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THE LEARNED PROFESSION EXEMPTION OF THE NORTH CAROLINA DECEPTIVE TRADE PRACTICES ACT: THE WRONG BRIGHT LINE?

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INTRODUCTION

A televangelist informed his followers that in a revelation God told him that he would die unless one million dollars was raised for his ministries by a certain date. Followers, including those on limited fixed incomes, contributed significant sums, but the total amount given fell short of the million dollars requested. The deadline passed without incident, and the monies received were spent elaborately furnishing the ministry's headquarters. A psychiatrist engaged in sexual relations with one of her patients during the course of treatment. The patient welcomed the overtures, convinced by the doctor that this emotional and sexual involvement would help him overcome disappointments in past relationships and feelings of inadequacy. The tryst soured, causing the patient to fear he could never again trust a psychotherapist. An attorney made representations to his client which created unjustified expectations for the results of the client's case, a case not taken on a

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contingency fee basis. After the expenditure of substantial sums of money in fees, the client consulted with another attorney, who advised him that the claim was groundless and that, even if the claim had been meritorious, the Statute of Limitations barred its pursuit.

Which of the preceding fictional scenarios most likely would constitute unfair or deceptive acts or practices in or affecting commerce, and hence be unlawful under the North Carolina statute designed to eradicate unfair business practices? Possibly none of the aforementioned situations would fall within the ambit of the law. Why? The act expressly exempts professional services rendered by a member of a learned profession, those professions traditionally being theology, medicine and law. This article will examine the North Carolina statute and the soundness of this exemption.

THE ACT GENERALLY

A. History And Purpose

The North Carolina Deceptive Trade Practices Act provides that "[U]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."[1] It is patterned after the Federal Trade Commission Act of 1938.[2] Because the FTCA does not provide a private cause of action,[3] many states in the late 1960's and early 1970's enacted "little FTCA's" in order to provide statutory redress for consumers who suffered damages because of unfair or deceptive commercial practices.[4] The legislature of North Carolina, and those of fifteen other states, chose the language of the federal

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1. N.C. GEN. STAT. § 75-1.1(a) (1988 & Supp. 1992) [hereinafter the "Act"].

2. 15 U.S.C. § 45 (1988) [hereinafter the "FTCA"]. Initially, the wording of the Act did not exactly mirror the language of the federal statute. However, North Carolina's act was amended in 1977 to incorporate the exact wording of the federal prohibition. *See infra* notes 13-18 and accompanying text.

3. Fulton v. Hecht, 580 F.2d 1243, 1248-49 n.2 (5th Cir. 1978), *reh'g denied*, 585 F.2d 520 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

4. *See generally* Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: Private Uses of FTC Jurisprudence*, 48 GEO. WASH. L. REV. 521 (1980); Joseph Thomas Moldovan, Note, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 BROOK. L. REV. 509 (1982); William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724 (1971); Michael C. Gilleran & L. Seth Stadfeld, *Little FTC Acts Emerge in Business Litigation*, 72 A.B.A. J. 58 (1986).

prohibition,[5] although nearly every other state created a private cause of action with some form of statutory prohibition against unfair or deceptive acts or practices in commerce.[6]

As originally enacted, the Act announced that "[T]he purpose of this section is to declare, and to provide civil legal means to

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5. The following state acts, like that of North Carolina, are patterned after the FTCA. CONN. GEN. STAT. ANN. § 42-110b(a) (West 1992); FLA. STAT. ANN. § 501.204(1) (West 1988); KY. REV. STAT. ANN. § 367.170(1) (Michie/Bobbs-Merrill 1987); LA. REV. STAT. ANN. § 51.1405(A) (West 1987); MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 1984); MONT. CODE. ANN. § 30-14-103 (1991); N.Y. GEN. BUS. LAW § 349-A (McKinney 1988); S.C. CODE ANN. § 39-5-20 (Law. Co-op. 1985); VT. STAT. ANN. tit. 9, § 2453(a) (1984); WASH. REV. CODE ANN. § 19.86.020 (West 1989). Five other states have coupled the federal prohibition with the Uniform Deceptive Trade Practices Act. GA. CODE ANN. §§ 10-1-372 TO 10-1-393 (HARRISON 1992); HAW. REV. STAT. §§ 481A-1 to 481A-5 and §§ 480-2 to 480-24 (1985 & Supp. 1987); ILL. ANN. STAT. ch. 121-½, §§ 311 to 317 and §§ 261 to 271 (Smith-Hurd Supp. 1992); ME. REV. STAT. ANN. tit. 10, §§ 1211 to 1216 (West 1980) and tit. 5, §§ 205-A to 214 (1989 & Supp. 1992); NEB. REV. STAT. §§ 87-301 to 87-306 and §§ 59-1602 to 59-1623 (1988). The Uniform Act basically contains a laundry list of unfair and deceptive acts or practices which, at common law, constituted a collection of wrongs known as "unfair competition." UNIF. DECEPTIVE TRADE PRACTICES ACT §§ 1-9, 7A U.L.A. 303 (1985). *See generally* Richard F. Dole, *Merchant and Consumer Protection: The Uniform Trade Practices Act,* 76 YALE L.J. 485 (1967). Unfair methods of competition in or affecting commerce also are prohibited by N.C. GEN. STAT. § 75-1.1(a) (1988 & Supp. 1992).

6. *See, e.g.,* ALA. CODE § 8-19-5 (1975); ALASKA STAT. §45-50.471 (1986 & Supp. 1992); ARIZ. REV. STAT. ANN. § 44-1522 (West 1987); ARK. CODE ANN. § 4-88-108 (Michie 1991); CAL. CIV. CODE § 1770 (West 1985); COLO. REV. STAT. ANN. § 6-1-105 (West 1989); D.C. CODE ANN. § 28-3904 (1991); DEL. CODE ANN. tit. 6, § 2513(a) (1975); IDAHO CODE § 48-603 (1977 & Supp. 1992); IND. CODE ANN. §24-5-0.5-3 (Burns 1991); KAN. STAT. ANN. §50-626 (1983 & Supp. 1992); MD. COM. LAW I CODE ANN. § 13-3-1 (1990); MICH. COMP. LAWS ANN. § 445.903 (WEST 1989); MINN. STAT. ANN. § 325F.69 (West 1981); MISS. CODE ANN. § 75-24-5 (1991); MO. ANN. STAT. § 407.020(1) (Vernon 1990); NEV. REV. STAT. §§ 598.410, 598.412, 598.413 (1991); N.H. REV. STAT. ANN. § 358-A:2 (1984 & Supp. 1992); N.J. STAT. ANN. § 56:8-2 (West 1989); N.M. STAT. ANN. §§ 57-12-3, 57-12-2(c) (Michie 1987 & Supp. 1992); N.D. CENT. CODE. § 51-15-02 (1989); OHIO REV. CODE ANN. § 13.45.01(A) (Anderson 1979 & Supp. 1992); OKLA. STAT. ANN. tit. 78, § 53 (West 1987); OR. REV. STAT. § 646.608 (1988); PA. CONS. STAT. ANN. tit. 73, §§ 201-2, 201-3 (Supp. 1992); R.I. GEN. LAWS §§ 6-13.1-1(5), 6-13.1-2 (1992); S.D. CODIFIED LAWS ANN. § 37-24-6 (1986); TENN. CODE ANN. § 47-18-104 (1988 & Supp. 1992); TEX. BUS. & COM. CODE ANN. § 17.46 (West 1987); UTAH CODE ANN. §§ 13-11-4, 13-5-2.5(1)(1992); VA. CODE ANN. § 59.1-200 (Michie 1992); W. VA. CODE § 46A-6-102(F), 46A-6-104 (1992); WIS. STAT. ANN. §§ 100.18 to 100.201 (West 1988); WYO. STAT. § 40-12-105 (1990). Iowa apparently provides for only criminal prosecution and no private cause of action. IOWA CODE ANN. §714.16 (West 1979 & Supp. 1992).

maintain, ethical standards of dealings 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."[7] Although this language was subsequently deleted,[8] North Carolina courts continue to reiterate this overriding purpose, that of establishing an effective cause of action for aggrieved consumers, and of promoting and maintaining ethical standards of dealings in commercial transactions.[9] The Act was enacted as an additional remedy, distinct from actions sounding in tort or contract, since such actions were deemed to be ineffective at times for aggrieved consumers.[10] It is this purpose, for which the Act was passed, which makes the express exemption for members of the learned professions even more perplexing.[11]

B. Basic Requirements For A Violation

An alleged unfair or deceptive act or practice must affect com-

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7. Law of June 12, 1969, ch. 833, 1969 N.C. Sess. Laws 930.

8. This section was deleted when the present statute was enacted in 1977. Law of June 27, 1977, ch. 747, § 1-2, 1977 N.C. Sess. Laws 984 (codified as amended at N. C. GEN. STAT. § 75-1.1 (1988 & Supp. 1992)).

9. *See, e.g.*, United Virginia Bank v. Air-Lift Assoc. Inc., 79 N.C. App. 315, 319-20, 339 S.E.2d 90, 93 (1986); McDonald v. Scarboro, 91 N.C. App. 13, 18, 370 S.E.2d 680, 683, *disc. rev. denied*, 323 N.C. 476, 373 S.E.2d 864 (1988); Investors Title Ins. Co. v. Herzig, 330 N.C. 681, 688, 413 S.E.2d 268, 271 (1992); Colvard v. Francis, 106 N.C. App 277, 283, 416 S.E. 2d 579, 582, *disc. rev. denied*, 332 N.C. 146, 419 S.E.2d 570 (1992). *See also* Hardy v. Toler, 24 N.C. App. 625, 630-31, 211 S.E.2d 809, 813, *aff'd and modified on other grounds*, 288 N.C. 303, 218 S.E.2d 342 (1975) (decision rendered prior to amendment deleting statutory purpose); Jack E. Karns, *Pleading Deceptive Trade Practice Claims Under the Consumer Protection Act*, N.C. ST. BAR. Q., Summer 1992, at 20, 21.

10. Marshall v. Miller, 302 N.C. 539, 543-44, 276 S.E.2d 397, 400 (1981); Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 232, 314 S.E.2d 582, 585, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984); Rucker v. Huffman, 99 N.C. App. 137, 142, 392 S.E.2d 419, 422 (1990). For example, the Deceptive Trade Practices Act was designed to embrace conduct less culpable than that which would be required for common law fraud. Process Components, Inc., v. Baltimore Aircoil Co., 89 N. C. App. 649, 651-52, 366 S.E.2d 907, 910, *aff'd*, 323 N.C. 620, 374 S.E.2d 116 (1988); Edward B. Simmons, 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, 490 (1976); Jay Reeves, *Vinyl Siding Firm is Hit by Verdict for Deceptive Acts*, N.C. LAW. WKLY. Sept. 28, 1992 at 1, 4. *See also infra* notes 56-57, 69-73 and accompanying text.

11. *See infra* notes 201-25 and accompanying text.

merce before it is actionable.[12] As originally enacted in 1969,[13] the language of the Act provided that "[U]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade* or commerce are hereby declared unlawful."[14] The North Carolina Supreme Court, in *State ex rel. Edmisten v. J.C. Penney Company*,[15] narrowly interpreted the combination of the words "trade or commerce" so as to require an exchange of some type, concluding that the only acts or practices forbidden by the Act were those involved in a bargain, sale, barter, exchange, or traffic.[16] In response, the legislature amended the Act, deleted the word trade, and substituted the phrase "in or affecting commerce" so as to allow for a broader application of its provisions.[17] It further liberally defined commerce as including "all business activities however denominated" except for the professional services rendered by learned professionals.[18]

Subsequently, the Act has been applied to a variety of activities which *affect* commerce.[19] The Act itself expressly exempts only

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12. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980) (relationship of borrower and mortgage broker involves commercial activities), *rev'g* 44 N.C. App. 210, 261 S.E.2d 135 (1979), *overruled on other grounds by* Myers & Chapman, Inc. v. Thomas G. Evans, Inc. 323 N.C. 559, 314 S.E.2d 385 (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989). *See generally* Robert G. Byrd, *Misrepresentation in North Carolina*, 70 N.C. L. REV. 323, 364 (1992).

13. Law of June 12, 1969, ch. 833, 1969 N.C. Sess. Laws 930.

14. *Id.* (Emphasis added). For an early North Carolina Supreme Court opinion interpreting the legislation see Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342, *modifying in part and aff'g in part* 24 N.C. App 625, 211 S.E.2d 809 (1975). *See also* Simmons, *supra* note 10 (discussing *Hardy v. Toler*).

15. 292 N.C. 311, 233 S.E.2d 895 (1977), *rev'g* 30 N.C. App. 368, 227 S.E.2d 141 (1976).

16. *Id.* at 315-17, 233 S.E.2d at 898-99. *See generally* William B. Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C. L. REV. 207, 210 (1982).

17. Law of June 27, 1977, ch. 747, §§ 1-2, 1977 N.C. Sess. Laws, 1st Sess. 984 (now codified at N.C. GEN. STAT.§ 75-1.1 (1988 and Supp. 1992)).

18. N.C. GEN. STAT. § 75-1.1(b) (1988 & Supp. 1992).

19. *See, e.g.*, J. M. Westall & Co. v. Windswept View of Asheville, 97 N.C. App. 71, 75, 387 S.E.2d 67, 69 (contractual relationship not required to affect commerce), *disc. rev. denied*, 327 N.C. 139, 394 S.E.2d 175 (1990); Rucker v. Huffman, 99 N.C. App. 137, 141, 392 S.E.2d 419, 421 (1990) (sale of home by licensed contractor affects commerce); Bhatti v. Buckland, 328 N.C. 240, 246, 400 S.E.2d 440, 444 (1991) (sale of private residence at auction affects commerce) *rev'g* 99 N.C. App. 750, 394 S.E.2d 192 (1990).

the professional activities of members of a learned profession[20] and the media, with respect to the publication of misleading advertisements.[21] In turn, courts have refrained from implying as a matter of law that any other activities are exempt from the definition of commerce. The judiciary has chosen to carve only two other exceptions to the Act. Courts have held that the isolated sale by homeowners of their residence did not affect commerce,[22] and that transactions in securities are to be exempt because of pervasive regulatory schemes under state and federal law.[23] Moreover, courts have chosen to interpret the definition of commerce expansively as embracing disputes between competitors in business as well as those between businesses and consumers.[24] It is unsettled, however, whether or not a business plaintiff must prove bad faith or intentional fraud before coming within the purview of the Act,[25] a

20. N.C. GEN. STAT. § 75-1.1(B) (1988 & SUPP. 1992).

21. N.C. GEN. STAT. § 75-1.1(c) (1988 & Supp. 1992). The exemption for the publishing activities of the media protects publishers from vicarious liability for misleading advertisements innocently published. *Id.*

22. Rosenthal v. Perkins, 42 N.C. App. 449, 454, 257 S.E.2d 63, 67 (1979). *See also* Johnson v. Beverly-Hanks Assoc., 97 N.C. App. 335, 344-45, 388 S.E.2d 584, 589 (1990), *aff'd in part and rev'd in part on other grounds,* 328 N.C. 202, 400 S.E.2d 38 (1991); Robertson v. Boyd, 88 N.C. App. 437, 443, 363 S.E.2d 672, 676 (1988). The supreme court has not ruled expressly upon the question of whether or not a homeowner's exception exists under the statute, although it has assumed, *arguendo,* that the exception exists. *Id.*; Bhatti v. Buckland, 328 N.C. 240, 245, 400 S.E.2d 440, 443 (1991), *rev'g* 99 N.C. App. 750, 394, S.E.2d 192 (1990).

23. *See infra* notes 208-209 and accompanying text.

24. *See, e.g.,* Johnson v. Phoenix Mut. Life Ins. Co., 300 N. C. 247, 261-62, 266 S.E.2d 610, 620 (developer and mortgage lender), *rev'g* 44 N. C. App. 210, 261 S.E.2d 610 (1980); Concrete Service Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, 760 (purchaser and supplier), *cert. denied,* 317 N.C. 333, 346 S.E.2d 137 (1986); McDonald v. Scarboro, 91 N.C. App. 13, 19, 370 S.E.2d 680, 684 (tortious interference with a contractual relationship), *disc. rev. denied,* 323 N.C. 476, 373 S.E.2d 864 (1988); United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988) (tortious interference with covenant not to compete). *See also* 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); Ellis v. Smith Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980). *But see* Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985) (because contract did not involve a sale, plaintiff was not a consumer).

25. The supreme court has declined to address this issue in two cases which arguably posed the question. *See* Olivetti Corp. v. Ames Business Sys., Inc., 319 N.C. 534, 356 S.E.2d 578 (1987), *aff'g in part and rev'g in part,* 81 N.C. App. 1, 344 S.E. 2d 82 (1986); Myers & Chapman v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E. 2d 385, *aff'g in part and rev'g in part,* 89 N.C. App. 41, 365 S.E. 2d 202 (1988). For an excellent discussion of the issue and the *Myers & Chapman* case

burden of proof not required of consumer plaintiffs.[26] Nevertheless, the Act does apply to some business disputes, though not necessarily every form of business activity,[27] and the overall scope of the Act remains extensive except for the learned profession exemption.

The standard for unfairness and deception under the Act, as interpreted and applied by the courts, is equally liberal. Plaintiffs must establish that the act or practice which forms the basis of the complaint is either unfair[28] or deceptive.[29] Proof of either unfairness or deception is sufficient to state a violation,[30] although often courts will find that the alleged infraction was either unfair or deceptive without making a specific finding as to which part of the Act was violated.[31] Because of the Act's provision for mandatory

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see Dinita L. James, Note, *Myers & Chapman v. Thomas G. Evans, Inc.: A Lesson in Reading Between the Lines*, 67 N.C. L. REV. 1225, 1239-44 (1989).

26. *See infra* notes 43-62 and accompanying text. Arguably, a distinction between consumer and business plaintiffs with respect to the burden of proof which must be established is sound, since business plaintiffs should be more knowledgeable about business dealings. Nevertheless, North Carolina courts seem to reject any type of "sophisticated consumer" defense, so the distinction may not be recognized, even in light of the automatic award of treble damages under the act. *See infra* notes 74-76 and accompanying text. For an argument in support of the distinction see James, *supra* note 25, at 1243-44.

27. First Fin. Sav. Bank v. American Bankers Ins., 783 F. Supp. 963, 970 (E.D.N.C. 1991) (citing Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales and Serv., Inc., 91 N.C. App. 539, 544, 372 S.E.2d 901, 904 (1988)).

28. *See infra* notes 43-50 and accompanying text.

29. *See infra* notes 51-57 and accompanying text.

30. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *rev'g* 44 N.C. App. 210, 261 S.E.2d 135 (1979). *See also* Bailey v. Le Beau, 79 N.C. App. 345, 352, 339 S.E.2d 460, 464 (1986) *modified on other grounds*, 318 N.C. 411, 348 S.E.2d 524 (1986); Hageman v. Twin City Chrysler Plymouth, Inc., 681 F. Supp. 303, 306 (M.D.N.C. 1988); Rucker v. Huffman, 99 N.C. App. 137, 141, 392 S.E.2d 419, 421 (1990).

31. *See, e.g.*, Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 228-29, 314 S.E.2d 582, 583-84 (1984), *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984); Eastern Roofing & Aluminum Co. v. Brock, 70 N.C. App. 431, 434, 320 S.E.2d 22, 24 (1984); McDonald v. Scarboro, 91 N.C. App. 13, 20, 370 S.E.2d 680, 684, *disc. rev. denied*, 323 N.C. 476, 373 S.E. 2d 864 (1988). For a discussion of the Eastern Roofing case see Karl William Leo, Eric C. Rowe & James S. Schenck IV, *North Carolina Construction Law Survey*, 21 WAKE FOREST L. REV. 633, 718-20 (1986). *See also* Robertson v. Boyd, 88 N.C. App. 437, 363 S.E. 2d 672 (1988) (cause of action stated for unfair or deceptive practice); Roane-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990) (tortious interference with restrictive covenant constituted unfair or deceptive trade practice).

treble damages in the event that a violation is established,[32] the Fourth Circuit Court of Appeals has interpreted the Act to require that "substantial aggravating circumstances" be present before an intentional breach of contract is deemed to be unfair or deceptive.[33] North Carolina courts have not expressly agreed with this interpretation.[34]

North Carolina courts have held that the unfair act or practice must have an impact in the marketplace,[35] although that impact is not to be judged by the amount of damages recoverable.[36] Moreover, the market impact requirement seems to be less onerous than the public interest requirement of the Federal Tort Claims Act,[37] a requirement embraced by the deceptive trade practice legislation of some states.[38] For example, in *McDonald v. Scarboro*,[39] the

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32. N.C. GEN. STAT. § 75-16 (1988 & Supp. 1992). *See infra* notes 77-82 and accompanying text.

33. United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 992 (4th Cir.) ("If such an award is to be trebled, the North Carolina legislature must have intended that substantial aggravating circumstances be present."), *cert. denied*, 454 U.S. 1054 (1981). General United Co. v. American Honda Motor Co., 618 F. Supp. 1452, 1455-56 (W.D.N.C. 1985) (defendant's motion for summary judgment properly granted); Hageman v. Twin City Chrysler-Plymouth Inc., 681 F. Supp. 303, 307 (M.D.N.C. 1988); Bartolomeo v. S.B. Thomas, Inc., 889 F.2d 530, 535-36 (4th Cir. 1989); Cameron v. Martin Marietta Corp., 729 F. Supp. 1529, 1532 (E.D.N.C. 1990) (cause of action stated).

34. The North Carolina courts have, however, held that breach of warranty alone will not constitute a violation of the Act. Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 691, 262 S.E. 2d 646, 650, *disc. rev. denied*, 300 N.C. 379, 267 S.E.2d 685 (1980); Stone v. Paradise Park Homes, Inc., 37 N.C. App. 97, 105-06, 245 S.E.2d 801, 807, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978).

35. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 262-63, 266 S.E.2d 610, 621 *rev'g* 44 N.C. App. 210, 261 S.E.2d 135 (1980); Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 230, 314 S.E.2d 582, 584, *disc. rev. denied*, 311 N.C. 751, S.E.2d 126 (1984); United Laboratories, Inc. v. Kuykendall, 102 N.C. App. 484, 490-91, 403 S.E.2d 104, 109, *disc. rev. allowed on other grounds*, 330 N.C. 123, 409 S.E.2d 610 (1991).

36. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 60-61, 338 S.E.2d 918, 924, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986).

37. 15 U.S.C. § 45 (1988). The federal act, unlike the North Carolina statute, provides no means of private redress. *See supra* note 3 and accompanying text. Since the state statute is designed to compensate individual consumers there should be no requirement for an adverse effect on the public at large. Simmons, *supra* note 10, at 488-89.

38. *See, e.g.*, Pilch v. Hendrix, 591 P.2d 824 (Wash. App. 1979) (construing WASH. REV. CODE ANN. §§ 19.86.010 *et seq.* (West 1989)); Noack Enters. v. Country Corner Interiors, 290 S.C. 475, 351 S.E.2d 347 (1986) (construing S.C. CODE ANN. §§ 39-5-10-560 (Law. Co-op. 1985)); Zeeman v. Black, 273 S.E.2d 910 (1980)

court recognized that the interference by one person with the business relationship of another had a sufficient impact upon the marketplace since such conduct, taken to an extreme, could lead to a monopolistic system and certainly failed to satisfy the statutory purpose[40] of promoting ethical standards in dealings.[41] Since commerce has been so broadly defined,[42] it is unlikely that the market impact requirement would curtail an expansive application of the Act.

C. *Conduct Amounting To A Violation*

The North Carolina Supreme Court, in *Johnson v. Phoenix Mutual Life Insurance Company*,[43] substantially adopted the Federal Trade Commission's definition of unfairness as recognized by the United States Supreme Court.[44] The court held that 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."[45] The *Johnson* court also

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(construing GA. CODE ANN. §§ 10-1-370-375 (Harrison 1992)). On the other hand, some state statutes expressly disclaim such a requirement. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 42-110g(a) (West 1992); HAW. REV. STAT. § 480-2(c) (1985 & Supp. 1991).

39. 91 N.C. App. 13, 370 S.E.2d 680, *disc. rev. denied*, 323 N.C. 476, 373 S.E.2d 864 (1988).

40. *See supra* notes 7-11 and accompanying text.

41. McDonald v. Scarboro, 91 N.C. App. 13, 19-20, 370 S.E.2d 680, 685, *disc. rev. denied*, 323 N.C. 476, 373 S.E.2d 864 (1988).

42. *See supra* notes 19-27 and accompanying text.

43. 300 N.C. 247, 263, 266 S.E.2d 610, 621, *rev'g* 44 N.C. App. 210, 261 S.E.2d 135 (1980), *modified*, Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 569, 374 S.E.2d 385, 392 (1988).

44. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972). The Supreme Court observed that:

> The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair: "(1) whether the practice, without necessarily 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; (3) whether it causes substantial injury to consumers (or competitors or other businessman)."

Id. at 244-45, n.5.

45. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980) (no violation found).

acknowledged that the concept of unfairness was broader than and included the concept of deception,[46] and further declared that an inequitable assertion of power or position could constitute an unfair act or practice.[47] Therefore, unfairness can embrace a wide range of commercial activities,[48] including using coercive tactics[49] or taking advantage of an inequitable bargaining position,[50] yet unfairness does not include the inequitable assertion of powers, coercive tactics or unfair advantage exercised by a member of the learned professions rendering professional services.

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46. *Id.*

47. *Id.* at 264, 266 S.E.2d at 622 (adopting this principle from Spiegel, Inc. v. FTC, 540 F.2d 287, 294 (7th Cir. 1976)). *See also* Warfield v. Hicks, 91 N.C. App. 1, 8, 370 S.E.2d 689, 693, *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988); Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 600, 394 S.E.2d 643, 650, *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

48. *See, e.g.*, United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985) (institution of frivolous lawsuit to interfere with business relationships); Rucker v. Huffman, 99 N.C. App. 137, 392 S.E.2d 419 (1990) (misrepresentations with respect to a residence); United Lab., Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375 (1988) (interference with covenant not to compete), *aff'g in part and rev'g in part*, 87 N.C. App. 296, 361 S.E.2d 292 (1987). The conduct must, however, offend public policy or be immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *See* Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981) (peaceful padlocking of premises by landlord not offensive to public policy); Overstreet v. Brookland, Inc., 52 N.C. App. 441, 279 S.E.2d 1 (1981) (alleged misrepresentation of future intent to impose restrictive covenants on property not actionable).

49. *See* Wilder v. Squires, 68 N.C. App. 310, 315 S.E.2d 63 (wrongful refusal to return binder to coerce the signing of a release is actionable), *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984); Hoke v. Young, 89 N.C. App. 569, 366 S.E.2d 548 (1988) (no coercion exercised by insurance company's reliance on hearsay statements of accident investigator); Love v. Keith, 95 N.C. App. 549, 383 S.E.2d 674 (1989) (wrongfully refusing to place house in Homeowners Warranty Program in order to coerce the release of escrow funds actionable).

50. Whitman v. Forbes, 55 N.C. App. 706, 286 S.E.2d 889 (1982) (summary judgment improper if allegations established that real estate broker purchased house at inadequate price knowing seller was mentally incompetent). This application of the unfairness definition is somewhat analogous to the contract defense of unconscionability. Some states have included in their deceptive trade practices act an express provision prohibiting unconscionable acts or practices. *See, e.g.*, IDAHO CODE §§ 48-603C(18), 48-603C (1977 & Supp. 1992); KAN. STAT. ANN. § 50-627(a) (1983 & Supp. 1992); MICH. COMP. LAWS ANN. § 445.903(1)(x) (West 1989); NEB. REV. STAT. § 87-303.01 (1988); N.M. STAT. ANN. § 57-12-2(d) (Michie 1987); OHIO REV. CODE ANN. § 1345.03 (ANDERSON 1979 & SUPP. 1992); ORE. REV. STAT. § 646.607 (1988); TEX. BUS. & COM. CODE ANN. § 17.45(5) (West 1987). UTAH CODE ANN. § 13-11-5 (1992).

The *Johnson* court also adopted the standard of deception to which the Federal Trade Commission previously adhered,[51] that is, a requirement only that the questionable act or practice have a *capacity or tendency* to deceive.[52] Both a truthful statement and a false statement can possess the tendency or capacity to deceive[53] as can a failure to disclose[54] or a negligent misrepresentation.[55] While proof of fraud necessarily will meet this standard,[56] deception under the Act embraces a broader range of misleading acts which may or may not constitute fraud.[57]

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51. The Federal Trade Commission and federal courts prior to 1984 defined deception as conduct which had the capacity or tendency to deceive consumers. *See e.g.*, Perloff v. FTC, 150 F.2d 757 (3d Cir. 1945); Niresk Indus., Inc. v. FTC, 278 F.2d 337 (7th Cir. 1960); Regina Corp.v. FTC, 322 F.2d 765 (3d Cir. 1963); FTC v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963); Trans World Accounts, Inc. v. FTC, 594 F.2d 212 (9th Cir. 1979); Gulf Oil Corp. v. FTC, 150 F.2d 106 (5th Cir. 1945); Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957). The FTC tightened the standard in 1984 and now defines deception as conduct likely to mislead consumers acting reasonably under the circumstances. In Re Cliffdale Assocs., 103 F.T.C. 110 (1984); Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir. 1986). *See generally* Karns, *supra* note 9, at 20-21.

52. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 265-66, 266 S.E.2d 610, 622 (1980), *modified*, Myers & Chapman, Inc. v. Thomas G. Evans, Inc. 323 N.C. 559, 569, 374 S.E.2d 385, 392 (1988). *Accord* Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

53. *Johnson*, 300 N.C. at 266, 266 S.E.2d at 622; Pinehurst, Inc. v. O'Leary Bros. Realty 79 N.C. App. 51, 59, 338 S.E.2d 918, 923, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986).

54. Kron Medical Corp. v. Collier Cobb & Assoc., 107 N.C.App. 331, 341, 420 S.E.2d 192, 196-97 (silence by insurance broker who owed fiduciary duty to the insured was deceptive), *disc. rev. denied*, 333 N.C. 168, 424 S.E.2d 910 (1992); Starling v. Sproles, 66 N.C. App. 653, 655-56, 311 S.E.2d 688, 690 (1984) (realtor's failure to disclose prior offer of purchase was deceptive).

55. Powell v. Wold, 88 N.C. App. 61, 362 S.E.2d 796 (1987) (granting of defendants' motion to dismiss reversed). An innocent misunderstanding, however, is not sufficient to establish deceptive conduct. Hageman v. Twin City Chrysler-Plymouth Inc., 681 F.Supp. 303, 307 (M.D.N.C. 1988).

56. Hardy v. Toler, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975). *See also* Olivetti Corp. v. Ames Business Sup., Inc., 81 N.C. App. 1, 24, 344 S.E.2d 82, 96, *aff'd in part and rev'd in part*, 319 N.C. 534, 356 S.E.2d 578 (1988); Powell v. Wold, 88 N.C. App. 61, 68, 362 S.E.2d 796, 800 (1987); Webb v. Triad Appraisal, 84 N.C.App. 446, 449, 352 S.E.2d 859, 862 (1987); Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 691, 370 S.E.2d 267, 271 (1985); Canady v. Mann, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992), *disc. rev. improvidently allowed*, 333 N.C. 569, 424 S.E.2d 905 (1993).

57. *See, e.g.*, Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985) (personnel agency's misrepresentations regarding investigation of back-

Furthermore, in *Marshall v. Miller*,[58] the North Carolina Supreme Court held that no showing of bad faith is required to establish either deception or unfairness,[59] and that neither the intent of the defendant, nor the presence of good faith on the defendant's part, was relevant. Rather, the court insisted that relevancy lay in the effect the actor's conduct had on the consuming public.[60] Nevertheless, there must be a causal relationship between the alleged

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ground and references of applicant), *aff'g* 70 N.C. App. 374, 320 S.E.2d 286 (1984); Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985) (misrepresentations of seller regarding ownership of certain assets), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 891 (1986); Love v. Keith, 95 N.C. App. 549, 383 S.E.2d 674 (1989) (builder's misrepresentation that he was a part of the Homeowners Warranty Program); Davidson v. Knauff Ins. Agency, 93 N.C. App. 20, 376 S.E.2d 488 (duplicative insurance was misrepresentation that second policy had value), *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989); J.M. Westall & Co. v. Windswept View of Asheville, 97 N.C. App. 71, 387 S.E.2d 67 (1990) (misleading statements that contractor was bonded made to procure additional building supplies), *disc. rev. denied*, 327 N.C. 139, 394 S.E.2d 175 (1990). *See generally* Byrd, *supra* note 12.

58. 302 N.C. 539, 276 S.E.2d 397 (1981), *aff'g as modified* 47 N.C. App. 530, 268 S.E.2d 97 (1980). *Contra* Wachovia Bank & Trust v. Smith, 44 N.C.App. 685, 691, 262 S.E.2d 646, 650 (1980) (evidence did not establish violation of the statute absent evidence of willful deception or bad faith), *disc. rev. denied*, 300 N.C. 379, 267 S.E.2d 685 (1980). The Marshall court expressly overruled any suggestion in Wachovia Bank and Trust that bad faith is a prerequisite to the recovery of treble damages under the act. Marshall v. Miller, 302 N.C. 539, 546, 276 S.E.2d 397, 401 (1981).

59. Marshall v. Miller, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981). For an excellent analysis of the case see Marilyn Harmon Stout, Note, *Unfair Trade Practices-Intent Not Required To Award Treble Damages For A Violation Of North Carolina's Unfair Or Deceptive Acts Or Practices Statute-* Marshall v. Miller, 18 WAKE FOREST L. REV. 134 (1982).

60. Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). *Accord* Wilder v. Squires, 68 N.C. App. 310, 316, 315 S.E.2d 63, 66, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984); Bolton Corp. v. T.A. Loving Co., 94 N.C. App. 392, 411, 380 S.E.2d 796, 808, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 496 (1989); Leake v. Sunbelt Ltd., 93 N.C. App. 199, 204-05, 377 S.E.2d 285, 288-89, *disc. rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989); Ken-Mar Fin. v. Harvey, 90 N.C. App. 362, 365, 368 S.E.2d 646, 648, *disc. rev. denied*, 323. N.C. 365, 373 S.E.2d 545 (1988); Mosley & Mosley Bldrs., Inc. v. Landin Ltd. 97 N.C. App. 511, 517, 389 S.E.2d 576, 579 (1990); Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991). Likewise, good faith is not a defense to an enforcement action by the Federal Trade Commission. United States v. Beatrice Food Co., 344 F.Supp. 104 (D. Minn. 1972), *aff'd*, 493 F.2d 1259 (8th Cir. 1974); Chrysler Corp. v. FTC, 561 F.2d 357 (D.C. Cir. 1977); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977).

unfair act or deceptive practice and the injury suffered,[61] which, of course, must be established as well.[62]

The determination of whether or not acts or practices meet either the capacity or tendency to deceive standard for deception,[63] or the immoral, unethical, oppressive or unscrupulous standard for unfairness,[64] is a bifurcated process whereby the jury finds the facts and the judge determines, given those facts, whether or not a violation has occurred as a matter of law.[65] Such a division checks

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61. Ellis v. Smith-Broadhurst, Inc., 48 N.C.App. 180, 184, 268 S.E.2d 271, 273-74 (1980); Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 470-71, 343 S.E.2d 174, 180 (1986); Bailey v. Le Beau, 79 N.C. App. 345, 352, 339 S.E.2d 460, 464 (1986) *aff'd as modified*, 318 N.C. 411, 348 S.E.2d 524 (1986).

62. The plaintiff must establish that the act of unfairness or deception had some adverse impact. *See, e.g.*, Olivetti Corp. v. Ames Business Sys., Inc., 319 N.C. 534, 549, 356 S.E.2d 578, 587 (1987) (question of whether or not the statute applied not reached because damages not established); Miller v. Ensley, 88 N.C. App. 686, 691, 365 S.E.2d 11, 14 (1988) (no harm caused because contractor was able to protect rights by lien claim); Canady v. Mann, 107 N. C. App. 252, 261, 419 S.E.2d 597, 602-03(1992), *disc. rev. improvidently allowed*, 333 N.C. 569, 429 S.E.2d 448 (1993) (loss of the use of specific and unique property along with its appreciated value could constitute actual injury). Stated another way, there must be detrimental reliance upon the unfair act or deceptive trade practice. Hageman v. Twin City Chrysler-Plymouth Inc., 681 F.Supp. 303, 308-09 (M.D.N.C. 1988). However, such reliance need necessarily not be reasonable. Byrd, *supra* note 12, at 367-369.

63. *See supra* notes 51-57 and accompanying text.

64. *See supra* notes 43-50 and accompanying text.

65. Hardy v. Toler, 288 N.C. 303, 310, 218 S.E.2d 342, 346-47 *aff'g as modified* 24 N.C. App. 625, 211 S.E.2d 809 (1975). *See* Branch Banking & Trust Co. v. Columbian Peanut Co., 649 F.Supp. 1116, 1121 (E.D.N.C. 1986) (asserting in good faith a claim predicted upon an erroneous interpretation of the law is not an unfair act); Opsahl v. Pinehurst, Inc., 81 N.C. App. 56, 70, 344 S.E.2d 68,77 (1986) (plaintiffs charged with knowledge of normal construction delays so missed completion date is not a violation of the act), *disc. rev. improvidently allowed*, 319 N.C. 222, 353 S.E.2d 400 (1987); Harris v. NCNB Nat. Bank of N.C., 85 N.C. App. 669, 677, 355 S.E.2d 838, 844 (1987) (communication from defendant's attorney to attorney for plaintiff's employer concerning subject matter of the controversy neither unfair nor deceptive); Hageman v. Twin City Chrysler-Plymouth Inc., 681 F.Supp. 303, 309 (M.D.N.C. 1988) (breach of oral modification to written lease not a deceptive trade practice); Hoke v. Young, 89 N.C. App. 569, 570-71, 366 S.E.2d 548, 549 (1988) (allegation of insurer's negligent reliance on hearsay statements gathered by accident investigator failed to state a claim as a matter of law); Colvard v. Frances, 106 N.C. App. 277, 283-84, 416 S.E.2d 579, 582 (summary judgment for defendant proper since no unfair acts or practices occurred in solicitation and receipt of bids for auction), *rev. denied*, 332 N.C. 146, 419 S.E.2d 570 (1992). *See also* 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); Whitman v. Forbes, 55 N.C. App.

any capricious conclusion which might be drawn by a potentially pro-consumer jury.[66] For this reason, and the fact the appellate courts offer a second check on a trial court's conclusions of law,[67] any fear of an arbitrary application of the Act to questionably violative conduct of learned professionals is arguably unfounded.[68]

D. Advantages Of Bringing Suit Under The Act

There are several advantages of bringing a suit under the Deceptive Trade Practices Act.[69] First, a cause of action under the Act is easier to establish than those available under the common law. Plaintiffs in a fraud case must establish that there was a "(1) [F]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party."[70] Such a prima facie case, then, by definition, requires

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706, 286 S.E.2d 889 (1982); La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986), *cert. denied and appeal dismissed*, 319 N.C. 459, 354 S.E.2d 888 (1987); Medina v. Town & Country Ford, Inc., 85 N.C. App. 650, 355 S.E.2d 831, 1987, *aff'd*, 321 N.C. 591, 364 S.E.2d 140 (1988); Love v. Keith, 95 N.C. App. 549, 838 S.E.2d 674 (1989). Defining unfair acts or deceptive practices, as well as defining "in or affecting commerce", are questions for the court. Chastain v. Wall, 78 N.C. App. 350, 357, 337 S.E.2d 150, 154 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 891 (1986).

66. *See* James McGee Phillips, Jr., Note, *Consumer Protection -Hardy v. Toler: Applying the North Carolina Deceptive Trade Practices Legislation - What Role For the Jury?*, 54 N.C.L. REV. 963 (1975-76). On the other hand, the act might have more impact if the jury played a more significant role. *Id.* at 975.

67. *See* Ellis v. Northern Star Co., 326 N.C. 219, 388 S.E.2d 127, *reh'g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). In *Ellis* the court opined that "it does not invade the province of the jury for this Court to determine as a matter of law on appeal that acts expressly found by the jury to have occurred and to have proximately caused damages are unfair or deceptive acts in or affecting commerce under N.C.G.S. § 75-1.1." *Id.* at 226, 388 S.E.2d at 131.

68. *See infra* notes 213-217 and accompanying text.

69. A party may assert other claims in addition to a violation of the Deceptive Trade Practices Act, such as claims for fraud or breach of contract. However, double or triple recovery is impermissible. Marshall v. Miller, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103, *aff'd as modified*, 302 N.C. 539, 276 S.E.2d 397 (1981); Wilder v. Hodges, 80 N.C. App. 333, 334, 342 S.E.2d 57, 58 (1986); Canady v. Mann, 107 N.C. App. 252, 259, 419 S.E.2d 597, 602 (1992); *disc. rev. improvidently allowed*, 333 N.C. 569, 429 S.E.2d 348 (1993).

70. Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). An allegation of fraud also requires proof of reasonable reliance by the defrauded party on the deceptive statement or omission. *See, e.g.*, Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 253, 266 S.E.2d 610, 615 (1980); Northwestern Bank v.

proof of scienter,[71] whereas proof of the statutory violation merely requires proof of either a representation which tends to deceive or some act of unfairness.[72] For example, statements of an intent to perform an act when no intention exists may furnish the basis for a cause of action for unfair and deceptive trade practices or for fraud; however, to succeed in fraud, the plaintiff must establish that the promissory representation was made with an intent to deceive,[73] not just a capacity to deceive. Likewise, establishing a violation of the Act often is easier than establishing an action in negligence, particularly since the common law defense of contributory negligence is not available under the Act.[74] Negligence is a fault theory of recovery; therefore the fault of the plaintiff in causing damages should be examined along with the conduct of the defendant. In contrast, under the Act, "[w]hat is relevant is the effect of the actor's conduct on the consuming public,"[75] not fault or the

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Roseman, 81 N.C. App. 228, 231-32, 344 S.E.2d 120, 123, *aff'd per curiam*, 319 N.C. 394, 354 S.E.2d 238 (1987); Leake v. Sunbelt Ltd. of Raleigh, 93 N.C. App. 199, 204, 377 S.E.2d 285, 288, *disc. rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989). *See generally* Byrd, *supra* note 12, at 325-351.

71. The knowledge and intent elements together comprise scienter. Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 568, 374 S.E.2d 385, 391, *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989); Forbes v. The Par Ten Group, Inc., 99 N.C. App. 587, 594, 394 S.E.2d 643, 647 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991). While culpable ignorance alone used to satisfy the scienter requirement, the *Myers & Chapman* case suggests that intent to deceive must be established along with any proof that the misrepresentation was made with knowledge of falsity or through culpable ignorance. *See* James, *supra* note 25, at 1231-32.

72. *See supra* notes 43-62 and accompanying text.

73. Smith v. Central Soya of Athens, Inc., 604 F.Supp. 518, 530 (E.D.N.C. 1985); Mapp v. Toyota World, Inc., 81 N.C. App. 421, 424-25, 344 S.E.2d 297, 300, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986); Leake v. Sunbelt Ltd. of Raleigh, 93 N.C. App. 199, 204-05, 377 S.E.2d 285, 288-89, *disc. rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989).

74. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 95-6, 331 S.E.2d 677, 680-81 (1985). *Accord* Concrete Service Corp. v. Investors Group, Inc., 79 N.C. App. 678, 685, 340 S.E.2d 755, 760, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986); Robertson v. Boyd, 88 N.C. App. 437, 443, 363 S.E.2d 672, 676 (1988). *Contra* Libby Hill Seafood Restaurants, Inc. v. Owens, 62 N.C. App 695, 303 S.E.2d 565, *disc. rev. denied*, 309 N.C. 321, 307 S.E.2d 164 (1983). In *Winston Realty Company* the court noted that any statement in *Libby Hill* with respect to contributory negligence being a defense to a statutory unfair or deceptive trade practice claim was *obiter dictum* and expressly disavowed. *Winston Realty Co.*, 314 N.C. at 94, 331 S.E.2d at 680 (1985).

75. Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). *See also*

level of the plaintiff's sophistication.[76]

The amount of monies which can be recovered under the Act also make it an attractive cause of action. The North Carolina Act provides that

> [I]f any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.[77]

Thus the Act, as interpreted, directs that damages are to be trebled automatically once a violation is established.[78] In contrast, punitive damages for fraud or negligence are to be awarded only when the wrong is done willfully or there are other extenuating circumstances evidencing a reckless disregard for the plaintiff's rights.[79] No showing of willfulness or bad faith is necessary for an

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supra notes 58-60 and accompanying text. One commentator has argued that it is the lack of such defenses which make the application of deceptive trade practice legislation to professionals problematic and unattractive. Robert B. Hale, Comment, *Auditor Liability Under the DTPA: Can It Get Any Worse For Accountants?* 44 BAYLOR L. REV. 313 (1992).

76. Some federal courts, however, still seem to consider a type of sophisticated plaintiff defense, even though any such distinction in *Libby Hill* was disavowed in *Winston Realty*. *See, e.g.*, Smith v. Central Soya of Athens, Inc., 604 F. Supp. 518, 531 (E.D.N.C. 1985) (plaintiff was an experienced businessman); Hageman v. Twin City Chrysler-Plymouth Inc., 681 F. Supp. 303, 307 (M.D.N.C. 1988) (plaintiff was an intelligent, experienced businesswoman); U.S. Dev. Corp. v. Peoples Fed. Sav. & Loan, 873 F.2d 731, 735 (4th Cir. 1989) (sophisticated real estate developer could not possibly have been deceived). On the other hand, perhaps the federal courts are using the plaintiff's level of sophistication to determine whether or not a representation had the capacity to deceive or to be unfair to that plaintiff, as well as to ascertain whether or not there was actual reliance.

77. N.C. GEN. STAT. § 75-16 (1988).

78. Marshall v. Miller, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981); Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 715 (4th Cir. 1983), *cert. denied*, 464 U.S. 848 (1983); Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 61, 338 S.E.2d 918, 924, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986).

79. *See generally* Swinton v. Savoy Realty Co., 236 N.C. 723, 73 S.E.2d 785 (1953); Davis v. North Carolina State Hwy. Comm., 271 N.C. 405, 156 S.E.2d 685 (1967); Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975) (outlining federal courts' suggestion that aggravating circumstances must be present before a violation of the Deceptive Trade Practices Act is found because the treble damages

award of treble damages,[80] since the Act was designed to encourage private enforcement and to make it economically feasible to bring a cause of action, even when the potential damages recoverable may be limited.[81] If two causes of action are established, one under the Act, and one under the common law wherein an award of punitive damages would be appropriate, the successful plaintiff must elect to recover either punitive damages under the common law, or treble damages under the Act.[82]

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provision is punitive in nature). *But see supra* notes 32-34 and accompanying text).

80. Only a few states allow automatic treble damages. COLO. REV. STAT. ANN. § 6-1-113 (West 1989); DEL. CODE ANN. tit. 6, § 2533(c) (1975); HAW. REV. STAT. § 480-13(a)(1) (1985 & Supp. 1987); NEV. REV. STAT. § 598A.210 (1991); N.J. STAT. ANN. § 56:8-19 (West 1989); TEX. (BUS. & COM.) CODE ANN § 17.50(b)(1) (West 1987 & Supp. 1993) (only first $1000.00 of actual damages automatically trebled). Other states require that the statute be knowingly and/or willfully violated before damages are trebled. ALASKA STAT. § 45.50.531 (1986 & Supp. 1992); LA. REV. STAT. ANN. § 51.1409 (West 1987); N.H. REV. STAT. ANN. § 358-A:10 (1984 & SUPP. 1992); N.Y. GEN. BUS. LAW § 349(h) (McKinney 1988 & Supp. 1992); S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1985); TENN. CODE ANN. § 47-18-109(a)(3) & (4) (1988 & Supp. 1992). Still other states allow trial courts to treble damages in the judge's discretion. ALA. CODE § 8-19-10 (1975); MONT. CODE ANN. § 30-14-133 (1991); PA. CONS. STAT. ANN. tit. 73, § 201-9.2(a) (Supp. 1992); WASH. REV. CODE ANN. § 19.86.090 (West 1989). Some commentators have noted that it might be more appropriate for North Carolina to implement discretionary treble damages or allow a recovery of treble damages only when intent or bad faith is present. *See* Paul M. Saraceni, Note, *Ellis v. Northern Star Co.: Libel in a Business Setting Subject to Mandatory Treble Damages Under North Carolina General Statutes Sections 75-1.1 and 75-16*, 69 N.C.L.REV. 1739, 1754 (1991); Stout, *supra* note 59, at 146-49. Mandatory treble damages coupled with liability under the act for only negligent acts or practices could complicate the feasibility of applying it to professional activities.

81. Marshall v. Miller, 302 N.C. 539, 549, 276 S.E.2d 397, 403-04 (1981). Furthermore, given this purpose, any credits for amounts received from codefendants should be deducted *after* the full amount of actual damages is trebled. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 416-17, 363 S.E.2d 643, 653, *writ of supersedeas and temporary stay denied*, 321 N.C. 745, 366 S.E.2d 871, *disc. rev. denied*, 322 N.C. 113, 367 S.E. 2d 917 (1988).

82. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 62-63, 338 S.E.2d 918, 925, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986); Mapp v. Toyota World, Inc., 81 N.C. App. 421, 426, 344 S.E.2d 297, 301, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986); Ellis v. Northern Star Co., 326 N.C. 219, 227, 388 S.E.2d 127, 132, *reh'g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). *See also* Hardy v. Toler, 288 N.C. 303, 311-12, 218 S.E.2d 342, 348 (1975) (Huskings, J., concurring). However, one appellate court has held that an election of punitive damages does not preclude an award of attorneys fees under the Deceptive Trade Practices Act. United Laboratories, Inc. v. Kuykendall, 102 N.C. App. 484, 493,

Another incentive for bringing suit under the Act is that it provides for the recovery of attorney fees,[83] at the discretion of the trial judge, providing the violation is willful.[84] Arguably mitigating the mandatory treble damages provision, the Act further provides that attorney fees may be assessed against the party instituting the action as well, if the presiding judge determines that the party knew or should have known that the action was frivolous and malicious.[85] A final rationale for bringing suit under the Act lies in its

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403 S.E.2d 104, 110, *disc. rev. allowed as to attorneys fees*, 409 S.E. 2d 610, 330 N.C. 121 (1991).

83. N.C. GEN. STAT. § 75-16.1(1) (1988 & Supp. 1992). Attorneys fees are a significant incentive, and to date have been generous. Reeves, *supra* note 10, at 4. This proposition holds true for other state acts which allow for the recovery of attorneys fees as well. *See, e.g.*, Nancy Friedman Atlas, Scott J. Atlas & Raymond T. Nimmer, *DTPA in the Courts: Two Empirical Studies and a Proposal for Change*, 21 ST. MARY'S L.J. 609, 655 (1990).

84. Concrete Service Corp. v. Investors Group, Inc., 79 N.C. App. 678, 687-88, 340 S.E.2d 755, 761-62, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986); Love v. Keith 95 N.C.App. 549, 556, 383 S.E.2d 674, 678 (1989); Cotton v. Stanley, 94 N.C. App. 367, 369-70, 380 S.E.2d 419, 422 (1989). Fees may be recoverable for post-trial motions and appeals as well. United Laboratories Inc. v. Kuykendall, 102 N.C. App. 484, 495, 403 S.E.2d 104, 111, *disc. rev. allowed as to attorneys fees*, 409 S.E.2d 610, 330 N.C 123 (1991). *See also* Aycock, *supra* note 16, at 259-60. Other states as well allow attorneys fees and/or costs to be granted in the trial court's discretion or when the statute is knowingly and/or willfully violated. *See, e.g.*, ALASKA STAT. § 45.50.531(a) (1986 & Supp. 1992); COLO. REV. STAT. ANN. § 6-1-113(2)(b) (West 1989); CONN. GEN. STAT. ANN. § 42-110(g)(d) (West 1992); DEL. CODE ANN. tit. 6, § 2533(b) (1975); GA. CODE ANN. § 106-1210(d) (Harrison 1992); HAW. REV. STAT. §§ 481A-4(a),408-13(a) (1985 & Supp. 1987); ILL. ANN. STAT. ch. 121-½ § 270a(c) (Smith-Hurd 1989 & Supp. 1992); IND. CODE ANN. § 24-5-0.5-4(a) (Burns 1991); KAN. STAT. ANN. §50-634(e) (1983 & Supp. 1992); KY. REV. STAT. ANN. § 367.220(3) (Michie/Bobbs-Merrill 1987); MD. CODE ANN. (COM. LAW) § 13-408 (1990); MINN. STAT. ANN. §§ 8-31, 325D.45 (West 1981); MO. ANN. STAT. § 407.025 (Vernon 1990); MONT. CODE ANN. § 30-14-133(3) (1991); N.Y. GEN. BUS. LAW §349(h) (McKinney 1988 & Supp. 1992); OHIO REV. CODE ANN. § 646.638(3) (1988); PA. CONS. STAT. ANN. tit. 73, §201-9.2(a) (Supp. 1992); TENN. CODE ANN. § 47-18-109(4)(e) (1) & (2) (1988 & Supp. 1992); VA. CODE ANN. § 59.1-204(B) (Michie 1992). *See generally* Debra E. Wax., Annotation, *Award of Attorney's Fees in Actions Under State Deceptive Trade Practices and Consumer Protection Acts*, 35 A.L.R. 4th 12 (1985).

85. N.C. GEN. STAT. § 75-16.1(2) (1988 & Supp. 1992). *See also* Marshall v. Miller, 302 N.C. 539, 550, 276 S.E.2d 397, 404 (1981) (potential for innocent defendant's award of attorneys fees is an important counterweight designed to inhibit the bringing of spurious lawsuits which the liberal damages provisions might otherwise encourage).

four year statute of limitations,[86] which is more generous than those of other causes of action.[87]

THE LEARNED PROFESSION EXEMPTION

A. *The Express Exemption Of The North Carolina Act*

The North Carolina Deceptive Trade Practices Act embraces a wide variety of activities which affect commerce,[88] but expressly excludes from the definition of commerce the professional services rendered by a member of a learned profession.[89] This exemption did not appear in the Act as originally enacted[90] but was added when the Act was amended in 1977. There is no legislative history explaining the change, which emerged from committee, although the exemption most likely was enacted to preclude the Act's application to professional malpractice suits.[91] A party claiming to come within the exemption bears that burden of proof, once a prima facie statutory violation otherwise has been established.[92]

There are only three states which by statute expressly exempt some services of professionals from their deceptive trade practices acts. However, North Carolina is the only state to use this precise

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86. N.C. GEN. STAT.§ 75-16.2 (1988 & Supp. 1992). The statute of limitations commences from the date the cause of action accrues, defined as when the alleged violation occurs. U.S. v. Ward, 618 F. Supp. 884, 902-03 (E.D.N.C. 1985).

87. *See, e.g.*, N.C. GEN. STAT. § 1-52(9) (1983) (three year statute for fraud); N.C. GEN. STAT. § 1-15(c) (1983) (not less than three years statute for professional malpractice). *See generally* Snipes v. Jackson, 69 N.C. App. 64, 70, 316 S.E.2d 657, 660, *disc. rev. denied*, 312 N.C. 85, 321 S.E.2d 899 (1984); Marshburn v. Associated Indemnity Corp., 84 N.C. App. 365, 374-75, 353 S.E.2d 123, 128-29, *disc. rev. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987); Nationwide Nut. Ins. Co. v. Winslow, 95 N.C. App. 413, 414-416, 382 S.E.2d 872, 872-73(1989).

88. *See supra* notes 12-27 and accompanying text.

89. N.C. GEN. STAT. § 75-1.1(b) (1988 & Supp. 1992).

90. Law of June 27, 1977, ch. 747, § 1-2, 1977 N.C. Sess. Laws, 1st Sess.

91. For a discussion of the 1977 legislation and the added exemption see Susan Wright Mason, Comment, *Trade Regulation - The North Carolina Consumer Protection Act of 1977*, 56 N.C.L. REV. 547, 552-53 (1978). *See also* 47 Op. N.C. Att'y Gen. 118 (1977).

92. N.C. GEN. STAT.§ 75-1.1(d) (1988 & Supp. 1992). *See also* State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 314, 233 S.E.2d 895, 897 (1977); Olivetti Corp. v. Ames Business Sys., Inc., 81 N.C. App. 1,. 22, 344 S.E.2d 82, 94 (1986), *aff'd in part and rev'd in part on other grounds*, 319 N.C. 534, 356 S.E.2d 578 (1987); Bhatti v. Buckland, 328 N.C. 240, 243-44, 400 S.E.2d 440, 442 (1991), *rev'g* 99 N.C. App. 750, 394 S.E.2d 192 (1990) (homeowners exemption). The defendant would bear that burden whether or not an implied or express exemption was claimed.

language in carving an exemption for professional activities from the statutory definition of commerce. Ohio's act prohibits unfair or deceptive acts or practices in connection with a consumer transaction,[93] excluding from the definition of consumer transaction those occurring between certified public accountants or public accountants, attorneys, physicians, or dentists and their clients or patients, or those between veterinarians and their patients that pertain to medical treatment but not ancillary services.[94] Maryland's statute expressly exempts the professional services of a certified public accountant, architect, clergyman, professional engineer, lawyer, veterinarian, insurance company authorized to do business in the state, insurance agent or broker licensed by the chiropractor, optometrist, physical therapist, podiatrist, real estate broker, associate real estate broker, or real estate salesperson, or medical or dental practitioner.[95] In contrast to the North Carolina Act, these statutes exempt specifically enumerated professional relationships or services performed by professional practitioners. While courts in other jurisdictions will impliedly exempt certain activities of members of the "learned professions,"[96] North Carolina is the only state to use this specific language in the legislation itself.[97] What is the origin of this term and why are these members of society to be treated differently?

B. *History Of The Learned Profession Distinction*

Learned professions are those "characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place, and in a profession like that of medicine by intimate and delicate personal ministration."[98] The classic learned professions were the-

93. OHIO REV. CODE ANN. §1345.02(A) (Anderson 1979 & Supp. 1992).

94. OHIO REV. CODE ANN. § 1345.01(A) (Anderson 1979 & Supp. 1992). *See also* Patton v. Diemer, 35 Ohio St. 3d 68, 518 N.E.2d 941 (1988) (noting distinction between definition of consumer transaction under the deceptive trade practices act and the statute precluding use of a warrant of attorney to confess judgment).

95. MD. COM. LAW CODE ANN. § 12-104 (1990).

96. *See infra* notes 114-139 and accompanying text.

97. Courts probably adhere to the "learned profession" terminology since determining whether or not a professional is exempt will occur slowly, on a case by case basis through the process of judicial inclusion. Legislatures, on the other hand, can determine which professions should be exempt with one sweep.

98. Massachusetts v. Brown, 20 N.E.2d 478, 481 (Mass. 1939) (quoting

ology, law, and medicine,[99] although today the definition has been extended to other occupations which require special knowledge as opposed to special skills.[100] Historically, these professions were characterized by a spirit of public service which served the other characteristics of the profession, organization and the pursuit of a learned act.[101] Dean Roscoe Pound described this spirit of public service as motivating professionals to act even with no expectation of reward, asserting that, while gaining a livelihood was involved in all callings, it was incidental to a professional calling.[102] Certainly such a dedication is commendable, but today it is probably more commendable than accurate.[103]

The significance of the learned profession distinction has its genesis in antitrust law.[104] The codes of conduct of certain professions seemed to sanction concerted activities, which otherwise might constitute a violation of the Sherman Antitrust Act's [105] prohibition against combinations in restraint of trade or commerce. However, in an early case, *Federal Trade Commission v. Raladam Company*,[106] the Supreme Court noted that a practicing professional "follows a profession and not a trade."[107] Subsequently,

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McMurdo v. Getter, 10 N.E.2d 139, 142 (Mass. 1937)).

99. State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 6 (Ariz. 1961); BLACK'S LAW DICTIONARY 1210 (6th ed. 1990).

100. Aulen v. Triumph Explosive, 58. F.Supp. 4, 8 (D.C. Md. 1944); *See also* Maryland Casualty Co. v. Crazy Water Co., 160 S.W.2d 102 (Tex. Ct. App. 1942); Board of Supervisor of Amherst County v. Boaz, 10 S.E.2d 498 (Va. 1940); Reich v. City of Reading, 284 A.2d 315 (Pa. 1971). However, which occupations have attained this distinction is unclear. *See infra* notes 157-200 and accompanying text.

101. *Arizona Land Title & Trust Co.*, 366 P.2d at 6 (quoting ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 6, 10 (1953)).

102. *Id.*

103. As U.S. Circuit Judge Craven observed, "[A]lthough the practice of law is a learned profession, it is pursued for the purpose (among others) of earning a living." Goldfarb v. Virginia State Bar, 497 F.2d 1, 24 (4th Cir. 1974) (Craven, J., concurring and dissenting), *rev'd*, 421 U.S. 773 (1975).

104. For a discussion of the history of the exemption in antitrust laws see Rousseau v. Eshleman, 519 A.2d 243, 246-48 (N.H. 1986) (Johnson, J., and Batchelders, J., dissenting). *See also* Michael J. Kaplan, Annotation, *"Learned Profession" Exemption in Federal Antitrust Laws* (15 U.S.C. §§ 1 *et seq.*), 39 A.L.R. FED. 774 (1978).

105. 15 U.S.C. §§ 1-78 (1988). This antitrust prohibition is also codified in North Carolina's state law. N. C. GEN. STAT. § 75.1 (1988 & Supp. 1992).

106. 283 U.S. 643 (1931) (construing the Federal Trade Commission Act).

107. *Id.* at 653.

however, the Court held that the sale of personal services, rather than commodities, did not except the transaction from the definition of trade.[108]

Ultimately, the Court recognized that some concerted activities of professionals can come within the purview of federal antitrust laws. In *Goldfarb v. Virginia State Bar Association*[109] the Court held that the activities of members of the learned professions were not *per se* exempt from the Sherman Act.[110] In *Goldfarb*, the state bar association enforced a minimum fee schedule fixed by county bar associations through its ethical opinions, which suggested that a deviation from the schedule might result in disciplinary action. The Court held that such activity violated the act and noted that "[I]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce."[111] Later, in *National Society of Professional Engineers v. United States*,[112] the Court held that the professional canons of an engineering society, which prohibited competitive bidding, violated the Sherman Act. While the Court rejected the Society's argument that the ban was necessary to prevent engineers from submitting deceptively low bids,[113] the Court reiterated *Goldfarb*'s recognition of the public service aspect of a professional's practice, a characteristic which precluded viewing that practice as being interchangeable with other business activities with respect to all antitrust concepts.[114]

In diminishing some of the significance of the learned profession distinction, the Supreme Court struck down regulations promulgated by local regulatory boards, boards which were in charge of promoting ethical standards, as being injurious to the public, and in violation of federal policy as established by Congress. Nevertheless, whether or not state regulatory boards pre-

108. United States v. National Association of Real Estate Boards, 339 U.S. 485, 490 (1950) (members of Washington Real Estate Board violated the Sherman Act), *modifying in part and rev'g in part*, 84 F.Supp. 802 (1949).

109. Goldfarb v. Virginia State Bar Assoc., 421 U.S. 773, *reh'g denied*, 423 U.S. 886 (1975).

110. *Id. See also* Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1981) (physician's price fixing arrangement violated Sherman Act).

111. Goldfarb v. Virginia State Bar Assoc., 421 U.S. 773 (1975).

112. 435 U.S. 679 (1978), *aff'g* 389 F.2d 978 (D.C. Cir. 1977).

113. *Id.* at 696.

114. *Id.* at 686-87.

empt state deceptive trade practice legislation as applied to the learned professions, as well as whether or not a "noncommercial activities" exemption should be recognized for the learned professions, remains an issue in state deceptive trade practices jurisprudence.

C. *The Learned Profession Distinction In Other States*

In interpreting the state deceptive trade practice legislation of other states, some courts preserve the learned profession distinction by exempting such professions based upon the existence of self-regulatory boards.[115] While such acts provide no express exemption for learned professions, many do expressly exempt conduct otherwise permitted by state or federal law[116] or activities authorized, required, or permitted by state or federal law.[117] The New Hampshire Deceptive Trade Practices Act exempts "trade or commerce otherwise permitted under laws administered by any regulatory board or offices acting under statutory authority of this state of the United States."[118] The New Hampshire Supreme Court, in *Rousseau v. Eshleman*,[119] fearing practical problems of shared responsibility between regulation by the state bar associa-

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115. In *Goldfarb*, the Supreme Court stated that "in holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." Goldfarb v. Virginia State Bar Assoc., 421 U.S. 773, 793 (1975).

116. *See, e.g.*, CONN. GEN. STAT. ANN. § 42-110c(a) (West 1992); IDAHO CODE § 41-10 (1977 & Supp. 1992); ME. REV. STAT. ANN. tit. 5, § 208(1) (West 1989 & Supp. 1992); MASS. GEN. LAWS ANN. ch. 93A, § 3 (West 1984); MONT. CODE ANN. § 30-14-105 (1991); N.H. REV. STAT. ANN. § 358-A:3 (1984); N.M. STAT. ANN. § 57-12-7 (Michie 1987); R.I. GEN. LAWS § 6-13.1-4 (1992); S.C. CODE ANN. § 39-5-40 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 37-24-10 (1986).

117. *See e.g.*, GA. CODE ANN. § 10-1-396(1) (Harrison 1992); ILL. ANN. STAT. ch. 121 ½, § 270b (Smith-Hurd Supp. 1992); IND. CODE ANN. § 24-5-0.5-6 (Burns 1991); KY. REV. STAT. ANN. § 367.176 (Michie/Bobbs-Merriel 1987); MICH. COMP. LAWS ANN. § 445.904 (West 1989); OHIO REV. CODE ANN. § 1345.12 (Anderson 1979 & Supp. 1992); TENN. CODE ANN. § 47-18-111 (1988); UTAH CODE ANN. § 13-11-22 (1992); VA. CODE ANN. §59.1-199 (Michie 1992); WYO. STAT. § 40-12-110 (1990). *See generally* Donald M. Zupanec, Annotation, *Scope and Exemptions of State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R. 3d 399 (1979 & Supp. 1990).

118. N. H. REV. STAT. ANN. § 358-A:3 (1984 & Supp. 1992).

119. 519 A.2d 243 (N.H. 1986), *reconsideration denied*, 529 A.2d 862 (N.H. 1987). In *Roussèau* the plaintiff claimed that the attorney misrepresented that the mortgage on certain property would be assumable by the buyer once the property was purchased. *Id.* at 863-64.

tion and enforcement under the consumer protection act, held that attorneys were exempt.[120]

In contrast, in *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*,[121] the Connecticut Supreme Court held that the provision of legal services constituted conduct in trade or commerce under the deceptive trade practices act.[122] The Connecticut court further held that, although attorney conduct was subject to regulation by the judiciary and the bar association, there was no reason why the disciplinary system and the deceptive trade practices legislation could not co-exist.[123] The court reserved, however, the question of whether or not the Act applied to every aspect of the practice of law.[124] Connecticut's statutory exemption[125] is identical to that of New Hampshire, although the question of whether or not attorneys were exempt under that provision was not presented.[126]

Often state courts faced with such an issue will vacillate between deciding whether or not regulatory boards preempt the application of deceptive trade practice legislation, and whether or not, because of such regulation, the legislature intended to exempt the noncommercial activities of learned professions from the definition of commerce.[127] Some state courts seem willing to apply the legislation to the commercial activities of the learned professions, but not to the noncommercial or professional activities.[128] For ex-

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120. *Id.* at 245. *See also* Short v. Demopolis, 691 P.2d 163, 177 (Wash. 1984) (Rosellini, J., dissenting) (application of consumer protection act to the practice of law is an unconstitutional infringement upon the exclusive jurisdiction of courts to regulate the practice).

121. 461 A.2d 938 (Conn. 1983).

122. *Heslin*, 461 A.2d at 941.

123. *Id.* at 946.

124. *Id.* at 943.

125. CONN. GEN. STAT. ANN. § 42-110c(A)(1) (WEST 1992).

126. *Heslin*, 461 A.2d at 941 (1983).

127. *See, e.g.*, Rousseau v. Eshleman, 519 A.2d 243 (N.H. 1986) (Johnson, J. and Batchelders, J., dissenting). The dissenting justices in *Rousseau* argued that the act's exemption provision should not prevent the act's application to all activities of attorneys, but that since the challenges were directed at competence and care in the rendition of legal services such a claim involved the actual practice of law, and as such, was beyond the reach of the act. *Rousseau*, 519 A.2d at 250-51.

128. The commercial/noncommercial delineation was first drawn in Marjorie Webster Junior College, Inc. v. Middle States Assoc. of Colleges and Secondary School, Inc., 423 F.2d 650, 654 (D.C. Cir. 1970); *cert. denied*, 400 U.S. 695 (1970) (proscriptions of the Sherman Act were tailored for the business world and not for the noncommercial aspects of the learned professions). Apparently the legisla-

ample, the Washington Supreme Court, in *Short v. Demopolis*,[129] held that the Washington act's prohibition against unfair or deceptive acts or practices in the conduct of any trade or commerce[130] included within its reach the entrepreneurial aspects of the practice of law, but not the actual practice of the profession.[131] The court suggested that while the business aspects of a legal practice, such as how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients, are properly subject to the act,[132] claims directed to the competence of and strategy employed by lawyers, amount to allegations of negligence or malpractice and are exempt.[133] Other appellate decisions have failed to illuminate this commercial/noncommercial distinction in a significant way, except to suggest that professionals who act outside their traditional role[134] or use their position to promote the entrepreneurial aspects of a practice[135] may cross into nonexempt territory.

Illinois courts, like Washington courts, also have held that their state act does not apply to the actual practice of law.[136] How-

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ture of North Carolina intended to codify this distinction by only exempting *professional services* rendered by a member of the learned professions. N.C. GEN. STAT. § 75-1.1(b) (1988 & Supp. 1992).

129. 691 P.2d 163 (Wash. 1984) (en banc).

130. WASH. REV. CODE ANN. § 19.86.020 (West 1989).

131. Short v. Demopolis, 691 P.2d 163, 168 (Wash. 1984). In *Short*, a former client of a law firm alleged that the firm had violated the Deceptive Trade Practices Act in that, while one attorney represented to the client that he would be handling the case personally, he delegated the legal matter to a younger associate without the client's consent. *See also* Jaramillo v. Morris, 750 P.2d 1301 (Wash. Ct. App. 1988) (alleged claim against hospital for negligence in not determining podiatrist's qualification to perform surgery does not involve the entrepreneurial aspects of the practice of medicine and therefore is exempt). Ikuno v. Yip, 912 F.2d 306 (9th Cir. 1990) (attorney's alleged failure to advise client of how lawfully to trade commodities states a claim in tort and not under the consumer protection act). *See generally* Timothy L. McMahan, Note, *Tolling The Death Knell On The "Learned Profession" Immunity Under The Consumer Protection Act:* Short v. Demopolis, 21 WILLAMETTE L. REV. 899 (1985).

132. Short v. Demopolis, 691 P.2d 163, 168 (Wash. 1984).

133. *Id.*

134. Gould v. Mut. Life Ins. Co., 683 P.2d 207 (Wash. Ct. App. 1984) (attorneys acting as de facto corporate officers in representation of client could be liable under the act).

135. Quimby v. Fine, 724 P.2d 403 (Wash. Ct. App. 1986) (cause of action stated under the act if physician's failure to adequately inform patient of risks or alternative was influenced by entrepreneurial motives).

136. *See, e.g.*, Frahm v. Urkovich, 447 N.E.2d 1007 (Ill. App. Ct. 1983); Lurz

ever, while Washington courts apparently are willing to allow a variety of professionals to take advantage of the distinction,[137] Illinois courts seem to limit the implied exemption for the noncommercial activities of members of the learned professions to those professions which are subject to stringent policing by regulatory boards.[138] Several decisions by other state courts, while not elaborating on the delineation *per se*, have suggested that the rendition of some professional services may be impliedly exempt from the otherwise applicable state deceptive trade practices act.[139]

On the other hand, some state courts are not as conservative with respect to the application of their state act. Texas courts seem more than willing to apply their state deceptive trade practices act[140] to a variety of professional activities.[141] In *DeBakey v.*

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v. Panek, 527 N.E.2d 663 (Ill. App. Ct. 1988); Pucci v. Santi, 711 F. Supp. 916 (N.D. Ill. 1989).

137. *See* Haberman v. Public Power Supply Sys., 744 P.2d 1032 (Wash. 1987) (accountants, investment advisors, and engineers).

138. *See* Lyne v. Arthur Anderson & Co., 772 F. Supp. 1064 (N.D. Ill. 1991). The federal district court in *Lyne* held that the act applied to audit services rendered by an accounting firm in conjunction with a securities offering. *Id.* at 1068. In distinguishing the line of cases which exempted the actual practice of law from the definition of commerce, the court emphasized that the accounting profession was not subject to the same type of policing as attorneys. *Id. See also* Guess v. Brophy, 517 N.E.2d 693 (Ill. App. Ct. 1987) (legal profession is subject to a policing more stringent than that to which purveyors of most commercial services are subject), *cert. denied*, 526 N.E.2d 830 (1988).

139. *See, e.g.*, Keyser v. St. Mary's Hosp., Inc., 662 F. Supp. 191 (D. Idaho 1987) (professional malpractice statute which requires proof of negligence bars application of consumer protection statute to physician); Gatten v. Merzi, 579 A.2d 974 (Pa. Super. Ct. 1990) (deceptive trade practices act intended to prohibit unlawful practices associated with business enterprises but not to physicians rendering medical services). Other courts in dicta have suggested such an implied exemption. *See, e.g.*, Robertson v. White, 633 F. Supp. 954 (W.D. Ark. 1986) (alternate holding that statute not designed to regulate the lawyer-client or accountant-client relationship); Neveroski v. Blair, 358 A.2d 473 (N.J. Super Ct. App. Div. 1976) (professionals such as lawyers, physicians, dentists, accountants and engineers engaged in activities beyond the pale of the act). *See generally* Sharon Bossmeyer, Note, *Reexamining New Jersey's Consumer Fraud Act: Loopholes for Professionals?* 7 SETON HALL LEGIS. J. 45 (1983).

140. TEX. BUS. & COM. CODE ANN. §§ 17.41 - 17.63 (West 1987 & Supp. 1993).

141. *See generally* John Robert Forshey, Comment, *Applicability of the Texas Deceptive Trade Practices Act to Attorneys*, 30 BAYLOR L. REV. 65 (1978); WILLIAM DEAN LEIKAM & LYNDA KAY CORBIN, Woods v. Littleton: *Consumerism Comes of Age*, 18 S. TEX. L. J. 477 (1977); Patricia Swanson, Comment, *The Texas Deceptive Trade Practices - Consumer Protection Act: Application to Professional Malpractice*, 8 ST. MARY'S L. J. 763, (1977); Donald F. Hawbaker, Com-

Staggs[142] a Texas appellate court held that the act applied to the purchase or acquisition of legal services.[143] In that case the defendant's attorney failed to timely obtain a name change, and in so failing, allegedly took advantage of his client's lack of knowledge to a grossly unfair degree.[144] In evaluating the statute's definitions of services and consumer,[145] the court concluded that an attorney does in fact sell legal services to a client, who as a consumer, purchases them.[146] The court opined that the legislature must have intended legal services to be covered, since only physicians and health care providers were exempted from the Texas act, wherein a claim was based upon negligence.[147] The Texas act has also been applied to other professionals, such as financial brokers,[148] accountants,[149] and architects.[150] While the Texas act provides that a failure to comply with an express or implied warranty can be actionable,[151] it is unsettled whether or not a professional impliedly warrants that professional services will be performed in a good and workmanlike manner.[152] If so, the potential for professional liabil-

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ment, *Specialization: The Resulting Standard of Care and Duty to Consult*, 30 BAYLOR L. REV. 729 (1978); Steven K. Ward, *Legal Malpractice in Texas*, 19 S. TEX. L. J. 587 (1978); Hale, *supra* note 75.

142. 605 S.W.2d 631 (Tex. Civ. App. 1980), *writ refused, no reversible error*, 612 S.W.2d 924 (Tex. 1981).

143. *Id.* at 633.

144. *Id.* at 632.

145. TEX. BUS. & COM. CODE ANN. §17.45 (West 1987 & Supp. 1993).

146. DeBakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Civ. App. 1980).

147. *Id. See also* Lucas v. Nesbitt, 653 S.W.2d 883 (Tex. Civ. App. 1983) (attorney's conduct of billing a client approximately four times the amount to which he had testified under oath was owed could be a violation of the act); Barnard v. Mecom, 650 S.W.2d 123 (Tex. Ct. App. 1983) (attorney's failure to either release trust funds or pursue lawsuit violated the act); Wright v. Lewis, 777 S.W.2d 520 (Tex. Ct. App. 1989) (failure to disclose offer of plea bargain could be a deceptive act if attorney had knowledge of offer); Parker v. Carnahan, 772 S.W.2d 151 (Tex. Ct. App. 1989) (attorney's services covered by the act).

148. E. F. Hutton & Co. v Youngblood, 741 S.W.2d 363 (Tex. 1987), *aff'g in part* 708 S.W.2d 865 (Tex. Ct. App. 1986).

149. Dominquez v. Brackey Enter., Inc., 756 S.W.2d 788 (Tex. Ct. App. 1988).

150. White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture, 798 S.W.2d 805 (Tex. Ct. App. 1990).

151. TEX. BUS. & COM. CODE § 17.50(A)(2) (WEST 1987 & SUPP. 1993).

152. *See, e.g.*, Melody Homes Mfg. Co. v. Barnes, 741 S.W.2d 349 (Tex. 1987) (issue of whether implied warranty extends to professional services of repairman reserved); Archibald v. Act III Arabians, 755 S.W.2d 84 (Tex. 1988) (improper horse training can be breach of implied warranty of good and workmanlike per-

ity under the Texas act will be significant.[153]

Massachusetts courts seem willing to apply their act to professional services as well. Although the supreme judicial court has applied the Massachusetts act only to the commercial activities of professionals,[154] other courts seem willing to apply it to noncommercial activities.[155] Should members of the learned professions be exempt? Should only their noncommercial activities be exempt? While this question has been presented in other states and answered in differing ways by other courts and legislatures, the legislature of North Carolina determined that the professional services of a member of a learned profession should not be included in the definition of commerce under the Deceptive Trade Practices Act.[156] How appropriate is this "bright" line?

NORTH CAROLINA'S EXEMPTION: POLICY ARGUMENTS FOR CHANGE

A. The Difficulty With The Definition

Who are these members of a learned profession? Although originally the term embraced only physicians, attorneys and the clergy, its dictionary meaning today embraces other occupational endeavor characterized by attainments in special knowledge.[157] For example, the Supreme Court has held, "[E]ngineering is an impor-

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formance); Dennis v. Allison, 698 S.W.2d 94 (Tex. 1985) (no need to imply warranty because patient plaintiff had other remedies available). *See generally* Mark L. Kincaid, *Recognizing an Implied Warranty That "Professional" Services Will Be Performed In a Good and Workmanlike Manner*, 21 ST. MARY'S L.J. 685 (1990).

153. *See* Hale, *supra* note 75, at 337-41. Of course, unlike the North Carolina act, under the Texas act only the first $1,000.00 of actual damages are trebled automatically. TEX. BUS. & COM. CODE ANN. § 17.50(a) (West 1987 & Supp. 1993).

154. Doucette v. Kwiat, 467 N.E. 2d 1374 (Mass. 1984) (charging fee to settle government liens when settlement agreement included attorney fees constituted a violation of the act); Guenard v. Burke, 443 N.E. 2d 892 (Mass. 1982) (no damages recoverable unless unfair or deceptive fee arrangement exceeded reasonable value of services rendered); Brown v. Gerstein, 460 N.E.2d 1043 (Mass. App. Ct. 1984) (attorney's liability under Deceptive Trade Practices Act for false representations concerning bank's foreclosure sale of client's property were questions for jury), *appeal denied* 464 N.E.2d 73 (Mass. 1984).

155. *See, e.g.*, Levin v. Berley, 728 F.2d 551 (1st Cir. 1984) (executor stated cause of action under the Deceptive Trade Practices Act for improperly drafted will).

156. N. C. GEN. STAT. § 75-1.1(b) (1988 & Supp. 1992).

157. BLACK'S LAW DICTIONARY 1210 (6th ed. 1990).

tant and learned profession."[158] A North Carolina Attorney general's opinion, in an attempt to illuminate the meaning of this term under the statutory exemption, endorsed the theoretical language in *Goldfarb* which suggested that a distinguishing characteristic was that the goal of professionals was to provide necessary services to the community, and to that end, competition and enhancing profit was not a goal.[159] The opinion also adopted the standard advanced in *Commonwealth v. Brown*,[160] that a learned profession is "characterized by the need of unusual learning, the existence of confidential relations, and adherence to a standard of ethics higher than that in the marketplace."[161] The opinion concluded that the phrase applied to physicians, attorneys, clergy, and *related* professions.[162] In practice, though, how can one determine which occupations are so related? Judges in other courts have noted that determining "who's in" and "who's out" is "a semantic adventure of questionable value."[163] Indeed, how can one determine how much unusual learning must be learned before the profession is "learned"?

Could this line be drawn based upon other criteria? Since regulation is an important characteristic of professional practices,[164] perhaps those occupations which are regulated should be exempted as being sufficiently related to a learned profession. Interpreting the state's deceptive trade practices act, which exempted activities otherwise regulated, the New Hampshire Supreme Court, in *Rousseau v. Eshleman*,[165] remarked in dicta that presumably physicians would be exempt because they were subject to licensing and regulation by a board of registration, and the same would be true of electricians and plumbers.[166] If this is to be the bright line for what

158. National Soc. of Professional Eng'rs v. United States, 435 U.S. 679, 681 (1978).

159. 47 Op. N.C. Att'y Gen. 118, 119 (1977).

160. 20 N.E.2d 478, 481 (Mass. 1939) (quoting McMurdo v. Getter, 10 N.E.2d 139 (Mass. 1937)) (dentistry is a learned profession).

161. 47 Op. N.C. Att'y Gen. 118, 119 (1977).

162. *Id.* at 118 (emphasis added).

163. Short v. Demopolis, 691 P.2d 163, 166-67 (Wash. 1984) (quoting United States v. National Soc'y of Professional Eng'rs, 389 F. Supp. 1193, 1198 (D.D.C. Cir. 1974)). *See also* United States v. National Assoc. of Real Estate Boards, 339 U.S. 484, 496 (1950) (Jackson, J., dissenting); Goldfarb v. Virginia State Bar Assoc., 497 F.2d 1, 24 (4th Cir. 1974) (Craven, J., concurring and dissenting).

164. *See supra* notes 115-27 and accompanying text.

165. 519 A.2d 243 (N.H. 1986).

166. *Id.* at 245. Subsequent federal court decisions have suggested that the

is learned and what is related, then under North Carolina law, realtors, accountants, contractors, barbers, and pawnbrokers, along with attorneys, medical practitioners, and a variety of other practitioners[167] should be exempt. Surely this delineation is inappropriate and too all encompassing.

Perhaps it is the existence of confidential relationships which should be emphasized instead, and the definition should encompass all occupations in which a fiduciary duty is owed to the consumers of the professional services. Certainly, members of the classic learned professions owe fiduciary duties to their clients, patients and parishioners. However, in North Carolina, insurance agents,[168] auctioneers,[169] realtors,[170] and a variety of other profes-

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exclusion was not meant to be interpreted applying to all trade or commerce, especially outside the context of attorneys and similar professionals. Therrien v. Resource Financial Group, Inc., 704 F. Supp. 322, 328 (D.N.H. 1989). *See also* WVG. v. Pacific Ins. Co., 707 F. Supp. 70, 72 (D.N.H. 1986) ("the issue is whether a transaction 'is otherwise permitted', not whether an agency exists to review the transaction").

167. Regulatory schemes exist for a variety of occupations under North Carolina law. *See, e.g.*, N.C. GEN. STAT. §§ 90-2 to 397 (1990 & Supp. 1992) (medicine and allied occupations including dentistry, nursing, osteopathy, midwives, veterinarians, psychologists and podiatrists); N.C. GEN. STAT. §§ 90B-1 to -14 (1991) (social workers); N. C. GEN. STAT. §§ 90C-1 to -19 (1987) (therapeutic recreation personnel); N. C. GEN. STAT. §§ 91A-1 to -14 (1989) (pawnbrokers); N. C. GEN. STAT. §§ 93-1 to -13 (1992) (public accountants); N. C. GEN. STAT. §§ 93D-1 to -16 (1991) (hearing aid dealers and fitters); N. C. GEN. STAT. §§ 89E-1 to -24 (1991) (geologists); N. C. GEN. STAT. §§ 89C-1 to -28 (1989) (engineering and land surveyors); N. C. GEN. STAT. §§ 78C-1 to -81 (1990) (investment advisors); N. C. GEN. STAT. §§ 83A-1 to -17 (1985) (architects); N. C. GEN. STAT. §§ 84-1 to -38 (1985) (attorneys); N.C. GEN. STAT. §§ 85B-1 to -9 (1992) (auctioneers); N. C. GEN. STAT. §§ 86A-1 to -26 (1985) (barbers); N. C. GEN. STAT. §§ 87-1 to -64 (1989) (contractors); N. C. GEN. STAT. §§ 89A-1 to -8 (1991) (landscape architects); N. C. GEN. STAT. §§ 88-1 to -30 (1990) (cosmetic artists); N. C. GEN. STAT. §§ 88A-1 to -23 (1990) (practitioners of electrolysis).

168. *See, e.g.*, R-Anell Homes, Inc. v. Alexander & Alexander, Inc., 62 N.C. App. 653, 659, 303 S.E.2d 573, 577 (1983); Davidson v. Knauff Ins. Agency, 93 N.C. App. 20, 32, 376 S.E.2d 488, 495, *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989); Kron Medical Corp. v. Collier Cobb & Assoc.,Inc., 107 N.C. App. 331, 240-41, 420 S.E.2d 192, 197, *disc. rev. denied*, 333 N.C. 168, 424 S.E.2d 910 (1992).

169. *See, e.g.*, Spence v. Spaulding and Perkins, Ltd., 82 N.C. App. 665, 667, 347 S.E.2d 864, 865, (1986); Colvard v. Francis, 106 N.C. App. 277, 282, 416 S.E.2d 579, 582, *disc. rev. denied*, 332 N.C. 146, 419 S.E.2d 570 (1992).

170. *See, e.g.*, Whitman v. Forbes, 55 N.C. App. 706, 713, 286 S.E.2d 889, 894, (1982); Kim v. Professional Business Brokers Ltd., 74 N.C. App. 48, 51-52, 328 S.E.2d 296, 299 (1985); Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 599, 394 S.E.2d 643, 650 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

sionals owe fiduciary duties to the consumers of their services as well. Are these professionals, then, learned? While it has been stated that a real estate broker and client have a measure of trust analogous to that of an attorney and client,[171] state courts also recognize that a breach of a fiduciary duty, in and of itself, can constitute a violation of the North Carolina Deceptive Trade Practices Act.[172] Therefore, even though involvement in special relationships of trust and confidence is one characteristic of the learned professions, a violation of that special trust, at times, can be a violation of the Act. This inconsistency dims the bright line somewhat. Nevertheless, if the determination eventually is made as to what professions are learned, one further inquiry must still be made.

Assuming that one is a member of a learned profession, what services are professional, and hence, exempt under the Act? The same attorney general's opinion previously discussed[173] also suggested that professional services were those which were not by nature commercial activities.[174] The opinion, by way of example, intimated that deceptive advertising by an attorney would violate the Act, as would a conspiracy among attorneys to fix prices.[175] The opinion concluded that such activities were not part of the actual performance of professional services, but were instead, commercial activities.[176] Apparently, then, the language used in the statutory exemption is an attempt to codify the separation between the commercial and noncommercial activities of a professional practice as developed in other states by their judiciary.[177] Assuming that this distinction is a valid one, is it workable? Even justices who endorse such a distinction admit that defining what is the actual practices of a profession, such as law, is a difficult endeavor.[178] The practice

171. Starling v. Sproles, 66 N.C. App. 653, 656, 311 S.E.2d 688, 690 (1984).

172. *See, e.g.*, Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 406-07, 363 S.E.2d 643, 647, *writ denied, stay denied*, 321 N.C. 745, 366 S.E.2d 871, *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988); Adams v. Moore, 96 N.C. App. 359, 361, 385 S.E.2d 799, 801 (1989), *disc. rev. denied*, 326 N.C. 46, 389 S.E.2d 83 (1990); Wilson v Wilson-Cook Medical, Inc., 720 F. Supp. 533, 542 (M.D.N.C. 1989), *mandamus denied*, 902 F.2d 1567 (4th Cir. 1990), *aff'd on other grounds* 942 F.2d 247 (4th Cir. 1991).

173. *See supra* notes 157-162 and accompanying text.

174. 47 Op. N.C. Att'y Gen. 119 (1977).

175. *Id.* at 120.

176. *Id.*

177. *See supra* notes 127-139 and accompanying text.

178. Rousseau v. Eshleman, 519 A.2d 243, 250 (N.H. 1986) (Johnson, J. and Batchelders, J., dissenting) ("Many courts have declined to formulate a single

of law today differs dramatically from the era in which the learned professions achieved their eminence. Today's complex society defies making any distinction based upon what is a purely legal issue. Many law firms utilize a multidisciplinary approach which involves other "professionals" in addressing economic, scientific, financial, and political questions, as well as those which are legal.[179] Who then among this group is learned, and when does their professional practice become primarily commercial, and hence subject to deceptive trade practice legislation? This same problem of defining what is commercial versus what is professional can arise in other allegedly learned professional practices as well.

Given that the exemption for the professional services of a member of a learned profession was codified over fifteen years ago, judicial opinions should have established parameters for who is learned and what services are professional. In *Cameron v. New Hanover Memorial Hospital*,[180] podiatrists sued a hospital and two staff doctors for allegedly conspiratorial conduct in denying them hospital privileges in violation of North Carolina's Deceptive Trade Practices Act. The cause of action accrued before the 1977 amendment to the Act and the court refused to give the statutory exemption retroactive effect.[181] Nevertheless, in evaluating the *Penney* court's narrow definition of trade and commerce under the earlier version,[182] along with the Uniform Commercial Code's definition of seller, and the *Commonwealth v. Brown* court's definition of learned professions,[183] the appellate court concluded that the Act did not apply to the activities in question.[184] In dicta the court noted that the same result would be reached if the case were decided instead, under the current statutory exemption.[185]

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definition, using only the 'wilderness of single instances' as guides in determining what constitutes the practice of law.").

179. *See generally* James W. Jones, *The Challenge of Change: The Practice of law in the Year 2000*, 41 VAND. L. REV. 683 (1988).

180. 58 N.C. App. 414, 293 S.E.2d 901, *disc. rev. denied and appeal dismissed*, 307 N.C. 127, 297 S.E.2d 399 (1982).

181. *Id.* at 443, 293 S.E.2d at 919.

182. *See supra* notes 16-17 and accompanying text.

183. *See supra* notes 160-161 and accompanying text.

184. *Cameron*, 58 N.C. App. at 444-46, 293 S.E.2d at 919-920.

185. *Id.* at 446, 293 S.E.2d at 920. In a subsequent federal case, Cohn v. Wilkes General Hosp., 767 F. Supp. 111 (W.D.N.C. 1991), a chiropractor brought a similar suit under the Deceptive Trade Practices Act for wrongful denial of medical privileges. Although the claim was dismissed for want of pendent jurisdiction, the court opined in dicta that, based upon *Cameron*, the act would not ap-

Since *Cameron*, there has been only one case which has addressed the extent of the exemption directly. In *Abram v. Charter Medical Corporation of Raleigh*[186] the plaintiff alleged that the actions of the defendant in seeking an extensive review of the plaintiff's application for a certificate of need violated the Act.[187] The defendant in turn argued that the Act exempted services rendered by a member of a learned profession, and that it was exempt as a professional health care provider.[188] The appellate court concluded that since an applicant seeking a certificate of need was required to meet certain criteria, a request by another facility that the application be subject to scrutiny did not give rise to a claim, given that the legislature intended to exclude professional services from the Act.[189] However, it defies reality to suggest, for the purposes of ruling on a motion to dismiss, that challenges to the admission of a potential competitor into the community of health care providers can be motivated solely by professional considerations, and not those of an economic nature.

Other cases have addressed the issue of who and what is exempt from the Act indirectly by not raising the question of whether or not the exemption applies. While realtors owe fiduciary duties to their clients and are regulated and licensed under state law, the Act undoubtedly applies to them.[190] Therefore, realtors

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ply. *Id.* at 114.

186. 100 N.C. App. 718, 398 S.E.2d 331 (1990), *disc. rev. denied*, 328 N.C. 328, 402 S.E.2d 828 (1991).

187. *Id.* at 722, 398 S.E.2d at 333. A "certificate of need" is a prerequisite to obtaining permission from the North Carolina Department of Human Resources to build a health service facility. *Id.*

188. *Id.*

189. *Id.* at 722-23, 398 S.E.2d at 334.

190. *See, e.g.*, Whitman v. Forbes, 55 N.C. App. 706, 286 S.E.2d 889 (1992) (broker's fraudulent purchase of house at inadequate price); Starling v. Sproles, 66 N.C. App. 653, 311 S.E.2d 688 (1984) (brokers violated the act by failing to disclose offer from third party prior to purchasing the property); Powell v. Wold, 88 N.C. App. 61, 362 S.E.2d 796 (1987) (realtor's alleged failure to disclose plan for major thoroughfare extension was sufficient to state cause of action); Robertson v. Boyd, 88 N.C. App. 437, 363 S.E.2d 672 (1988) (cause of action stated based upon broker's alleged concealment of termite infestation); Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 394 S.E.2d 643 (1990) (summary judgment for defendants improper where allegations established misapplication of deposits from sale of property), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991); Johnson v. Beverly-Hanks & Assoc., 328 N.C. 202, 400 S.E.2d 38 (1991) (summary judgment for defendants improper where allegations could establish fraud by realtors), *rev'g in part, aff'g in part and remanding* 97 N.C. App. 335, 388 S.E.2d 584 (1990).

must not be considered members of a learned profession, since typically the conduct which forms the basis of the complaint involves either a deceptive rendition of their services or an unfair abuse of their fiduciary responsibilities.[191]

The issue of whether accountants in North Carolina are considered members of a learned profession is unanswered. In *Jennings v. Lindsey*,[192] the plaintiffs and their accountants embarked upon a joint enterprise which subsequently soured. Plaintiffs sued, alleging inter alia that the accountants had committed unfair and deceptive trade practices in violation of the Act.[193] The issue of whether or not the accountants were exempt was not addressed. The appellate court held only that the claim was improperly dismissed by the trial court since the four year statute of limitations applied to that specific count.[194] Perhaps accountants are members of a learned profession, but the joint venture in *Jennings* exceeded the scope of their professional services.[195]

The fact that attorneys are unquestionably members of a learned profession makes two other cases more difficult to rationalize. In *Concrete Service Corporation v. Investors Group Incorporated*,[196] the defendant attorney was held to have engaged in unfair or deceptive acts.[197] The attorney formed a corporation with his father-in-law and, in the course of business, fraudulently induced suppliers to extend credit to the firm based upon letters written by the attorney on legal stationary, financial statements supplied by the attorney, and an overall appearance created by the attorney suggesting that the enterprise was creditworthy and backed by the security of an attorney's trust account.[198] Even though such practices seem inextricably intertwined with the actual practice of law, the applicability of the exemption was not addressed.

Likewise, in *Investors Title Insurance Company v. Herzig*,[199]

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191. *See supra* note 190.

192. 69 N.C. App. 710, 318 S.E.2d 318 (1984).

193. *Id.*

194. *Id.* at 717, 318 S.E.2d at 322.

195. Even if the activities were considered commercial in nature and exempt, the case itself notes that the business relationship developed because of the professional relationship. When does professional end and commercial begin?

196. 79 N.C. App. 678, 340 S.E.2d 755, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

197. *Id.* at 686-87, 340 S.E.2d at 761.

198. *Id.*

199. 101 N.C. App. 127, 398 S.E.2d 659 (1990), *rev'd on other grounds*, 330 N.C. 681, 413 S.E.2d 268 (1992). The liability of the attorney's firm under agency

an attorney was found to have engaged in unfair and deceptive acts arising from fraudulently certifying a title insurance application for the purposes of obtaining a personal loan. Although the transaction in *Herzig* was quite complicated, the false certification of title was at the core of the conspiracy and seems to be indisputably a rendition of legal services. In both cases, the courts must have been distinguishing the nature of the legal services rendered based upon the fact that a third party brought suit, and not the attorney's client.[200] Whether or not the Act dictates that particular application of the exemption does not seem apparent from either the wording of the Act or the opinions in the cases.

B. The Wisdom Of The Exemption

That the bright line seems anything but bright is not as troublesome a situation as the issue of whether or not professional services rendered by members of a learned profession should be exempt from the Act in the first place. One of the purposes of the Act is to maintain ethical standards in business dealings.[201] Why then should professionals, who are to be held to the highest ethical standards, be exempt? It would be comforting to conclude that members of learned professions should be exempt precisely because of their adherence to a standard of ethics higher than that of the marketplace, but were that uniformly the case, professional disciplinary systems would serve no purpose and conduct no business.

A second purpose of the Act is to provide an effective cause of action for aggrieved consumers.[202] Why should consumers of professional services be barred from this additional remedial measure?

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law also was addressed. Investors Title Ins. Co. v. Herzig, 320 N.C. 770, 360 S.E.2d 786 (1987).

200. *See also* Harris v. NCNB Nat'l Bank of North Carolina, 85 N.C. App. 669, 355 S.E.2d 838, (1987). In *Harris* defendant's attorney sent an allegedly defamatory letter to the employer of the plaintiff. In upholding the trial court's dismissal of the complaint, the appellate court did not address whether or not the communication was exempt as being a professional service, but concluded as a matter of law that the communication was neither unfair nor deceptive given the strong public policy favoring freedom of communication between parties and their attorneys with respect to anticipated or pending litigation. *Id.* at 677, 355 S.E.2d at 844.

201. *See supra* notes 7-11 and accompanying text.

202. *See supra* note 10 and accompanying text.

Is it because there are other avenues for redress available,[203] such as professional malpractice suits and disciplinary sanctions? Arguably those avenues are often "ineffective for aggrieved consumers" because malpractice claims are difficult to prove,[204] and disciplinary sanctions provide no remedies directly to the consumer.[205] Moreover, the statutory remedies of attorney fees and treble damages would be unavailable if other grounds were pursued.[206]

Perhaps it is because professional practices are heavily regulated that there is no need to submit practitioners to the possibility of dual penalties.[207] This argument has been accepted by North Carolina courts with respect to securities transactions.[208] However, such transactions are subject to pervasive *federal* regulation.[209] In

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203. This argument is not particularly persuasive because in other deceptive trade practices cases there are usually other causes of action available as well. *See supra* note 69 and accompanying text.

204. *See generally* Craig C. Beles & Daniel Wm. Wyckoff, *The Washington Consumer Protection Act v. The Learned Professional,* 10 GONZ. L. REV. 435 (1975).

205. Heslin v. Connecticut Law Clinic of Trantolo & Trantolo, 461 A.2d 938, 945 (Conn. 1983). *See also* Mason, *supra* note 91, at 553-54.

206. Parties injured by attorneys who commit fraudulent practices may only recover double damages. N. C. GEN. STAT. § 84-13 (1985).

207. *See* Saraceni, *supra* note 80, at 1748 n. 93. *See also* Bossmeyer, *supra* note 139. On the other hand, the fact that an occupation is licensed does not mean it is licensed to use unfair and deceptive practices. Rousseau v. Eshleman, 529 A.2d 862, 864 (N.H. 1987) (argument of plaintiff on motion for reconsideration).

208. Skinner v. E. F. Hutton & Co., 314 N.C. 267, 333 S.E.2d 236 (1985); Linder v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985); City Nat'l Bank v. American Commonwealth Fin. Corp., 801 F.2d 714 (4th Cir. 1986) *cert. denied,* 479 U.S. 1091 (1987); *Accord* Ellis v. Northern Star Co., 326 N.C. 219, 388 S.E.2d 127, *reh. denied,* 326 N.C. 488, 392 S.E.2d 89 (1990); McPhail v. Wilson, 733 F. Supp. 1011 (W.D.N.C. 1990).

209. The question may be one of federal preemption, not whether or not dual state regulatory schemes can coexist. Other states, possibly because of the existence of pervasive federal regulation, do not subject securities transactions to their deceptive trade practice legislation. *See e.g.,* Robertson v. White, 633 F. Supp. 954 (W.D. Ark. 1986) (act removes transactions governed by State Commissioner of Securities); Stephenson v. Paine Webber Jackson & Curtis, Inc., 839 F.2d 1095 (5th Cir. 1988) (Louisiana act inapplicable to securities fraud cases), *reh'g denied,* 849 F.2d 901 (5th Cir. 1988) *cert. denied,* 488 U.S. 926 (1988); Mercer v. Jaffe, Snider, Raitt & Heuer, P.C. 713 F.Supp. 1019 (W.D. Mich. 1989) (sale of securities not regulated by Michigan act); State *ex rel.* McLeod v. Rhoades, 267 S.E.2d 539 (S.C. 1980) (allegedly deceptive practices in public offering not subject to South Carolina Act); Kittilson v. Ford, 595 P.2d 944 (Wash. Ct. App. 1979) (act not applicable since alleged misrepresentations were regulated by securities law);

contrast, insurance, like professional licensing, is traditionally regulated by the states. North Carolina permits unfair and deceptive insurance practices to be subject to regulation under a separate statutory regime for insurance,[210] as well as under the Deceptive Trade Practices Act.[211] That practitioners of professions are exempt from such dual regulation may even raise constitutional questions.[212]

Some jurists fear that the application of deceptive trade practices acts to members of learned professions would undermine the performance of their duties, since their roles often require them to exercise professional judgment.[213] These acts, however, allow liability to attach even with respect to negligent omissions or errors in judgment, while disallowing any defenses to negligence.[214] However, the North Carolina Act does not create strict liability[215] nor liability for any implied warranty of professional services.[216] Some

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Cabot v. Baddour, 477 N.E.2d 399 (Mass. 1985) (act should not be extended to securities given federal regulation); Nichols v. Merrill Lynch, Pierce, Fenner & Smith, 706 F. Supp. 1309 (M.D. Tenn. 1989) (federal preeminence in field of securities precludes application of state consumer act to such transactions).

210. N.C. GEN. STAT.§§ 58-63-1 to -60 (1991). The regulatory scheme creates no private right of action.

211. *See, e.g.*, Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980); Phillips v. Integon Corp., 70 N.C. App. 440, 319 S.E.2d 673 (1984); Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986); United States Fire Ins. Co. v. Nationwide Mut. Ins. Co., 735 F. Supp. 1320 (E.D.N.C. 1990); Kron Medical Corp. v. Collier Cobb & Assoc., 107 N.C. App. 331, 420 S.E.2d 192, *disc. rev. denied*, 333 N. C. 168, 424 S.E.2d 910 (1992). The Deceptive Trade Practices Act is allowed to coexist with other regulatory schemes as well. *See* Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985) (statutes regulating personnel agencies as enforced by the Commissioner of Labor); Tomlinson v. Camel City Motors, Inc., 330 N.C. 76, 408 S.E.2d 853, *aff'g in part and rev'g in part*, 101 N.C. App. 419, 399 S.E.2d 147 (1991) (regulation of motor vehicle dealers). *See also* Christina L. Goshaw, Note, Tomlinson v. Camel City Motors, Inc.: *The North Carolina Supreme Court's Hybrid Solution to Surety Liability Under General Statutes Section 75-16*, 70 N.C. REV. 1959 (1992).

212. Mason, *supra* note 91, at 554.

213. Short v. Demopolis, 691 P.2d 163, 172 (Wash. 1984) (Dimmick, J., and Cunningham, J., concurring); Rousseau v. Eshleman, 519 A.2d 243, 249 (N. H. 1986) (Johnson, J., and Batchelders, J., dissenting); Gatten v. Merzi, 579 A.2d 974, 975 (Pa. Super. Ct. 1990).

214. Hale, *supra* note 75, at 343.

215. *See also* Jenson v. Touche Ross & Co., 335 N.W.2d 720 (Minn. 1983) (language of Minnesota statute connotes some degree of culpability).

216. *See supra* notes 34, 151-53 and accompanying text.

degree of wrongful conduct must be established. Moreover, merely because a violation of the Act is claimed does not mean that liability is automatic. A violation is a question of law: "Courts have the capacity to recognize an unfair or deceptive practice when they see one."[217] This check should help to alleviate fears that the Act will be applied indiscriminately to professional activities.

Furthermore, there are numerous blatantly unfair acts and deceptive practices which can be committed by professionals which fall nowhere near a borderline culpability situation. Attorneys can settle claims without their client's consent, commingle the funds of clients with their own, and knowingly and willfully neglect the legal affairs of their clients, while falsely representing that the claim is being pursued. Psychiatrists can engage in sexual relations with patients knowing that such conduct violates ethical standards[218] and lessens the patients's chances for recovery.[219] What of Jim Bakker and Heritage U.S.A.? Should the query be whether or not such acts are commercial or professional? Or should the appropriate inquiry be whether or not such practices of are unfair or deceptive, notwithstanding the nature of the services or the historical roots of the practitioner's occupation?

North Carolina courts recognize that an inequitable assertion of power or position can constitute an unfair trade practice.[220] Yet the legislature expressly exempted those individuals who stand in the strongest position of being able to abuse their position of trust.[221] Ironically, the standard bearer of the definition of learned

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217. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 59, 338 S.E.2d 918, 923, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986).

218. *See generally* William L. Webb, *The Doctor-Patient Covenant and the Threat of Exploitation*, 143 AM. J. PSYCHIATRY 1149 (Sept. 1986) (editorial); Jeremy A. Lazarus, *Sex With Former Patients Almost Always Unethical*, 149 AM. J. PSYCHIATRY 855 (July 1992) (editorial).

219. *See generally* Nanette Gartrell et. al., *Psychiatrist-Patient Sexual Contact: Results of a National Survey, I: Prevalence*, 143 AM. J. PSYCHIATRY 1126 (Sept. 1986).

220. *See supra* notes 46-50 and accompanying text.

221. *See, e.g.*, Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989), *disc. rev. denied*, 326 N.C. 46, 389 S.E.2d 83 (1990). In *Adams* a woman's pastor unjustly enriched himself in the purchase of her home. The court correctly held that such an abuse of confidence stated a claim under the Deceptive Trade Practices Act. *Id.* An inquiry as to whether or not, as a member of the learned professions, he was rendering professional services was not, and should not, have been addressed.

professions, *Commonwealth v. Brown*,[222] involved the constitutionality of a state statute, which penalized the advertisement of professional services.[223] In upholding the statute the court justified the legislature's prohibition, noting that "thousands if not millions of citizens might receive inferior service in the belief, induced by skillful advertising that it was superior. . .[T]he Legislature, taking the view which has been expressed, might conclude that the regulations made were necessary for the protection of public interest."[224] Of course today that view is no longer viable with respect to the advertising of professional services.[225] Perhaps today the blanket exemption for professional services rendered by members of the learned professions is no longer viable either.

CONCLUSION

In the true spirit of public service, members of the learned professions should lobby for inclusion in the Act's coverage. It is now time to take one more step away from the archaic distinction enjoyed by members of the learned professions, a step which has already been taken in some states. That step could be the drastic one of obliterating the exemption. However, given the automatic treble damages provision of the Act, which does not require a showing of bad faith, such a step might be too large, notwithstanding that the judiciary has the sole discretion to determine what conduct constitutes a violation. A more palatable step might be to disembark from the semantic adventure of trying to ascertain who is learned and what is a professional service, in favor of an exemption which excepts damages caused by the *negligent* rendition of services performed by *specifically enumerated* professionals, particularly if privity exists. Arguably that was the original purpose behind a very ambiguous, and arguably unjustifiable exclusion. In this way the legislature can determine and provide notice as to exactly who is to be exempt. For those individuals the important inquiry then will be whether or not their conduct was unfair or de-

222. 20 N.E.2d 478 (Mass. 1939).

223. *Id.* at 479.

224. *Id.* at 481.

225. For a historical perspective on attorney advertising see James R. Devine, *Lawyer Advertising and the Kutak Commission: A Refreshing Return to the Past*, 18 WAKE FOREST L. REV. 503 (1982).

ceptive, as opposed to negligent. Such a revision would serve to further the purposes of the Act and the public interest to which members of the learned professions are dedicated.