when the defendant has deceived the plaintiff in connection with the formation or the breach of a contract.[85]

5. Direct Unfairness Claims

All of the above types of section 75-1.1 violations arguably involve some kind of unfairness.[86] Even outside those categories, however, lawyers often cite the phrases that define unfair practices in general[87] and assert, based on these phrases, that the facts in a given case violate section 75-1.1.[88]

These direct unfairness claims—claims of unfairness that do not derive from other types of section 75-1.1 violations—are the focus of this Article. Part II below analyzes the current standards for direct unfairness claims. It also analyzes signs that those standards are insufficient.

II. THE CURRENT CONDITION OF UNFAIRNESS CLAIMS UNDER SECTION 75-1.1

Courts applying North Carolina law have stated a variety of definitions of unfair conduct under section 75-1.1. As this Part of the Article shows, these definitions give insufficient guidance to courts in section 75-1.1 cases. There are two key signs of this problem. First, courts often apply the unfairness tests in a conclusory way. Second, courts often take pains to avoid deciding unfairness cases on their merits.

85. *See, e.g.*, Poor v. Hill, 138 N.C. App. 19, 28–29, 530 S.E.2d 838, 844–45 (2000) (finding aggravating circumstances when a landowner deceived potential purchasers); Garlock v. Henson, 112 N.C. App. 243, 246, 435 S.E.2d 114, 115 (1993) (finding aggravating circumstances when a defendant repeatedly lied about the sale of a bulldozer and forged a bill of sale).

86. *See, e.g.*, United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 992 (4th Cir. 1981) (stating that many breaches of contract are, in a sense, unfair); Mitchell v. Linville, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001) (stating that unfairness includes, but is broader than, deception); *see also* Morgan, *supra* note 19, at 20 (presenting, in the same year as the enactment of section 75-1.1, a list of "unfair or deceptive practices," all of which arguably involve deception).

87. *See infra* notes 89–95 and accompanying text (quoting these phrases).

88. For example, in *HAJMM Co. v. House of Raeford Farms, Inc.*, 94 N.C. App. 1, 379 S.E.2d 868 (1989), *aff'd in part, rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991), the plaintiff alleged that the defendant's refusal to redeem a security-like instrument was "inequitable, arbitrary, in bad faith, . . . an abuse of discretion, and a violation of [the defendant's] by-laws." *Id.* at 14, 379 S.E.2d at 876. The court of appeals held that allegations of this type stated a claim for "unfair or deceptive" practices. *Id.*; *see* HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 592, 403 S.E.2d 483, 492 (1991) (referring to this claim as a claim for unfair practices).

Over time, the North Carolina courts have offered varying definitions of unfairness under section 75-1.1:

- "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."[89]
- "A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position."[90]
- "The concept of 'unfairness' is broader than and includes the concept of 'deception.' "[91]
- Unfair practices include "[c]oercive conduct."[92]
- "[A] trade practice is unfair if the conduct undermines the ethical standards and good faith dealings between parties engaged in business transactions."[93]
- "One method of determining if actions are unfair or unethical is to look at those actions through the lens of equity."[94]
- "Unfair practices are not subject to a single definition. . . . Whether an act or practice is unfair or deceptive is to be determined by all the facts and circumstances surrounding the transaction."[95]

Because of the broad and vague nature of these definitions, courts have struggled to decide whether particular conduct is unfair

89. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980) (citing Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976)), *overruled on other grounds by* Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988). This standard was derived from an FTC statement under section 5 of the FTC Act. *See infra* notes 126–34 and accompanying text.

90. *Johnson*, 300 N.C. at 264, 266 S.E.2d at 622 (citing *Spiegel*, 540 F.2d at 294).

91. *Id.* at 263, 266 S.E.2d at 621.

92. Owens v. Pepsi Cola Bottling Co. of Hickory, N.C., 330 N.C. 666, 677, 412 S.E.2d 636, 643 (1992).

93. Mech. Sys. & Servs., Inc. v. Carolina Air Solutions, L.L.C., No. 02 CVS 8572, 2003 WL 22872490, at *7 (N.C. Bus. Ct. Dec. 3, 2003) (citing First Atl. Mgmt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998)).

94. Sunbelt Rentals, Inc. v. Head & Engquist Equip., LLC, No. 00 CVS 10358, 2003 WL 21017456, at *51 (N.C. Bus. Ct. May 2, 2003), *aff'd*, 174 N.C. App. 49, 620 S.E.2d 222 (2005).

95. Barbee v. Atl. Marine Sales & Serv., Inc., 115 N.C. App. 641, 646, 446 S.E.2d 117, 121 (1994).

enough to violate section 75-1.1.[96] There are two key indications of this struggle.

First, when courts apply the standards for unfairness, they often apply the standards in conclusory ways. Opinions on direct unfairness claims usually follow the same script: They quote one or more of the above tests for unfairness. They then restate the facts. Finally, they state the conclusion that the facts satisfy or do not satisfy the test for liability under section 75-1.1.

For example, the Supreme Court of North Carolina gave a cursory explanation of an unfairness claim in *Spinks v. Taylor*.[97] When the plaintiffs failed to pay rent, their landlord padlocked the apartment.[98] To support its conclusion that no unfairness had occurred, the court offered this reasoning: "We cannot say that defendant's padlocking procedures offend 'established public policy' or constitute a practice which is 'immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' "[99] In contrast, the North Carolina Court of Appeals concluded that a landlord's attempt to collect rent on an unfit dwelling "can be considered 'immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' "[100] Both courts relied on the usual list of adjectives as a basis for their decisions, but neither court explained why the conduct at issue satisfied or failed to satisfy those adjectives.

This conclusory reasoning appears in non-consumer-oriented unfairness cases as well. For example, the Supreme Court of North Carolina held, in a per curiam opinion, that false statements to regulators about a competitor "are 'unfair' within the meaning and intent of N.C.G.S. § 75-1.1."[101] Likewise, the North Carolina Business Court stated that misuse of a competitor's documents "was an unfair trade practice."[102]

96. *See, e.g.*, Shields v. Bobby Murray Chevrolet, Inc., 300 N.C. 366, 370, 266 S.E.2d 658, 660 (1980) (per curiam) (dividing 3-3 on whether repossessing and selling a car without remitting surplus proceeds to the plaintiff was an unfair practice).

97. 303 N.C. 256, 278 S.E.2d 501 (1981).

98. *Id.* at 257, 278 S.E.2d at 502.

99. *Id.* at 265, 278 S.E.2d at 506 (quoting Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980)).

100. Allen v. Simmons, 99 N.C. App. 636, 645, 394 S.E.2d 478, 484 (1990) (quoting Mosley & Mosley Builders, Inc. v. Landin Ltd., 97 N.C. App. 511, 517, 389 S.E.2d 576, 579 (1990)).

101. Martin Marietta Corp. v. Wake Stone Corp., 339 N.C. 602, 603, 453 S.E.2d 146, 147 (1995).

102. CNC/Access, Inc. v. Scruggs, No. 04 CVS 1490, 2006 WL 3350854, at *11 (N.C. Bus. Ct. Nov. 15, 2006).

Federal courts have fallen into the same pattern. For example, the court in *Static Control Components, Inc. v. Darkprint Imaging, Inc.*[103] first decided that the defendant's conduct amounted to misappropriation of trade secrets.[104] Regarding section 75-1.1, the court stated only that "[t]his conduct is *surely* 'immoral, unethical, oppressive, unscrupulous, or substantially injurious.' "[105]

These and other decisions[106] show that the existing standards for unfairness have too little content to allow courts to apply the law to

103. 240 F. Supp. 2d 465 (M.D.N.C. 2002).

104. *Id.* at 484.

105. *Id.* at 487 (emphasis added) (quoting Walker v. Sloan, 137 N.C. App. 387, 395, 529 S.E.2d 236, 243 (2000)).

106. *See, e.g.*, *In re* Fifth Third Bank, Nat'l Ass'n—Vill. of Penland Litig., __, N.C. App. __, __ n.5, 719 S.E.2d 171, 179 n.5 (2011) ("We are unable to see how a lender's decision to loan money . . . based upon a particular borrower's net worth rather than upon the value of the collateral, regardless of whether those 'facts' were disclosed to the borrower, would constitute an unfair and deceptive trade practice for purposes of N.C. [Gen. Stat.] § 75-1.1."), *petition for cert. filed*, No. 23P12 (N.C. Jan. 13, 2012); Shepard v. Bonita Vista Props., L.P., 191 N.C. App. 614, 625, 664 S.E.2d 388, 395 (2008) (concluding that RV lot owners' acts of "interfering with and disconnecting [renters'] electricity were, at a minimum, unfair"), *aff'd per curiam*, 363 N.C. 252, 675 S.E.2d 332 (2009); S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 189 N.C. App. 601, 608, 659 S.E.2d 442, 449 (2008) (holding that "competitive business activities" do not rise to the level of an unfair act or practice because the activities involve no inequitable assertion of power by defendants over the plaintiff); *see also* Eason v. Cleveland Draft House, LLC, No. COA08-684, 2009 WL 676951, at *6–7 (N.C. Ct. App. Mar. 17, 2009) (holding that serving "drinks stronger than the recommended dosage" did not involve an inequitable assertion of power or position); Triton Indus. v. Riverwalk in Highlands, LLC, No. COA08-583, 2009 WL 368322, at *4 (N.C. Ct. App. Feb. 17, 2009) (holding that failure to pay general contractor who "worked and furnished materials and equipment for payment" stated a section 75-1.1 claim); Green v. Branch Banking & Trust Co., No. COA05-1681, 2007 WL 328723, at *2 (N.C. Ct. App. Feb. 6, 2007) (holding that bank's decision to loan money to a plaintiff who lacked financial wherewithal was not unfair); Thortex, Inc. v. Standard Dyes, Inc., No. COA05-1274, 2006 WL 1532136, at *4 (N.C. Ct. App. June 6, 2006) (holding that the facts that the plaintiff alleged in support of a section 75-1.1 claim involved "nothing more than the normal ambit of competitive business activities"); Bruning & Federle Mfg. Co. v. Mills, No. COA04-999, 2005 WL 2429788, at *5 (N.C. Ct. App. Oct. 4, 2005) (holding that former employee committed no unfair act by going to work for the defendant and bidding successfully on a contract that he had worked on previously while still an employee of the plaintiff).

In some section 75-1.1 decisions, courts distinguish precedents that the parties have cited, but without explaining why the factual differences make the conduct at issue more or less unfair than the conduct in the cited decisions. *See, e.g.*, D.G. II, Inc. v. Nix, __ N.C. App. __, __, 713 S.E.2d 140, 149 (2011) (involving a claim under section 75-1.1 for an aggravated breach of contract).

These problems are not new. Commentators have noted the conclusory reasoning in section 75-1.1 decisions for thirty years. *See, e.g.*, Farr, *supra* note 32, at 425–26; Edward M. McClure, Jr., Comment, *The Trouble with Trebles: What Violates § 75-1.1?*, 5 CAMPBELL L. REV. 119, 127–32, 157–61 (1982). Commentators on other section 5 analogues have noted similar problems under those statutes. *See, e.g.*, Robert M. Langer & Michael L. Miller, *The Second Prong of the 'Cigarette Rule' Continues to Serve as a Basis*

facts in a rigorous way.[107] The analysis in unfairness opinions is usually little more than the announcement of a violation or of its absence.

Second, courts have often refrained from deciding the merits of unfairness claims. They have done so by applying limits on the scope of section 75-1.1 or other categorical rules.

The courts' most common basis for avoiding the merits of section 75-1.1 claims is the requirement that conduct be "in or affecting commerce."[108] According to the Supreme Court of North Carolina, commerce means "business activities," and business activities mean "the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized."[109] Applying this test, the court has held that the "General Assembly did not intend for the Act's protections to extend to a business's internal operations."[110] On similar grounds, courts have excluded most, but not all, employer/employee disputes from

for Finding Unfairness Under Several 'Little FTC Acts,' 101 Antitrust & Trade Reg. Rep. (BNA) 408, 410 (Sept. 30, 2011) (noting that "state courts often summarily hold that [the adjectival test for unfairness] has been met without further explanation or support").

107. *See, e.g.*, JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 675 (5th ed. 2007) (listing, as a legitimate criticism of a judicial opinion, that it "[f]ails to provide a reasonable connection between the controlling law and its applicability to the specific facts of the case"); Hon. Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 34, 36 (2009) (emphasizing that the "purpose of a judicial opinion is to convince any reader that sound logic supports the court's decision" and that this result requires, among other qualities, "exposition of analysis").

108. N.C. GEN. STAT. § 75-1.1(a) (2011); *id.* § 75-1.1(b) (defining "commerce"); Buford, *supra* note 33 ("Courts that have prevented the statute from having almost unlimited application have done so by determining that particular activities are not 'in or affecting commerce.' ").

109. HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991); *cf.* Sec. Credit Corp. v. Mid/E. Acceptance Corp. of N.C., No. COA11-775-2, 2012 WL 1337400, at *3 (N.C. Ct. App. Apr. 17, 2012) (affirming dismissal of a section 75-1.1 claim that allegedly involved "extraordinary events" rather than "the manner in which defendants conduct their regular, day-to-day activities or affairs").

110. White v. Thompson, 364 N.C. 47, 53, 691 S.E.2d 676, 680 (2010) (holding that action contained completely within a partnership is not in or affecting commerce). Similarly, the dissolution of a corporation is considered an "extraordinary event" that cannot be the basis of a section 75-1.1 claim. Lawrence v. UMLIC-Five Corp., No. 06 CVS 20643, 2007 WL 2570256, at *6 (N.C. Bus. Ct. June 18, 2007). Likewise, changing a corporation's bylaws is not a "day-to-day, regular business activity," so it falls outside the scope of section 75-1.1. Wilson v. Blue Ridge Electric Membership Corp., 157 N.C. App. 355, 358, 578 S.E.2d 692, 694 (2003). In contrast, the sale of an entire business is considered "in or affecting commerce." Compton v. Kirby, 157 N.C. App. 1, 20, 577 S.E.2d 905, 917 (2003).

the scope of commerce under the statute.[111] Finally, capital-raising activities are said not to be in or affecting commerce.[112]

The courts have also held that section 75-1.1 does not cover certain business activities of limited scope. For example, the North Carolina Court of Appeals has consistently held that a single sale of personal real estate falls outside the scope of section 75-1.1.[113] The same type of exemption applies to donations of property to charitable organizations.[114]

The courts have also decided, in multiple contexts, that section 75-1.1 does not cover transactions that are subject to extensive regulation under other bodies of law.[115] The courts have stated that if the other regulatory scheme is extensive enough, allowing section 75-1.1 claims to accompany that scheme would "create unnecessary and 'overlapping supervision, enforcement, and liability.' "[116] These concerns have generated exemptions from section 75-1.1 for securities and commodities transactions.[117]

111. *Compare* Combs v. City Electric Supply Co., 203 N.C. App. 75, 87, 690 S.E.2d 719, 727 (2010) (holding that a "simple employment dispute" falls outside section 75-1.1), *and* Buie v. Daniel Int'l Corp., 56 N.C. App. 445, 289 S.E.2d 118 (1982) (seminal decision on this subject), *and HAJMM*, 328 N.C. at 591–92, 403 S.E.2d at 492 (seeming to endorse *Buie*), *with* Sara Lee Corp. v. Carter, 351 N.C. 27, 34, 519 S.E.2d 308, 312 (1999) (holding that self-dealing by an employee is distinguishable from *Buie* and is thus within the scope of commerce).

112. *See, e.g.*, *HAJMM*, 328 N.C. at 593–94, 403 S.E.2d at 493; Latigo Invs. II, LLC v. Waddell & Reed Fin., Inc., No. 06 CVS 18666, 2007 WL 2570753, at *4–5 (N.C. Bus. Ct. May 22, 2007). The Supreme Court of North Carolina has also explained the longstanding securities exemption under section 75-1.1, *see infra* note 118 and accompanying text, in these terms. *See White*, 364 N.C. at 52, 691 S.E.2d at 679; *HAJMM*, 328 N.C. at 593, 403 S.E.2d at 493.

113. *See, e.g.*, Carcano v. JBSS, LLC, 200 N.C. App. 162, 173–76, 684 S.E.2d 41, 51–52 (2009); MacFadden v. Louf, 182 N.C. App. 745, 746–47, 643 S.E.2d 432, 433–34 (2007).

114. Stephenson v. Warren, 136 N.C. App. 768, 773, 525 S.E.2d 809, 813 (2000).

115. *See, e.g.*, State *ex rel.* Cooper v. Ridgeway Brands Mfg., LLC, 184 N.C. App. 613, 623, 646 S.E.2d 790, 798 (2007), *aff'd in part, rev'd in part on other grounds*, 362 N.C. 431, 666 S.E.2d 107 (2008); State *ex rel.* Cooper v. McClure, No. 03 CVS 5617, 2005 WL 3018635, at *1 (N.C. Bus. Ct. Oct. 28, 2005); *see also* Esther Lee, Note, Cooper v. McClure: *The Difficulty of Proving Antitrust Violations and the Need for a False Claims Act*, 4 J. BUS. & TECH. L. 395, 403–09 (2009) (criticizing other aspects of the business court's reasoning in *McClure*).

116. *Ridgeway*, 184 N.C. App. at 624, 646 S.E.2d at 798 (quoting *HAJMM*, 328 N.C. at 593, 403 S.E.2d at 493); *see* Brinkman v. Barrett Kays & Assocs., P.A., 155 N.C. App. 738, 745, 575 S.E.2d 40, 45 (2003) (holding that the plaintiff could not use section 75-1.1 to create a claim based on the Clean Water Act); Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 678, 575 S.E.2d 532, 536–37 (2003) (rejecting a section 75-1.1 claim because another statute governed debt collectors).

117. *See* Lindner v. Durham Hosiery Mills, 761 F.2d 162, 167–68 (4th Cir. 1985) (establishing the securities exemption); Skinner v. E.F. Hutton & Co., 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985) (following *Lindner*); Bache Halsey Stuart, Inc. v. Hunsucker, 38

Finally, instead of addressing the substance of unfairness claims, courts have sometimes relied on the failure of other claims, generally without saying whether the failure of the other claims was independently sufficient to defeat the section 75-1.1 claim. This pattern has played out with federal antitrust claims,[118] defamation claims,[119] claims for misappropriation of trade secrets,[120] fraud claims,[121] claims for tortious interference,[122] and claims for breach of fiduciary duties.[123] These decisions leave the unfairness standard and its relationship with other claims unexplained.[124]

In sum, the current standards for unfairness make it difficult for courts to explain why particular conduct is or is not unfair. The multiple techniques that courts use to avoid deciding the merits of section 75-1.1 claims are indirect, but telling, signs of the problems with the unfairness standard.

III. AVAILABLE FOR BORROWING: THE STANDARDS FOR UNFAIRNESS UNDER SECTION 5 OF THE FTC ACT

Courts that must decide unfairness claims under section 75-1.1 have more tools available than the above decisions suggest. As shown below, there is a seventy-year history of FTC statements and court decisions that define unfairness under section 5 of the FTC Act. In fact, the current definition of unfairness under section 5 includes an element that courts applying section 75-1.1 would find helpful.

N.C. App. 414, 420, 248 S.E.2d 567, 570 (1978) (establishing the commodities exemption). In *Lindner*, the Fourth Circuit also relied on the relationship between section 75-1.1 and section 5 of the FTC Act. The court noted "the absence of any federal court decision holding that securities transactions are subject to § 5(a)(1) of the FTC Act." *Lindner*, 761 F.2d at 167.

118. *See, e.g.*, R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 396 (M.D.N.C. 2002), *aff'd mem.*, 67 F. App'x 810 (4th Cir. 2003).

119. *See, e.g.*, Radcliff v. Orders Distrib. Co., No. COA07-1041, 2008 WL 2415976, at *6 (N.C. Ct. App. June 17, 2008); Craven v. Cope, 188 N.C. App. 814, 820, 656 S.E.2d 729, 734 (2008).

120. *See, e.g.*, Modular Techs., Inc. v. Modular Solutions, Inc., No. COA06-813, 2007 WL 2034046, at *5 (N.C. Ct. App. July 17, 2007); Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 526, 586 S.E.2d 507, 512 (2003).

121. *See, e.g.*, Watson Elec. Constr. Co. v. Summit Cos., 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003).

122. *See, e.g.*, Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Co. Consol., No. 99 CVS 2459, 2003 WL 21017350, at *18 (N.C. Bus. Ct. Apr. 28, 2003).

123. *See, e.g.*, Campbell v. Bowman, No. COA05-16, 2005 WL 3046438, at *4 (N.C. Ct. App. Nov. 15, 2005).

124. These decisions, which approach but do not establish a "reverse per se rule" under section 75-1.1, add to the difficulties with per se theories under section 75-1.1. *See supra* notes 46–59 and accompanying text.