CHAPTER IV

When a Business Wrong is Not a Commercial Wrong

Stephen D. Feldman
Ellis & Winters LLP
Raleigh, NC

NORTH CAROLINA
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A. OVERVIEW

This manuscript describes certain categories of business conduct that fall beyond the reach of N.C. Gen. Stat. § 75-1.1, North Carolina's statutory prohibition on unfair and deceptive trade practices.

By its text, section 75-1.1 applies only to acts or practices "in or affecting commerce." The statute then defines "commerce" to include "all business activities, however denominated."

That definition seems limitless. "All business activities" arguably encompasses any action that a business takes.

Unsurprisingly, courts have concluded that the term "commerce" has boundaries. This manuscript reviews those boundaries in four areas: (1) the learned-profession exemption, (2) employment disputes, (3) internal business disputes, and (4) pervasively regulated conduct.

B. THE LEARNED-PROFESSION EXEMPTION

1. The statutory language.

Section 75-1.1 contains only one express exemption from the term "commerce." Under section 75-1.1(b), "commerce" does not include "professional services rendered by a member of a learned profession." This exemption is generally known as the learned-profession exemption.

2. The exemption's breadth.

Significantly, the exemption applies more broadly than solely to the actions of individual professionals performing their crafts. For example, in *Cameron v. New Hanover Mem'l Hosp., Inc.*, 58 N.C. App. 414, 446, 293 S.E.2d 901, 920 (1982), the exemption barred a section 75-1.1 claim about the denial of hospital staff privileges to a physician. The exemption applied because grants and denials of privileges relate to the rendering of professional services. *Id.* at 447, 293 S.E.2d at 921.

The decision in *Abram v. Charter Medical Corporation of Raleigh, Inc.*, 398 S.E.2d 331, 334, 100 N.C. App. 718, 722 (1990), also reflects the exemption's breadth. There, the exemption precluded a 75-1.1 claim against a medical-services company that tried to block a proposed chemical-dependency-treatment facility. The allegedly wrongful conduct would affect the plaintiff's ability to offer health care services, so the exemption applied. *Id.*

And in *Burgess v. Busby*, 142 N.C. App. 393, 407, 544 S.E.2d 4, 11–12, *disc. review dismissed as improvidently allowed*, 354 N.C. 351, 553 S.E.2d 679 (2001), the exemption applied to the distribution of a letter by a physician to other medical professionals in his county that discouraged them from treating the plaintiffs.

These decisions are faithful to the relevant statutory language. Under the plain language in sections 75-1.1(a) and (b), the salient question when considering the exemption's application is whether the relevant conduct *affected or affects* the provision of professional services by a learned professional.

Recent decisions confirm this interpretation.

In *Alamance Family Practice, P.A. v. Lindley*, 2018 NCBC 82,[1] a nurse practitioner for a family medical practice started a separate allergy-testing business, using the family practice's patient information to solicit patients. The family practice sued the nurse and raised a 75-1.1 claim, but the exemption barred the claim. The exemption applied because the challenged conduct—stealing patient information to provide health care services to those patients—affected the rendering of professional services. *Id.* ¶¶ 59–60.

And in *Sykes v. Health Network Solutions, Inc.*, 2017 NCBC 72, the exemption barred a section 75-1.1 claim by chiropractors that concerned alleged restrictions on the chiropractors' ability to provide chiropractic services. The plaintiffs argued against the exemption because the claim did not concern the actual provision of treatment. The 75-1.1 claim, however, would "fundamentally change the marketplace in which chiropractors deliver their services." *Id.* ¶ 126.

1 For brevity, this manuscript cites to decisions of the North Carolina Business Court in the form of [YEAR] NCBC [NUMBER].

The claim therefore concerned conduct that affected the provision of professional services.

3. The exemption's limits.

One recent appellate decision suggests that the exemption's breadth—illustrated in the above decisions—has limits.

In *H.M.A. Hamlet v. Hernandez*, 821 S.E.2d 600 (N.C. Ct. App. 2018), a hospital sued a doctor for failing to fulfill an employment agreement. The doctor counterclaimed, alleging that the hospital duped him into signing the agreement. His counterclaims included an alleged violation of section 75-1.1, but the trial court dismissed that claim based on the learned-profession exemption.

The Court of Appeals reversed that dismissal. Citing *Cameron* and other precedent, the Court of Appeals concluded that *Hamlet* involved a distinct fact pattern: "negotiations regarding a business arrangement," which was fundamentally "a business deal, not rendition of medical services." *Id.* at 608. The Court of Appeals forecasted that the application of the exemption in *Hamlet* would mean that the exemption would apply to "any business arrangement between medical professionals." *Id.*

The Court of Appeals then gave an example. If a physician entered into a lease for space in a medical office building owned by a group of physicians or hospital and sought to bring a 75-1.1 claim based on a lease dispute, that dispute—in the Court's view—"should be treated no differently than a similar lease arrangement for parties in any other business." *Id.* The Court explained that the lease arrangement does not arise from the rendition of professional services and has no effect on the quality of the medical care provided, even if medical services would be provided in the building.

This reasoning drew a dissent from Judge Mark Davis, who emphasized that prior decisions of the Court of Appeals make clear that the exemption "is to be construed broadly." *Id.* at 611. Judge Davis, moreover, viewed *Cameron* as analogous to *Hamlet*. Both cases involved a dispute between medical professionals and a hospital. And in both cases, a hospital made arrangements for medical professionals to provide care to patients at its facilities.

Put another way, the hospital negotiated with the doctor to make arrangements for the hospital to provide medical care to its patients. The agreement at the heart of the case even had specific requirements about the doctor being on emergency call and accepting unassigned patients.

On this basis, Judge Davis concluded that the dispute in *Hamlet* affected the rendition of professional services, both by the hospital and by the doctor, and that the learned-profession exemption should apply.

The hospital has appealed to the Supreme Court. Briefing has not yet begun. The Supreme Court has not before issued an opinion on the learned-profession exemption, making the *Hamlet* appeal a potentially significant one.

C. EMPLOYMENT DISPUTES.

The learned-profession exemption is an explicit carveout from the scope of section 75-1.1. We now turn to judicial decisions that interpret the phrase "in or affecting commerce" to have implicit limits.

The first of those limits concerns disputes between an employer and its employee. Three appellate decisions supply the key principles for assessing whether this type of dispute falls within the reach of section 75-1.1.

1. *Buie v. Daniel Int'l*

In *Buie v. Daniel International Corp.*, 56 N.C. App. 445, 289 S.E.2d 118 (1982), the Court of Appeals concluded that section 75-1.1 does not regulate claims about an employment relationship. The plaintiff in *Buie* alleged that his employer harassed and then dismissed him because he sought workers' compensation benefits following a work-related injury. The Court of Appeals interpreted section 75-1.1 to apply to dealings between buyers and sellers, and then concluded that an employment relationship isn't a buyer-seller relationship. *Id.* at 448, 289 S.E.2d at 119–20.

Buie set the stage for a pair of decisions from the North Carolina Supreme Court—issued within two years of each other—about the scope of the employment exemption. Those decisions are *Sara Lee v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), and *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001).

2. *Sara Lee v. Carter*

Sara Lee concerned an employee's self-dealing. The employee (Carter) was responsible for purchasing computer parts and repair services for his employer (Sara Lee). Carter then set up his own companies—without telling Sara Lee—to sell parts to Sara Lee at inflated prices. Sara Lee sued Carter, and its claims included an alleged 75-1.1 violation.

Carter argued that the principles in *Buie* foreclosed that claim. But the Supreme Court disagreed, noting that the wrongdoing occurred in a buyer-seller relationship. Carter's label as an employee, the Supreme Court explained, did not change the commercial character of the wrongful transactions.

3. *Dalton v. Camp*

While *Sara Lee* might appear to have softened the rigid rule announced in *Buie*, the Supreme Court quickly quashed that misperception in *Dalton*.

Like *Sara Lee*, *Dalton* involved an employee who concealed his conduct from his employer. The employer (Dalton) published an employee newsletter for a furniture company. Camp worked for Dalton. Dalton's contract with the furniture company expired, but Dalton kept publishing the newsletter while negotiations continued about a new contract. Camp continued to fulfill his obligations to Dalton—but he also was negotiating with the furniture company *on his own behalf* for the new newsletter contract. The furniture company ultimately selected Camp.

Dalton sued Camp for violation of section 75-1.1. The Supreme Court, however, held that section 75-1.1 did not apply. The Supreme Court emphasized two points in reaching this holding. First, unlike the employee in *Sara Lee*, Camp did not owe a fiduciary duty to Dalton. Second, and relatedly, Camp had no buyer-seller relationship with Dalton. In addition, the record showed that Camp used his best efforts in his work for Dalton.

4. The overarching principle

Viewed together, the decisions in *Buie*, *Sara Lee*, and *Dalton* appear to set forth the following overarching principle: when a 75-1.1 claim is raised in a dispute between an employer and employee, the character of the transaction—and not the labels of "employer" and "employee"—determine whether the claim is within the scope of 75-1.1.

D. INTERNAL BUSINESS DISPUTES.

An employer-employee dispute is not the only type of intra-business dispute that falls outside of section 75-1.1. In *White v. Thompson*, 364 N.C. 47, 691 S.E.2d 676 (2010), the Supreme Court clarified that section 75-1.1 does not reach internal business disputes more generally.

White involved three partners who went into business together. After a series of disagreements among the partners, one of them left and started his own business. Further fights ensued about how to distribute assets of the business. The remaining partners sued the departing partner, alleging that the departing partner breached his fiduciary duty to the partnership and cooked the partnership's books to the departing partner's benefit. The lawsuit asserted that this conduct violated section 75-1.1.

The Supreme Court concluded that this alleged conduct fell outside of section 75-1.1's purview. The Court emphasized the same point that the Court of Appeals emphasized in *Buie*: the General Assembly intended section 75-1.1 to regulate interactions between market participants. *Id.* at 51, 691 S.E.2d at 679. On this basis, the Court concluded that the "internal operations of a single business" are not "business activities" within that term's meaning in section 75-1.1. *Id.* at 52, 691 S.E.2d at 679. The Court then explicitly stated that "any unfair or deceptive practices . . . solely related to the internal operations of[] a business will not give rise to a claim under the Act." *Id.*

Because the allegedly wrongful conduct in *White* occurred in interactions within the partnership, the conduct fell outside of section 75-1.1's scope. It did not matter that the conduct had external marketplace effects. What mattered is *where* the conduct occurred.

The decision and reasoning in *White* has not stopped litigants from asserting section 75-1.1 claims in disputes that center on internal business operations. A recent Business Court decision summarizes the frequency and futility of these claims. *See Brewster v. Powell Bail Bonding, Inc.*, 2018 NCBC 74.

In *Brewster*, Judge Adam Conrad wrote that section 75-1.1 was designed to address "unfair market conduct," not classic shareholder disputes. Conduct internal to a single market participant—such as dissipating corporate assets, and obstructing a shareholder's rights to corporate records—falls outside of the statute's scope. But Judge Conrad didn't stop there.

He instead noted that the claim in *Brewster* "is part of a regrettable trend in North Carolina business litigation." *Id.* ¶ 36. He observed that "[t]here exists an impulse to turn every shareholder dispute or disagreement between members of a limited liability company into a section 75-1.1 claim." *Id.* Judge Conrad then pointed to the "growing body of case law following White" that "have recognized [these] disputes for what they really are: intra-company feuds about internal operations." *Id.* (quoting *Potts v. KEL, LLC*, 2018 NCBC 24 ¶ 33). To confirm this point, Judge Conrad cited *sixteen* separate Business Court decisions over the past four years that rejected section 75-1.1 claims that concerned internal business disputes.

Judge Conrad then explained the "significant and unhealthy" effects of including these claims: avoidable motion practice, which drives up litigation costs, taxes the Court's resources, and exposes a plaintiff to attorney fees under section 75-16.1. *Id.* ¶ 37. It also "impedes settlement discussions by introducing remedies (including treble damages) that would otherwise be unavailable, thereby distorting the parties' incentives and their perceived risks." *Id.*

This is not to say that a dispute between business owners, or internal to the business, is always barred under *White* and its progeny.

For example, if a business terminates because of an internal dispute, but the wrongful conduct continues after the business has been shut down, the post-termination conduct might not be barred. *See RoundPoint Mortg. Co. v. Florez*, 2016 NCBC 17 ¶ 25.

Or if the fact pattern includes misrepresentations to third parties, those misrepresentations could form the basis of a claim not barred by the principles in *White*. *See County of Harnett v. Rogers*, No. COA16-757, 2017 WL 1056245, at * 5 (N.C. Ct. App. March 21, 2017) (unpublished); *Wilkie v. Stanley*, 2011 NCBC ¶ 10.

In addition, the fact that two businesses have some common ownership does not mean that a dispute between the businesses is necessarily an "internal" business dispute. *See Songwooyarn Trading Co. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 57, 714 S.E.2d 162, 168 (2011).

The mere involvement of a third party, however, in connection with an internal dispute will not save the claim. Multiple decisions have made clear that siphoning corporate assets to a third party does not change the character of the wrongful conduct: self-dealing within a single entity. *See, e.g.*, *Chisum v. Campagna*, 2017 NCBC ¶¶ 58–59; *Urquhart v. Trenkelbach*, 2017 NCBC 12 ¶ 30.

In sum, the "internal business disputes" doctrine rests on the view that section 75-1.1 governs the conduct between market participants. Courts therefore hesitate to conclude that the statute's reach extends to conduct that occurs within the confines of any single market participant.

E. MATTERS OF PERVASIVE REGULATION.

This final section addresses a different issue on the reach of section 75-1.1: Did the General Assembly intend for "commerce" to include subject matters that are already the subject of extensive regulation?

1. The doctrine's roots

This inquiry finds its roots in *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 248 S.E.2d 567 (1978). That case involved allegations of wrongful conduct regarding purchases of commodities futures. The Court of Appeals concluded that section 75-1.1 did not regulate the conduct because "the commercial activity surrounding the commodities futures exchanges is a field highly regulated by federal statutes and administrative regulations." *Id.* at 417, 248 S.E.2d at 568. The Court of Appeals reasoned that the General Assembly did not intend the definition of "commerce" in section 75-1.1 to infringe on a subject matter where Congress expressed its intent to exercise exclusive jurisdiction. *Id.* at 419–21, 248 S.E.2d at 570–71.

Bache Halsey laid the groundwork for three important decisions—one from the Fourth Circuit, and two from the North Carolina Supreme Court.

2. Three key decisions

The significant Fourth Circuit decision is *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162 (4th Cir. 1985). *Lindner* was a securities dispute in which the plaintiff raised an alleged violation of section 75-1.1. The *Lindner* Court concluded that, for multiple reasons, securities transactions fall outside of the statute's scope. First, the court interpreted *Bache Halsey* and *Buie* as standing for the proposition that the presence of other federal or state statutory schemes can limit the scope of section 75-1.1. Second, the court emphasized that the purpose of section 75-1.1 was to protect "the consuming public." *Id.* at 165. Finally, the court voiced concern about subjecting those involved with securities transactions to overlapping supervision and enforcement. The North Carolina Secretary of State was already charged with enforcing the North Carolina Securities Act, whereas the North Carolina Attorney General was charged with enforcing section 75-1.1.

Months later, the North Carolina Supreme Court addressed—and reached the same conclusion on—the question raised in *Lindner*. *See Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 273–75, 333 S.E.2d 236, 241 (1985). The plaintiffs in *Skinner* alleged that they received misleading advice in connection with stock trading. The Supreme Court cited and extensively quoted *Lindner* in deciding that section 75-1.1 does not govern securities transactions. The Supreme Court emphasized that, like the commodities futures in *Bache Halsey*, securities are subject to a pervasive federal regulatory scheme.

The Supreme Court revisited these principles in *HAJMM Co. v. House of Raeford Farms., Inc.*, 328 N.C. 578, 403 S.E.2d 483 (1991). *HAJMM* concerned a section 75-1.1 claim about a corporation's actions related to an investment called a revolving fund certificate. The defendant issued this certificate to the plaintiff, and the parties had differing views about the defendant's repayment obligations.

The *HAJMM* defendant argued that, under *Skinner*, the dispute fell outside the scope of section 75-1.1. The Supreme Court agreed that the revolving fund certificates in *HAJMM* were essentially corporate securities, but the court noted an important difference between the certificate and more conventional corporate securities: the certificate was not subject to the same extensive regulations that govern securities.

With "pervasive regulation" unavailable to justify exempting the relevant conduct from section 75-1.1's scope, the Supreme Court viewed the issue from a different angle. The Court reasoned that the issuance of the certificate did not fit within the meaning of "business activities," as that term is used in section 75-1.1(b) to define "commerce." "Business activities," the Court explained, refers to the activities in which a business regularly engages to achieve the purposes for which it is organized. Relying on this interpretation, the Supreme Court concluded that the issuance and redemption of securities are not "business activities." Those activities are extraordinary events to raise capital; a business is not organized to issue and redeem securities.

HAJMM, then, is an important decision in 75-1.1 jurisprudence. First, it reaffirms the vitality of "pervasive regulation" as a touchstone for assessing the boundaries of section 75-1.1—even if that principle did not apply to the facts in *HAJMM*. Second, *HAJMM* introduced a new inquiry: whether the conduct at issue is an activity for which the business was organized.

3. Private codes of conduct

Significantly, the concept of pervasive regulation is not limited to state and federal regulation. A relatively recent decision shows that the concept can also apply to private codes of conduct. *See Champion Pro Consulting Grp., Inc. v. Impact Sports Football, LLC*, 845 F.3d 104 (4th Cir. 2016).

Champion Pro involved a fight between sports agents. The fight was over Robert Quinn, a former UNC football standout drafted by the then-St. Louis Rams. Before the draft, Quinn signed a contract with the Champion agency. Half a year later, Quinn terminated that contract and instead signed with the Impact Sports agency . Quinn also received $100,000 from Impact.

Champion's founder, Carl Carey, filed a grievance with the NFL Players Association. Carey alleged that Quinn breached the contract between Quinn and Champion. The case went to arbitration, and Carey received an award of $17,500. Carey and Champion then sued Impact in federal court. The lawsuit raised multiple claims, including an alleged violation of section 75-1.1.

Champion argued that Impact violated section 75-1.1 in three ways. First, Champion contended that Impact illegally used "runners" to recruit Quinn. A "runner" is someone who offers money or other benefits to a player to secure the player as an agent's client. Second, Champion argued that Impact's $100,000 payment to Quinn induced Quinn to breach his contract with Champion. Third, Champion said that Impact's conduct constituted unlawful retaliation.

The Fourth Circuit rejected each of these arguments. In doing so, the Fourth Circuit relied on the broad principle first announced in *Bache Halsey*: section 75-1.1 does not apply to matters that are already subject to pervasive and intricate regulation.

In *Champion Pro*, the record reflected that the NFLPA regulates conduct of agents like Champion and Impact. In particular, the NFLPA's regulations prohibit dishonest and fraudulent conduct in agents' dealings with players. The regulations also permit monetary damages, and they require the arbitration of disputes.

In the Fourth Circuit's view, section 75-1.1 does not reach conduct that is subject to regulations like those of the NFLPA. The court listed three policy reasons to support its conclusion.

First, the Fourth Circuit suggested that public policy does not favor conduct being subject to "overlapping" regulation—though the court did not clarify whether its concern was inconsistent regulations, duplicative regulations, or both.

Second, the Fourth Circuit voiced concern that the standards of section 75-1.1 could disrupt "the practical workings of th[e] industry." Here, the Fourth Circuit pointed out that payments like the $100,000 payment from Impact to Quinn are an accepted part of doing business in the industry.

Third, the Fourth Circuit opined that section 75-1.1 was not needed here to correct any imbalance of power among the parties. In stating this opinion, the Fourth Circuit cited to one of its earlier decisions, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (1999) for the proposition that the fundamental purpose of section 75-1.1 "is to protect the consumer."

Champion Pro no doubt reveals the potency of the "pervasive regulation" doctrine. With that said, defendants who raise this defense might be well-served to measure whether and how the policy considerations enunciated in *Champion Pro* apply to their cases. In particular:

- How significant is the overlap between the existing regulatory regime and section 75-1.1?

- Might the application of section 75-1.1 change a key feature of the industry —a feature not proscribed by the existing regulatory regime?

- Does the case involve any consumer-like behavior?

4. Skepticism?

Another recent decision, however, shows that the "pervasive regulation" defense is not always a silver bullet. The decision, in a putative class action named *Contant v. Bank of America*, 17 Civ. 3139 (LGS), 2018 WL 5292126, at *14 (S.D.N.Y. Oct. 25, 2018), concerns alleged wrongdoing in the market for foreign exchange instruments. One of the *Contant* plaintiffs was from North Carolina. She raised several claims, including an alleged 75-1.1 violation.

The defendants moved to dismiss that claim, arguing that this exception applies when applying section 75-1.1 would create unneeded or overlapping supervision, enforcement, and liability in view of existing regulatory schemes.

For support, the defendants noted that numerous authorities regulate foreign exchange instruments. Those authorities include the Office of the Comptroller of the Currency and the Federal Reserve Board of Governors. The defendants stressed that these regulators have asserted jurisdiction over alleged wrongdoing, conducted investigations, and imposed billions of dollars in fines and settlements.

On the law, the defendants cited the leading 75-1.1 decisions on pervasive regulation and securities, including *Skinner* and *HAJMM*.

The plaintiffs responded with two main arguments. First, they turned to a different area of 75-1.1 jurisprudence: the law on *per se* violations. They argued that, in view of this law, a court should be hesitant to conclude that the existence of statutory regulation of a subject matter reflects legislative intent to except that subject matter from the scope of section 75-1.1.

Second, they argued that, when courts have concluded that conduct falls outside of section 75-1.1's scope due to pervasive regulation, those courts have first ensured that the regulatory scheme provided a plaintiff with a meaningful remedy. The plaintiffs then argued that no other source of law on foreign exchange instruments gave them the chance to recover the treble damages available under section 75-1.1.

The court adopted the plaintiffs' position, agreeing that an overlapping regulatory scheme isn't alone sufficient to preclude section 75-1.1's application. The court also emphasized the plaintiffs' second point: an overlapping regulatory regime does not obviate section 75-1.1's application if the regime doesn't provide "an adequate remedy," even though neither *Skinner* nor *HAJMM* refers to a private right of action as being relevant to the issue of whether a statutory scheme is sufficiently "pervasive."

E. CONCLUSION

The plain language of sections 75-1.1(a) and (b) suggest that the statute regulates almost any alleged wrong in a business context. But courts have reasonably resisted that interpretation, and the decisions described above provide a roadmap for assessing whether any particular fact pattern might fall outside the statute's scope.