THE UNEASY RELATIONSHIP BETWEEN CONTRACTS AND ALLEGED VIOLATIONS OF N.C. GEN. STAT. § 75-1.1

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Section 75-1.1 of the North Carolina General Statutes declares unlawful "unfair or deceptive acts or practices in or affecting commerce."

Because section 75-1.1 is not limited to consumer claims, most complex business disputes include an alleged violation of the statute. Litigants have powerful economic and strategic incentives—the threat of treble damages and attorney fees—to bring these claims.

This manuscript focuses on a particular aspect of the law on section 75-1.1: the reach of section 75-1.1 when the relevant conduct relates to a contract. The manuscript provides an overview of three issues within that topic:

1. Substantial aggravating circumstances. We all know the refrain: a breach of contract alone—even if intentional—does not violate section 75-1.1. Instead, when a 75-1.1 claim concerns a contract, the claimant must prove "substantial aggravating circumstances." From where, though, did this doctrine originate? And what are the current views about the contours of the doctrine? This manuscript addresses these questions.

2. The economic-loss rule. The economic-loss rule bars a party to a contract from pursuing non-contract remedies in connection with a breach that concerns only economic injury. This manuscript examines how courts have evaluated whether and how the rule applies to claims for violation of section 75-1.1.

3. Choice-of-law provisions. Finally, this manuscript considers the effect of contractual choice-of-law provisions on section 75-1.1 claims. In particular, when a choice-of-law provision calls for the application of the law of a state other than North Carolina, does the provision sound the death knell for a section 75-1.1 claim?

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I. What Circumstances Are Sufficiently Aggravating?

The first published decision to discuss aggravating circumstances in a 75-1.1 case came from the Fourth Circuit. See United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 991–92 (4th Cir. 1981). Eight years later, in Bartolomeo v. S.B. Thomas, Inc., 889 F.2d 530,535–36 (4th Cir. 1989), the Fourth Circuit issued another key early opinion on "substantial aggravating circumstances."

When North Carolina state courts discuss substantial aggravating circumstances, they often cite United Roasters or Bartolomeo. Even when they don't cite those decisions, moreover, they usually cite their descendants.

What, then, do United Roasters and Bartolomeo tell us about the meaning of substantial aggravating circumstances? And how do those decisions compare to the current version of the doctrine?

A. *United Roasters*: An "Ordinary" Breach Is Neither Unfair Nor Deceptive

In 1973, United Roasters made a contract with Colgate, giving Colgate the right to manufacture and distribute a roasted soybean snack called Bambeanos. The contract had a fixed term, but it allowed Colgate to terminate the contract before the end of the term.

Before the term ended, Colgate decided to stop manufacturing and selling Bambeanos. Colgate made this decision in January 1976, but it waited until July 1976 to tell United Roasters. According to United Roasters, the contract impliedly obligated Colgate to exercise its termination rights in good faith. United Roasters sued Colgate, alleging a breach of contract and violations of section 75-1.1.

A federal jury sided with United Roasters. The jury found that Colgate's failure to tell United Roasters about the termination decision violated the 1973 contract. Whether these facts violated section 75-1.1, however, was an issue of law for the court to decide. The federal district judge concluded that Colgate's breach was neither unfair nor deceptive.

On appeal, the Fourth Circuit affirmed the breach-of-contract judgment on different grounds. The court decided that Colgate violated the contract not by keeping its termination decision secret for six months, but by failing to perform the contract in good faith before the termination.

The Fourth Circuit then addressed whether the contract breach (the one that the court had just recognized) violated section 75-1.1. According to the Fourth Circuit, an intentional breach of a contract—even an undisclosed breach—shows no more than the type of unfairness that "inheres in every breach of contract when one of the contracting parties is denied the advantage for which he contracted." The Fourth Circuit rejected this possible form of unfairness as "nothing more than an ordinary contract breach."

The court went on to say that if an award for a breach of contract "is to be trebled, the North Carolina legislature must have intended that substantial aggravating circumstances be present."

The Fourth Circuit then tried to give some definition to aggravating circumstances. It pointed to the North Carolina Supreme Court's decision in State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977). That decision listed several practices as illustrations of what section 75-1.1 prohibits. The practices listed in J.C. Penney, the Fourth Circuit observed, "are actually deceptive or approach deception."

The court then evaluated the jury's findings in United Roasters. As the court noted, the jury did not conclude that Colgate acted deceptively when it breached its agreement. Thus, although Colgate's breach "was intentional and not promptly disclosed," it was no worse than "ordinary."

B. *Bartolomeo*: Substantial Aggravating Circumstances Probably Require Deception

Eight years later in Bartolomeo, the Fourth Circuit again addressed the standard for turning a contract breach into a 75-1.1 violation.

The plaintiff, Tim Bartolomeo, did business as Quality Brands, Inc. In 1983, Quality Brands made an oral agreement with S.B. Thomas, Inc., to distribute Thomas' Original English Muffins.

In 1987, S.B. Thomas terminated the distribution agreement. The termination came after repeated assurances from a Thomas affiliate that Bartolomeo's business would continue. Bartolomeo sued Thomas for breach of contract and violations of section 75-1.1.

Thomas moved for summary judgment. In response, Bartolomeo argued that there were genuine issues of material fact on whether Thomas misled him into thinking his distributorship would continue. The Fourth Circuit, however, reiterated United Roasters: It held that, to prove a 75-1.1 violation based on a contract breach, "a plaintiff must show substantial aggravating circumstances attending the breach."

The Fourth Circuit acknowledged that Bartolomeo had listed seven different acts by Thomas (in addition to the assurances) that allegedly showed a 75-1.1 violation. These acts included tampering with documents, delaying reimbursements, and not telling Bartolomeo about incentive bonuses. The Fourth Circuit, however, concluded that these acts were, "at most, simple breaches of contract."

More importantly, the Fourth Circuit used the Bartolomeo opinion as a platform to summarize its holding in United Roasters. The court said that, to show a 75-1.1 violation under United Roasters, "one would probably need to demonstrate deception either in the formation of the contract or in the circumstances of the breach."

C. *Post v. Avita Drugs*: A Current View on Substantial Aggravating Circumstances

Read together, United Roasters and Bartolomeo cases arguably hold that a 75-1.1 violation based on substantial aggravating circumstances requires a showing of deceptive conduct. And following United Roasters, many state and federal court decisions have analyzed the kind of conduct that constitutes "substantial aggravating circumstances."

The North Carolina Business Court's recent decision in Post v. Avita Drugs, LLC, 2017 NCBC 93 (N.C. Bus. Ct. Oct. 11, 2007), summarizes the key principles in these decisions.

In Post, shareholders of a company named MedExpress sued Avita Drugs, which purchased the stock of MedExpress. The stock purchase agreement called for a $6 million payment by Avita at closing, and then for a deferred payment of up to $5.5 million. A formula in the stock purchase agreement would determine the precise amount of the deferred payment. The formula relied on the financial performance of MedExpress during the one-year period after the sale.

Ultimately, the shareholders and Avita clashed on the deferred payment amount. One of the shareholders ultimately sued Avita, alleging claims for breach of contract and violation of section 75-1.1.

In assessing the 75-1.1 claim, Judge Adam Conrad used the opportunity to expound on the policies behind the "substantial aggravating circumstances" doctrine.

First, Judge Conrad noted that North Carolina state and federal courts disfavor 75-1.1 claims that simply "piggyback" on breach-of-contract claims. As his opinion explains, the extraordinary damages available to a 75-1.1 claimant cannot be obtained in a breach-of-contract case. The rule against extraordinary damages in contract cases, Judge Conrad continued, promotes certainty in commercial contract negotiations. That certainty, in turn, permits the contracting parties to focus on the substance of the contract, not "the pitfalls posed by legal wild cards."

Judge Conrad then catalogued the foundational points from the many decisions on "substantial aggravating circumstance." The principles include the following:

- Deception in the formation of a contract is a "classic example" of an aggravating circumstance. This includes conduct that induced the plaintiff to enter the contract even though the defendant did not intend to keep its promises. It also includes deliberate misrepresentations during the formation period.

- Proving aggravating circumstances after contract formation is "far more difficult to allege and prove." This is because post-formation conduct usually involves a contract breach, meaning that any 75-1.1 claim is bound up with an assessment of the parties' contract rights. As Judge Conrad explains, the best way to resolve these claims is simply assessing whether the parties fulfilled their duties.

- An intentional breach of contract does not qualify as "substantially aggravating." Threats to breach and efforts to encourage performance while intending to breach also do not qualify.

- "Only where the circumstances of the breach exhibit clear deception are they sufficiently egregious to impose section 75-1.1 liability." These circumstances include forging or destroying documents, or concealing a breach while taking steps to deter investigation into the breach.

Judge Conrad then applied these principles to the facts of Post. Those facts concerned conduct (1) that occurred after the execution of the stock purchase agreement, and (2) that was subject to a provision of that agreement. For these reasons, the shareholders' rights should be determined by the agreement, and not the law on section 75-1.1.

D. Open questions

A review of United Roasters, Bartolomeo, and Post provides the foundation of the law on "substantial aggravating circumstances." Even with these decisions, open questions remain.

For example, how does a "substantial aggravating circumstances" claim based on deception differ from any other misrepresentation-based 75-1.1 claim? A misrepresentation-based claim under section 75-1.1 requires proof of a misrepresentation and reliance on that misrepresentation. Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 89–90, 747 S.E.2d 220, 227 (2013). The Bartolomeo court essentially made this point. It wrote that, even if Thomas gave false assurances to Bartolomeo for months, Bartolomeo did not show that he suffered actual injury as a proximate result of any statements by Thomas.

Second, United Roasters, Bartolomeo, and Post do not expressly decide whether a breach of contract can be unfair (that is, unfair beyond the level of unfairness that applies to every breach of contract). Assuming that an unfair breach—however it might be defined—does violate section 75-1.1, what would distinguish an unfair-breach claim from a claim for direct unfairness—one of the categories of section 75-1.1 claims? See Sparks v. Oxy-Health, LLC, 134 F. Supp. 3d 961, 997–98 (E.D.N.C. 2015) (providing a taxonomy of section 75-1.1 claims).

Future decisions might well clarify these issues. Until then, parties and lawyers can use United Roasters, Bartolomeo, and Post as a foundation for arguments on contract-based 75-1.1 claims.

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II. How Have Courts Analyzed the Economic-Loss Rule in Connection with Alleged Violations of Section 75-1.1?

When a plaintiff attempts to allege a section 75-1.1 claim related to a contract, the "substantial aggravating circumstances" doctrine is not the plaintiff's only initial hurdle. The plaintiff must also consider whether the economic-loss rule will bar the claim.

Under the economic-loss rule, a contract breach that causes only economic injury cannot support a separate tort action. The North Carolina Supreme Court delineated the rule in N.C. State Ports Authority v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 81–83, 240 S.E.2d 345, 350–51 (1978)

The economic-loss rule rests on the principle that contracting parties have intentionally allocated risk in their contract. The rule therefore confines the law of contracts and the law of torts to separate spheres, and it precludes parties from circumventing their agreed-upon contractual remedies with open-ended tort remedies.

North Carolina's appellate courts have not issued a decision that squarely answers whether or when the economic-loss rule bars claims under section 75-1.1.

The courts that have examined the question, however, have shown that the economic-loss rule can be a potent defense to a 75-1.1 claim.

First, at least two cases have applied the economic-loss rule to a section 75-1.1 claim that parrots a breach-of-warranty claim.

For example, in Bussian v. DaimlerChrysler Corp., 411 F. Supp. 2d 614, 625–26 (M.D.N.C. 2006), the court dismissed a section 75-1.1 claim in a putative class action relating to defective ball joints in DaimlerChrysler's Dodge Durango. No class member suffered any physical injury. The only damage was to the car itself.

In addition to raising a 75-1.1 claim, the plaintiff in Bussian sued for breach of warranty. The existence of the warranty gave rise to the application of the economic-loss rule: because the 75-1.1 claim involved the same allegations as the warranty claim, and because only damage was to the car itself, the economic-loss rule barred the plaintiff from pursuing extracontractual remedies.

Several years after Bussian, another federal court applied the same reasoning to dismiss a section 75-1.1 claim that mimicked a claim for breach of warranty of a home-construction material. Ellis v. La.-Pac. Corp., No. 3:11CV191, *2 (W.D.N.C. Nov. 8, 2011), aff'd, 699 F.3d 778 (4th Cir. 2012). The Fourth Circuit affirmed Ellis, but did so without addressing the economic-loss rule.

More recently, the Business Court relied on the economic-loss rule to dismiss a section 75-1.1 claim related to a lease agreement for an airplane. See Carmeyer, LLC v. Koury Aviation, Inc., 2017 NCBC 80, ¶¶ 71–75, 88 (N.C. Bus. Ct. Sep. 11, 2017). The court concluded that the substance of the 75-1.1 claim—the defendants' duty to advise the plaintiff on the plane's condition and certification status—were governed by the lease agreement. The economic-loss rule therefore barred the claim, which sought only economic injury.

As these cases show, to avoid the economic-loss rule, a section 75-1.1 claimant would be well-served to premise its claim on conduct that is not governed by the relevant contract.

For example, in Artistic Southern Inc. v. Lund, 2015 NCBC 109 ¶¶ 57–61 (N.C. Bus. Ct. Dec. 9, 2015), the Business Court addressed whether the economic-loss rule barred a section 75-1.1 claim related to an employment agreement. The plaintiff alleged that a former employee—who was bound by the agreement—misappropriated trade secrets, embezzled, interfered with contracts, and committed multiple other fraudulent acts. The court concluded that these acts—each of which supported the plaintiff's 75-1.1 claim—implicated duties separate and distinct from those under the employment agreement. The court therefore did not dismiss the claim based on the economic-loss rule.

Not all section 75-1.1 claims, however, make for tidy application of the economic-loss rule. In this regard, consider two decisions by the North Carolina

Court of Appeals decided roughly one year ago, in December 2016, by the North Carolina Court of Appeals. See Buffa v. Cygnature Constr. & Dev., Inc., No. COA16-237, 2016 WL 7984216, at *6–*7 (N.C. Ct. App. Dec. 30, 2016) (unpublished); Bradley Woodcraft, Inc. v. Bodden, 795 S.E.2d 253, 258–60 (N.C. Ct. App. 2016).

Buffa concerned the construction of a mountain home. Five years after the construction ended, the owners discovered extensive water damage that had already harmed the structural integrity of the home. Several inspections suggested that the water had entered through windows.

The owners sued several companies associated with the construction, including the window manufacturer. Their 75-1.1 claim against the window manufacturer stated only the following (emphasis added):

> Windsor Windows engaged in unfair and deceptive acts or practices . . . when, in selling and advertising the windows in the Buffa Home, Windsor Windows failed to give the Buffas adequate warnings and notices regarding the defect in the windows despite the fact that Windsor knew or should have known of this defect, with the intent that the Buffas would rely upon Windsor's failure to disclose the defect when purchasing the windows. The Buffas were deceived by and relied upon Windsor Windows' failure to disclose.

The trial court granted summary judgment in favor of the window manufacturer. The court held that the economic-loss rule barred the 75-1.1 claim and several tort claims.

The owners appealed. On the section 75-1.1 claim, the owners argued that the economic-loss rule does not apply to 75-1.1 claims at all. They cited a string of state and federal cases that, they argued, allowed consumers to recover under section 75-1.1 "for purely economic loss."

Because the owners had not contracted directly with the window manufacturer, the Court of Appeals first considered whether the case was even within the general ambit of economic-loss rule. The court held that it was within that ambit. Although the owners did not contract directly with the window manufacturer, they were beneficiaries of a contract: the window manufacturer's express warranty.

After reaching that conclusion, the court rejected the owners' "conten[tion that] the trial court erred by applying the economic-loss rule to a claim of unfair and deceptive trade practices." The court, however, did not analyze the economic-loss rule beyond that. Instead, the bulk of the court's opinion asked the more usual question in contract-based 75-1.1 cases: whether a breach of contract was accompanied by "egregious or aggravating circumstances."

As the above block quote shows, the owners' section 75-1.1 claim alleged only that the window manufacturer failed to notify the owners of a known design defect. The Court of Appeals held that this nondisclosure was nothing more than a breach of warranty. On that basis, it upheld the trial court's summary judgment against the 75-1.1 claim.

Just ten days earlier, a different panel of the Court of Appeals issued an opinion in the opposite direction in Bradley Woodcraft. In that case, the Court of Appeals appeared to hold that fraud claims are never subject to the economic-loss rule.

Bradley Woodcraft, like Buffa, involved a construction dispute. The homeowner's claims included breach of contract, fraud, and violations of section 75-1.1. The case went to trial. At the close of the homeowner's evidence, the contractor moved for a directed verdict on the fraud and section 75-1.1 counterclaims, citing the economic-loss rule. The trial court granted the contractor's motion.

On appeal, the Court of Appeals focused on the fraud claim. The court seemed to hold categorically that the economic-loss rule does not apply to fraud claims: "[W]hile claims for negligence are barred by the economic-loss rule where a valid contract exists between the litigants, claims for fraud are not so barred."

The court went on to reverse the directed verdict against Ms. Bodden's 75-1.1 claim because that claim was "factually interwoven" with the fraud claim.

What might be the effect of Bradley Woodcraft?

- Under a broad reading of Bradley Woodcraft, a 75-1.1 claim that can be characterized as a fraud claim might survive the economic-loss rule.

- A narrow reading, however, can also be justified. The record and briefs in the case show that the fraud and 75-1.1 claims were based on extracontractual statements by the contractor, including statements about the contractor's qualifications and later representations about potential damage to the home. Given this context, the court's decision could be interpreted as the same reasoning from Lund—the case involved conduct not governed by the contract, so the homeowner could pursue non-contract claims.

Finally, if they seek policy arguments to sidestep the economic-loss rule, section 75-1.1 claimants might consider the points raised in now-Justice Hudson's dissent in Coker v. DaimlerChrysler Corp.,172 N.C. App. 386, 406–07, 617 S.E.2d 306, 319 (2005) (Hudson, J., dissenting). Coker involved consumer-warranty claims, including an alleged violation of section 75-1.1. The Court of Appeals concluded that the plaintiffs lacked standing and, for that reason, did not turn to the argument of whether the plaintiff's claims were barred by the economic-loss rule.

In dissent, Justice Hudson disagreed with the Court's standing analysis. She then concluded that the section 75-1.1 claim should survive the economic-loss rule. In making the argument, Justice Hudson relied on two points of policy.

First, she stated that the economic-loss rule is designed to prevent parties from circumventing their contracts. This purpose is not served, she elaborated, when fraud, unfairness, or deception undermine a party's ability to freely negotiate and allocate risk.

Second, with respect to section 75-1.1 claims in particular, Justice Hudson interpreted section 75-1.1 as an expression of the General Assembly's intent to give consumers a specific remedy for acts and practices prohibited by the statute. For this reason, Justice Hudson discerned a legislative intent that section 75-1.1 claims would not be nullified by the economic-loss rule.

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III. How Does a Choice-of-Law Clause in a Contract Affect the Application of Section 75-1.1?

As discussed above, the mere existence of a contract can sound the death knell of a section 75-1.1 claim. A contract can doom a section 75-1.1 claim in another way, as well. The contract might contain a choice-of-law clause that calls for the contract to be construed under the law of a state other than North Carolina.

When a contract contains that type of clause, a party charged with a 75-1.1 violation related to the contract is likely to argue that the choice-of-law provision precludes the 75-1.1 claim.

How strong is that argument? Some recent cases provide answers.

A. Choice-of-Law Clauses and Fundamental Public Policy

In Canon U.S.A., Inc. v. Cavin's Business Solutions, Inc., 208 F.Supp.3d 494, 504–05 (E.D.N.Y. 2016), a federal court in New York considered a 75-1.1 claim against a North Carolina defendant. The claim centered on a business contract—a contract that stipulated that it was governed by New York law.

Significantly, New York law and North Carolina law had a true conflict. Under New York law on unfair trade practices, the plaintiff's proposed claim would fail.

The plaintiff, however, insisted that section 75-1.1 should still apply. Under New York's conflict-of-laws regime, a contractual choice of law will not be enforced if application of the chosen law would violate a fundamental public policy of the jurisdiction whose law would otherwise apply. (The same is true under North Carolina's choice-of-law regime.) According to the plaintiff, applying New York law would violate a fundamental public policy of North Carolina.

The Canon court put the onus on the plaintiff to show why the public policy of North Carolina that prohibits fraudulent commercial conduct was fundamental enough to overcome the choice-of-law clause in the relevant agreement.

The court decided that the plaintiff did not make this showing. In particular, the plaintiff did not identify any authority from North Carolina that calls the enforcement of section 75-1.1 fundamental. The fact that section 75-1.1 is a significant statute, the court explained, does not necessarily mean that it embodies a fundamental public policy. (Unfortunately, the court did not explain what characteristics might make a public policy fundamental, rather than just significant.)

The court also saw no reason why North Carolina had a materially greater interest in this dispute than New York had. New York, after all, has its own statute and case law on unfair trade practices. The fact that New York law is narrower than North Carolina law does not mean that New York's interest is somehow less important than North Carolina's interests.

In Canon, then, the mere fact that New York law differed from North Carolina law on unfair trade practices did not automatically mean that applying New York law would offend fundamental public policies.

B. Section 75-1.1 Claims and the Scope of Choice-of-Law Clauses

A section 75-1.1 claimant can attempt to sidestep a choice-of-law clause through another argument. The claimant can contend that the section 75-1.1 claim involves conduct that falls outside of the contract's scope.

This issue arose in recent decision from the U.S. District Court for the Middle District of North Carolina that assessed a section 75-1.1 claim related to a contract with a non-North Carolina choice-of-law clause. See SmithKline Beecham Corp. d/b/a GlaxoSmithKline v. Abbott Labs., No. 1:15CV360, 2017 WL 1051123, *6–*11 (M.D.N.C. Mar. 20, 2017).

GSK concerned a drug manufactured by Abbott to treat HIV infection. The drug, called Norvir, is a protease inhibitor. Norvir can prevent immature HIV from becoming a mature virus. When paired with other protease inhibitors, Norvir can improve patient outcomes related to HIV. For this reason, GSK relied on Norvir's availability when GSK developed its own protease inhibitors.

In 2002, Abbott and GSK entered into a license agreement to allow GSK to promote Norvir with GSK's protease inhibitors. New York law governed the agreement.

GSK then introduced a new protease inhibitor to be used specifically with Norvir. Two weeks after this introduction, however, Abbott raised the price of Norvir by four-hundred percent. In its lawsuit, GSK alleged that this price increase prevented GSK from promoting its new protease inhibitor at a competitive price, and thereby caused GSK to lose market share.

GSK also alleged that, during contract negotiations, Abbott concealed its plan to hike prices. As some evidence of this allegation, GSK pointed to a statement by a senior Abbott executive after the price increase, in which the executive congratulated his Abbott colleagues on "giving a lump of coal to . . . GSK for the holidays."

Abbott filed a motion for judgment on the pleadings. Abbott argued that, under North Carolina's choice-of-law rules (which apply in federal court), GSK could not pursue a section 75-1.1 claim. According to Abbott, the laws of either Pennsylvania (GSK's corporate headquarters) or New York (the law that governed the license agreement) apply to the claim. Abbott reasoned that GSK cannot pursue its 75-1.1 claim because Pennsylvania and New York do not permit a business to assert an unfair-trade-practices claim against another business.

Notably, the GSK court did not start its analysis with the New York choice-of-law provision in the license agreement. The court cited two reasons.

1. Because a section 75-1.1 claim does not require a contract, a choice-of-law clause in a contract is not dispositive of what law applies to the claim.

2. The choice-of-law clause in the license agreement did not apply to the section 75-1.1 claim in any event, because GSK's 75-1.1 claim did not rely on the validity or enforceability of any provision in the agreement.

This reasoning mirrors the approach that other courts have taken when discerning whether a choice-of-law clause applies to a section 75-1.1 claim. See, e.g., ITCO Corp. v. Michelin Tire Corp., 722 F.2d 42, 49 n.11 (4th Cir. 1983).

The GSK court then conducted a detailed choice-of-law analysis. The court noted at the outset that North Carolina's choice-of-law regime for unfair-trade-practices claims is unsettled. This is because the North Carolina Supreme Court has not addressed the issue, and the North Carolina Court of Appeals has issued conflicting decisions:

- Some decisions apply the lex loci test. Under that test, the court applies the law of the state where the claimant was injured.

- Other decisions apply the most significant relationship test. Under that test, the court applies the law of the state having the most significant relationship to the occurrence that gave rise to the action.

The court ultimately applied the lex loci test. The court concluded that, under that test, North Carolina law governed GSK's section 75-1.1 claim. To reach this conclusion, the court explained that the place of injury in a section 75-1.1 claim is the state where the last act occurred that gave rise to the injury. GSK's injury was lost market share and lost profits, but the parties disagreed about where GSK suffered that injury. Abbott pointed to Pennsylvania, site of GSK's corporate headquarters. GSK pointed to North Carolina, site of its HIV business.

The court essentially left the question open. The issue was before the court on a Rule 12(b)(6) motion, and the court decided that GSK had plausibly pleaded that GSK suffered its injury in North Carolina. That allegation was enough at the Rule 12 stage to deny the motion.

The court also noted that the most significant relationship test would yield the same result. The court explained that the key factor in that test is the place where the relationship between the parties is centered, and the relationship between GSK and Abbott was centered in North Carolina. That was because GSK operates its HIV-drug operations out of its North Carolina offices. In addition, those offices were the site of the alleged misrepresentations. These facts outweighed the fact that Pennsylvania was GSK's corporate headquarters.

The decision in GSK highlights at least two significant practical considerations for section 75-1.1 litigation.

First, a 75-1.1 claimant should assess the extent to which its theory is intertwined with any contract that has a choice-of-law provision. In GSK, a misrepresentation claim related to contract negotiations fell outside of the contract's choice-of-law provision. An aggravated-breach claim, in contrast, might well be subsumed in a contract's choice-of-law provision.

Second, a 75-1.1 claimant should be aware of the operative choice-of-law regime if the choice-of-law provision does not apply. That regime can have enormous stakes in section 75-1.1 litigation.

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