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# The Sword of North Carolina's "Unfair and Deceptive Trade Practices Act": Combating North Carolina Businesses Who Undercut Competition by Hiring Illegal Immigrants

Boris S. Abbey

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## The Sword of North Carolina's "Unfair and Deceptive Trade Practices Act": Combating North Carolina Businesses Who Undercut Competition by Hiring Illegal Immigrants

### I. INTRODUCTION

The hiring of illegal immigrants is an increasing problem that is pandemic throughout the United States, particularly in North Carolina. According to the Center for Immigration Studies, North Carolina's immigrant population (both legal and illegal) increased threefold between 1995 and 2005 (170,000 to 590,000).<sup>1</sup> Growth during the past five years has been even more rapid.<sup>2</sup> North Carolina's immigrant population has increased by 58.1% between 2000 and 2005 (373,000 to 590,000),<sup>3</sup> and the state has the nation's eighth-largest population of illegal aliens.<sup>4</sup>

The problem faced by many business owners in North Carolina is that many businesses knowingly hire illegal immigrants at lower wages and with the intent to avoid taxes. This lowers labor costs, providing these businesses a competitive, albeit illegal, edge. Consequently, business owners that follow the law are put at a severe competitive disadvantage. Numerous businesses in North Carolina hire illegal immigrants. The Raleigh, North Carolina *News & Observer* noted in a February 2007 article that over 500 employees at a Smithfield Packing Company plant in Bladen County—nearly 10 percent of the total work force—were slated for termination for failing to provide adequate employment documentation.<sup>5</sup>

The legal issue explored in this Comment is whether a cause of action is available to North Carolina business owners that have been put at an economic disadvantage by competing companies that hire illegal immigrants. A unique approach has been developed in Anaheim, California, by attorney David Klehm who has initiated a suit

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1. Steven A. Camarota, *Immigrants at Mid-Decade: A Snapshot of America's Foreign-Born Population in 2005*, CENTER FOR IMMIGRATION STUDIES, Dec. 2005, <http://www.cis.org/articles/2005/back1405.html>.

2. *Id.*

3. *Id.*

4. JEFFERY S. PASSEL, PEW HISPANIC CTR., *ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION (2005)*, <http://pewhispanic.org/files/reports/44.pdf>.

5. Kristin Collins, *Screening Flags Illegal Workers at N.C. Sites*, THE NEWS & OBSERVER (Raleigh), Feb. 5, 2007, at A1.

on behalf of a business that alleged it was put in a detrimental position by a competitor who used illegal workers.<sup>6</sup> Klehm's strategy is to use antitrust laws, which prohibit companies from conspiring to prevent competition, in suits against employers who hire illegal immigrants.<sup>7</sup>

In August 2006, Klehm filed a suit on behalf of Global Horizons, Inc. against Munger Brothers, LLC for alleged violations of California's antitrust statute, the Cartwright Act.<sup>8</sup> In *Global Horizons, Inc. v. Munger Brothers, LLC*, AgriLabor, a division of Los Angeles-based Global Horizons, had a contract to provide farm workers to help Munger Brothers pick blueberries over a nine-week harvest from April to June.<sup>9</sup>

AgriLabor was expected to provide 600 workers to Munger Brothers, LLC during the peak of the picking season.<sup>10</sup> According to the suit, Munger Brothers, LLC ended its contract with AgriLabor in the middle of May, at the start of the peak harvest, arguing that the workers provided failed to pick berries quickly enough.<sup>11</sup> After terminating its contract with AgriLabor, Munger contracted to obtain farm workers from two local companies that hire illegal immigrants.<sup>12</sup> AgriLabor, following federal laws, obtained temporary visas and provided housing for its workers from Thailand and Central America which added costs to labor. The suit alleges that the other labor providers didn't meet such requirements, enabling them to offer Munger a cheaper deal due to lowered costs of hiring illegal immigrants.<sup>13</sup>

## II. OVERVIEW

Utilizing North Carolina antitrust statutes to combat companies who gain an unfair or illegal competitive edge appears to be a novel approach. As in California prior to the *Global Horizons* suit, as of this writing, not one case has been raised in a North Carolina court alleging such a claim. The objective of this Comment is to provide an overview of legal remedies that North Carolina businesses can utilize to combat businesses that have obtained a competitive edge by hiring illegal immigrants.

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6. Amy Taxin, *Suit contends illegal pickers undercut firm*, THE ORANGE COUNTY REGISTER (Orange County), Aug. 5, 2006. [http://www.ocregister.com/ocregister/homepage/abox/article\\_1250390.php](http://www.ocregister.com/ocregister/homepage/abox/article_1250390.php)

7. *Id.*

8. CAL. BUS. & PROF. CODE §§ 16720-16728 (Deering 2007).

9. *Global Horizons, Inc. v. Munger Brothers, LLC*, 2006 CA Sup. Ct. Pleadings LEXIS 923 (2006).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

The scope of this Comment is limited to remedies available under North Carolina's Unfair and Deceptive Trade Practices Act<sup>14</sup> and common law torts actions available under North Carolina law that fall under section 75. Section III of this comment provides a brief overview of North Carolina's Unfair and Deceptive Trade Practices Act. It is important to note that there are two prongs under section 75-1.1, "unfair methods" and "unfair or deceptive acts and practices."<sup>15</sup> Due to the expansive and confusing nature of section 75-1.1, the scope of analysis offered in the next section is limited to solely the "unfair or deceptive acts and practices" prong. Section IV reviews cases that parallel the factors in Klehm's *Global Horizons Inc.* case and offers a framework of analysis based upon the "unfair or deceptive acts and practices" prong of section 75-1.1. Section V addresses two North Carolina torts: tortious interference with prospective economic advantage and tortious interference with contracts, both of which are frequently raised under a section 75-1.1 claim. This section also discusses the benefits of raising a tort claim under section 75-1.1. Finally, section VI concludes and briefly mentions other sections of North Carolina anti-trust law that may offer business owners additional causes of action.

### III. NORTH CAROLINA'S UNFAIR AND DECEPTIVE TRADE PRACTICES ACT

North Carolina's Unfair and Deceptive Trade Practices statute,<sup>16</sup> offers an expansive litigation tool that is relied upon significantly by claimants in commercial litigation.<sup>17</sup> In North Carolina, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."<sup>18</sup> For those familiar with federal antitrust statutes, N.C. Gen. Stat. 75-1.1 is an exact copy of language in the Federal Trade Commission Act (FTCA).<sup>19</sup>

As a preliminary matter, it is important to dissect the act into two prongs: "unfair methods of competition" and "unfair or deceptive acts and practices."<sup>20</sup> In the federal context, the Federal Trade Commission (FTC) and the reviewing federal courts apply the "unfair methods" of

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14. N.C. GEN. STAT. § 75-1.1 (2005).

15. John F. Graybeal, *Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina*, 80 N.C. L. REV. 1927, 1929 (2002).

16. § 75-1.1.

17. Graybeal, *supra* note 15, at 1929.

18. § 75-1.1(a).

19. 15 U.S.C.S § 45(a)(1) (LexisNexis 2007).

20. Graybeal, *supra* note 15, at 1929.

competition under the FTCA to antitrust conduct.<sup>21</sup> The “unfair or deceptive acts and practices” prong applies to issues not raising anti-trust concerns.<sup>22</sup> The main difference between both prongs is that an unfair method of competition requires a showing of an adverse effect on market competition while the unfair or deceptive act and practices prong does not require a showing of any effect on market competition.<sup>23</sup> Furthermore, when applying N.C. Gen. Stat. 75-1.1, North Carolina courts have issued confusing opinions by misapplying the prongs, sometimes not requiring an effect on competition under an unfair method of competition fact pattern and vice versa.<sup>24</sup> This confusion is discussed in detail by Professor Graybeal in an article entitled, *Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina*.<sup>25</sup> A detailed discussion of these issues goes beyond the scope of this paper. It is prudent to mention the differences between the prongs and to mention the confusion, because research of North Carolina case law falling under N.C. Gen. Stat. 75-1.1 shows that North Carolina courts frequently misapply the law.

To alleviate the inherent confusion of the interpretation of the Act, this paper focuses exclusively on the “unfair or deceptive act or practice” prong. The objective of this narrow focus is to reduce uncertainty regarding the conflicting opinions rendered by North Carolina courts and to focus on the prong that offers fewest burdens for a plaintiff’s attorney. The unfair or deceptive prong does not require a showing of any effect on market competition. This is not to say that additional remedies are not available under the first prong or under other provisions of Chapter 75. Other remedies may be available, but these areas go beyond the narrow scope of this paper.

Section 75-1.1 is a unique section in the North Carolina code. Unlike the federal antitrust statutes, it encompasses a broader sector of business activity. Section 75-1.1 permits business torts to be raised as unfair and deceptive acts.<sup>26</sup> Additionally, unlike the FTCA, which precludes a private cause of action, the North Carolina unfair trade practices statute affords a private cause of action. Furthermore, the benefits to injured parties and attorneys are more evident in the North Carolina code. A winning plaintiff in a section 75-1.1 case automati-

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21. *Id.* at 1931.

22. *Id.* at 1939.

23. *Id.* at 1939, 1970.

24. *See generally id.*

25. *Id.*; *see also* American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411, 1434 (E.D.N.C. 1986).

26. Graybeal, *supra* note 15, at 1955.

cally receives treble damages.<sup>27</sup> Furthermore, the plaintiff's "duly licensed attorney" may get attorney's fees at the discretion of the court.<sup>28</sup>

### A. *Elements for a Cause of Action*

At first glance, the elements for a claim under section 75-1.1 may seem straightforward. The elements of a claim for unfair and deceptive practices are: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately causes actual injury to the plaintiff or to his business.<sup>29</sup> The inherent beauty, for the plaintiff of course, is that the aforementioned elements offer a very broad avenue of approach for litigation. The statute is so broad it has led to a significant amount of criticism by authorities.<sup>30</sup> Regardless of the criticism, the second prong of section 75-1.1 offers a crystal clear path of analysis for fact patterns similar to *Global Horizons, Inc.*

### B. *Unfair or Deceptive Act or Practice*

The greatest amount of flexibility for the plaintiffs' bar in initiating a claim comes from the first element that requires the defendant to commit an "unfair or deceptive act or practice." In general, the courts use a mix of North Carolina common law and federal statutes to define "unfair" and "deceptive" which results in a broad definition that encapsulates a wide variety of acts and practices.<sup>31</sup>

Section 75-1.1 does not define the term "deceptive."<sup>32</sup> Accordingly, the North Carolina courts have borrowed the expansive definition of "deception" that federal courts have traditionally employed in interpreting the FTCA.<sup>33</sup> The North Carolina Supreme Court, summa-

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27. N.C. GEN. STAT. § 75-16 (2005); see also *Pinehurst, Inc. v. O'Leary Bros. Realty*, 338 S.E.2d 918 (N.C. Ct. App. 1986); *Peterson v. Bozzano*, 183 B.R. 735 (Bankr. M.D.N.C. 1995).

28. N.C. GEN. STAT. § 75-16.1. This is different from federal antitrust actions where attorney's fees are awarded to successful plaintiffs themselves. See 15 U.S.C. §15(a) (LexisNexis 2007).

29. *Furr v. Fonville Morisey Realty, Inc.*, 503 S.E.2d 401 (N.C. Ct. App. 1998); see also *Peterson*, 183 B.R. 735; *Wysong & Miles Co. v. Employers of Wausau*, 4 F. Supp. 2d 421 (M.D.N.C. 1998); *First Atl. Mgt. Corp. v. Dunlea Realty Co.*, 507 S.E.2d 56 (N.C. Ct. App. 1998).

30. See generally, Graybeal, *supra* note 15.

31. *Id.* at 1934.

32. See N.C. GEN. STAT. § 75-1.1.

33. *Hageman v. Twin City Chrysler-Plymouth, Inc.*, 681 F. Supp. 303 (M.D.N.C. 1988).

ricing the essence of “deception” in *Johnson v. Phoenix Mut. Life Ins. Co.*, stated,

Though the factors which the Federal Trade Commission considers in making a determination of whether a practice is unfair are of necessity broad, the application they received by the Seventh Circuit in *Spiegel* reveals their essence: 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.”<sup>34</sup>

Additionally, “a practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive.”<sup>35</sup>

Although the acts and practices that can fall under the first element are very broad, North Carolina courts have found limitations that restrict the wide range of practices and acts that could possibly fall under the Act. For example, a mere breach of contract does not constitute an unfair or deceptive trade practice.<sup>36</sup> A requirement of aggravating circumstances is required in addition to a claim of breach of contract.<sup>37</sup> In *Johnson v. Colonial Life & Accident Insurance Co.*, a case arising from the termination of an employee where the jury found there was a breach of contract by the employer and also found the employer engaged in two of three aggravating circumstances associated with the breach, the employer had engaged in unfair and deceptive trade practices.<sup>38</sup> The court in *Johnson* recognized that failure to investigate a false claim and use of a false claim as an allegation that resulted in termination of employment are aggravating factors that transformed a breach of contract claim into an unfair or deceptive trade practice.<sup>39</sup>

Additionally, a violation of North Carolina public policy can be an unfair and deceptive trade practice.<sup>40</sup> A practice is generally unfair when it “offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially inju-

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34. 266 S.E.2d 610, 622 (N.C. 1980), *overruled by* *Meyers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 374 S.E.2d 385 (N.C. 1988). *Meyers* overruled *Johnson*, but only in respect to the element of “intent” in a cause of action for fraud. *Johnson* is still valid authority for the purposes of this discussion.

35. *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987).

36. *Horack v. S. Real Estate Co. of Charlotte*, 563 S.E.2d 47, 51 (N.C. Ct. App. 2002).

37. *Baldine v. Furniture Comfort Corp.* 956 F. Supp. 580, 587 (M.D.N.C. 1996).

38. *Johnson v. Colonial Life & Accident Ins. Co.*, 618 S.E.2d 867, 869-70 (N.C. Ct. App. 2005).

39. *Id.* at 71.

40. *Process Components, Inc. v. Baltimore Aircoil Co.*, 366 S.E.2d 907 (N.C. Ct. App. 1998), *aff'd*, 374 S.E.2d 116 (N.C. 1988).

rious . . . ."<sup>41</sup> The use of public policy to constitute an unfair or deceptive act or practice offers a plethora of opportunities to satisfy the initial requirements of section 75-1.1. North Carolina courts have recognized that a violation of a North Carolina General Statute may be a violation of public policy.<sup>42</sup> For example, the North Carolina Court of Appeals in *Amos v. Oakdale Knitting Co.*, addressing a violation of the North Carolina Wage and Hour Act, held, "Without question, payment of the minimum wage is the public policy of North Carolina."<sup>43</sup> Consequently, an employer's failure to pay an employee the minimum wage easily satisfies the requirement of an unfair or deceptive act.

An unanswered question is whether a violation of a federal statute, or federal public policy, would also be a violation of North Carolina public policy. For example, would the violation of a federal immigration statute be, absent a North Carolina statute prohibiting the hiring of illegal immigrants, a violation of North Carolina public policy? The federal Immigration and Nationality Act considers felonious the acts of transporting, assisting, sheltering, or assisting an alien reasonably known to be illegally in the United States or lacking employment authorization.<sup>44</sup> Additionally, it is a crime to assist an illegal alien who lacks employment authorization by referring him to an employer or by acting as his employer.<sup>45</sup> A good faith argument could be made that a violation of federal law is also a violation of North Carolina public policy. Furthermore, the violation of a federal statute could be considered "unethical" thus satisfying the unfair requirement of section 75-1.1.

### C. *In or Affecting Commerce*

"In or affecting commerce" is the second element of a claim for unfair and deceptive practices and encompasses a broad area of business activity. Section 75-1.1 states, "For 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."<sup>46</sup> The North Carolina Supreme Court, citing United Supreme Court decisions, stated in *Johnson v. Phoenix Mutual Life*

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41. *Johnson v. Phoenix Mut. Life Ins. Co.*, 266 S.E.2d 610, 621 (N.C. 1980).

42. *Amos v. Oakdale Knitting Co.*, 403 S.E.2d 565, 567 (N.C. Ct. App. 1991) (citing N.C. GEN. STAT. § 95-25.1(b)), *rev'd on other grounds*, 416 S.E.2d 166 (N.C. 1992).

43. *Id.*

44. INA §274A(a)(1)(A) (2007); 8 U.S.C.S. § 1324(a)(1)(A) (LexisNexis 2007).

45. *Id.*

46. N.C. GEN. STAT. § 75-1.1(b) (2005).



*Insurance Co.*, “[c]ommerce in its broadest sense comprehends intercourse for the purposes of trade in any form.”<sup>47</sup> Furthermore, the N.C. Supreme Court addressed limitations on “commerce” by recognizing in *Johnson* the use of the word “trade” interchangeably with the word “commerce” indicates that the statute intends a narrower definition of commerce, which contemplates an exchange of some type.<sup>48</sup>

In addition to the exchange limitation, the statute itself exempts both “professional services rendered by a member of a learned profession”<sup>49</sup> and acts committed by advertisers who are unaware of their “false, misleading or deceptive character.”<sup>50</sup> Furthermore, the North Carolina Court of Appeals has created further exemptions. In two cases, *Rosenthal v. Perkins* and *Robertson v. Boyd*, the court held that private homeowners selling a residence are not subject to the Act.<sup>51</sup> In *Rosenthal*, the court stated,

The defendants . . . were not engaged in trade or commerce. They did not by the sale of their residence on this one occasion become realtors. It is clear from the cases involving violation of the Unfair Trade Practices Act that the alleged violators must be engaged in a business, a commercial or industrial establishment or enterprise.<sup>52</sup>

The requirement of an exchange in *Johnson*, accompanied with the *Rosenthal* requirement that violators must be engaged in a business, commercial or industrial establishment or enterprise still encompasses virtually all businesses that have not been specifically excluded under the act, such as professional services of a learned profession or advertising. It is safe to say any person, acting individually and outside of the bounds of a business, will be exempt from the act. On the other hand, anyone engaged in a business or commercial enterprise clearly acts “in or affecting commerce.” An investigation of North Carolina case law shows that “traditional” businesses which involve an exchange or buyer-seller relationship, such as a department store or manufacturing plant, satisfy the second element since the issue of whether these businesses fall under the statute is rarely litigated.

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47. *Johnson*, 266 S.E.2d at 620; see also *Adair v. United States*, 208 U.S. 161 (1908); *Welton v. Missouri*, 91 U.S. 275 (1876); *Gibbons v. Ogden*, 22 U.S. 1 (1824); *State ex rel. Edmisten v. J. C. Penney Co.*, 233 S.E.2d 895 (N.C. 1977).

48. *J. C. Penney Co.*, 233 S.E.2d at 899.

49. N.C. GEN. STAT. §75-1.1(b).

50. N.C. GEN. STAT. § 75-1.1(c).

51. *Rosenthal v. Perkins*, 257 S.E.2d 63, 67 (N.C. Ct. App. 1979); *Robertson v. Boyd*, 363 S.E.2d 672, 676 (N.C. Ct. App. 1988).

52. *Rosenthal*, 257 S.E.2d at 67; accord *Bhatti v. Buckland*, 400 S.E.2d 440, 443 (N.C. 1991); *Robertson*, 363 S.E.2d at 676.

When a dispute arises regarding the business enterprise portion of the analysis, cases generally fall into two categories: real estate and lender-debtor. Businesses within ambit of section 75-1.1 include commercial property rentals,<sup>53</sup> home buying, selling, or leasing as a business,<sup>54</sup> borrower and mortgage broker relationships,<sup>55</sup> and buyer-seller relationships.<sup>56</sup> In all of the aforementioned areas, if the person was in the business of renting or lending, a business enterprise was found satisfying the requirements under section 75-1.1. Cases finding the alleged violators were not engaged in business enterprises included private parties in the sale of real estate<sup>57</sup> and matters of internal corporate management.<sup>58</sup> It is also worthy to mention, especially to those reading this comment, the professional services, i.e. the "member of a learned profession" exception, applies to attorneys, even those practicing in debt collection, thus shielding them from the provisions of unfair trade acts.<sup>59</sup>

#### D. *Proximately Caused Actual Injury to the Plaintiff or to His Business*

The final element for a cause of action under section 75-1.1 is that the act or practice must proximately cause actual injury to the plaintiff or to his business.<sup>60</sup> The statute requires plaintiffs to suffer "actual injury" but does not define the term.<sup>61</sup> A review of North Carolina case law shows that the actual injury element is not heavily litigated. As shown by the two cases discussed below, actual injury requires a showing of actual loss or damage.

The North Carolina Court of Appeals noted in *Bailey v. LeBeau* that as an essential element of a cause of action under section 75-1.1, a

53. *Kent v. Humphries*, 275 S.E.2d 176 (N.C. Ct. App.), *aff'd and modified*, 281 S.E.2d 43 (N.C. 1981).

54. *Adams v. Moore*, 385 S.E.2d 799 (N.C. Ct. App. 1989).

55. *Johnson v. Phoenix Mut. Life Ins. Co.*, 266 S.E.2d 610 (N.C. 1980).

56. *Buie v. Daniel Int'l Corp.*, 289 S.E.2d 118 (N.C. Ct. App. 1982); *American Marble Corp. v. Crawford*, 351 S.E.2d 848 (N.C. Ct. App. 1987); *Liggett Group, Inc. v. Sunas*, 437 S.E.2d 674 (N.C. Ct. App. 1993).

57. *Robertson*, 363 S.E.2d 672; *Johnson v. Beverly-Hanks & Assocs.*, 388 S.E.2d 584 (N.C. Ct. App. 1990), *rev'd on other grounds*, 400 S.E.2d 38 (N.C. 1991).

58. *Wilson v. Blue Ridge Elec. Mbrshp. Corp.*, 578 S.E.2d 692 (N.C. Ct. App. 2003) (holding matters of internal corporate management, such as the manner of selection of and qualifications for directors, do not affect commerce in the context of a claim of unfair and deceptive trade practices).

59. *Godfredson v. JBC Legal Group, P.C.*, 387 F. Supp. 2d 543 (E.D.N.C. 2005); *see also Sharp v. Gailor*, 510 S.E.2d 702 (N.C. Ct. App. 1999).

60. *Furr v. Fonville Morisey Realty, Inc.*, 503 S.E.2d 401 (N.C. Ct. App. 1998).

61. *See Canady v. Mann*, 419 S.E.2d 597, 602 (N.C. Ct. App. 1992).

plaintiff must prove a defendant violated the section but also the plaintiff has suffered actual injury as a proximate result of defendant's act or practice.<sup>62</sup> The act committed in *Bailey* was a misrepresentation concerning engine parts purchased and used in the plaintiff's automobile.<sup>63</sup> The court in *Bailey* stated the plaintiff failed to show evidence of an actual injury and emphasized this fact by noting the automobile failed to breakdown due to the engine parts.<sup>64</sup>

The North Carolina Court of Appeals also addressed actual injury in *Canady v. Mann*.<sup>65</sup> *Canady* involved a plaintiff land purchaser who sued a defendant land development corporation due to the sale of real estate lots that were allegedly uninhabitable.<sup>66</sup> The court stated sufficient evidence was present for actual injury due to the loss of use of the purchase money and closing costs, loss of potential interest the funds used for the purchase price and the closing costs could have earned, and loss of the appreciated value of property, i.e., loss of the benefit of the bargain.<sup>67</sup>

#### IV. FRAMEWORK OF ANALYSIS FOR COMBATING BUSINESSES THAT HIRE ILLEGAL IMMIGRANTS TO OBTAIN A COMPETITIVE ADVANTAGE

The inquiry now is to determine a framework based upon the general guidelines set out in section III and establish whether the fact pattern in *Global Horizons, Inc.* can be successfully litigated in North Carolina under section 75-1.1.

A summary of a hypothetical fact pattern identical to *Global Horizons Inc.* is as follows:

Plaintiff, a duly licensed North Carolina business, provides farm labor contracting services to commercial farmers. Plaintiff competes with another firm, Defendant Supplier, who also provides labor contracting services to commercial farmers. Defendant Farmer, a commercial farmer and also a duly licensed business in North Carolina, owns a farm and sells and markets fruits and vegetables grown on his farm to the food industry.

Defendant Farmer engages in intrastate commerce by selling, distributing, and marketing commercially grown agricultural products. Plaintiff and Defendant Supplier engage in intrastate commerce by

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62. *Bailey v. LeBeau*, 339 S.E.2d 460 (N.C. Ct. App. 1986), *modified and aff'd*, 348 S.E.2d 524 (N.C. 1986).

63. *Id.* at 464.

64. *Id.*

65. *Canady*, 419 S.E.2d 597.

66. *Id.* at 599.

67. *Id.* at 603.

supplying labor to Defendant Farmer and other businesses requiring such labor.

Defendant Farmer and Plaintiff enter into a contract for Plaintiff to supply labor to Defendant Farmer to pick blueberries. The contract stipulates that hired employees will pick 10 pounds of blueberries per hour.

In the middle of the growing season, Defendant Farmer contacts Plaintiff and alleges hired employees provided by Plaintiff failed to meet picking requirements. Consequently, Plaintiff Farmer states it will terminate the contract due to Plaintiff's material breach of agreement.

Defendant Farmer then contracts with Defendant Supplier to supply labor for Defendant Farmer's commercial farm. Defendant Supplier hires illegal immigrants and thus, due to lower labor costs, offers a better deal to Defendant Farmer. All of Plaintiff's labor pool consists of legal U.S. citizens or migrant farm laborers under an H2-A program, which in turn requires additional costs to hire, unlike the laborers of Defendant Supplier.

What cause of action does Plaintiff have against the Defendants under section 75-1.1? The statute states "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."<sup>68</sup>

#### A. Defendant Farmer and Supplier "In or Affecting Commerce"

The analysis can begin with the establishment of the "in or affecting commerce" portion of section 75-1.1. Under the *Rosenthal* reasoning, which involved buying and selling real estate, "It is clear from the cases involving violation of the Unfair Trade Practices Act that the alleged violators must be engaged in a business, a commercial or industrial establishment or enterprise."<sup>69</sup> Defendant Farmer clearly is operating a business enterprise, is involved in the selling of agricultural products, and falls under the buyer-seller relationship.<sup>70</sup>

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68. N.C. GEN. STAT. § 75-1.1(a) (2005).

69. *Bhatti v. Buckland*, 440 S.E.2d 440, 443 (N.C. 1991) (quoting *Rosenthal v. Perkins*, 257 S.E.2d 63, 67 (N.C. Ct. App. 1979)); see also *Robertson v. Boyd*, 363 S.E.2d 672, 676 (N.C. Ct. App. 1988) ("[P]rivate parties engaged in the sale of a residence [are] not involved in trade or commerce and cannot be held liable under [Chapter 75].").

70. See *Buie v. Daniel Int'l Corp.*, 289 S.E.2d 118 (N.C. Ct. App. 1982); *American Marble Corp. v. Crawford*, 351 S.E.2d 848 (N.C. Ct. App. 1987); *Liggett Group, Inc. v. Sunas*, 437 S.E.2d 674 (N.C. Ct. App. 1993).

Defendant Supplier is also in a business enterprise that provides the supply of laborers. A unique case that is directly on point is *Winston Realty Co. v. G.H.G., Inc.*<sup>71</sup> The facts in *Winston Realty Co.* involved a private personnel service that advertised qualified personnel.<sup>72</sup> The plaintiff brought an unfair trade practices claim against the personnel agency, alleging that the agency falsely advertised that it screened its applicants.<sup>73</sup> The defendant in *Winston Realty Co.* argued that Chapter 75 applies only to buyer-seller relationships and competition between business competitors.<sup>74</sup> The court, ruling against defendant's argument, stated:

The breadth and scope of these provisions requires no elaboration, and we are of the opinion that defendant's activities were covered by them. In recommending employees to plaintiff and other employers defendant certainly was engaged in business and its activities obviously affected commerce. On this subject, our Supreme Court has said, "'commerce' in its broadest sense comprehends intercourse for the purposes of trade in any form." No doubt, because the Act is so broad and comprehensive, the Legislature specifically excluded members of a learned profession from its application, but it has not excluded employment agencies, and defendant has not shown that it is exempt. We therefore hold that [c]hapter 75 does apply to defendant's activities in this case . . . .<sup>75</sup>

*Winston Realty Co.* thus establishes that Defendant Supplier, a business providing employment services, is a business that is subject to the in or affecting commerce provisions of section 75-1.1.

#### B. *The Unfair or Deceptive Acts or Practices of Defendant Farmer and Supplier*

The second issue is whether the conduct of Defendant Farmer and Defendant Supplier constitutes an unfair or deceptive act. Under the aforementioned requirements for unfair or deceptive acts or practices, Plaintiff will have to establish that Defendants Farmer and Supplier engaged in conduct which amounts to an inequitable assertion of its power or position,<sup>76</sup> in a practice that is unethical or unscrupulous, or

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71. 320 S.E.2d 286 (N.C. Ct. App. 1984), *aff'd*, 331 S.E.2d 677 (N.C. 1985).

72. *Winston Realty*, 320 S.E.2d at 289.

73. *Id.* at 289

74. *Id.* at 290.

75. *Id.* at 291 (internal citations omitted).

76. *Johnson v. Phoenix Mut. Life Ins. Co.*, 266 S.E.2d 610, 622 (N.C. 1980).

in an act or practice that has a tendency to deceive.<sup>77</sup> Furthermore, Plaintiff can also classify Defendant's acts as unfair or deceptive by establishing a violation of public policy.<sup>78</sup>

The public policy route may be the easiest to satisfy if Plaintiff can prove that Defendant Farmer or Supplier violated a North Carolina statute. The two most prevalent areas to consider in the context of hiring illegal immigrants is that employers either pay illegal immigrants below the statutory minimum wage requirement and or pay illegal immigrants "under the table," evading North Carolina taxes. A violation of the North Carolina Wage and Hour Act and violation of Chapter 105 entitled "Taxation" are violations of North Carolina public policy.

Wages in North Carolina are governed by the North Carolina General Statutes, which state:

The public policy of this state is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry.<sup>79</sup>

In *Amos v. Oakdale Knitting Co.*, the plaintiffs filed a suit against their employer for paying wages that were substantially below the current minimum wage.<sup>80</sup> The court in *Amos* recognized that the minimum wage is the public policy of North Carolina.<sup>81</sup> Consequently, the court held that firing an employee for refusing to work for less than the statutory minimum wage violates the public policy of North Carolina.<sup>82</sup>

Taxes in North Carolina are governed by Chapter 105 of the North Carolina General Statutes.<sup>83</sup> Occurrences and penalties that arise from tax evasion are specifically addressed.<sup>84</sup> For example, it is a violation of the statute if a person "willfully fails to collect or truthfully account for and pay [taxes] . . . ."<sup>85</sup> Consequently, an employer who

77. *Polo Fashions, Inc. v. Crafttex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987) (citing *Marshall v. Miller*, 276 S.E.2d 397, 403 (N.C. 1981) and *Overstreet v. Brookland, Inc.*, 279 S.E.2d 1, 7 (N.C. 1981)).

78. *Process Components, Inc. v. Baltimore Aircoil Co.*, 366 S.E.2d 907 (N.C. Ct. App. 1988), *aff'd*, 374 S.E.2d 116 (N.C. 1988).

79. N.C. GEN. STAT. § 95-25.1(b) (2005).

80. *Amos v. Oakdale Knitting Co.*, 416 S.E.2d 166, 167-68 (N.C. 1992).

81. *Id.* at 169-70.

82. *Id.* at 170.

83. N.C. GEN. STAT §§ 105-1 to -564 (2005).

84. § 105-236(a).

85. § 105-236(a)(8).

knowingly hires any employee, legally or illegally, and fails to account for payroll taxes is in violation of the law and consequently in violation of North Carolina's public policy, thus satisfying the "untruthful or deceptive" requirements of section 75.

An unresolved issue that has not been addressed by North Carolina courts is whether a violation of a federal statute would also be a violation of North Carolina public policy. The North Carolina Supreme Court, by adopting the language of a Seventh Circuit decision, added to the public policy approach regarding the violation of general statutes by holding in *Johnson v. Phoenix Mutual Life Insurance Co.*<sup>86</sup> a trade practice is generally unfair when the practice is "immoral, unethical, oppressive, unscrupulous, or substantially injurious."<sup>87</sup> North Carolina courts have not addressed whether hiring illegal immigrants to obtain an unfair competitive advantage is "immoral, unethical, oppressive, unscrupulous, or substantially injurious."

Reviewing *Spiegel, Inc. v. Federal Trade Commission* shows that violation of federal public policy triggers a violation of the FTCA,<sup>88</sup> which is similar to Chapter 75 of the North Carolina General Statutes.<sup>89</sup> In *Spiegel, Inc.*, the court cited *National Candy Co. v. Federal Trade Commission*, which held:

[A] method of competition which is contrary to the established public policy of the United States is an unfair method of competition within the intent and meaning of section 5 of the statute. A violation of public policy is an injury to the public, and it is in the public interest to prevent the use of a method of competition which is contrary to an established public policy of the Federal Government, even if injury to competitors be not alleged or proved.<sup>90</sup>

It is recognized in antitrust cases in North Carolina that proof of conduct that violates federal antitrust statutes is generally sufficient proof to establish a violation of the North Carolina Unfair Trade Practices Act.<sup>91</sup> Furthermore, the North Carolina Supreme Court recognized in *Johnson* that, because of the similarity in language of North Carolina section 75-1.1 and the Federal Trade Commission Act, it is appropriate for North Carolina courts to look to the federal decisions

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86. 266 S.E.2d at 621; see generally *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976).

87. *Ken-Mar Finance v. Harvey*, 368 S.E.2d 646, 648 (N.C. Ct. App. 1988).

88. 540 F.2d 287 (7th Cir. 1976).

89. N.C. GEN. STAT. § 75-1.1(a).

90. *National Candy Co. v. Federal Trade Comm'n*, 104 F.2d 999, 1006 (7th Cir. 1939).

91. *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42 (4th Cir. 1983).

interpreting the FTC Act for guidance in construing the meaning of this section.<sup>92</sup> A logical line of reasoning is that hiring illegal immigrants is a violation of federal statutes and thus a violation of federal public policy. Since North Carolina has no official public policy conflicting with the federal policy, the federal public policy is therefore the policy of North Carolina. Another line of reasoning is that since hiring illegal immigrants is a violation of federal laws, it is also unethical or unscrupulous, especially if it is done to undercut a competitor.

Additionally, Defendant Farmer will be "guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position."<sup>93</sup> This issue was addressed by the North Carolina Supreme Court in *Owens v. Pepsi Cola Bottling Co. of Hickory*.<sup>94</sup> In *Owens*, the plaintiff brought an action against the defendant for alleged unfair practices and price-fixing under sections 75-1.1 and 75-5 and for tortious interference with prospective economic advantage.<sup>95</sup> Plaintiff claimed defendant had unlawfully imposed restrictions on the amount of twelve-packs and two-liter bottles of soft drinks plaintiff could purchase, sell, and wholesale and had unlawfully attempted to force him to raise his prices for two-liters.<sup>96</sup>

The plaintiff's claim of unfair practices in *Owens*, brought under section 75-1.1, alleged that defendant employed coercive business tactics to force him to raise his retail prices for two-liters.<sup>97</sup> The plaintiff's evidence in *Owens* showed "that on at least two occasions defendant demanded that he raise his retail price for two-liters and threatened to cut off his supply if he did not comply."<sup>98</sup> The court stated that the forecast of evidence offered by plaintiff was sufficient to raise a question of fact as to whether defendant imposed the two-liter supply restrictions in order to restrict sales.<sup>99</sup>

This form of coercion in *Owens* is typical in situations involving one party exerting an "inequitable assertion of its power or position" and applicable to the conduct of Defendant Farmer. If Defendant Farmer used his position, in a similar fashion to the defendant in *Owens*, to restrict the business activities of Plaintiff, Defendant Farmer committed an unfair act or practice in violation of section 75-1.1. For

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92. *Johnson*, 266 S.E.2d at 620 (citing 15 U.S.C. § 45(a)(1)); *Ken-Mar Fin. v. Harvey*, 368 S.E.2d 646 (N.C. Ct. App. 1988).

93. *Johnson*, 266 S.E.2d at 622.

94. *Owens v. Pepsi Cola Bottling Co.*, 412 S.E.2d 636 (N.C. 1992).

95. *Id.* (citing N.C. GEN. STAT §§ 75-1.1(a), 75-5(b)(3)).

96. *Id.* at 637.

97. *Id.* at 639.

98. *Id.* at 642.

99. *Id.* at 643.



example, under the *Owens* reasoning, if Defendant Farmer demanded cheaper employment and threatened to cut-off business relations for failing to do so, this would raise an issue of fact as to whether Defendant Farmer imposed the demands in order to prevent restrictions on the supply of labor.

## V. BUSINESS TORTS APPLIED UNDER SECTION 75-1.1

In addition to unfair and deceptive acts or practices, North Carolina recognizes that business torts can be brought as actions under section 75-1.1. Two actions that have been used in North Carolina are tortious interference with prospective economic advantage and tortious interference with a contract.

### A. *Tortious Interference with Prospective Economic Advantage*

An action for tortious interference with prospective economic advantage is recognized in North Carolina.<sup>100</sup> An action for tortious interference with prospective economic advantage is based on conduct by a party which prevents another party from entering into a contract with a third party.<sup>101</sup> In *Coleman v. Whisnant*, the North Carolina Supreme Court stated the following:

We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant[s'] own rights, but with design to injure the plaintiffs, or gaining some advantage at [their] expense . . . . "Maliciously inducing a person not to enter into a contract with another, which he would otherwise have entered into, is actionable if damage results." The word "malicious" used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiffs or gaining some advantage at [their] expense.<sup>102</sup>

Thus, to state a claim for wrongful interference with prospective advantage, a party must allege facts to show that the accused acted without justification in "inducing a third party to refrain from entering

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100. *Walker v. Sloan*, 529 S.E.2d 236 (N.C. Ct. App. 2000).

101. *Owens*, 412 S.E.2d at 644.

102. 35 S.E.2d 647, 656 (N.C. 1945) (quoting *Kamm v. Flink*, 175 A. 62, 67 (N.J. 1943)) (internal citations omitted).

into a contract with them which contract would have ensued but for the interference."<sup>103</sup>

A leading case in North Carolina for tortious interference with prospective economic advantage is *Owens v. Pepsi Cola Bottling Co.*<sup>104</sup> In *Owens*, the tort claim arose from the plaintiff's final claim that the defendant interfered with the business relationship between the plaintiff and his institutional customers thereby robbing him of prospective economic advantage.<sup>105</sup> The plaintiff's evidence showed the defendant curtailed his supply of twelve-packs so he could no longer fill orders from local schools and factories and then forbade at least one of those customers from continuing to purchase from the plaintiff.<sup>106</sup> The court held tortious interference with prospective economic advantage may be based on conduct which prevents the making of contracts.<sup>107</sup> The court stated further,

[T]he general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of defendant's own right, but with design to injure the plaintiff, or gaining some advantage at his expense.<sup>108</sup>

Application to Defendant Farmer and Supplier demonstrates Plaintiff can bring a valid claim under tortious interference with economic interference if he can establish the Defendants hired illegal immigrants to injure Plaintiff and gained an advantage by hiring illegal immigrants at a lower cost from Defendant Supplier, thereby giving them an advantage at Plaintiffs expense.

### B. *Wrongful Interference with Contractual Rights*

The final remedy available to Plaintiff against Defendant Farmer and Supplier is the tort of wrongful interference with contractual rights. The North Carolina Supreme Court stated the essential elements of wrongful interference with contractual rights as follows:

... First, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. *Second*, that the outsider had knowledge of the plain-

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103. *Cameron v. New Hanover Mem'l Hosp.*, 293 S.E.2d 901, 917 (N.C. Ct. App. 1982).

104. 412 S.E.2d 636.

105. *Id.* at 639.

106. *Id.* at 645.

107. *Id.*

108. *Id.* at 644.

tiff's contract with the third person. *Third*, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. *Fourth*, that in so doing the outsider acted without justification. *Fifth*, that the outsider's act caused the plaintiff actual damages.<sup>109</sup>

One must be aware a tort claim of this nature can be raised independently from section 75-1.1, but the North Carolina Supreme Court held in *United Labs., Inc. v. Kuykendall* that tortious interference with contract situations are also governed by section 75-1.1, as they are not "limited to actions involving consumers, or, when used to protect business, . . . to areas involving fraudulent advertising or a buyer-seller relationship."<sup>110</sup>

The transformation from a standard tort claim for tortious interference with contract situations to a claim that can be brought under section 75-1.1 occurs when there are "aggravating circumstances."<sup>111</sup> The court in *Baldine v. Furniture Comfort Corp.* stated, "Although a mere breach of contract does not constitute a violation of this section, a breach accompanied with aggravating circumstances, such as an intentional misrepresentation made for the purpose of deceiving another and which has the natural tendency to injure another, can violate the statute."<sup>112</sup>

Applying the fact patterns for the illegal immigrant scheme, if Defendant Farmer made intentional misrepresentations regarding the amount of blueberries picked for the purpose of deceiving Plaintiff, which in turn injured Plaintiff because the contract was terminated, the conduct would fall within the sphere of analysis offered under *Baldine*. These factors buttress the claim as one possessing aggravating circumstances, thus transforming the claim from one under the common law to one to one falling under section 75-1.1.

### C. *Benefits of Raising a Tort Claim under Section 75-1.1*

Both of the aforementioned torts can be raised outside the penumbra of section 75-1.1, but it would be prudent for Plaintiff to ensure these claims are also raised under section 75-1.1. The benefits offered to Plaintiff under the section provide the essential reason for transforming a claim. Unlike a traditional tort, a winning plaintiff in a sec-

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109. *Childress v. Abeles*, 84 S.E.2d 176, 181-82 (N.C. 1954) (internal citations omitted).

110. *United Lab. v. Kuykendall*, 370 S.E.2d 375, 383 (N.C. 1988).

111. *Baldine v. Furniture Comfort Corp.*, 956 F. Supp. 580, 587 (M.D.N.C. 1996).

112. *Id.*

tion 75-1.1 case *automatically* receives treble damages.<sup>113</sup> Furthermore, the plaintiff's "duly licensed attorney" may get attorney's fees at the discretion of the court.<sup>114</sup>

## VI. CONCLUSION

The "unfair or deceptive" act or practice prong of section 75-1.1 may offer hope for North Carolina businesses harmed by companies that disregard federal laws and North Carolina public policy by hiring illegal immigrants. Furthermore, tortious interference with prospective economic advantage and contractual rights may also offer strategic litigation opportunities for businesses being destroyed by firms that undercut the competition by hiring illegal immigrants.

In closing, the causes of action previously discussed are not the only approaches an innovative attorney can use to hold businesses accountable for hiring illegal immigrants. Due to the expansive nature of section 75-1.1, alternative approaches may be developed under the first prong of "unfair methods." Additionally, North Carolina antitrust laws encompass standard antitrust causes of action and may offer additional courses of action for businesses and consumers harmed by businesses that exploit illegal immigrants to obtain a competitive advantage.<sup>115</sup>

*Boris S. Abbey*

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113. N.C. GEN. STAT. § 75-16 (2005); *see also* *Pinehurst, Inc. v. O'Leary Bros. Realty*, 338 S.E.2d 918 (N.C. Ct. App. 1986); *Peterson v. Bozzano*, 183 B.R. 735 (Bankr. M.D.N.C. 1995).

114. § 75-16.1.

115. §§ 75-1 (Sherman § 1 analog); 75-2 (common law adopted); 75-4 (regulating non-competition agreements); 75-16 (private right of action for treble damages).