant's intent to induce the purchase by means of the misrepresentation. 42 N.C. App. at 452, 257 S.E.2d at 66. The Court of Appeals cited to the rest of the sentence from *Hardy v. Toler* quoted *supra* at the text accompanying note 82, "however, the converse is not always true." *Id.* at 455, 257 S.E.2d at 67, *quoting* 288 N.C. 303, 309, 218 S.E.2d 342, 346. The court then cited G.S. § 75-1.1(b) regarding the purpose of the statute and held that a cause of action had been stated, without further discussion or analysis. 42 N.C. App. at 455, 257 S.E.2d at 67.

85. Spinks v. Taylor, 47 N.C. App. 68, 266 S.E.2d 857 (1980), *modified on other grounds*, 303 N.C. 256, 278 S.E.2d 501 (1981).

86. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977). *See supra* note 84.

87. Spinks v. Taylor, 47 N.C. App. at 73-74, 266 S.E.2d at 680.

88. Greenway v. N.C. Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978); Burgess v. N.C. Farm Bureau Mut. Ins. Co., 44 N.C. App. 441, 261 S.E.2d 234 (1980).

89. Burgess v. N.C. Farm Bureau Mut. Ins. Co., 44 N.C. App. at 446, 261 S.E.2d at 238.

90. Greenway v. N.C. Farm Bureau Mut. Ins. Co., 35 N.C. App. at 314, 241 S.E.2d at 343.

91. 45 N.C. App. 206, 262 S.E.2d 860 (1980).

92. N.C. GEN. STAT. §§ 75-16 and 75-16.1, respectively.

93. 45 N.C. App. at 212, 262 S.E.2d at 864. The key to the court's analysis is the language of N.C. GEN. STAT. § 75-16, requiring on its face that a plaintiff must be *injured* to have a right of action under Chapter 75. The court in *Mayton* held that this indicates an absence of legislative intent to have individuals act as private attorneys general. 45 N.C. App. at 212, 262 S.E.2d at 864.

94. 37 N.C. App. 97, 245 S.E.2d 801 (1978).

acts as found by the jury were unfair and deceptive.[95] The court of appeals agreed with the plaintiffs that damages awarded for fraud should have been trebled,[96] but stated that "[t]here is no authority to support plaintiffs' argument that . . . the portion attributable to damages solely for breach of implied and express warranties should be trebled."[97] Judge Arnold noted that G.S. § 75-16 provided treble damages for acts "in violation of the provisions of this Chapter," and declared, without further comment, that breach of implied or express warranties did not constitute such a violation.[98] The failure to enunciate *why* a set of facts did or did not constitute an unfair trade practice continued to sow confusion in G.S. § 75-1.1 jurisprudence.

The conflict over simple breach of contract first arose in *Wachovia Bank & Trust Co., N.A. v. Smith.*[99] The Smiths purchased a mobile home from Tunstall, a third-party defendant; Wachovia held the note. When the Smiths revoked acceptance, Tunstall refused to return their down payment. Wachovia sued on the note, and the Smiths brought in Tunstall, alleging fraud and violation of G.S. § 75-1.1. At the close of all the evidence, the trail judge directed a verdict for Tunstall on the fraud and unfair trade practice allegations. The court of appeals agreed with the trial court that the Smiths presented insufficient evidence to justify an inference of bad faith or knowledge of defects at the time of sale.[100] In the absence of any other guidance, the court looked to the rule for unfair *competition* stated in *Harrington Manufacturing*:[101] was the the sale unfair or deceptive in light of the circumstances surrounding the transaction?[102] The court then discussed *Hardy*,[103] and seemed to conclude from defendant's actual knowledge of the defects in *Hardy* that this was an element required before a violation of G.S. § 75-1.1 could be found.[104] The court then stated that ab-

95. *Id.* at 105, 245 S.E.2d at 807.

96. *See supra* text accompanying note 82.

97. 37 N.C. App. at 105, 245 S.E.2d at 807.

98. *Id.*

99. 44 N.C. App. 685, 262 S.E.2d 646 (1980), *overruled by* Marshall v. Miller, 302 N.C. 539, 546, 276 S.E.2d 397, 401 (1981).

100. 44 N.C. App. at 688-89, 262 S.E.2d at 648 (discussing the fraud count).

101. 38 N.C. App. 393, 248 S.E.2d 739 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979). *See supra* text accompanying note 55 *et seq.*

102. 44 N.C. App. at 690, 262 S.E.2d at 649.

103. 288 N.C. 303, 218 S.E.2d 342 (1975). *See supra* text accompanying note 28 *et seq.*

104. 44 N.C. App. at 691, 262 S.E.2d at 650.

sent evidence of *willful deception* or *bad faith*, the case at bar presented no violation of the statute.[105] *Stone*[106] was then cited for the general proposition that breach of warranty alone did not constitute an unfair trade practice.[107] Unfortunately, this perpetuated the lack of guidance as to *why* this set of facts did not constitute a violation of G.S. § 75-1.1.

III. CONFLICT

A. *Johnson v. Phoenix Mutual Life Insurance Co.*

Six weeks before the Court of Appeals rendered its decision in *Marshall v. Miller*,[108] the North Carolina Supreme Court decided *Johnson v. Phoenix Mutual Life Ins. Co.*,[109] its first interpretation of G.S. § 75-1.1 since *J.C. Penney*[110] three years earlier. This was the first private non-consumer action before the Court of Appeals with the exception of *Harrington Manufacturing*,[111] which was a straightforward unfair competition action.[112] The facts in *Johnson* were complicated, but a few points of interest should be mentioned before reviewing the decision, because the wrong complained of was quite subtle. This was an appeal by the plaintiffs, developers of a proposed shopping center, from summary judgment.[113] The relevant counts were fraud[114] and violation of G.S. § 75-1.1,[115] both of which were based on the same set of facts.[116] The defendants' summary judgment motion was based on the pleadings, depositions of the plaintiffs, the deposition of the agent of the defendant insur-

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105. *Id.*

106. 37 N.C. App. 97, 245 S.E.2d 801 (1978). *See supra* text accompanying note 94 *et seq.*

107. 44 N.C. App. at 691, 262 S.E.2d at 650.

108. 47 N.C. App. 530, 268 S.E.2d 97 (1980), *modified by* 302 N.C. 539, 276 S.E.2d 397 (1981). Discussed *infra* at text accompanying note 228 *et seq.*

109. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980), *rev'g* 44 N.C. App. 210, 261 S.E.2d 135 (1979). The Court of Appeals opinion in *Marshall* cites to its own opinion in *Johnson* and not that of the Supreme Court. 47 N.C. App. at 543, 268 S.E.2d at 104.

110. 292 N.C. 311, 233 S.E.2d 895 (1977).

111. 38 N.C. App. 393, 248 S.E.2d 739 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979); discussed *supra* at text accompanying note 55.

112. *See* Annex: N.C. GEN. STAT. § 75-1.1 Interpretation Chronology, *infra* at text page 414.

113. 44 N.C. App. at 214, 261 S.E.2d at 140.

114. *Id.* at 214-15, 261 S.E.2d at 140.

115. *Id.* at 220, 261 S.E.2d at 143.

116. *See infra* text accompanying note 118.

ance company, and the affidavit of the agent for the defendant Cameron-Brown.[117] Plaintiffs, proposing to develop a shopping center, entered into a contract with Cameron-Brown, giving Cameron-Brown the exclusive rights to negotiate a permanent mortgage loan.[118] At this point, plaintiffs had four major tenants committed, and were negotiating with Sears and a bank. Cameron-Brown's agent arranged for a loan commitment from defendant Phoenix Mutual, conditioned on all six leases being in effect and a construction loan being acquired within ninety days. A loan was promptly acquired, but Sears decided not to lease space in the proposed center. Subsequent negotiations reduced Phoenix Mutual's commitment by $100,000. Plaintiffs found a potential replacement for Sears which was acceptable to Phoenix Mutual, but could not get a bank to commit itself. Because of this and plaintiffs' inability to raise the $100,000 difference in permanent financing, the construction lender refused to advance funds. Subsequent negotiations with Phoenix Mutual were unsuccessful, and Phoenix Mutual terminated its commitment according to its terms.

The complaint alleged that Phoenix Mutual and Cameron-Brown had deliberately acted to force plaintiffs to drop the project,[119] and that the defendants' conduct amounted to unfair and deceptive acts in violation of G.S. § 75-1.1.[120] Each defendant moved for summary judgment; the trial court granted both motions.[121] The court of appeals approached the case as sounding in fraud, emphasizing the general rule that summary judgment was "apt to be inappropriate" in fraud actions.[122] The specific allegation of fraud was that Cameron-Brown's agent had falsely assured plaintiffs that substituting tenants would be no problem.[123] The court of appeals found that the depositions showed a sufficient

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117. 44 N.C. App. at 214, 261 S.E.2d at 140.

118. The facts are taken from Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 249-51, 266 S.E.2d at 613-14.

119. 300 N.C. at 251, 266 S.E.2d at 614. *Cf.*, Pedwell v. First Union Nat'l Bank of N.C., 51 N.C. App. 236, 275 S.E.2d 565 (1981), discussed briefly *infra* at text accompanying note 166.

120. 300 N.C. at 251, 266 S.E.2d at 614.

121. *Id.* The granting of Phoenix Mutual's motion was affirmed by the court of appeals, 44 N.C. App. at 223, 261 S.E.2d at 144, and was not before the Supreme Court, 300 N.C. at 251, n.1, 266 S.E.2d at 614, n.1.

122. 44 N.C. App. at 214-15, 261 S.E.2d at 140, *citing* 6 MOORE'S FEDERAL PRACTICE ¶ 56.17[27], at 866 (2d ed. 1979).

123. *Id.* at 215, 261 S.E.2d at 140.

forecast of evidence of the elements of fraud,[124] especially if a jury found the existence of a fiduciary relationship between plaintiffs and Cameron-Brown.[125] Based on *Hardy*,[126] the court of appeals proceeded to hold that evidence of fraud sufficient to withstand summary judgment was sufficient evidence of a violation of G.S. § 75-1.1.[127] Judge Clark dissented, arguing that any representation by Cameron-Brown must be interpreted in light of its duties as a loan broker, without responsibility for finding substitute tenants.[128] The supreme court agreed, and after reviewing four references to the alleged misrepresentation in the supporting statements, concluded that the substance of the statement clearly referred to the ease of obtaining permission to substitute from the lender.[129] Furthermore, the court found that this representation was not in fact false—that Phoenix Mutual had willingly permitted substitutions.[130]

Since the fraud basis for the G.S. § 75-1.1 count[131] was reversed, the supreme court found it necessary to deal with the unfair trade practice claim in its own right.[132] This was a pre-1977 claim, so the court had to deal with the restrictive "trade or commerce" definition of *J.C. Penney*.[133] It did so quickly, noting that a mortgage broker was in the business of selling his services.[134] The court then looked for guidance in the identification of unfair or deceptive acts or practices, finding it[135] in cases interpreting the FTC Act, specifically the similarly worded Section 5(a)(1).[136] The general nature of the standards imposed by the statute, reaching to

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124. *Id.*

125. *Id.* at 218, 261 S.E.2d at 142.

126. 288 N.C. 303, 218 S.E.2d 342 (1975); discussed *supra* at text accompanying note 28 *et seq.* *See also supra* text accompanying note 34.

127. 44 N.C. App. at 221, 261 S.E.2d at 144. The opinion proceeds to discuss the "trade or commerce" problem, *see supra* text accompanying note 39 and note 40, and the applicable statute of limitations, N.C. GEN. STAT. § 1-52(a). *Id.* at 221-22, 261 S.E.2d at 144.

128. *Id.* at 223, 261 S.E.2d at 145.

129. 300 N.C. at 255, 266 S.E.2d at 616.

130. *Id.* at 259, 266 S.E.2d at 618.

131. *See supra* text accompanying notes 126 and 127.

132. 300 N.C. at 260-66, 266 S.E.2d at 619-23.

133. 292 N.C. 311, 317, 233 S.E.2d 895, 897 (1977). *See supra* text accompanying note 40.

134. 300 N.C. at 261-62, 266 S.E.2d at 620.

135. *Id.* at 262, 266 S.E.2d at 620.

136. 15 U.S.C. § 45(a)(1) (1976). *See generally supra* text accompanying notes 16-24 and the authorities cited therein.

unanticipated acts and practices, was stressed.[137] The court looked to the FTC jurisprudence,[138] a similar Massachusetts case,[139] and *Hardy*,[140] for the general rule that the definition of an unfair or deceptive trade practice depended on the facts of each case and the impact of the practice on the marketplace.[141] When comparing *Johnson* with later cases, one needs to keep in mind that *Johnson* was a commercial rather than a consumer case. This being so, the extension of the market impact analysis from the largely consumer context of existing FTC case law to the wider reach of G.S. § 75-1.1. created a new framework for analysis.

The court went on to define the two grounds for relief in the statute—unfairness and deception.[142] "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."[143] In a footnote, the opinion quotes *F.T.C. v. Sperry & Hutchinson Co.*,[144] a leading FTC case which describes the factors in unfairness:

> (1)[W]hether the practice, without having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen).[145]

The Court used as an example the *Spiegel, Inc. v. F.T.C.* case.[146]

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137. 300 N.C. at 262, 266 S.E.2d at 620-21.

138. Pan American World Airways, Inc. v. U.S., 371 U.S. 296 (1963).

139. Commonwealth v. DeCotis, 366 Mass. 234, 316 N.E.2d 748 (1974); *see also supra* text accompanying note 32.

140. 288 N.C. 303, 218 S.E.2d 342 (1975), discussed *supra* at text accompanying notes 28-38.

141. 300 N.C. at 262-63, 266 S.E.2d at 621. *See* Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 400-01, 248 S.E.2d 739, 744 (1978); discussed *supra* at text accompanying note 60.

142. 300 N.C. at 263, 266 S.E.2d at 621.

143. *Id.*

144. 405 U.S. 233 (1972).

145. *Id.* at 244-45, *quoted in* n. 6, 300 N.C. at 263, 266 S.E.2d at 621. One might question the meaning of the differences in wording between these two statements, particularly the omission of "competitors or other businessmen" from the body of the opinion in this, a non-consumer case.

146. 540 F.2d 287 (7th Cir. 1976), *modifying on other grounds In re* Spiegel,

The public policy violated was the guarantee of a meaningful opportunity to defend oneself in court.[147] Distilling the FTC jurisprudence down to a general rule, the court asserted a status argument: "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position."[148] The reference to equity may be awkward,[149] but the tenor of the policy is clear.

Deception was reduced to four rules: (1) an act or practice is deceptive if it has the *capacity* or *tendency* to deceive; (2) proof of *actual* deception is unnecessary; (3) expressions literally true may still be deceptive; and (4) deception is determined by its *effect* on the *average* consumer.[150] Just who constitutes an "average consumer," especially in a non-consumer type case, should probably be determined by the intended target audience of the allegedly deceptive communication.[151]

In *Johnson*, the court found neither unfairness[152] nor deception[153] when it applied the law to the facts. There was no evidence that Cameron-Brown did anything but keep the plaintiffs accurately and clearly informed of events.[154] *Johnson* provides a format for analysis which, if used, can lead to principled decisions. But *Johnson* left questions unanswered, questions arising from the use of civil actions for treble damages rather than FTC orders and from the application of concepts created in a consumer protection context to non-consumer problems. Given the apparent fear of the power of this remedy among the judiciary,[155] it was not suprising

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Inc., 86 F.T.C. 425 (1975).

147. 300 N.C. at 264, 266 S.E.2d at 622.

148. *Id.*

149. The possibility is that lower courts might limit the scope of the statute to only those situations where a court of equity would act. The subsequent behavior of the N.C. Court of Appeals, *e.g.*, Overstreet v. Brookland, Inc., 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981), and the Fourth Circuit, *e.g.*, United Roasters, Inc. v. Colgate-Palmolive, Inc., 649 F.2d 985, 992 (1981), is not reassuring.

150. 300 N.C. at 265-66, 266 S.E.2d at 622 (emphasis added, citations omitted).

151. *See* Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 400-01, 248 S.E.2d 739, 744 (1978) (unfair competition determined by traditional principles); *see supra* text accompanying note 55 *et seq.*

152. 300 N.C. at 265, 266 S.E.2d at 622.

153. *Id.* at 266, 266 S.E.2d at 622-23.

154. *Id.*

155. *See, e.g.*, United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 992 (4th Cir. 1981); Hammers v. Lowe's Co., Inc., 48 N.C. App. 150, 154, 268 S.E.2d 257, 259-60 (1980); CF Indus., Inc. v. Transcontinental Gas Pipe Line

that such cases quickly arose before the appellate courts.[156]

Four cases were decided by the court of appeals between *Johnson* and *Marshall*.[157] None of them used the analytic scheme presented in *Johnson*.[158] The first[159] argued strenuously in dictum against the application of the treble damages provision of G.S. § 75-16 against defendants who had not knowingly or willfully violated G.S. § 75-1.1.[160] The second case,[161] reported the same day, reversed summary judgment for the defendant on an unfair competition complaint[162] stressing that the jury must find a causal relation between defendant's act and the plaintiff's injuries.[163] The third,[164] concerning noxious behavior by the landlord in a commercial lease situation, found sufficient evidence of fraud (and, therefore, of a G.S. § 75-1.1 violation) forecasted to overturn summary judgment.[165] The fourth case[166] found, without discussion, that conspiracy to prevent performance of a contract is an unfair act under G.S. § 75-1.1.[167] None of these cases flies in the face of previously existing case law or common sense, but none contributes sig-

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Corp., 448 F. Supp. 475, 485 (W.D.N.C. 1978).

156. United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir. 1981); Marshall v. Miller, 47 N.C. App. 530, 268 S.E.2d 97 (1980).

157. Hammers v. Lowe's Co., Inc., 48 N.C. App. 150, 268 S.E.2d 257 (1980); Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980); Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, *modified on other grounds*, 303 N.C. 675, 281 S.E.2d 43 (1981); Pedwell v. First Union Nat'l Bank of N.C., 51 N.C. App. 236, 275 S.E.2d 565 (1981).

158. *Ellis* does cite to the North Carolina Court of Appeals' *Johnson* opinion, 44 N.C. App. 210, 222, 261 S.E.2d 135, 144 (1979), *rev'd on other grounds*, 300 N.C. 247, 266 S.E.2d 610 (1980), but only for its incorporation of Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977), into North Carolina jurisprudence for the proposition that N.C. GEN. STAT. § 75-1.1 applies to the insurance industry. Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 183, 268 S.E.2d 271, 273 (1980).

159. Hammers v. Lowe's Companies, Inc., 48 N.C. App. 150, 268 S.E.2d 257 (1980).

160. *Id.* at 154, n.1, 268 S.E.2d at 259-60.

161. Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980).

162. *Id.* at 184, 268 S.E.2d at 274.

163. *Id.* at 184, 268 S.E.2d at 273-74.

164. Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, *modified on other grounds*, 303 N.C. 675, 281 S.E.2d 43 (1981).

165. *Id.* at 589, 275 S.E.2d at 183.

166. Pedwell v. First Union Nat'l Bank, 51 N.C. App. 236, 275 S.E.2d 565 (1981).

167. *Id.* at 238, 275 S.E.2d at 567.

nificantly to our understanding of G.S. § 75-1.1.[168]

B. United Roasters *in United States District Court*[169]

Before examining what happened in *United Roasters, Inc. v. Colgate-Palmolive Co.* at the Fourth Circuit Court of Appeals[170] and what it contradicts in North Carolina case law, its progress in the Eastern District Court requires examination.[171] As in *Johnson*

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168. The Supreme Court's review of *Kent* did not concern N.C. GEN. STAT. § 75-1.1. 303 N.C. 675, 281 S.E.2d 43 (1981).

169. The timing of the filings, decisions made, and opinions rendered in these cases is important:

Effective date of 1977 amendments. . . .	27 June 1977
United Roasters complaint filed. . . .	13 July 1977
Marshall v. Miller complaint filed. . . .	7 Oct. 1979
United Roasters partial summary judgment denied.	13 July 1979
Johnson v. Phoenix Mutual N.C. App. opinion.	18 Dec. 1979
United Roasters treble damages denied.	23 Jan. 1980
Johnson v. Phoenix Mutual N.C. opinion.	3 June 1980
Marshall v. Miller N.C. App. opinion.	15 July 1980
United Roasters argued before the 4th Circuit.	2 Dec. 1980
Marshall v. Miller N.C. opinion.	7 Apr. 1980
United Roasters decided in 4th Circuit.	18 May 1981
United Roasters rehearing denied in 4th Circuit.	19 June 1981

United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979) (Dupree, J.) and 485 F. Supp. 1049 (E.D.N.C. 1980)(Maletz, J.), *aff'd*, 649 F.2d 985 (4th Cir. 1981)(Haynesworth, Sr. J.), *cert. den.*, _ *U.S.*_, 102 S. Ct. 599 (1981)(petition by Colgate-Palmolive); Marshall v. Miller, 47 N.C. App. 530, 268 S.E.2d 97 (1980), *modified*, 302 N.C. 539, 276 S.E.2d 397 (1981)(Meyer, J.).

The second opinion in *United Roasters*, 485 F. Supp. 1049 (E.D.N.C. 1980), is cited by the North Carolina Court of Appeals in its *Marshall* opinion, 47 N.C. App. 530, 544, 268 S.E.2d 97, 104, and is criticized in the North Carolina Supreme Court's *Marshall* opinion, 302 N.C. 539, 546, 276 S.E.2d 397, 401-02. The Court of Appeals' *Marshall* opinion does not mention the Supreme Court's opinion in Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980). Since it had not yet reached the advance sheets, this is hardly surprising even given the six week lag. It is interesting to speculate what the Court of Appeals might have decided in *Marshall* if *Johnson* had been brought to the Court's attention.

The North Carolina Supreme Court's opinions in *Johnson* and *Marshall* are mentioned in the Fourth Circuit's *United Roasters* opinion, 649 F.2d 985 at 991-92. *See infra* at text accompanying note 262. However, the chronology shown above indicates that the *Marshall* opinion could not have been available for oral argument.

170. At *infra* text accompanying note 255 *et seq.*

171. There are two opinions, published together. 485 F. Supp. 1041 (E.D.N.C. 1979) and 485 F. Supp. 1049 (E.D.N.C. 1980). In the first opinion, Judge Dupree treated Colgate-Palmolive's motion for summary judgment as a motion to dismiss

(also a commercial case), the facts in *United Roasters* were complicated[172] but critical to understanding the injury complained of and the responses of the courts.

United Roasters was in the business of producing and distributing roasted soybean and corn snacks.[173] Interested in expansion, it negotiated an agreement with Colgate-Palmolive whereby Colgate would test market United Roasters' soybean snack for two years, September, 1973 to September, 1975. United Roasters transferred all its assets, including its rights to the soybean snack production process, to Colgate in return for a royalty of four percent of gross sales. United Roasters was to be retained as an independent contractor for the actual manufacture of the snacks. If, after 1 September 1975, Colgate decided not to continue, the rights and assets would be returned to United Roasters. If Colgate elected to continue, the royalty would be altered somewhat, based on either gross sales or gross profits. Colgate had the right to terminate the agreement either before or after the test market period. If termination occurred after the test market period, however, United Roasters would be required to pay Colgate the net book value of all improvements. Colgate agreed to cover a $100,000 note due in October of 1976 if test marketing delays disrupted royalty payments during the first year after the test market period.

Events proceeded according to the agreement until some time before the end of the test period, when Colgate allegedly decided to stop expanding the test markets and to stop marketing altogether after January, 1976, but not to terminate the contract before the end of the test market period. Colgate first told United Roasters of this decision in July, 1976. Colgate refused to reconvey the assets back to United Roasters without compensation for improvements, under the termination provision in effect during the test market period. Apparently caught between the post-test market provision that it pay for improvements and the $100,000 note

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under F.R. Civ. P. Rule 12(b)(6), and, therefore, interpreted the facts alleged in the manner most favorable to the plaintiff. 485 F. Supp. 1041, 1043. After trial, Judge Maletz made his decision on the plaintiff's motion for treble damages on the basis of the complaint as amended and the facts as found by the jury. 485 F. Supp. 1049, 1054, n.3.

172. "The court has studied 1,626 pages of depositions, 74 pages of answers to interrogatories, 29 pages of briefs and hundreds of pages of exhibits filed in support of and in opposition to the motion for summary judgment." 485 F. Supp. 1041, 1043.

173. The facts in this paragraph are taken from 485 F. Supp. 1041, 1043-45.

due in October, 1976, United Roasters was unable to do either and collapsed.

United Roasters claimed, among other things,[174] that this course of action violated G.S. § 75-1.1.[175] Colgate contended that the statute was only a consumer protection statute, or that it concerned injury to competitors and United Roasters had not alleged any such competition between itself and Colgate, and that none of the acts alleged was "designed to effect a sale" under the North Carolina Supreme Court's interpretation of the statute in *J.C. Penney*.[176] The court cited the words of the statute[177] and *Harrington Manufacturing*[178] to deal quickly with the first two contentions.[179] In response to the third contention, the court held that the alleged activities would "affect or surround" a sale by terminating otherwise binding obligations and causing title in the assets to revert to United Roasters, and that this was enough under *J.C. Penney* to bring the transaction under G.S. § 75-1.1.[180]

At trial, the acts complained of had been reduced by amendment to the failure of Colgate to notify United Roasters with reasonable promptness of its decision to discontinue performance.[181]

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174. The complaint contained seven counts, including restraint of trade in violation of both N.C. GEN. STAT. §§ 75-1 and 75-2 (1913). *Id.* at 1043.

175. *Id.* at 1045. The anticompetitive aspects of Colgate's acts were apparently confined to the N.C. GEN. STAT. §§ 75-1 and 75-2 counts, and were not discussed in relation to N.C. GEN. STAT. § 75-1.1 in either district court opinion or on appeal.

176. 292 N.C. 311, 233 S.E.2d 895 (1977).

177. *See supra* note 1 for text of N.C. GEN. STAT. § 75-1.1 (1969).

178. 38 N.C. App. 393, 248 S.E.2d 739 (1978), discussed *supra* at text accompanying note 55 *et seq.*

179. 485 F. Supp. at 1046.

180. *Id.* at 1046-47. Note that the complaint was filed after June 27, 1977. The case should not have been controlled by the original "trade or commerce" language interpreted narrowly in State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977). *See supra* notes 1 and 40, and text *supra* accompanying notes 39 through 44. The court in *United Roasters* held that the amendment of 1977 did not apply to causes of action arising before its effective date, 485 F. Supp. at 1054-57, although the Session Law states that it "shall become effective upon ratification and shall not apply to pending litigation." Section Five, ch. 747, 1977 N.C. Sess. Laws 987. North Carolina courts appear to have applied the amended statute to all actions *filed* on or after June 27, 1977. *See, e.g.*, Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); *cf.*, Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979); Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980). The Fourth Circuit apparently assumed the amended language applied.

181. 485 F. Supp. 1049, 1052 and n.3.

The jury found that Colgate acted in bad faith in exercising its right to terminate, that it made this decision in the first quarter of 1976, that the deception was *not* intentional, and that Colgate unfairly failed to advise United Roasters of its decesion.[182] Denying treble damages under G.S. § 75-16, the court held that the failure to notify did not in itself "surround or affect" the sale and, therefore, G.S. § 75-1.1 did not apply.[183] Failure to notify did not activate the contract provisions requiring Colgate to reconvey the assets to United Roasters, so the parties continued to have binding obligations and title to the assets was unaffected.[184]

The court proceeded under the assumption that the statute applied. It determined that the jury's findings of fact indicated that G.S. § 75-1.1 had not been violated.[185] Only an implied promise of good faith performance was breached.[186] The main point in the court's analysis was its conclusion that G.S. § 75-16, and, therefore, G.S. § 75-1.1, is punitive, requiring intentional wrongdoing.[187] The court looked at the language in *J.C. Penney*[188] to the effect that the statute is at least in part punitive,[189] and at Justice Huskin's concurring opinion in *Hardy v. Toler*[190] emphasizing its punitive nature.[191] The requirement for intentional action was deduced from three North Carolina cases.[192] *Stone* was cited for the North Carolina Court of Appeals statement, without elucidation, that breach of warranty alone did not constitute a violation of G.S. § 75-1.1.[193] *Hardy* was cited for the statement that fraud is unfair and deceptive, but "the converse is not always true."[194] *Love v.*

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182. *Id.*

183. *Id.* at 1052-53.

184. *Id.* at 1053-54 and n.3.

185. *Id.* at 1057.

186. *Id.*

187. *Id.* at 1058.

188. 292 N.C. 311, 233 S.E.2d 895 (1977), discussed *supra* at text accompanying note 39 *et seq.*

189. *Id.* at 319, 233 S.E.2d at 900, *cited* at 485 F. Supp. 1049, 1058.

190. 288 N.C. 303, 218 S.E.2d 342 (1975), discussed *supra* at text accompanying note 28 *et seq.*

191. *Id.* at 312, 218 S.E.2d at 348, *cited* at 485 F. Supp. 1049, 1058 and n.5.

192. Stone v. Paradise Park Homes, Inc., 37 N.C. App. 97, 245 S.E.2d 801 (1978), discussed *supra* at text accompanying note 94 *et seq.*; Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), discussed *supra* at note 84.

193. 37 N.C. App. at 106, 245 S.E.2d at 807.

194. 288 N.C. 303, 309, 218 S.E.2d 342, 346, *cited* at 485 F. Supp. 1059; *see supra* text accompanying note 28 *et seq.*

Pressley, where trespass and conversion showed a violation of the statute, was the third case.[195] Two other early cases[196] were cited for the proposition that an intentional act was required to violate G.S. § 75-1.1.[197] As further support, the Court looked to the same Massachusetts case and statute cited by the North Carolina Supreme Court in *Hardy*,[198] and noted the contrast between the "remedial" FTC Act and the "punitive" G.S. § 75-16.[199] North Carolina punitive damages policy, stressing the punishment of intentional wrongdoers while deterrring others, was emphasized.[200]

The result is not surprising, given the limitations of state law interpretation imposed on federal courts by the *Erie* Doctrine.[201] Looking at the interpretation chronology,[202] at the time the decision was rendered[203] North Carolina appellate courts had upheld the application of G.S. § 75-1.1 in four fraud cases,[204] one near-common law unfair competition case,[205] and one trespass and con-

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195. 34 N.C. App. 503, 239 S.E.2d 574 (1977), *cited* at 485 F. Supp. 1059. It is interesting that the district court emphasized the "intentional" nature of the torts, *id.*, when the tortfeasor in either might be acting in good faith. The intent required is not a matter of conscious wrongdoing. W. PROSSER, THE LAW OF TORTS § 13, at 74 (trespass) and § 15, at 84 (conversion) (4th ed. 1971).

196. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), discussed *supra* at text accompanying note 55 *et seq.*; CF Ind., Inc., v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978), discussed *supra* at text accompanying note 50 *et seq.*

197. 485 F. Supp. at 1059.

198. *Id.* at n.8 and 7, *citing* Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975); Commonwealth v. DeCotis, 366 Mass. 239, 316 N.E.2d 748 (1974). *See supra* text accompanying note 32.

199. 485 F. Supp. at 1059, n.7.

200. *Id.* Judge Dupree had denied United Roaster's motion to add a fraud claim to its complaint, on the grounds that it was "merely repetitious of counts already stated . . . and since an ample statutory remedy is already provided in lieu of punitive damages, the addition of the fraud claim would be inappropriate." *Id.* at n.9.

201. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS §§ 55-58 (3d ed. 1976).

202. *See* Annex, *infra* at page 414.

203. January 23, 1980.

204. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975); Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979); Holley v. Coggin Pontiac, 43 N.C. App. 229, 259 S.E.2d 1 (1979); Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980), *rev'g* 44 N.C. App. 210, 261 S.E.2d 135 (1979).

205. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), *cert. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).

version case.[206] Comparison with comparable regulatory schemes at federal and state levels confirmed the trial court's interpretation of the treble damages provision as punitive, requiring intentional wrongdoing. The difficulty with this result is that "intentional" in the North Carolina cases is best contrasted with "negligent." The jury verdict, as stated, does not say if the defendant intended to delay notice. It says, "[t]he defendant did not intentionally deceive plaintiff by failing to advise. . . ."[207] Intent "to trespass" is not required for liability for trespass, only the intent to enter; similarly, intent "to convert" is not required for conversion, only the intent to do something with the property inconsistent with the true owner's rights.[208] In a trade regulation context, for closer comparison, intent "to restrain trade" is not required to find a violation of section one of the Sherman Act.[209]

In so stating the interrogatory to the jury, the district court misread the basic requirement of *Hardy v. Toler*:[210] "[T]he determination as to the liability under those facts [found by the jury] should be found by the court as a matter of law."[211] If the jury in *United Roasters* had found that the defendant had deceived the plaintiff, it would in fact have decided liability. For a court interpreting G.S. § 75-1.1, the rule of *Hardy* is clear. The jury finds the facts as to what actually happened, and the judge takes it from there. In a sense, the jury finds what would be called "evidentiary facts" under code pleading;[212] the court then applies the facts to the law. In *United Roasters*, the facts to be determined by the jury were the acts of the defendant. When did it decide to terminate the contract? When did it notify United Roasters? Was United Roasters injured by the delay? At this point it was the function of the court to decide deception or unfairness.

The court in *United Roasters* cited *Holley v. Coggin Pontiac, Inc.*[213] for the proposition that G.S. § 75-16, and, therefore, G.S. §

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206. Love v. Pressley, 34 N.C. App. 503, 239, S.E.2d 574 (1977).

207. United Roasters v. Colgate-Palmolive Co., 485 F. Supp. 1041, 1057.

208. W. PROSSER, THE LAW OF TORTS §§ 13-15 (4th ed. 1971).

209. P. AREEDA, ANTITRUST ANALYSIS ¶ 159 at 68-69 and ¶ 154 at 53-54 (2d ed. 1974).

210. 288 N.C. 303, 218 S.E.2d 342 (1975), discussed *supra* at text accompanying note 28 *et seq.*, and cited by the district court, 485 F. Supp. at 1058.

211. 288 N.C. at 309, 218 S.E.2d at 346.

212. *Cf.*, the verdict form used in Marshall v. Miller, 302 N.C. 539, 541-42, 276 S.E.2d 397, 399 (1981), set out *infra* at note 231.

213. 43 N.C. App. 229, 259 S.E.2d 1 (1979).

75-1.1, is punitive.[214] *Holley* was a fraud case, and the opinion is primarily concerned with the proper statute of limitations to be applied in G.S. § 75-1.1 cases.[215] In *Holley*, the defendant argued that G.S. § 75-16 was penal in nature, and, therefore, a one-year statute of limitations applied.[216] Neither the punitive nature of the statute nor the implications thereof were directly addressed, but some principles for analysis were set out. First, "[the question's] resolution depends on a sensitive analysis of the statutory scheme by which North Carolina regulates unfair trade practices."[217] Distinguishing G.S. § 75-1.1 from the FTC Act, "the General Assembly placed partial enforcement authority in the Attorney General and amended the treble damages provision of the North Carolina antitrust statute to *encourage* enforcement of the act by private individuals injured by unfair trade practices."[218] G.S. § 75-16 is a hybrid statute serving at least three major purposes: as an *incentive* for injured private individuals to attack unfair trade practices and thereby assist the State, as a *remedy* for those injured, and as a *deterrent* against future violations.[219] "Only the latter of these purposes is at all punitive in nature. . . ."[220] Evidence of legislative intent[221] is cited in *Holley* to the effect that the treble damages provision was "intended by the General Assembly to serve as an incentive to injured parties to pursue their rights under [Chapter 75]."[222] Finally, the court in *Holley* cites a passage from *J.C. Penney*:[223] "Defendant contends the statute is penal in nature. . . . The State, on the other hand, insists the statute is remedial. . . . We find neither of these views persuasive."[224] *Holley* should have at least raised doubts as to the simple designation of G.S. § 75-1.1 as punitive.

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214. Albeit not penal. 485 F. Supp. at 1058, n.5.

215. In 1979, the General Assembly fixed the statute of limitations at four years, N.C. GEN. STAT. § 75-16.2 (1979).

216. 43 N.C. App. at 236, 259 S.E.2d at 6.

217. *Id.* at 234, 259 S.E.2d at 6.

218. *Id.* at 235, 259 S.E.2d at 6 (emphasis added).

219. *Id.* at 237, 259 S.E.2d at 6.

220. *Id.*

221. *Id.* at 239, n.1, 259 S.E.2d at 7. (Memorandum from L.E. Koman, Asst. Atty. Gen., to Rep. W.H. McMillan, concerning H.B. 238, Statute of Limitations Under Chapter 75, Feb. 13, 1979).

222. *Id.* at 240, 259 S.E.2d at 8.

223. 292 N.C. 311, 319, 233 S.E.2d 895, 900 (1977). *See supra* text accompanying note 39 *et seq.*

224. Citations omitted. 43 N.C. App. at 238-39, 259 S.E.2d at 7.

If the statute was not punitive, and if intentional wrongdoing was not required, and if the facts of the conduct could have been inferred from jury's findings as a whole, the trial court in *United Roasters* was still left with a problem: did the acts of Colgate-Palmolive constitute an unfair trade practice? When this opinion was prepared, little or no guidance existed beyond that "which a court of equity would consider unfair."[225] It would be four months before the North Carolina Supreme Court would decide *Johnson*[226] and fourteen months until it would decide *Marshall v. Miller*.[227]

C. *Marshall v. Miller*[228]

In *Marshall v. Miller*, owners and managers of a mobile home park led residents to believe they would be furnished with particular facilities, including playgrounds, pool, garbage pickup, yard care, and paved streets. Over a three year period, the defendants failed to provide any of these facilities or services. Based on the facts found by the jury,[229] the trial judge found as a matter of law that the defendants had engaged in unfair and deceptive practices and trebled the damages.[230]

The North Carolina Supreme Court confined its review to one of the issues on the verdict form submitted to the jury.[231] The

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225. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 400, 248 S.E.2d 739, 744 (1978), *citing* Carolina Aniline & Extract Co. v. Ray, 221 N.C. 269, 273, 20 S.E.2d 59, 61 (1942), discussed *supra* at text accompanying note 59.

226. 300 N.C. 247, 266 S.E.2d 610 (1980). *See supra* text accompanying note 109 *et seq.*

227. 302 N.C. 539, 276 S.E.2d 397 (1981). *See infra* text accompanying note 231 *et seq.*

228. *Id.*, *modifiying* 47 N.C. App. 530, 268 S.E.2d 97 (1980). The facts are taken from the Supreme Court of North Carolina opinion, *id.* at 540-42, 276 S.E.2d at 398-99.

229. *See* Issue No. 4, set out *infra* at note 231.

230. 302 N.C. at 540, 276 S.E.2d at 398-99. The N.C. GEN. STAT. § 75-1.1 issue was the only one reviewed by the Supreme Court. The Court of Appeals reversed the trial court on three other issues: the trial court erroneously directed the verdict on a breach of lease claim, 47 N.C. App. at 539, 268 S.E.2d at 101; erroneously directed the verdict on a breach of constructive trust, *id.* at 540, 268 S.E.2d at 102; and the instructions given by the trial court permitted the jury to give damages twice for the same wrongful act, *id.* at 542, 268 S.E.2d at 103.

231. Issue No. 4:

> Did the defendant, after October 7, 1974, without the intent and/or the ability to perform lead the plaintiffs or any of them to believe that he would provide the following equipped facilities for their use, reasonable wear and tear accepted[sic]?

court of appeals considered this statement of the issue erroneous because the trial court could have found a violation of G.S. § 75-1.1 without a jury finding that the defendants acted in bad faith.[232] Federal Trade Commission enforcement of section five of the FTC Act was likened to enforcement of G.S. § 75-1.1 by the Attorney General under the provisions of G.S. §§ 75-14 and 75-15.2, and the absence of a private right of action under the FTC Act was emphasized.[233] Citing to *Wachovia Bank & Trust Co., N.A. v. Smith*[234] and *United Roasters*,[235] the court of appeals held "treble damages should not be assessed against a defendant who acts in good faith where he is not otherwise on notice that his conduct violates G.S. § 75-1.1."[236]

On this issue, the supreme court reversed the court of appeals.[237] Justice Meyer approached the problem as one of statutory

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(a) Two playgrounds
ANSWER: Yes
(b) One basketball court
ANSWER: Yes
(c) One swimming pool
ANSWER:Yes
(d) Household water
ANSWER: Yes
(e) Adequate garbage facilities and pickup
ANSWER: Yes
(f) Complete yard care, that is, mowing and trimming
ANSWER: Yes
(g) Paved streets
ANSWER: Yes
(h)Lighted streets
ANSWER: Yes
(i) Common facilities
ANSWER: Yes

302 N.C. 539, 541-42, 276 S.E.2d 397, 399.

232. 47 N.C. App. 530, 542, 268 S.E.2d 97, 103-04.

233. *Id.*

234. 44 N.C. App. 685, 262 S.E.2d 646 (1980) (expressly limited to its facts), *overruled by* Marshall v. Miller, 302 N.C. 539, 544, 276 S.E.2d 397, 401 (1981), and discussed *supra* at text accompanying note 99 *et. seq.*

235. 485 F. Supp. 1049 (E.D.N.C. 1980), discussed *supra* at text accompanying note 170 *et seq.* *Wachovia* and *United Roasters* were decided within two weeks of each other.

236. 47 N.C. App. 544, 268 S.E.2d at 104.

237. 302 N.C. at 550, 276 S.E.2d at 404. The Court of Appeals remanded for a new trial on other issues; its decision on those was not disturbed by the Supreme Court. *Id. See supra* note 230.

interpretation. What was the Legislature's intent? What was the Act intended to accomplish? How can that purpose be most fully realized?[238] In addressing these questions, for the first time, an opinion set out what was known of the legislative history of the act.[239]

> Such legislation was needed because common law remedies had proved often ineffective. Tort actions for deceit in cases of misrepresentation involved proof of scienter as an essential element and were subject to the defense of "puffing." Proof of actionable fraud involved a heavy burden of proof, including a showing of intent to deceive. Actions alleging breach of express and implied warranties in contract also entailed burdensome elements of proof. A contract action for rescission or restitution might be impeded by the parol evidence rule where a form contract disclaimed oral misrepresentations made in the course of a sale. Use of a product after discovery of a defect or misrepresentation might constitute an affirmance of the contract. Any delay in notifying a seller of an intention to rescind might foreclose an action for rescission. Against this background, and with the federal act as guidance, North Carolina and all but one of her sister states have adopted unfair and deceptive trade practices statutes.[240]

The opinion carefully discussed the existing North Carolina case law cited by the Court of Appeals and by Judge Maletz in *United Roasters*. The dictum of *Wachovia Bank*,[241] that intentional wrongdoing or bad faith was required for a violation of G.S. § 75-1.1, was expressly overruled.[242] The North Carolina Court of Appeals had apparently been misled by the original language of G.S. § 75-1.1(b), to the effect that the statute was passed "to the end that good faith and fair dealings . . . be had in this State."[243] The supreme court stated that this statute, even when in effect, did not support a bad faith requirement for violation.[244]

United Roasters was dealt with next. The authorities for a re-

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

239. *Id.; see supra* text accompanying note 22 *et seq.*

240. 302 N.C. at 543-44, 276 S.E.2d at 400 (citations omitted).

241. 44 N.C. App. 685, 262 S.E.2d 646 (1980), discussed *supra* at text accompanying note 99 *et seq.*

242. 302 N.C. at 546, 276 S.E.2d at 401.

243. N.C. GEN. STAT. § 75-1.1(b)(1969), *replaced* June 27, 1977.

244. 302 N.C. at 245-46, 276 S.E.2d at 401. The supreme court also emphasized that the court of appeals in *Wachovia* had in fact limited itself to the facts of the case. *Id., citing* 44 N.C. App. at 691, 262 S.E.2d at 650.

quirement of intentional wrongdoing cited by Judge Maletz[245] were dismissed quickly. While all these cases involved intentional acts, this simply showed that the conduct of the defendants was "so egregious as clearly to have been in bad faith."[246] *Holley* was then cited for the propositon that G.S. § 75-16 is a hybrid statute.[247] Common law tort and contract actions and the parallel statutory remedies of several states were distinguished from G.S. § 75-16. In the former, multiple damages are discretionary or expressly premised on a finding of intentional wrongdoing; in the North Carolina statute they are mandatory.[248]

> Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages assessed to be automatic once a violation is shown. To rule otherwise would produce the anomalous 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.[249]

As an alternative argument against a requirement of intentional wrongdoing, the Court pointed to Judge Britt's criteria for an unfair trade practice enunciated in *Johnson*.[250]

> If unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public.[251]

The court also pointed out the express requirement of willfulness in G.S. § 75-16.1 (the attorney's fees provision) holding that this indicates that the absence of such a requirement in G.S. § 75-16

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245. *See supra* text accompanying note 192.

246. 302 N.C. at 546, 276 S.E.2d at 402. Of course, at the time Judge Maletz made his decision in *United Roasters*, he could not have known for sure that the North Carolina Supreme Court would take this view. *See supra* text accompanying note 201 *et seq.*

247. 302 N.C. at 546, 276 S.E.2d at 402.

248. *Id.* at 546-47, 276 S.E.2d at 402.

249. *Id.*

250. *Id.* at 548, 276 S.E.2d at 403. *See supra* text accompanying notes 142-50.

251. *Id. Cf.*, Leaffer & Lipson, *supra* note 16, at 536. Part of the problem with the consumer-oriented language in this opinion may be the verbatim adoption of many of the concepts discussed in the Leaffer & Lipson article, which is oriented towards consumer protection and does not discuss commercial problems.

was intentional on the part of the Legislature.[252]

The *Marshall* opinion highlights the court's interpretation of the legislative purposes of G.S. §§ 75-1.1 and 75-16: to create "an entirely statutory cause of action,"[253] supplement federal legislation, provide an effective substitute for ineffective existing remedies, make actions economically feasible, encourage settlement, and encourage private enforcement in the marketplace.[254] It confirms the analytical approach taken in *Johnson*, and emphsizes the non-common law nature of the cause of action. In a sense, it is like strict liability—the defendant is judged on *effects* rather than actions or intent. His good or bad faith, his willfulness or negligence, are not relevant.

D. United Roasters *at the Fourth Circuit*[255]

The Court of Appeals for the Fourth Circuit had before it both *Johnson* and *Marshall*.[256] The reluctance of the court to apply G.S. § 75-1.1 to this commercial fact situation is almost palpable. The analysis begins by referring back to *J.C. Penney*[257] for its narrow interpretation of the scope of the statute, limiting it to the sale of goods.[258] The opinion then acknowledges that *Johnson* broadens the scope of the statute even for pre-1977 cases.[259] *Marshall* is then held up in contrast to *Johnson*:

> Quite recently, however, the Supreme Court of North Carolina in *Marshall v. Miller* put a different gloss upon the statute. It was repeatedly described as an act for the protection of consumers, and the treble damages provision of § 75-16, it said, was intended to create an effective private remedy for aggrieved consumers. In that context, the provision of treble damages is surely understandable.[260]

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252. 302 N.C. at 549, 276 S.E.2d at 404.

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

254. *Id.* at 549, 276 S.E.2d at 403-04.

255. 649 F.2d 985 (4th Cir. 1981). The Attorney General of North Carolina appeared as *amicus*.

256. *See supra* the chronology at note 169. Both are recited, 649 F.2d at 991. The Court of Appeals upheld a judgment for simple damages for breach of contract on different grounds from those used by the district court.

257. 292 N.C. 311, 233 S.E.2d 895 (1977), discussed *supra* at text accompanying note 39 *et seq.*

258. 649 F.2d at 991.

259. *Id.*

260. *Id.* (citation omitted). The root "consum-" appears as a noun or adjec-

The opinion then acknowledges, however, that this view of the statute is inconsistent with *Johnson*:

> In *Marshall*, however, the earlier decision in *Johnson* was not overruled or repudiated.[261] If the North Carolina statute was intended only for the protection of consumers purchasing goods and services, it is difficult to understand its application to a developer of a shopping center seeking more than two million dollars in mortgage financing. Arguably, under *Johnson* sophisticated 'business concerns' like United Roasters may be within the Act's protection. . . .[262]

Having convinced itself that the parties and the transaction fell within the scope of G.S. § 75-1.1, the court proceeded to look at the district court's application of the statute. The opinion accepts the *Marshall* rule that absence of intent is no defense;[263] the court, however, misstates the rule—"[u]nder the statute, one is only to look at the impact upon the victim or victims."[264] Nowhere does *Marshall* say this. The North Carolina Supreme Court has made it

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tive five times in eleven (N.C.) pages in *Marshall*. The Fourth Circuit apparently seized on this sentence: "In enacting G.S. 75-16 and G.S. 75-16.1, our Legislature intended to establish an effective private cause of action for aggrieved *consumers* in this State." 302 N.C. at 543, 276 S.E.2d at 400 (emphasis added). Of course, N.C. GEN. STAT. § 75-16 was passed in 1913, well before "consumerism" or N.C. GEN. STAT. § 75-1.1 were imagined. There is no doubt that in locating the North Carolina unfair trade practice statute in Chapter 75 and making N.C. GEN. STAT. § 75-16 applicable to it, the General Assembly intended to create an effective remedy for consumers, among others. The opinion in *Marshall* was written in a consumer fact context; that it would talk about consumers is hardly surprising. The opinion also has thirteen references to "private" litigation, mostly apart from consumer emphasis. The North Carolina Supreme Court described the treble damages provision as analogous to Section Four of the Clayton Act, 15 U.S.C. § 15 (1976), providing treble damages in private suits for violation of federal antitrust laws other than the FTC Act. Marshal v. Miller, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981).

261. In fact, the analytical process used in *Marshall* seems to have been taken directly from *Johnson*. 302 N.C. at 548, 276 S.E.2d at 403.

262. 649 F.2d at 991 (footnote added).

263. Again, reluctantly:

> The context of this case is far from that in which people acquire mobile homes and the rights to place them upon lots in mobile home parks, but, if the statute is applicable here, *Marshall* strongly suggests that the fact that Colgate may not have intended to be unfair or deceptive is no defense.

Id. at 992.

264. *Id.*

abundantly clear that a court analyzing a fact situation determines if an act is unfair or deceptive by determining its effect on the marketplace,[265] not by its impact on some particular plaintiff who fortuitiously finds himself the "victim" of some particular defendant.

The fourth circuit's analysis continued, emphasizing the consumer orientation of much of the existing case law:

> It is clear that the statute encompasses such things as misrepresentation and a wide variety of shady practices sometimes associated with the marketing of consumer goods and services. Whatever the limit of their reach, however, *the words must mean something more than an ordinary contract breach.*
>
> In a sense, unfairness inheres in every breach of contract when one of the contracting parties is denied the advantage for which he contracted, but this is why remedial damages are awarded on contract claims. If such an award is to be trebled, *the North Carolina legislature must have intended that substantial aggravating circumstances be present.*[266]

The first conclusion emphasized above is both tautological and irrelevant. Based on *Johnson* and *Marshall*, the words "unfair or deceptive" mean something *different* from an ordinary breach of contract. The second conclusion is misleading. The question is not one of "substantial aggravating circumstances," but of the effect of the practice on the marketplace. There are simple breaches of contract, and even completely rightful contract terminations—rightful in common law contract sense—that are unfair trade practices. For example, the General Assembly has specifically recognized the unfairness of the otherwise lawful unilateral termination of an automobile dealer franchise under certain conditions.[267]

Further attempting to define "unfair or deceptive acts," the fourth circuit's opinion looks at the list of practices adopted from Senator Morgan's 1969 article[268] in *J.C. Penney*.[269] The conclusions

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265. 302 N.C. at 548, 276 S.E.2d at 403. *See supra* the discussions of *Johnson* at text accompanying notes 135-51 and *Marshall* at text accompanying notes 250-51.

266. 649 F.2d at 992 (emphasis added).

267. N.C. GEN. STAT. § 20-305(3)(1973); *see* Mazda Motors of America, Inc. v. Southwestern Motors, Inc., 296 N.C. 357, 250 S.E.2d 250 (1979). *See also* N.C. GEN. STAT., Ch. 66, arts. 19 (Business Opportunity Sales Act); 20 (loan brokers); 21 (prepaid entertainment contracts); 22 (discount buying clubs); 23 (rental referral agencies).

268. Morgan, *supra* note 4, at 20, *cited in* State ex rel. Edmisten v. J.C. Pen-

drawn from this list are that unfair or deceptive acts are all "actually deceptive or approach deception,"[270] and that "the deception or unfairness was present at the time of contract formation."[271] North Carolina case law does not support either conclusion.[272] In concluding that the acts found by the jury were neither unfair nor deceptive,[273] the opinion emphasizes the absence of unfairness or deception in the formulation of the contract and of deception in its breach.[274]

> The contract here was carefully negotiated and drawn by sophisticated parties. There is no hint of any unfairness to either party before Colgate's cessation of performance. It then broke the contract, but we cannot conclude that unfairness inhered in the circumstances of the breach within the meaning of the statute simply because the breach was intentional and not promptly disclosed.[275]

Assuming the fourth circuit had the facts straight, it answered the wrong questions. It deduced propositions at variance with existing North Carolina case law from dicta in a case repudiated by both the General Assembly and the courts. In neglecting to ask the questions that *Johnson* directed it to answer, it neglected its *Erie*[276] obligations.

IV. DISCUSSION

Although the driving force behind the passage of G.S. § 75-1.1

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ney Co., 292 N.C. 311, 318, 233 S.E.2d 895, 899-900 (1977). The Court in *J.C. Penney* used the list to justify its conclusion that the statute was limited to acts related to a sale of goods. *Id.* at 318, 233 S.E.2d at 900.

269. 649 F.2d at 992.

270. *Id.*

271. *Id.*

272. *Cf.*, Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978) (conversion of tenant's property by landlord); Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, *modified on other grounds*, 303 N.C. 675, 281 S.E.2d 43 (1981) (noxious behavior by landlord); Pedwell v. First Union Nat'l Bank of N.C., 51 N.C. App. 236, 275 S.E.2d 565 (1981) (conspiracy to prevent performance of contract).

273. *See supra* text accompanying notes 181-82. *See also* the criticism of this verdict form *supra* at text accompanying notes 210-12.

274. 649 F.2d at 992.

275. *Id.*

276. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), requiring federal courts to apply substantive state law. *See* C. WRIGHT, LAW OF FEDERAL COURTS §§ 55-58 (3d ed. 1976).

was politically visible consumer dissatisfaction,[277] the origins of unfair trade practice legislation lie in the area of commercial problems, particularly anti-competitive activities.[278] When the General Assembly first enacted G.S. § 75-1.1, it was perhaps only slightly conscious of this aspect of the statute. When it amended the statute in 1977, adopting the exact language of Section Five of the FTC Act, it did so again in response to consumer problems.[279] But the definition of commerce adopted in G.S. § 75-1.1(b)[280] seems to reflect a desire to regulate commercial as well as consumer transactions. The lack of consciousness of the commercial role of the statute has left ambiguity, vaguness, and a real fear of the power of the remedy among some. The Fourth Circuit,[281] while it may have missed the point of the statute, points out a gut-level conflict that has not yet been answered satisfactorily by the North Carolina courts or Legislature. In three hundred years, the law has grown accustomed to contract remedies in commercial disputes. This new and drastic remedy is disturbing, lacking a principled foundation from which to understand it. Starting with the analytical scheme set out in *Johnson*,[282] and clarified in *Marshall*,[283] we may be able to see towards what end the statute is directed. If mixed feelings are engendered when a "simple" breach of contract is alleged to be an unfair trade practice, as in *United Roasters*, perhaps a look at breach of contract will help. An assumption of economics that seems to have intuitive validity is that society's resources should be allocated as efficiently as possible at all times.[284] When someone is locked-in to one use of resources by a promise that law will enforce, and a more efficient use presents itself, soci-

277. Evidenced by Morgan, *supra* note 4.

278. *See supra* text accompanying notes 16-19.

279. Aggressive consumer credit collection practices, held outside the scope of the statute in State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

280. "(b) For the purposes of this section, 'commerce' includes all business activities, however denominated. . . ." N.C. GEN. STAT. § 75-1.1(b) (1977).

281. United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir. 1981), discussed *supra* at text accompanying notes 255-76.

282. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 262-66, 266 S.E.2d 610, 621-22 (1980), discussed *supra* at text accompanying notes 109-54.

283. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981), discussed *supra* at text accompanying notes 228-54.

284. E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS 19 (3d ed. 1980). The author thanks Professor Hugh Divine of the Campbell University School of Law for pointing out this line of inquiry.

ety is better served by his breaking that promise. Economic analysis suggests that the wisdom as to breach of contract remedies and measures of damages that has evolved since Lord Mansfield's day is socially efficient; put the promisee in the position he would have been in had the promise been performed.[285] But experience since the late 19th century indicates something is wrong with these models. Beginning with conspiracy in restraint of trade and monopolization,[286] legislatures have identified practices that were not *wrongful* in a tort sense, but which disrupted competition, thereby distorting the market system and reducing economic efficiency. Similarly, information-related defects in the marketplace were found to lead to economic inefficiency.[287] What underlies these practices is the effect they have on the economy, distortion in the use of resources in society. The distortion they cause is independent of the correcting mechanism of breach of contract.

If a contract-related practice distorts the market by making it less profitable to perform, the conventional damages for breach will not lead to the desired social effects. Alternatively, a practice might distort the market by making an otherwise desirable breach unprofitable, thereby pinning the party down to society's detriment. Normal damage measurements will not correct these situations. Furthermore, economic studies generally ignore the frictional costs of conventional remedies.[288] The cost of litigation, time delays, uncertainty of recovery, the likely impossibility of ever really ascertaining or proving just how much the promisee has lost, and irreversible catastrophic results,[289] all reduce the expected return to the promisee.[290] The General Assembly and the North Carolina

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285. *See* Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277 (1972); Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970). *See generally*, Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982).

286. The Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976), first enacted in 1890. The first North Carolina antitrust law was enacted in 1889. Law of March 11, 1889, ch. 374, 1889 N.C. PUB. LAWS 372. For a brief history of Chapter 75 and its predecessors, *see* Aycock (1972), *supra* note 18.

287. *Cf.*, the Wheeler-Lea Amendment of 1938, giving the FTC responsibility for dealing with deceptive advertising. 15 U.S.C. §§ 41 & 44 (1976).

288. *Cf.*, Barton, *supra* note 285; Birmingham, *supra* note 285.

289. *E.g.*, the destruction of the plaintiff corporation in *United Roasters*.

290. Conventional economic analysis is based on "bargaining games," where equilibrium is reached through successive offers and counter-offers or repeated experiences that lead to realistic expectations. Cooter, *supra* note 285, at 22 and 22-23. Query, just how realistic this assumption is. In the real world, one or both

courts have recognized the inadequate motivation created by normal contract damages.[291] Whenever the act constituting a "simple" breach of contract distorts the marketplace, simple contract damages will not protect either the promisee or society.

V. CONCLUSION: WHAT IS THE WRONG?

Trade regulation law—new rights and responsibilities in commerce—was created to protect the integrity *of* the marketplace. Included is integrity *in* the marketplace, but this is only part of the objective. An act damaging the integrity of the marketplace damages both plaintiff and society, irrespective of the actor's intent. This means the actor must be held strictly liable for the consequences of such acts.[292] Acts damaging the integrity of the marketplace can be summarized as follows:

(1) Abuse of economic power, for example, monopoly, conspiracy in restraint of trade, price discrimination,[293] unconscionable adhesion contracts, economic duress;[294]
(2) Abuse of information or access power, for example, misuse of legal process,[295] use of political influence,[296] interference with contractual relationships;[297]
(3) Interference with the creation of reasonable expectations, for example, deception, "fine print" disclaimers;
(4) Bad faith, that is, the failure to strike a reasonable and proper

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parties usually deals in near-complete ignorance of the other party's reliability or choice of strategy, ignorance either self-imposed or imposed by the marketplace. *Cf.*, the value placed on credit information. *See also* the comparison of "default" and "duress" games in the context of Austin Instruments, Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971), *in* Cooter, *supra* note 285, at 24-27.

291. N.C. GEN. STAT. § 75-16 (1980), providing treble damages in civil suits for violations of Chapter 75; Marshall v. Miller, 302 N.C. 539, 546, 276 S.E.2d 397, 402 (1981).

292. *See* Cooter, *supra* note 285, at 7-9. Cooter points out that it is important not to allow the measure of damages to depend on something the plaintiff can control, *id.*, or to be set too high, *id.* at 19. Both distort the plaintiff's motivation to take precautions against injury.

293. *See, e.g.*, Patterson v. Southern Ry., 214 N.C. 38, 198 S.E. 364 (1938).

294. *See, e.g.*, Austin Instruments, Inc. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971).

295. *See, e.g.*, Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976).

296. *See, e.g.*, Pinehurst Airlines, Inc. v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

297. *See, e.g.*, Pedwell v. First Union Nat'l Bank of N.C., 51 N.C. App. 236, 275 S.E.2d 565 (1981).

balance between one's own interests and those of one's promisee;[298]
(5) Appropriation of the product of another's investment of skill, time and capital, for example, use of another's goodwill,[299] pirating of recordings;[300]
(6) Any other act that distorts the operation of a market, causing misdirection of resources into socially less efficient uses.

These are not discrete categories, nor are they inclusive. The key to the analysis is to remember that G.S. § 75-1.1 is not trespass, trover, assumpsit or quasi-contract, but a distinct statutory cause of action with its own principles and policies.

How can counsel prove the existence (or nonexistence) of an unfair or deceptive trade practice? First, by analogy to existing law: other regulatory statutes, cases decided under Chapter 75 or earlier common law counterparts, FTC cases and regulations, and parallel cases from other states. Second, by showing actual subjective misbehavior by the defendant: intentional, knowing, or in bad faith. Third, by demonstrating the impact of the act on the marketplace—that if generally permitted the act would lead to the misdirection of resources: economic and commercial experts, Brandeis briefs, and possibly reference under Rule 53.[301]

Existing decisions and statutes have left many questions unanswered. What degree of causation should be required between alleged unfair acts and damage to the integrity of the marketplace? How is the "marketplace" to be defined for each case? How should damages be measured and paid to accomplish the goals of the statutory scheme? How should damages be integrated with rescissionary remedies?[302] Are there fields like employer-employee rela-

298. *See* Holmes, *Is There Life After Gilmore's Death of Contract?*, 65 CORNELL L. REV. 330 (1980). Note that the location of this balance will depend on the particular market involved, expectations, and comparative social costs of each choice. *Cf.*, *id.* at 380 (comparing the costs of good faith versus strict liability standards in first-party insurance cases); United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 988-90 (4th Cir. 1981) ("We find no guidance in North Carolina cases." *Id.* at 989).

299. *See, e.g.*, Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978). *See generally* Note, *Unfair Competition—Law of Unfair Competition in North Carolina*, 46 N.C.L. REV. 856 (1968).

300. *See, e.g.*, Liberty/UA, Inc. v. Eastern Tape Corp., 11 N.C. App. 20, 180 S.E.2d 414 (1971).

301. N.C.R. CIV. P. 53.

302. *Cf.*, Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), *cert. denied*, 289 N.C. 619, 223 S.E.2d 396 (1976) (rescission inconsis-

tions[303] and isolated transactions among non-merchants[304] that should be excluded from the scope of the statute? How should remedies under Chapter 75 be integrated with Uniform Commercial Code remedies and other regulatory statutes? Effective and realistic answers will require careful and patient consideration by the General Assembly and the courts.

VI. SUGGESTIONS FOR THE JUDICIARY, GENERAL ASSEMBLY AND BAR

To help the development and effectiveness of G.S. § 75-1.1, the courts of North Carolina might consider providing for the publication of trial court decisions involving G.S. § 75-1.1, continuing the effort to clarify the analytical process by setting out underlying policies and more fully applying the law to the facts of each case, and requiring the trial courts to reach principled decisions which include market impact findings. The General Assembly might consider adding an express statement of policy to G.S. § 75-1.1, establishing a system for continuing and rapid responses to appellate decisions with which it does not concur, integrating by reference the UCC and regulatory statutes, explicitly enunciating a general policy of inclusion and expressly identifying exclusions from the scope of the statute, and revising the remedies in Chapter 75 to reflect judicial mistrust and the most economically efficient systems of damages. The Bar should use the statute, plead facts showing the effects of alleged unfair acts on the marketplace, argue the policies behind the statute, and educate clients, judges and each other as to the scope, meaning, and impact of G.S. § 75-1.1.

VII. POSTSCRIPT: N.C. GEN. STAT. § 75-1.1 CASES SINCE MARSHALL

Several cases have appeared in the North Carolina appellate courts since *Marshall*. They generally confirm a pessimistic view of the judiciary's willingness to come to grips with the broad application of G.S. § 75-1.1 intended by the General Assembly. Two months after *Marshall*, the North Carolina Supreme Court upheld the court of appeals in *Spinks v. Taylor*[305] as to G.S. § 75-1.1. Ap-

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tent with injury required for treble damages).

303. *See* Buie v. Daniel Int'l Corp., 56 N.C. App. 445; 289 S.E.2d 118 (1982).

304. *See* Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979).

305. 303 N.C. 256, 278 S.E.2d 501 (1981), *modifying* 47 N.C. App. 68, 266 S.E.2d 857 (1980); discussed *supra* at text accompanying notes 85 and 87.

plying *Johnson*, the supreme court agreed that a lockout by a landlord of a wrongful holdover tenant was not unfair.[306] The General Assembly disagreed, and ten days later amended Chapter 42[307] to permit an action where a landlord does not act in accordance with the statutory ejectment procedure.[308]

In *Overstreet v. Brookland, Inc.*,[309] homeowners in a subdivision sued the developer, alleging fraud and unfair trade practices. The developer had represented that the street they lived on would remain a dead-end. The developer subsequently sold a lot to a farmer who cut a path through to his adjacent fields for farm vehicles and machinery.[310] The homeowners could not recover from the developer for breach of restrictive convenants, because the developer no longer owned the lot in question and no duty was imposed on the developer to enforce the covenants.[311] Plaintiffs could not show fraud, since they could not show present intent to deceive at the time the homeowners bought their lot.[312] Citing *Marshall* and *Johnson*, the court stated that to prove a violation of G.S. § 75-1.1, the plaintiffs had to show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception, or offended established public policy, or were immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.[313] The court concluded, "[w]e do not find that plaintiffs have shown that defendant's acts in this case meet any of these criteria."[314] It is unfortunate that the court did not apply these principles to the facts or set out any analysis except to find "that our decision as to the issue of fraud in this case is substantially dispositive of plaintiffs' alleged cause of action . . ." under G.S. § 75-1.1.[315] The problem may have been awkward pleading by the plaintiffs; their complaint claimed that the developer represented that the street would be dead-end while having made a

306. *Id.* at 265, 278 S.E.2d at 506.

307. Law of June 12, 1981, ch. 566, § 1; 6 N.C. Adv. Legis. Serv. 238 (1981), (to be codified as N.C. GEN. STAT. §§ 42-25.6 to 42-25.9).

308. N.C. GEN. STAT. § 44A-2(e) (1981). The tenant is limited, however, to actual damages.

309. 52 N.C. App. 444, 279 S.E.2d 1 (1981).

310. *Id.* at 449-50, 279 S.E.2d at 4-5.

311. *Id.* at 451, 279 S.E.2d at 5-6.

312. *Id.* at 452, 279 S.E.2d at 6.

313. *Id.* at 453, 279 S.E.2d at 7.

314. *Id.*

315. *Id.* at 452, 279 S.E.2d at 7.

prior agreement for its use as a through road.[316] The directed verdict apparently was based on the plaintiffs' inability to show the prior agreement. This sort of behavior by developers is notorious; promise whatever is required to sell the lots, then ignore it later. Fraud is one of those ineffective remedies that motivated enactment of G.S. § 75-1.1.[317] Arguably, the subsequent sale by the developer to the farmer, knowing the previous representation made, the use to which the lot was to be put, the restrictive covenants and the likely position of the homeowners trying to enforce the covenants against the farmer, indicated bad faith. While bad faith is not necessary for a violation of G.S. § 75-1.1,[318] it should be sufficient if the practice would distort the marketplace. Those acting in reliance on the developer's representations made substantial investments that would otherwise have been made elsewhere. This distorts the home market, and *is* substantially injurious to consumers. The developer should have been liable for the cost of enforcing the restrictive covenant, trebled.

Three other court of appeals cases raise questions about the integration of G.S. § 75-1.1 with other regulatory statutes. In *Smith v. King*,[319] the Court apparently held that the pactices described in the insurance unfair trade practice statute[320] constitute the only practices prohibited in that industry. Since the plaintiff was a third-party beneficiary and the statute expressly referred only to first-party claims, the statute did not apply and the plaintiff could not recover treble damages under G.S. § 75-16.[321]

In *Abernathy v. Ralph Squires Realty Co.*,[322] the plaintiffs hired the defendant real-estate agent to sell their home. The agent subsequently found them a new home as well, which they bought. The agent agreed to buy the plaintiff's old home and split the net

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316. *Id.* at 446, 279 S.E.2d at 3.

317. Marshall v. Miller, 302 N.C. 539, 543-44, 276 S.E.2d 397, 400 (1981), quoted *supra* at text accompanying note 240.

318. *Id.*

319. 52 N.C. App. 158, 277 S.E.2d 875 (1981).

320. N.C. GEN. STAT. § 58-54.4 (1980).

321. 52 N.C. App. at 161, 277 S.E.2d at 879. *Compare* Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980) (violation of N.C. GEN. STAT. § 58-54.4 violates N.C. GEN. STAT. § 75-1.1) *with* State *ex rel.* Edmisten v. Zim Chemical Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980) (violation of antifreeze labelling statute constituted a deceptive act violating N.C. GEN. STAT. § 75-1.1).

322. 55 N.C. App. 354, 285 S.E.2d 325 (1982).

proceeds from its subsequent sale.[323] There was a net loss on the sale. Three unfair practices were alleged. Plaintiffs claimed that the agent altered the contract for the sale of their old home in order to add more expenses to be deducted before dividing up the proceeds. The court of appeals agreed with the trial court that, if true, this was not really deceptive since the words allegedly added did not in fact change the meaning of the contract.[324] Plaintiffs claimed that the agent acted for both buyer and seller without their knowledge in violation of G.S. § 93A-6(a)(4),[325] since the agent received a commission from the seller of their new home, and that this, therefore, violated G.S. § 75-1.1. The court said, "[t]his problem, however, exists in many real estate transactions. In the absence of any evidence that defendant *knowingly* and *willfully* negotiated the sale price for the plaintiffs, we can find nothing deceptive or unfair in this practice."[326] It is not clear which statute the court was saying was not violated. Plaintiffs claimed that the agent misrepresented that the seller of the new home had performed his pre-closing obligations. The court responded first that it could not find that the agent's "affirmative response to such a broad question amounted to an *intentional* misrepresentation."[327] The court then pointed out that the plaintiff in this case was in as good a position to ascertain the situation as the agent, and could sue the seller for breach of contract.[328] The former of these last two arguments is the only valid point in the court's analysis. While the Court recites the *Johnson* litany,[329] it fails to follow it. The court was aware of *Marshall*,[330] but continued to look for intent rather than effect.

In *Buie v. Daniel International Corp.*,[331] the court of appeals held that the section of the workers' compensation statutes[332] per-

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323. *Id.* at 355, 285 S.E.2d at 325-26.

324. *Id.* at 357-58, 285 S.E.2d at 327. Query, shouldn't this be a jury question?

325. N.C. GEN. STAT. § 93A-6(a)(4) (1980).

326. 55 N.C. App. at 358, 285 S.E.2d at 327 (emphasis added).

327. *Id.* at 359, 285 S.E.2d at 328 (emphasis added).

328. *Id.*

329. *Id.* at 357, 285 S.E.2d at 327, *citing* Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 262-66, 266 S.E.2d 610, 621-22 (1980), discussed *supra* at text accompanying notes 109-54.

330. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981), *cited*, 55 N.C. App. at 358, 285 S.E.2d at 327.

331. 56 N.C. App. 445; 289 S.E.2d 118 (1982).

332. N.C. GEN. STAT. § 97-6.1 (1979).

mitting recovery for retaliatory discharge constituted the sole remedy, and that G.S. § 75-1.1 could not apply since G.S. § 97-6.1(b) permitted recovery of "reasonable damages suffered,"[333] rather than multiple damages.[334]

In the wake of *Johnson* and *Marshall*, the absence of any application of the analytical scheme set out by the supreme court to the facts of these cases is troubling.

Edward M. McClure, Jr.

333. *Id.*

334. Buie v. Daniel Int'l Corp., 56 N.C. App. 445; 289 S.E.2d 118 (1982).

ANNEX: N.C. GEN. STAT. § 75-1.1 INTERPRETATION CHRONOLOGY

Opinion Date Date',5d,.5]		Case	Court	Type
1975	Oct. 7	*Hardy v. Toler*[28]	N.C.	Consumer
	Dec. 17	*Taylor v. Triangle Porsche-Audi*[302]	N.C. App.	Consumer
1977	Apr. 14	*State v. J.C. Penney Co.*[39]	N.C.	Statutory
	May 2	*Ray v. United Family Life*[48]	W.D.N.C.	Unf. Comp.
	June 27	(Effective date of 1977 amendments)		
	Dec. 7	*Love v. Pressley*[73,84]	N.C. App.	Consumer
1978	Feb. 21	*Greenway v. N.C. Farm Bureau Mut.*[74,99]	N.C. App.	Consumer
	Feb. 27	*CF Industries v. Transcont. Pipe Line*[50]	W.D.N.C.	Comm'l.
	July 11	*Stone v. Paradise Park Homes*[75,80,94]	N.C. App.	Consumer
	Nov. 7	*Harrington Mfg. v. Powell Mfg.*[55]	N.C. App.	Unf. Comp.
	Nov. 7	*Bache Halsey Stewart v. Hunsucker*[78]	N.C. App.	Consumer
1979	July 31	*Rosenthal v. Perkins*[75,79,84]	N.C. App.	Consumer
	Oct. 16	*Holley v. Coggin Pontiac*[76,80]	N.C. App.	Consumer
	Nov.1	*Pinehurst Airlines*[49]	M.D.N.C.	Comm'l.
	Dec. 18	*Johnson v. Phoenix Mut. Life*[109,118]	N.C. App.	Comm'l.
1980	Jan. 8	*Burgess v. N.C. Farm Bureau Mut.*[74,88]	N.C. App.	Consumer
	Jan. 23	*United Roasters v. Colgate-Palmolive*[169]	E.D.N.C.	Comm'l.
	Feb. 5	*Wachovia Bank v. Smith*[77,99]	N.C. App.	Consumer
	Feb. 5	*Taylor v. Hayes*[73]	N.C. App.	Consumer
	Feb. 19	*Mayton v. Hiatt's Used Cars*[76,91]	N.C. App.	Consumer
	Feb. 19	*State v. Zim Chemical*[69]	N.C. App.	Statutory
	June 3	*Vickery v. Olin Hill Const.*[75,80]	N.C. App.	Consumer
	June 3	*Spinks v. Taylor*[73,85]	N.C. App.	Consumer
	June 3	*Johnson v. Phoenix Mut. Life*[109,129]	N.C.	Comm'l.
	July 15	*Marshall v. Miller*[227,228,232]	N.C. App.	Consumer
	Aug. 5	*Hammers v. Lowe's Companies*[159]	N.C. App.	Consumer
	Aug. 5	*Ellis v. Smith-Broadhurst*[161]	N.C. App.	Unf. Comp.
	Dec. 2	*United Roasters* argued	4th Cir.	Comm'l.
1981	Feb. 17	*Kent v. Humphries*[164]	N.C. App.	Comm'l.
	Mar. 17	*Pedwell v. First Union Nat'l Bank*[272]	N.C. App.	Comm'l.
	Apr. 7	*Marshall v. Miller*[227,237]	N.C.	Consumer
	May 18	*United Roasters v. Colgate-Palmolive*[255]	4th Cir.	Comm'l.
	May 19	*Smith v. King*[319]	N.C. App.	Statutory
	June 2	*Spinks v. Taylor*[305]	N.C.	Consumer
	June 16	*Overstreet v. Brookland, Inc.*[309]	N.C. App.	Consumer
	June 19	*United Roasters* rehearing denied	4th Cir.	Comm'l.
1982	Jan. 5	*Abernethy v. Ralph Squires Realty*[322]	N.C. App.	Consumer
	Mar. 16	*Buie v. Daniel Int'l Corp.*[331]	N.C. App.	Statutory

Explanation: This annex lists the cases and other interpretive events discussed in this comment, placing them in chronological order for the reader's convenience. The complete case names, citations, and discussions are at the footnotes given. The classification of cases into the four types shown is approximate. "Consumer" cases are those where a naive purchaser of goods or services was dealing with a sophisticated seller. "Statutory" cases involve the interaction of G.S. § 75-1.1 with other regulatory statutes. "Unf. Comp." (unfair competition) cases concern anticompetitive activities that might have been within the scope of common law unfair competition. "Comm'l." (commercial) cases concern unfair trade practices among sophisticated parties. Many cases in fact should be included in more than one class.