

## DEFINING UNFAIRNESS IN “UNFAIR TRADE PRACTICES”\*

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*North Carolina’s “unfair or deceptive acts or practices” statute, section 75-1.1 of the North Carolina General Statutes, is a constant presence in North Carolina litigation. The statute combines two explosive ingredients: (1) a private right of action for treble damages and (2) an open-ended conduct standard.*

*For claims of unfair practices, the conduct standard under section 75-1.1 is open-ended to the point of dysfunction. The standard is no more than a list of adjectives—a list that does not forecast the outcome of a given case. When courts apply this list of adjectives, they usually cannot explain why the adjectives are or are not satisfied. The resulting case law is opaque. This opaqueness makes the outcome of unfairness cases unpredictable.*

*A solution to these problems is readily available. Section 75-1.1 is based on section 5 of the Federal Trade Commission Act. Early decisions under section 75-1.1 said expressly that courts should take guidance from the law under section 5. The courts need only follow that advice.*

*The law under section 5 has much to offer courts in section 75-1.1 cases. Most notably, section 5 doctrine holds that conduct is unfair only if it causes injuries that a plaintiff cannot reasonably avoid. Adding this “not reasonably avoidable” test to the unfairness doctrine under section 75-1.1 will make this form of litigation more balanced and predictable.*

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## INTRODUCTION

Section 75-1.1 of the North Carolina General Statutes<sup>1</sup> is a central feature of North Carolina litigation. A claim under this statute is “a boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina.”<sup>2</sup> Section 75-1.1 is invoked so frequently because a violation of the statute triggers powerful remedies: automatic treble damages, plus an opportunity to recover attorney fees.<sup>3</sup>

1. N.C. GEN. STAT. § 75-1.1(a) (2011). Throughout this Article, we refer to this statute as “section 75-1.1.” We do this for two reasons.

First, we hope to avoid reinforcing the idea that the statute reaches everything that the undefined terms “unfair” and “deceptive” might cover. In the title of this Article,

Section 75-1.1 claims are common for another reason as well. The conduct standard under the statute is so open-ended that unless a categorical exemption applies, there is almost always a credible threat that a 75-1.1 claim will succeed. As a result, North Carolina lawyers include a 75-1.1 claim in almost every lawsuit that involves business conduct.<sup>4</sup> This pattern holds true in consumer cases<sup>5</sup> and business-versus-business cases alike.<sup>6</sup>

In fact, some experienced litigators now pursue substantial lawsuits under section 75-1.1 alone.<sup>7</sup> Because of the loosely defined conduct standard under section 75-1.1, the added uncertainty for the defense in a pure section 75-1.1 case outweighs the risks to the plaintiff from omitting other claims. This new pattern in North Carolina litigation highlights the amorphous standard for liability under section 75-1.1.

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we use the most popular name for section 75-1.1, but we do so only because North Carolina lawyers and judges recognize this name most readily. *See* NOEL L. ALLEN, NORTH CAROLINA UNFAIR BUSINESS PRACTICE § 1.01, at 1-1 (3d ed. 2011) (noting that courts often use the term “unfair trade practices” to describe section 75-1.1).

Second, courts and commentators actually have not settled on a name for section 75-1.1. *See, e.g.*, N.C. Farm Bureau Mut. Ins. Co. v. Cully’s Motorcross Park, Inc., \_\_ N.C. App. \_\_, 725 S.E.2d 638, 640 n.1 (2012) (“We note that the parties in this case, as well as the trial court, refer to ‘unfair and deceptive trade practices’ claims. Because N.C. Gen. Stat. § 75-1.1 . . . no longer contains the word ‘trade,’ we will refer to Defendants’ claims as ‘Section 75-1.1 claims.’”), *petition for disc. rev. filed*, No. 243P12 (N.C. June 4, 2012). Because we want to put content behind the labels *in* section 75-1.1, we want to avoid debate over what labels to put *on* the statute.

2. *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 347 (4th Cir. 1998) (quoting *Allied Distribs., Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379 (E.D.N.C. 1993)).

3. *See* N.C. GEN. STAT. §§ 75-16, -16.1 (2011).

4. *See infra* notes 33–35 and accompanying text (discussing the ubiquity of section 75-1.1 claims).

5. *See, e.g.*, *Forbes v. Par Ten Grp., Inc.*, 99 N.C. App. 587, 589–91, 394 S.E.2d 643, 644–45 (1990) (describing a claim by purchasers of lots in a golf course community).

6. *See, e.g.*, *Allied Distribs., Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 377 (E.D.N.C. 1993).

7. *See, e.g.*, *Wilson v. Blue Ridge Electric Membership Corp.*, 157 N.C. App. 355, 355, 578 S.E.2d 692, 693 (2003) (stating that a section 75-1.1 claim alone was raised in corporate governance dispute); Complaint ¶¶ 109–19, *Hamilton v. Mortg. Info. Servs., Inc.*, \_\_ N.C. App. \_\_, 711 S.E.2d 185 (2011) (Wake County, N.C. Super. Ct. No. 08 CVS 15102) (using only section 75-1.1 claims to attack the allegedly unauthorized practice of law and alleged excess charges in real-estate loan closings); Complaint ¶¶ 40–59, *Canady v. Coats*, No. 10 CVS 873 (Columbus County, N.C. Super. Ct. June 24, 2010) (using only section 75-1.1 claims to seek recovery for investment scheme that the defendant allegedly carried out in connection with premium financing of life insurance); *cf. In re Fifth Third Bank, Nat’l Ass’n—Vill. of Penland Litig.*, \_\_ N.C. App. \_\_, 719 S.E.2d 171, 174–75 (2011) (noting that the plaintiffs in a real-estate fraud case had pared down their claims to two: a section 75-1.1 claim and a claim for “Tortious Action in Concert and Civil Conspiracy”), *petition for cert. filed*, No. 23P12 (N.C. Jan. 13, 2012).

The liability standards under section 75-1.1 are especially problematic for claims of “unfair” conduct. For unfairness claims, the case law instructs courts to apply a list of adjectives, such as “immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.”<sup>8</sup> When courts must decide whether particular conduct is unfair, these adjectives offer no real help. The courts find it difficult to interweave the adjectives with the facts in a meaningful way. Instead, the courts can only announce a violation or its absence. Because of this pattern, the unfairness case law, like the unfairness standard itself, offers no forecast for the outcome of a given case.

Things do not have to be this way. There is a rich source of standards for defining unfairness under section 75-1.1: agency pronouncements and court decisions that define unfairness under section 5 of the Federal Trade Commission Act (FTC Act).<sup>9</sup> Section 75-1.1 is based on section 5 and borrows its text.<sup>10</sup> In the early years of decisions under section 75-1.1, North Carolina courts regularly took guidance from authorities under section 5.<sup>11</sup> However, this practice has faded in recent years. As the case law under section 75-1.1 itself has expanded, the courts have quietly stopped cross-checking against section 5 authorities.

Rekindling the relationship between section 75-1.1 and section 5 would solve many of the problems with unfairness liability under section 75-1.1. From the 1980s forward, the Federal Trade Commission (FTC) has refined the standards for unfairness under section 5.<sup>12</sup> In particular, the FTC has added a helpful question to the test for unfairness: Was the plaintiff reasonably able to avoid the injury that she alleges?<sup>13</sup>

This Article recommends that courts in section 75-1.1 cases resume taking guidance from section 5 authorities. Specifically, the Article recommends that courts add the “not reasonably avoidable” test to their analysis of unfairness claims under section 75-1.1.

Part I of this Article gives an overview of section 75-1.1 and its history. It also describes how unfairness claims fit into the array of claims under section 75-1.1. Part II explains the current troubled state

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

9. 15 U.S.C. § 45(a)(1) (2006).

10. *See infra* notes 174–77 and accompanying text (describing the relationship between section 75-1.1 and section 5).

11. *See infra* notes 178–96 and accompanying text.

12. *See infra* notes 143–64 and accompanying text.

13. *See infra* notes 147–48 and accompanying text.

of unfairness claims under section 75-1.1. Part III traces the analysis of unfair acts and practices under section 5. Part IV outlines North Carolina courts' history of referring to authorities under section 5 in section 75-1.1 cases. Part V justifies adding the "not reasonably avoidable" test to the test for unfairness under section 75-1.1.

## I. THE HISTORY AND ESSENTIAL FEATURES OF SECTION 75-1.1

### A. Section 75-1.1 and Its History

Section 75-1.1 states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."<sup>14</sup> The North Carolina General Assembly enacted section 75-1.1 in 1969.<sup>15</sup> The statute was part of a nationwide wave of consumer protection measures that states enacted in the 1960s and early 1970s.<sup>16</sup>

Section 75-1.1 is based on one version of a model statute, the Unfair Trade Practices and Consumer Protection Law,<sup>17</sup> that the FTC had promoted.<sup>18</sup> Like that version of the model statute, section 75-1.1 mirrors section 5 of the FTC Act.<sup>19</sup>

In the first decade that section 75-1.1 was on the books, the General Assembly broadened the statute's scope without changing its conduct standard. This process began with a decision of the Supreme Court of North Carolina. In *State ex rel. Edmisten v. J.C. Penney*

14. N.C. GEN. STAT. § 75-1.1(a) (2011).

15. Act of June 12, 1969, ch. 833, sec. 1(b), 1969 N.C. Sess. Laws 930, 930. The key language in the 1969 version of the statute read: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *Id.* sec. 1(b), § 75-1.1(a), amended by Act of June 27, 1977, ch. 747, §§ 1–2, 1977 N.C. Sess. Laws 984, 984.

16. See John F. Graybeal, *Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina*, 80 N.C. L. REV. 1927, 1933–34 (2002).

17. 28 COMM. OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION, COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION C-4 (1969).

18. See, e.g., *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981); William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 730 (1972); see also Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 170–73 (2011) (outlining the history and contents of the model statute).

19. Compare N.C. GEN. STAT. § 75-1.1(a), with 15 U.S.C. § 45(a)(1) (2006). See generally Robert Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRAMURAL L. REV. 1, 18–20 (1969) (discussing the history of the enactment of section 75-1.1, including the intentional choice to follow the language of section 5).

For reasons similar to those discussed above, see *supra* note 1, we call state statutes that are based on section 5 of the FTC Act "section 5 analogues."

*Co.*,<sup>20</sup> the supreme court decided that the 1969 version of the statute covered only “bargain, sale, barter, exchange or traffic” in goods.<sup>21</sup> The court therefore held that the statute did not cover abusive debt collection practices.<sup>22</sup> Later that year, the General Assembly overruled *J.C. Penney*. It did so by deleting the word “trade” from section 75-1.1 and inserting a statement that, except for certain express exclusions, the statute covers “all business activities, however denominated.”<sup>23</sup> However, neither the *J.C. Penney* decision nor the 1977 statutory amendment addressed the conduct standard under the statute.<sup>24</sup>

*B. The Remedies for Section 75-1.1 Violations*

One purpose of enacting section 75-1.1 was “to encourage enforcement of the act by private individuals injured by unfair trade practices.”<sup>25</sup> To accomplish this goal, the legislature attached lucrative private remedies to section 75-1.1. Most notably, the legislature included section 75-1.1 among the North Carolina statutes that generate automatic treble damages.<sup>26</sup> In addition, a claimant who

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20. 292 N.C. 311, 233 S.E.2d 895 (1977).

21. *Id.* at 316–17, 233 S.E.2d at 899.

22. *See id.* at 320, 233 S.E.2d at 901.

23. N.C. GEN. STAT. § 75-1.1(b) (2011); *see Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 261 n.5, 266 S.E.2d 610, 620 n.5 (1980) (noting that this statutory amendment occurred “in the wake of our decision in *Penney*”), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). The new definition of “commerce” replaced the following statutory language on the purpose of section 75-1.1:

The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and 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.

Act of June 12, 1969, ch. 833, sec. 1(b), § 75-1.1(b), 1969 N.C. Sess. Laws 930, 930 (emphasis added), *repealed by* Act of June 27, 1977, ch. 747, § 2, 1977 N.C. Sess. Laws 984, 984.

In *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), the Supreme Court of North Carolina noted the deletion of former subsection 75-1.1(b) in a way that obliquely suggested that the deletion has substantive significance, but the court did not describe the significance. *See id.* at 545–46 & n.1, 276 S.E.2d at 401 & n.1.

24. *See* Act of June 27, 1977, ch. 747, §§ 1–3, 1977 N.C. Sess. Laws 984, 984; *J.C. Penney*, 292 N.C. at 314–17, 233 S.E.2d at 897–99.

25. *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 235, 259 S.E.2d 1, 5 (1979); *see Morgan, supra* note 19, at 14 (discussing this purpose).

26. *See* N.C. GEN. STAT. § 75-16 (2011); *see also* Stephen Mason Thomas, Note, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C. L. REV. 896, 899 (1970) (noting the significance of the fact that section 75-1.1 is part

prevails on a section 75-1.1 claim can recover attorney fees if he can show that the defendant violated the statute willfully and made an “unwarranted refusal . . . to fully resolve the matter which constitutes the basis of” the lawsuit.<sup>27</sup>

Section 75-1.1 claims led to the three largest verdicts or settlements reported in North Carolina’s legal newspaper in 2009.<sup>28</sup> In view of the remedies available for section 75-1.1 violations, the size of these recoveries, ranging from \$11.2 million to \$42.5 million, is not surprising.

According to the Supreme Court of North Carolina, the remedies for section 75-1.1 claims were designed to encourage private enforcement and, indeed, to create incentives for settlement.<sup>29</sup> Despite the punitive nature of treble damages,<sup>30</sup> the court has held

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of chapter 75). Indeed, at the same time that the General Assembly enacted section 75-1.1, it amended the treble-damages statute, section 75-16, to broaden the classes of people and businesses who could recover under it. *See* Act of June 12, 1969, ch. 833, sec. 1(*l*), 1969 N.C. Sess. Laws 930, 931; Thomas, *supra*, at 899; *see also* Hyde v. Abbott Labs., Inc., 123 N.C. App. 572, 576–78, 473 S.E.2d 680, 683–84 (1996) (relying on the 1969 amendment to section 75-16 as a basis for finding that the General Assembly intended to allow indirect purchasers to recover under North Carolina’s state antitrust laws).

Chapter 75 of the North Carolina General Statutes includes North Carolina’s state antitrust laws. *See* N.C. GEN. STAT. §§ 75-1, -2, -2.1 (2011). It also includes a variety of other consumer protection statutes, as well as statutes on public enforcement. *See, e.g., id.* §§ 75-38 to -39 (prohibiting price gouging under stated circumstances); *id.* §§ 75-120 to -121 (prohibiting certain “foreclosure rescue” transactions); *id.* §§ 75-9 to -15.2 (governing attorney general enforcement, with some provisions specific to section 75-1.1). Some of the substantive statutes in chapter 75 state their own remedies. *See, e.g., id.* § 75-127 (imposing civil penalty of \$5,000 to \$15,000 for violations of the Truth in Music Advertising Act).

In view of the mixed contents of chapter 75, careful lawyers avoid two common misnomers: (1) calling section 75-1.1 alone “chapter 75” and (2) citing “N.C. GEN. STAT. §§ 75-1.1 et seq.” *See* ALLEN, *supra* note 1, § 1.04, at 1-9 to -10 (discussing the nomenclature problems in decisions under section 75-1.1).

27. N.C. GEN. STAT. § 75-16.1(1) (2011). This fee-shifting provision is limited to claims under section 75-1.1, as opposed to the antitrust statutes or the other statutes in chapter 75. *See id.* § 75-16.1; *cf.* Clayton Act §§ 4(a), 16, 15 U.S.C. §§ 15(a), 26 (2006) (allowing attorney fees in successful claims under the federal antitrust laws). Section 75-16.1 also allows *reverse* fee shifting if “[t]he party instituting the action knew, or should have known, the action was frivolous and malicious.” N.C. GEN. STAT. § 75-16.1(2) (2011). Reverse fee awards under section 75-16.1 are comparatively rare. *See* ALLEN, *supra* note 1, § 11.10, at 11-32 to -37.

28. *See Largest Verdicts & Settlements*, N.C. LAW. WKLY., Jan. 25, 2010, at 14; *see also Top Verdicts & Settlements*, N.C. LAW. WKLY., Feb. 6, 2012, at 7 (reporting a September 2011 verdict for \$8.76 million for “unfair and deceptive trade practices”); *Large Verdicts & Settlements*, N.C. LAW. WKLY., Jan. 31, 2011, at 7 (reporting a \$10.1 million arbitration award in June 2010 on a counterclaim for “unfair/deceptive trade practices”).

29. *Marshall v. Miller*, 302 N.C. 539, 549, 276 S.E.2d 397, 403–04 (1981).

30. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (recognizing a long history of using “double, treble, or quadruple damages to deter and

that section 75-1.1 is both punitive and remedial.<sup>31</sup> The court might have adopted this description with an eye on the due process constraints on punitive remedies.<sup>32</sup>

Because of the lucrative remedies available for section 75-1.1 violations, “[i]n modern business litigation in North Carolina, it is increasingly rare to see a complaint that does *not* contain a claim

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punish”); *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (“The very idea of treble damages reveals an intent to punish past and to deter future, unlawful conduct . . .”).

31. *Marshall*, 302 N.C. at 546–47, 276 S.E.2d at 402; *State ex rel. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 316–17, 233 S.E.2d 895, 899 (1977).

Section 75-1.1 involves a mixed pattern of adjudication as well. Under section 75-1.1 case law, a jury finds the “facts,” then the court decides as a matter of law whether the facts found by the jury satisfy the conduct standard under the statute. *See, e.g.*, *Hardy v. Toler*, 288 N.C. 303, 310, 218 S.E.2d 342, 346–47 (1975) (establishing these roles for the jury and for the court in section 75-1.1 cases). This distinction between factfinding and application of a legal standard tends to collapse in practice. *See, e.g.*, Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1005–06 (1986); *see also* *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 399 F.3d 248, 269–70 (3d Cir. 2005) (Ambro, J., concurring) (describing the difficulties that arise when the relevant question “can only be answered by both determining the facts of a case and determining what the relevant law means”). The slippage between factfinding and application of law increases when trial courts phrase 75-1.1-related jury issues in terms that resemble the standard for unfairness. For example, in *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 403 S.E.2d 483 (1991), the trial court allowed the jury to decide whether the defendants’ “refusal to retire HAJMM’s revolving fund certificate [was] an open, fair and honest transaction.” *Id.* at 582, 403 S.E.2d at 486 (quoting verdict form); *see id.* at 595–96, 403 S.E.2d at 494 (Martin, J., dissenting) (arguing that the jury’s “no” answer to this question established liability under section 75-1.1).

32. If section 75-1.1 were considered punitive, the vagueness of the conduct standard under the statute, *see infra* notes 36–39, 89–96 and accompanying text, would raise a due process concern. *See, e.g.*, *Hammers v. Lowe’s Cos.*, 48 N.C. App. 150, 154, 268 S.E.2d 257, 260 (1980) (stating that the language of 75-1.1 is “so broad and vague, indeed, as to render the triple damage penalty provided by [section 75-16] in a private action brought for violation of the vague language of [section 75-1.1] at least of questionable validity”); *see also* *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 81 N.C. App. 1, 24, 344 S.E.2d 82, 95 (1986) (rejecting void-for-vagueness challenge to a 75-1.1 claim on the ground that the case at bar involved fraud and that “[c]learly, the language of G.S. § 75-1.1 provides adequate notice that conduct constituting fraud is prohibited”), *aff’d in part, rev’d in part on other grounds*, 319 N.C. 534, 356 S.E.2d 578 (1987). *See generally* Thomas A. Farr, *Unfair and Deceptive Legislation: The Case for Finding North Carolina General Statutes Section 75-1.1 Unconstitutionally Vague as Applied to an Alleged Breach of a Commercial Contract*, 8 CAMPBELL L. REV. 421, 426–29 (1986) (arguing that, at least in non-consumer cases, section 75-1.1 is unconstitutionally vague whether it is considered penal or not); Glenn C. Campbell, Note, *Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Treble Damages and the Void-for-Vagueness Doctrine*, 62 N.C. L. REV. 1129, 1137–38 (1984) (opining that because section 5 has been held not unconstitutionally vague, section 75-1.1 is not unconstitutionally vague as applied).



under G.S. § 75-1.1 for unfair or deceptive trade practices.”<sup>33</sup> Over its forty-three-year history, the statute is said to have generated 1,090 reported decisions,<sup>34</sup> to say nothing of unreported decisions. The federal courts have commented several times, with disfavor, on the ubiquity of section 75-1.1 claims.<sup>35</sup>

### C. *The Elements of a Section 75-1.1 Claim*

Another important factor that encourages section 75-1.1 claims is the vagueness of the elements of a violation. To prevail under the statute, plaintiffs “must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs.”<sup>36</sup> The statute also allows claims for unfair methods of competition.<sup>37</sup>

Unlike section 5 analogues in many other states,<sup>38</sup> section 75-1.1 does not contain a list of specifically prohibited business practices. The North Carolina courts have also declined to limit section 75-1.1 to consumer claims or to buyer-seller relationships.<sup>39</sup>

As the North Carolina courts have defined section 75-1.1 claims, they have rejected a number of potential defenses. For example, a section 75-1.1 plaintiff does not need to show a defendant’s bad faith,

33. John Buford, *Supreme Court Rejects Chapter 75 Claim Between Partners*, N.C. BUS. LITIG. REP. (Apr. 21, 2010), <http://www.ncbusinesslitigationreport.com/2010/04/articles/fiduciary-duty/supreme-court-rejects-chapter-75-claim-between-partners> (emphasis added).

34. ALLEN, *supra* note 1, § 1.01, at 1-2.

35. *See, e.g.*, *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 347 (4th Cir. 1998); *Deltacom, Inc. v. Budget Telecom, Inc.*, No. 5:10-CV-38-FL, 2011 WL 2036676, at \*4 (E.D.N.C. May 22, 2011); *Allied Distribs., Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379 (E.D.N.C. 1993).

36. *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 71–72, 653 S.E.2d 393, 399 (2007).

37. *See* N.C. GEN. STAT. § 75-1.1(a) (2011); *infra* notes 60–65 and accompanying text. As shown below, there are also two other types of section 75-1.1 claims: (1) claims based on violations of other statutes, violations of agency regulations, or business torts (as a group, so-called per se violations of section 75-1.1); and (2) claims based on “aggravated” breaches of contracts. *See infra* notes 46–59, 76–85 and accompanying text.

38. *See, e.g.*, ALASKA STAT. § 45.50.471(b) (2010); 73 PA. CONS. STAT. ANN. § 201-2(4) (2008). *See generally* 1 DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW app. 3B, at 171–73 (2011) (listing 38 states and territories whose section 5 analogues include a list—in most cases, a nonexclusive list—of prohibited acts).

39. *See, e.g.*, *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988); *see also infra* notes 241–42 (citing eight-figure recoveries by business plaintiffs under section 75-1.1).

intent, willfulness, or knowledge.<sup>40</sup> In addition, a plaintiff's contributory negligence is no defense to a section 75-1.1 claim.<sup>41</sup>

*D. Types of Claims Under Section 75-1.1*

This Article focuses on section 75-1.1 claims for unfair acts or practices alone—what we call “direct unfairness claims.”<sup>42</sup> To understand this type of claim, one should distinguish it from other types of claims under section 75-1.1.

Court opinions rarely classify section 75-1.1 claims in any detail. Instead, courts and litigants often cite section 75-1.1 in general, without specifying which type of 75-1.1 claim is at issue.<sup>43</sup> As John Graybeal has shown, this lack of attention to categories garbles the analysis under the statute.<sup>44</sup>

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40. See, e.g., *Marshall v. Miller*, 302 N.C. 539, 544, 276 S.E.2d 397, 400–01 (1981); *Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 452, 678 S.E.2d 671, 683 (2009).

41. See, e.g., *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 96, 331 S.E.2d 677, 681 (1985); see also *Media Network*, 197 N.C. App. at 452–53, 678 S.E.2d at 684 (extrapolating from this rule to hold that a plaintiff's commercial bribery does not undermine its claim); cf. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1233, 1235 (M.D.N.C. 1996) (rejecting, on the facts, the defenses of unclean hands and *in pari delicto*), *aff'd in part, rev'd in part on other grounds*, 194 F.3d 505 (4th Cir. 1999).

42. See *infra* notes 86–88 and accompanying text (explaining this focus further).

43. See, e.g., *Walker v. Fleetwood Homes of N.C., Inc.*, 363 N.C. 63, 71–72, 653 S.E.2d 393, 399 (2007); *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469–71, 597 S.E.2d 674, 693–94 (2004); *SongWooYarn Trading Co. v. Sox Eleven, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 714 S.E.2d 162, 167, *disc. rev. denied*, 365 N.C. 360, 718 S.E.2d 396 (2011); *Fortner, PLLC v. Koonse Wooten & Haywood, LLP*, No. COA10-1260, 2011 WL 2206809, at \*5 (N.C. Ct. App. June 7, 2011).

44. See Graybeal, *supra* note 16, at 1956–70.

These problems of taxonomy also affect section 7A-45.4 of the North Carolina General Statutes, the statute that defines the mandatory jurisdiction of the North Carolina Business Court. See Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 166–68 (2004) (describing the business court and its early history); Carrie A. O'Brien, Note, *The North Carolina Business Court: North Carolina's Special Superior Court for Complex Business Cases*, 6 N.C. BANKING INST. 367, 374–78 (2002) (same). Compare *Estate of Browne v. Thompson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 727 S.E.2d 573, 576 (2012) (“The Business Court is a special Superior Court, the decisions of which have no precedential value in North Carolina.”), *petition for disc. rev. filed*, No. 204P12 (N.C. May 7, 2012), with Mack Sperling, *Five Reasons You Should Care About the Rulings from the North Carolina Business Court Even Though the NC Court of Appeals Says You Shouldn't*, N.C. BUS. LITIG. REP. (Apr. 24, 2012), <http://www.ncbusinesslitigationreport.com/2012/04/articles/about-the-business-court/five-reasons-you-should-care-about-the-rulings-from-the-north-carolina-business-court-even-though-the-nc-court-of-appeals-says-you-shouldnt>.

The mandatory-jurisdiction statute for the business court allows parties to remove specific types of cases from the regular North Carolina superior courts to the business court, whether or not the other side agrees. See N.C. GEN. STAT. § 7A-45.4(d)(3) (2011). Section 7A-45.4 extends the business court's mandatory jurisdiction, and thus its removal

One can divide section 75-1.1 claims into the following categories:

- claims for “per se violations” of section 75-1.1, which re-express statutory or regulatory violations or torts as section 75-1.1 violations;
- claims of unfair methods of competition, which involve alleged harm to the competitive process;
- claims of deceptive conduct;
- claims of aggravated breaches of contract (which, as shown below, appear to be a type of unfairness claim); and
- direct unfairness claims.

This Part of the Article describes these types of claims in turn.<sup>45</sup> The next Part analyzes the focal point of the Article: direct unfairness claims.

### 1. Per Se Violations

Per se violations occur when conduct that violates a legal standard outside section 75-1.1 automatically establishes a section 75-1.1 violation as well. The external standards most often come from other statutes, agency regulations, or common-law torts.

Statutes that generate per se violations of section 75-1.1 come in two categories. First, at least forty North Carolina statutes<sup>46</sup> expressly state that a violation of the statute constitutes a violation of section

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jurisdiction, to categories that include the following: “Antitrust law, except claims based solely on unfair competition under G.S. 75-1.1[, and] State trademark or unfair competition law, except claims based solely on unfair competition under G.S. 75-1.1.” *Id.* § 7A-45.4(a)(3)–(4).

The jurisdictional statute’s exceptions for “unfair competition under G.S. 75-1.1” interact uneasily with the existing categories of claims under section 75-1.1. Section 75-1.1, by its terms, condemns “unfair methods of competition” and “unfair . . . acts or practices.” *Id.* § 75-1.1(a). Recent North Carolina decisions use the term “unfair competition” to refer to both of the above types of 75-1.1 claim. *See, e.g.*, *Currituck Assocs. Residential P’ship v. Coastland Corp.*, No. COA09-1279, 2010 WL 2816633, at \*6 (N.C. Ct. App. July 20, 2010); *White v. Thompson*, 196 N.C. App. 568, 579, 676 S.E.2d 104, 112 (2009) (Ervin, J., concurring), *aff’d*, 364 N.C. 47, 691 S.E.2d 676 (2010). Because the phrase “unfair competition under G.S. 75-1.1” triggers an *exception* to the right to remove certain cases to the business court, it would be useful to know whether this excepting phrase includes only the relatively narrow category of unfair methods of competition, the broad category of unfair acts and practices, or something else. *See* N.C. GEN. STAT. §§ 7A-45.4(a)(3), (4).

45. By describing these other types of 75-1.1 claims in neutral terms, we do not mean to suggest that they are immune from analysis and refinement. *See, e.g.*, *infra* note 55 (implying doubt about distinctions in the current leading decision on per se violations).

46. *See* ALLEN, *supra* note 1, § 1.03, at 1-8 n.22 (listing these statutes).

75-1.1. These statutes range from North Carolina's Identity Theft Protection Act<sup>47</sup> to a statute that bars discrimination among cable TV customers.<sup>48</sup>

Second, courts have recognized *per se* section 75-1.1 violations based on violations of statutes that do *not* refer expressly to section 75-1.1.<sup>49</sup> These statutes range from the federal antitrust statutes<sup>50</sup> to a state statute that prohibits the misbranding of antifreeze.<sup>51</sup> The North Carolina Court of Appeals recently described two murky categories of statutes that lack cross-references to section 75-1.1 but nonetheless generate *per se* 75-1.1 violations: (1) "where the regulatory statute *specifically* defines and proscribes conduct which is unfair or deceptive within the meaning of N.C. Gen. Stat. § 75-1.1" and (2) "where the regulatory violation satisfies the three elements of a [section 75-1.1] claim."<sup>52</sup> Under tests like these, *per se* section 75-1.1

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47. N.C. GEN. STAT. §§ 75-60 to -66 (2011); *see id.* § 75-62(d) (stating expressly that a violation of the provisions on protection of social security numbers is a 75-1.1 violation); *id.* § 75-63(q) (stating the same for violations of the provisions on account freezes); *id.* § 75-64(f) (allowing, but expressly limiting, 75-1.1 claims for failures to destroy certain customer records); *id.* § 75-65(i) (allowing 75-1.1 claims for failure to provide proper notice of security breaches, but stating expressly—and probably unnecessarily—that such a claim requires proof of an injury to the plaintiff). *But cf. id.* § 75-66(e) (stating that a violation of the provisions on publishing personal information is a violation of N.C. GEN. STAT. § 1-539.2C (2011), a remedial statute specific to identity theft, which provides remedies slightly broader than those available for section 75-1.1 violations).

48. *See* N.C. GEN. STAT. § 66-356(a) (2011).

49. *See, e.g., In re Fifth Third Bank, Nat'l Ass'n—Vill. of Penland Litig.*, \_\_ N.C. App. \_\_, \_\_, 719 S.E.2d 171, 176 (2011) ("[A] violation of a consumer protection statute may, in some instances, constitute a *per se* violation of [section 75-1.1]."), *petition for cert. filed*, No. 23P12 (N.C. Jan. 13, 2012); *Drouillard v. Keister Williams Newspaper Servs., Inc.*, 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992) ("Plaintiffs contend that because the Legislature did not specifically provide that any violation of [the North Carolina Trade Secrets Protection Act] would constitute unfair or deceptive acts or practices under N.C. Gen. Stat. § 75-1.1, such a result was not intended. We disagree.").

50. *E.g., Sherman Act* §§ 1, 2, 15 U.S.C. §§ 1, 2 (2006); *see, e.g., ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 48 (4th Cir. 1983), *aff'd mem. on reh'g*, 742 F.2d 170 (4th Cir. 1984). *But cf. Van Dorn Retail Mgmt., Inc. v. Klaussner Furniture Indus.*, 132 N.C. App. 531, 532, 512 S.E.2d 456, 457 (1999) (refusing to follow *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477, 482 (M.D.N.C. 1985), which stated that secondary-line price discrimination would violate section 75-1.1). State court decisions that expressly analyze the federal antitrust statutes are rare, because the federal courts have exclusive subject-matter jurisdiction over federal antitrust claims. *See* 28 U.S.C. § 1337 (2006); *Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co.*, 260 U.S. 261, 286–87 (1922).

51. N.C. GEN. STAT. § 106-579.6 (2011); *see State ex rel. Edmisten v. Zim Chem. Co.*, 45 N.C. App. 604, 607, 263 S.E.2d 849, 851 (1980).

52. *Noble v. Hooters of Greenville (NC), LLC*, 199 N.C. App. 163, 170–71, 681 S.E.2d 448, 454–55 (2009).

Not even all violations of North Carolina consumer protection statutes might satisfy these tests. For example, in *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 665 S.E.2d 767 (2008), the court held that a violation of North Carolina's basic usury statute,

violations can arise even when fewer than all of the elements of the triggering statute are satisfied.<sup>53</sup>

Likewise, administrative regulations can generate per se section 75-1.1 violations.<sup>54</sup> The Supreme Court of North Carolina has held, however, that not all violations of regulations are per se violations of section 75-1.1.<sup>55</sup>

Finally, common-law torts can support per se violations of section 75-1.1. For example, fraud is a per se violation.<sup>56</sup> Courts have

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N.C. GEN. STAT. § 24-1.1 (2011), is not a per se violation of section 75-1.1, but that usury can join with additional “unfair and deceptive acts” to show a violation of section 75-1.1 “as a matter of law.” *Odell*, 192 N.C. App. at 318–19, 665 S.E.2d at 780–81. In rejecting the per se theory, the court found it important that certain sections of chapter 24 state expressly that violations of those sections also violate section 75-1.1, but section 24-1.1 does not. *Id.* at 318, 665 S.E.2d at 780.

*Fifth Third* contains another variation on the per se theory. The court of appeals recited the plaintiffs’ claims that the defendants had violated section 75-1.1 by violating banking statutes and regulations. *Fifth Third*, \_\_ N.C. App. at \_\_ & n.3, 719 S.E.2d at 178 & n.3. The court held, however, that the plaintiffs had not relied on the appraisals that allegedly violated the banking statutes and regulations, so there was no causal connection between any per se violation and the plaintiffs’ injury. *See id.* at \_\_, 719 S.E.2d at 178–79. The court also rejected the plaintiffs’ claim that “a violation of internal business policies and general industry standards [constitutes] a *per se* violation of [section 75-1.1].” *Id.* at \_\_, 719 S.E.2d at 178.

53. *See, e.g.*, *Gray v. N.C. Ins. Underwriting Ass’n*, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000) (holding that a violation of one subsection of an insurance consumer protection statute, even in the absence of an element of a violation of that statute, “constitutes a violation of N.C.G.S. § 75-1.1, as a matter of law”).

54. *See Fifth Third*, \_\_ N.C. App. at \_\_, 719 S.E.2d at 178; *E. Roofing & Alum. Co. v. Brock*, 70 N.C. App. 431, 434–35, 320 S.E.2d 22, 24 (1984). In *Eastern Roofing*, the court found a per se section 75-1.1 violation based on a violation of an FTC regulation. 70 N.C. App. at 435, 320 S.E.2d at 24. This holding might be limited, however. A North Carolina statute, the Retail Installment Sales Act, expressly refers to the FTC regulations at issue in *Eastern Roofing*. *See* N.C. GEN. STAT. § 25A-39(a) (2011); *see also Ken-Mar Fin. Co. v. Harvey*, 90 N.C. App. 362, 367, 368 S.E.2d 646, 649–50 (1988) (stating in dicta that even if FTC regulations had been in effect at the relevant time, a violation of those regulations would not state a per se violation of section 75-1.1).

55. *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 70–71, 653 S.E.2d 393, 398–99 (2007). The *Walker* court emphasized that the regulations at issue were licensing regulations. *See id.* at 71, 653 S.E.2d at 399. The court, however, said little about why licensing regulations are less appropriate triggers for per se section 75-1.1 violations than other types of regulations are. *See id.* The court, in fact, went on to hold that a violation of certain licensing regulations can still “be evidence of” an unfair or deceptive practice. *Id.*

56. *See Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991); *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975); *Jones v. Harrelson & Smith Contractors, LLC*, 194 N.C. App. 203, 217, 670 S.E.2d 242, 252 (2008), *aff’d per curiam*, 363 N.C. 371, 677 S.E.2d 453 (2009). Note, however, that a claimant can recover under section 75-1.1 for deceptive conduct by showing much less than fraud: conduct that merely has a “capacity or tendency to deceive.” *See, e.g., Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 470–71, 343 S.E.2d 174, 180 (1986); *see also infra* notes 67–75 and

also recognized per se section 75-1.1 violations based on tortious interference with contract<sup>57</sup> and constructive fraud (a tort closely related to breach of fiduciary duty),<sup>58</sup> among other business torts. The North Carolina Business Court has even stated that “[g]enerally, proof of an independent tort is sufficient to make out a separate [section 75-1.1] claim.”<sup>59</sup>

## 2. Unfair Methods of Competition

Section 75-1.1 shares the phrase “unfair methods of competition” with section 5 of the FTC Act.<sup>60</sup> Under section 5, unfair methods of competition include actual or incipient violations of the federal antitrust laws (the Sherman, Clayton, and Robinson-Patman Acts).<sup>61</sup> Unfair methods also include conduct that violates the policies or spirit of the federal antitrust laws.<sup>62</sup> Finally, unfair methods of competition

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accompanying text (further describing the standards for deception claims under section 75-1.1).

57. *Roane-Barker v. Se. Hosp. Supply Corp.*, 99 N.C. App. 30, 41, 392 S.E.2d 663, 670 (1990); *Battleground Veterinary Hosp., P.C. v. McGeough*, No. 05 CVS 18918, 2007 WL 3071618, at \*19 (N.C. Bus. Ct. Oct. 19, 2007); *Praxair, Inc. v. Airgas, Inc.*, No. 98 CVS 8571, 1999 WL 33545515, at \*6 (N.C. Bus. Ct. May 26, 1999).

58. *Compton v. Kirby*, 157 N.C. App. 1, 20, 577 S.E.2d 905, 917 (2003); *Governors Club, Inc. v. Governors Club Ltd. P’ship*, 152 N.C. App. 240, 250, 567 S.E.2d 781, 788 (2002), *aff’d per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003); *see also White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 293–94, 603 S.E.2d 147, 155–56 (2004) (distinguishing elements of breach of fiduciary duty from elements of constructive fraud).

59. *Reid Pointe, LLC v. Stevens*, No. 08 CVS 4304, 2008 WL 3846174, at \*7 (N.C. Bus. Ct. Aug. 18, 2008).

60. *Compare* N.C. GEN. STAT. § 75-1.1(a) (2011), *with* 15 U.S.C. § 45(a)(1) (2006). The rest of the substantive language of section 75-1.1 also parallels the language of section 5. *See infra* notes 174–77 and accompanying text (describing the relationship between the two statutes).

61. *See* *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321–22 (1966) (holding in the alternative that section 5 reaches incipient Clayton Act violations); *FTC v. Cement Inst.*, 333 U.S. 683, 693 (1948) (holding that section 5 covers actual Sherman Act violations); *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 464–66 (1941) (holding that section 5 reaches actual Clayton Act violations and incipient Sherman Act violations); *Grand Union Co. v. FTC*, 300 F.2d 92, 98–99 (2d Cir. 1962) (same for incipient violations of Robinson-Patman Act); *see also* 15 U.S.C. §§ 1–7 (2006) (Sherman Act); *id.* §§ 12–26 (Clayton Act); *id.* §§ 13, 13a (codifying sections 2 and 3 of the Robinson-Patman Act).

62. *See, e.g., Brown Shoe*, 384 U.S. at 321 (“This broad power of the [FTC] is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton acts . . .”); *see also* Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 251–71 (1980) [hereinafter *The Meaning of “Unfair Methods of Competition”*] (closely analyzing the reach of this theory); Statement of Chairman Leibowitz and Commissioner Rosch in the Matter of Intel Corp. 1–2 (Dec. 16, 2009), *available at* <http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf> (opining that it is important for the FTC to pursue section 5 unfair-methods claims that actively seek to expand that theory beyond the limits of current Sherman Act case law).

under section 5 might incorporate unfair and deceptive acts, on the theory that engaging in these acts will give a business an unfair competitive advantage.<sup>63</sup>

Similarly, under section 75-1.1, unfair methods of competition denote antitrust violations and other acts that arguably cause harm to the competitive process.<sup>64</sup> At the same time, courts have also used the phrase “unfair methods of competition” to describe tactics that pose no harm to the competitive process but do injure a specific competitor.<sup>65</sup> This extension of the unfair-methods concept beyond true anticompetitive conduct has drawn criticism.<sup>66</sup>

### 3. Deceptive Acts and Practices

Claims of deception are the most common type of section 75-1.1 claims.<sup>67</sup> Indeed, a major goal behind the enactment of section 75-1.1 was to allow consumers to recover for deceptive conduct without having to show intent to deceive and the other demanding elements of fraud claims.<sup>68</sup>

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63. See, e.g., *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 313 (1934); see also *The Meaning of “Unfair Methods of Competition,” supra* note 62, at 271–75 (citing congressional statements that support the view that the “unfair methods” aspect of section 5 extends to violations of business morality and violations of non-antitrust statutes).

64. See, e.g., *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 49 (4th Cir. 1983) (stating that unfair methods include vertical restraints and price discrimination), *aff’d mem. on reh’g*, 742 F.2d 170 (4th Cir. 1984); *Phillips v. Integon Corp.*, 70 N.C. App. 440, 444, 319 S.E.2d 673, 675 (1984) (implying that unfair methods include predatory pricing of insurance).

65. See, e.g., *Edmondson v. Am. Motorcycle Ass’n*, 7 F. App’x 136, 152 (4th Cir. 2001); *Dalton v. Camp*, 353 N.C. 647, 655–58, 548 S.E.2d 704, 710–12 (2001); *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, No. 00 CVS 10358, 2003 WL 21017456, at \*51, \*54 (N.C. Bus. Ct. May 2, 2003), *aff’d*, 174 N.C. App. 49, 620 S.E.2d 222 (2005); cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasizing that the federal antitrust laws “were enacted for ‘the protection of *competition*, not *competitors*’”) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 370 (1962)).

66. See *Graybeal*, *supra* note 16, at 1970–83 (arguing that in cases of allegedly anticompetitive conduct, using section 75-1.1 to broaden liability skews the balance of concerns that underlies modern antitrust enforcement); see also Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2248 (2012) (noting that “state consumer protection enforcement efforts against low prices, such as Wal-Mart’s generic prescription program, clearly run counter to the consumer welfare approach laid out in federal antitrust law”).

67. See *Morgan*, *supra* note 19, at 20.

68. See Robert G. Byrd, *Misrepresentation in North Carolina*, 70 N.C. L. REV. 323, 363–64 (1992); see also *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975) (“Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true.”).

Deceptive practices under section 75-1.1 include fraud,<sup>69</sup> but they are not limited to fraud. For example, the lesser tort of negligent misrepresentation can support a section 75-1.1 claim.<sup>70</sup> Although a negligent misrepresentation does not automatically establish a deception claim under section 75-1.1,<sup>71</sup> it can go far toward establishing such a claim.<sup>72</sup>

An act is deceptive “if it has the capacity or tendency to deceive.”<sup>73</sup> Under this standard, even a truthful statement can be considered deceptive.<sup>74</sup> This standard, like other aspects of the law under section 75-1.1, comes from decisions under section 5.<sup>75</sup>

#### 4. Aggravated Breaches of Contract

The remedies available for section 75-1.1 violations, as well as the open-ended conduct standards under the statute, give lawyers ample reason to consider adding section 75-1.1 claims to other claims. This approach is especially common with claims for breach of contract.<sup>76</sup> The leading treatise on section 75-1.1 cites over 100 decisions in which litigants pursued section 75-1.1 claims in connection with contract claims.<sup>77</sup>

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69. See *supra* note 56 and accompanying text.

70. See Byrd, *supra* note 68, at 362.

71. See ALLEN, *supra* note 1, § 19.03[4], at 19-31 (noting that “negligent misrepresentation has not been identified by the courts as a *per se* violation of § 75-1.1”).

72. See, e.g., *Forbes v. Par Ten Grp.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1990); see also ALLEN, *supra* note 1, § 19.03[4], at 19-31 to -34 (analyzing the case law on section 75-1.1 claims that are based on negligent misrepresentations).

73. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). This capacity or tendency turns on the perceptions of the average consumer. See, e.g., *Creekside Apartments v. Poteat*, 116 N.C. App. 26, 36, 446 S.E.2d 826, 833 (1994). Business sophistication might reduce a plaintiff’s chance of prevailing on a claim for deceptive practices. See, e.g., *RD & J Props. v. Lauralea-Dilton Enters.*, 165 N.C. App. 737, 749, 600 S.E.2d 492, 501 (2004).

74. See *Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 471, 343 S.E.2d 174, 180 (1986) (dictum).

75. See, e.g., *Johnson*, 300 N.C. at 265–66, 266 S.E.2d at 622 (citing ten federal decisions under section 5 as a basis for the standard for deceptive trade practices). For a general discussion of the relationship between federal and state standards for deceptive, as opposed to unfair, acts or practices, see Jack E. Karns, *State Regulation of Deceptive Trade Practices Under “Little FTC Acts”: Should Federal Standards Control?*, 94 DICK. L. REV. 373, 389–429 (1990).

76. See ALLEN, *supra* note 1, § 19.04[2], at 19-46 to -67.

77. See *id.* Adding a section 75-1.1 claim to a contract claim has benefits that go beyond enhanced remedies. For example, a section 75-1.1 claim allows the claimant to sidestep the parol evidence rule. See *Marshall v. Miller*, 302 N.C. 539, 543–44, 276 S.E.2d 397, 400 (1981). The same is true for the statute of frauds. See, e.g., *Dealers Supply Co. v. Cheil Indus.*, 348 F. Supp. 2d 579, 592–94 (M.D.N.C. 2004).



In a sense, every breach of contract is unfair, because “one of the contracting parties is denied the advantage for which he contracted.”<sup>78</sup> This point, and the resulting danger that nearly every breach of contract would generate treble damages under section 75-1.1, was recognized early in the statute’s history. In 1978, in *CF Industries v. Transcontinental Gas Pipe Line Corp.*,<sup>79</sup> the district court lamented, in a statement that today’s researchers might wish were still true, that “the number of reported decisions construing [section 75-1.1] is extremely small.”<sup>80</sup> The court examined the purposes of section 75-1.1 and decided for the first time that a breach of contract alone does not constitute a section 75-1.1 claim. The court stated: “Plaintiffs’ theory in this case . . . threatens to make every intentional breach of a commercial contract an unfair trade practice subjecting the breaching party to treble damages . . . . [T]hese ordinary commercial breaches are wholly foreign to the purposes of § 75-1.1.”<sup>81</sup>

Since then, courts have tried to craft distinctions to decide what contract-related misconduct amounts to a section 75-1.1 violation. They have agreed that a “mere” breach of contract, even an intentional breach, does not violate section 75-1.1.<sup>82</sup> Instead, “substantial aggravating circumstances attendant to the breach must be shown.”<sup>83</sup> Over the last fifteen years, the courts—especially the federal courts and the North Carolina Business Court—have grown skeptical of contract-related section 75-1.1 claims.<sup>84</sup> Under current case law, substantial aggravating circumstances are found most often

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78. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 992 (4th Cir. 1981).

79. 448 F. Supp. 475 (W.D.N.C. 1978).

80. *Id.* at 484.

81. *Id.* at 485.

82. *Gray v. N.C. Ins. Underwriting Ass’n*, 352 N.C. 61, 75, 529 S.E.2d 676, 685 (2000); *accord Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 70–71, 653 S.E.2d 393, 399 (2007) (dictum); *see also ALLEN, supra* note 1, § 19.04[2], at 19-55 to -57 (citing dozens of similar decisions from federal courts and the North Carolina Court of Appeals).

83. *Gray*, 352 N.C. at 75, 529 S.E.2d at 685.

84. *See, e.g., Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 347 (4th Cir. 1998) (“[T]he district court should not have allowed the UTPA claim to piggyback on plaintiffs’ breach of contract action.”); *Thompson Installations, Inc. v. Stock Bldg. Supply, LLC*, No. 11 CVS 5650, 2012 WL 555308, at \*3–4 (N.C. Bus. Ct. Feb. 21, 2012) (holding that allegations that defendant sought exclusive dealing did not show an anticompetitive outcome, and thus did not show “substantial aggravating circumstances”); *Crockett Capital Corp. v. Inland Am. Winston Hotels, Inc.*, No. 08 CVS 0691, 2011 WL 1679431, at \*31 (N.C. Bus. Ct. Feb. 28, 2011) (deciding that many of the cited aggravating circumstances did not relate to the specific contract claims that had survived summary judgment and that the aggravating circumstances that did relate to those contracts—alleged coercive conduct—“amount[ed] to little more than breach of contract claims”).

when the defendant has deceived the plaintiff in connection with the formation or the breach of a contract.<sup>85</sup>

### 5. Direct Unfairness Claims

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

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.

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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.”<sup>89</sup>
- “A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.”<sup>90</sup>
- “The concept of ‘unfairness’ is broader than and includes the concept of ‘deception.’”<sup>91</sup>
- Unfair practices include “[c]oercive conduct.”<sup>92</sup>
- “[A] trade practice is unfair if the conduct undermines the ethical standards and good faith dealings between parties engaged in business transactions.”<sup>93</sup>
- “One method of determining if actions are unfair or unethical is to look at those actions through the lens of equity.”<sup>94</sup>
- “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.”<sup>95</sup>

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

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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.<sup>96</sup> 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*.<sup>97</sup> When the plaintiffs failed to pay rent, their landlord padlocked the apartment.<sup>98</sup> 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.’”<sup>99</sup> 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.’”<sup>100</sup> 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.”<sup>101</sup> Likewise, the North Carolina Business Court stated that misuse of a competitor’s documents “was an unfair trade practice.”<sup>102</sup>

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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.*<sup>103</sup> first decided that the defendant's conduct amounted to misappropriation of trade secrets.<sup>104</sup> Regarding section 75-1.1, the court stated only that "[t]his conduct is *surely* 'immoral, unethical, oppressive, unscrupulous, or substantially injurious.'" <sup>105</sup>

These and other decisions<sup>106</sup> 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.<sup>107</sup> 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."<sup>108</sup> 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."<sup>109</sup> 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."<sup>110</sup> On similar grounds, courts have excluded most, but not all, employer/employee disputes from

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*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.<sup>111</sup> Finally, capital-raising activities are said not to be in or affecting commerce.<sup>112</sup>

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.<sup>113</sup> The same type of exemption applies to donations of property to charitable organizations.<sup>114</sup>

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.<sup>115</sup> 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.’”<sup>116</sup> These concerns have generated exemptions from section 75-1.1 for securities and commodities transactions.<sup>117</sup>

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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,<sup>118</sup> defamation claims,<sup>119</sup> claims for misappropriation of trade secrets,<sup>120</sup> fraud claims,<sup>121</sup> claims for tortious interference,<sup>122</sup> and claims for breach of fiduciary duties.<sup>123</sup> These decisions leave the unfairness standard and its relationship with other claims unexplained.<sup>124</sup>

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.

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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.



The direct prohibition of unfair acts and practices under section 5 stems from the 1938 amendments to the FTC Act.<sup>125</sup> When Congress passed the original FTC Act in 1914, section 5 prohibited only unfair methods of competition.<sup>126</sup> When the first non-competition-oriented case under section 5 came before the United States Supreme Court in 1931, the Court decided that “[u]nfair trade methods are not per se unfair methods of *competition*.”<sup>127</sup> In 1938, Congress responded to this decision by adding to section 5 an express prohibition of unfair or deceptive acts or practices.<sup>128</sup> Over the following years, however, the unfairness aspect of section 5 was widely criticized as overbroad and unpredictable.<sup>129</sup>

In 1964, the FTC added definition to its authority to regulate unfair acts and practices. This added content appeared in the FTC’s statement of the basis and purpose of proposed rules to govern cigarette labeling and advertising.<sup>130</sup> In this statement, the FTC identified three factors that it would use to judge whether a given practice was unfair. First, the FTC would analyze whether the practice, “without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes,

125. Federal Trade Commission (Wheeler-Lea) Amendments of 1938, ch. 49, sec. 3, § 5(a), 52 Stat. 111, 111 (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

126. Federal Trade Commission Act of 1914, ch. 311, § 5(a), 38 Stat. 717, 719 (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

127. *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931). *Raladam* involved the advertising and sale of an alleged obesity cure that apparently had no basis for its therapeutic claims. *See id.* at 644–45. The Court emphasized the lack of any “finding [or] evidence from which the conclusion legitimately can be drawn that these advertisements substantially injured, or tended thus to injure, the business of any competitor or of competitors generally.” *Id.* at 652–53.

128. Wheeler-Lea Amendments § 5(a), 52 Stat. at 111 (codified at 15 U.S.C. § 45(a)(1)).

129. Neil W. Averitt, *The Meaning of “Unfair Acts or Practices” in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 225 (1981) [hereinafter *The Meaning of “Unfair Acts or Practices”*].

130. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose, 29 Fed. Reg. 8324, 8325 (July 2, 1964) (treating the failure to include health warnings on cigarette packs as unfair). In its statement, the FTC acknowledged its responsibility “to determine, within broad limits, what kinds of trade practices should be forbidden in the public interest because they are unfair or deceptive and thus injurious to competitors or the consuming public.” *Id.* at 8349. At the same time, the FTC stated that “[i]t is not possible to give an exact and comprehensive definition of the unfair acts or practices proscribed by [section 5].” *Id.* at 8354.

Current Seventh Circuit Judge Richard Posner is reputed to be the main author of the 1964 statement. J. Howard Beales III, Director, Bur. of Consumer Prot., Fed. Trade Comm’n, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL’Y & MARKETING 192, 193 n.4 (2003).

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.”<sup>131</sup> Second, the FTC would ask “whether [the practice] is immoral, unethical, oppressive, or unscrupulous.”<sup>132</sup> Third, the FTC would ask whether the practice “causes substantial injury to consumers (or competitors or other businessmen).”<sup>133</sup> This three-part test became known as the “Cigarette Rule.”<sup>134</sup>

A few years later, the United States Supreme Court gave a degree of endorsement to the Cigarette Rule. In *FTC v. Sperry & Hutchinson Co. (S&H)*,<sup>135</sup> the Court reviewed the FTC’s administrative proceedings against the largest purveyor of trading stamps.<sup>136</sup> The Court held that the FTC had the authority to regulate unfair business practices even when those practices did not have an adverse effect on competition.<sup>137</sup> To explain the FTC’s authority to regulate consumer unfairness, the Court neutrally quoted the Cigarette Rule in a footnote.<sup>138</sup>

After receiving this arguable endorsement of its unfairness standards, the FTC sought to pursue rulemakings and adjudications

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131. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. at 8355.

132. *Id.*

133. *Id.*

134. *E.g.*, *The Meaning of “Unfair Acts or Practices,” supra* note 129, at 240–41.

135. 405 U.S. 233 (1972).

136. *See id.* at 234, 246–49.

137. *Id.* at 244 (“[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”). The Court, however, held that the FTC’s decision in *S&H* was correctly reversed because the FTC had not based its decision on its consumer unfairness authority, but instead had based the decision on the FTC’s authority to condemn unfair methods of competition. *Id.* at 248–49; *see Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (“It is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”).

138. *See S&H*, 405 U.S. at 244–45 n.5. *Compare Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 n.8 (7th Cir. 1976) (stating that footnote 5 of *S&H* “approved” the Cigarette Rule), with David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 GEO. WASH. L. REV. 1, 25–26 (1984) (arguing that in view of the language and context of the *S&H* decision, footnote 5 was not a substantive endorsement of the Cigarette Rule).

Ironically, the FTC statement that became known as the Cigarette Rule had a much longer lifespan than did the proposed rules that the FTC statement addressed. Before the proposed rules could go into effect, Congress enacted statutes that displaced them. *See Federal Cigarette Labeling and Advertising Act*, Pub. L. No. 89-92, § 5(c), 79 Stat. 282, 283 (1965) (codified as amended at 15 U.S.C.A. §§ 1331–1341 (West 2009)).

on a wide variety of perceived unfair conduct.<sup>139</sup> The FTC even sought to prohibit most or all advertising directed at children.<sup>140</sup> Complaints that the FTC had become a “national nanny”<sup>141</sup> sparked a response in Congress: oversight hearings on the FTC’s use of its unfairness jurisdiction.<sup>142</sup>

To defuse this controversy, in 1980, the FTC issued a policy statement on its unfairness standards (the 1980 Statement).<sup>143</sup> In this statement, the FTC specifically rejected the “immoral, unethical, oppressive, or unscrupulous” test as a basis for unfairness enforcement.<sup>144</sup> The FTC also wrote that in the future, it would limit the policy considerations that could support unfairness enforcement to “clear and well-established” considerations.<sup>145</sup> The statement also announced that “[u]njustified consumer injury [wa]s the primary

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139. See, e.g., *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 969 & n.10 (D.C. Cir. 1985); Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1952–53 (2000); Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 WAYNE L. REV. 1869, 1872–73 (2000); see also Trade Regulation Rules; Labeling and Advertising of Home Insulation, Statement of Basis & Purpose, 44 Fed. Reg. 50,218 (Aug. 27, 1979) (prescribing standardized test methods for thermal characteristics of home insulation materials); Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, Promulgation of Trade Regulation Rule and Statement of Basis & Purpose, 43 Fed. Reg. 59,614 (Dec. 21, 1978) (requiring franchisors and franchise brokers to disclose information to prospective franchisees regarding a sale and/or business opportunity); Advertising of Ophthalmic Goods and Services, Statement of Basis & Purpose, 43 Fed. Reg. 23,992 (June 2, 1978) (prohibiting state laws from banning or burdening the advertising of eyewear or eye examinations and prohibiting restrictions on advertising by private associations); Preservation of Consumers’ Claims and Defenses, Promulgation of Trade Regulation Rule and Statement of Basis & Purpose, 40 Fed. Reg. 53,506, 53,524 (Nov. 18, 1975) (abolishing the holder in due course doctrine in most consumer transactions).

140. See, e.g., Children’s Advertising: Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17,967, 17,967–69 (Apr. 27, 1978).

141. See, e.g., *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

142. Beales, *supra* note 130, at 193.

143. Letter from the FTC to Sens. Ford & Danforth (Dec. 17, 1980), reprinted in Int’l Harvester Co., 104 F.T.C. 949, 1070, 1073 (1984) [hereinafter 1980 Statement, with pinpoint citations to the reprint in *International Harvester*]; cf. *The Meaning of “Unfair Acts or Practices,” supra* note 129, at 227 (“[T]he Commission had itself decided on the desirability of a more precise standard. It therefore used the congressional inquiry as an opportunity to complete the project and make its conclusions public.”).

Because of similar disputes over the FTC’s enforcement regarding deceptive practices, the FTC issued a similar policy statement on deception a few years later. See Karns, *supra* note 75, at 385–86. This deception policy statement has led to similar discussion on the interplay between the federal and state standards for deception cases. See generally *id.* at 389–429 (discussing how state statutes and decisions on deception have resembled, and varied from, FTC doctrine since the deception policy statement).

144. 1980 Statement, *supra* note 143, at 1076.

145. *Id.*

focus of the FTC Act, and the most important of the three [Cigarette Rule] criteria.”<sup>146</sup>

In view of the importance of unjustified consumer injury, the 1980 Statement laid out a new three-part standard for such an injury. To meet this standard, an injury (1) “must be substantial,” (2) “must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces,” and (3) “must be an injury that consumers themselves could not reasonably have avoided.”<sup>147</sup> The Commission explained the third part of this standard, the “not reasonably avoidable” test, in the following terms:

Normally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. However, it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. Most of the Commission’s unfairness matters are brought under these circumstances. They are brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.<sup>148</sup>

As this explanation shows, the “not reasonably avoidable” test is a significant addition to the definition of unfairness under section 5. The test broadens the analysis of unfairness, allowing the FTC to consider the injured party’s options, not just the defendant’s actions.

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146. *Id.* at 1073.

147. *Id.*

148. *Id.* In a seminal article on unfairness, published shortly after the 1980 Statement, then-FTC staff member Neil Averitt offered a nonexclusive list of types of conduct that meets these standards: “(1) overt coercion; (2) covert coercion; (3) exercising undue influence over vulnerable classes of consumers; (4) withholding material information; and (5) engaging in false, deceptive, and misleading statements.” *The Meaning of “Unfair Acts or Practices,”* *supra* note 129, at 252; *see id.* at 252–67 (elaborating on these categories); *see also* Richard Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107, 108–09 (stating that the bulk of the FTC’s unfairness enforcement has concerned “(a) withhold[ing] material information, (b) mak[ing] unsubstantiated advertising claims, (c) depriv[ing] consumers of various post-purchase rights, and (d) us[ing] various high-pressure sales techniques”).

In this way, the “not reasonably avoidable” test is distinct from the other two elements discussed in the 1980 Statement.

The FTC applied and further explained the “not reasonably avoidable” test in a 1984 decision, *International Harvester Co.*<sup>149</sup> The case involved a dangerous type of tractor fuel tank.<sup>150</sup> The FTC decided that the manufacturer did not adequately inform tractor purchasers of the dangers that would result if they did not follow the manufacturer’s safety instructions.<sup>151</sup> The FTC explained that “[w]hether some consequence is ‘reasonably avoidable’ depends, not just on whether people know the physical steps to take in order to prevent it, but also on whether they understand the necessity of actually taking those steps.”<sup>152</sup> Because the manufacturer did not adequately disclose the tractors’ risks, the FTC concluded that the injuries caused by the tractors were not reasonably avoidable.<sup>153</sup>

A few years later, the FTC added an element of foreseeability to the “not reasonably avoidable” test.<sup>154</sup> The national pest-control company Orkin offered a lifetime warranty to its customers as long as they paid a fixed annual renewal fee.<sup>155</sup> Later, however, Orkin unilaterally raised the renewal fee.<sup>156</sup> The FTC concluded that this systematic and widespread breach of contracts, with warranty continuation hanging in the balance, was unfair.<sup>157</sup> It reasoned that “[s]ince Orkin’s customers could not have foreseen that Orkin would increase the annual renewal fee at some future date, they could not have reasonably avoided the injury.”<sup>158</sup> It also concluded that customers could not have avoided the injury by seeking an exception

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149. 104 F.T.C. 949 (1984).

150. *Id.* at 950.

151. *Id.* at 1065–66. Although this nondisclosure sounds like the basis of a deception theory, the FTC used it to find unfairness instead. The FTC held that in *International Harvester*, a deception theory would turn on an implied representation that the tractor was fit for its intended purposes. *Id.* at 1063. The FTC held that the number of harmful incidents with the tractor to date was too low to make this implied representation false. *Id.* The FTC thus held that the case was better resolved under the harm/benefit analysis of the unfairness doctrine. *Id.* at 1063–64. Under the unfairness doctrine, in contrast to the deception theory, the FTC found that the then-current total of one death and eleven serious burns qualified as a substantial injury. *Id.* at 1064.

152. *Id.* at 1066.

153. *Id.* at 1066–67.

154. *See Orkin Exterminating Co.*, 108 F.T.C. 263, 321 (1986), *aff’d*, 849 F.2d 1354 (11th Cir. 1988).

155. *Id.* at 341.

156. *Id.* at 282–84.

157. *See id.* at 336.

158. *Id.* at 321.

from Orkin or by switching to Orkin's competitors.<sup>159</sup> Thus, in *Orkin*, the FTC relied in part on the "not reasonably avoidable" test as the FTC found unfairness under section 5. The Eleventh Circuit affirmed the FTC's decision.<sup>160</sup>

Over time, the 1980 Statement as a whole has become accepted as the FTC's test for unfairness.<sup>161</sup> The "not reasonably avoidable" test, in particular, has exerted some restraint on the FTC's enforcement decisions. Recently, for example, the FTC abandoned its investigation into LimeWire, a peer-to-peer file-sharing application.<sup>162</sup> The FTC alleged that LimeWire "put consumers' personal information in peril" because identity thieves could use the application to retrieve users' private information.<sup>163</sup> However, the FTC eventually dropped the investigation. It did so in part because

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159. *Id.* at 367. In his concurrence in *Orkin*, FTC Commissioner Oliver added the point that consumers could not reasonably avoid the injury by suing Orkin for breach of contract. *See id.* at 379–80 (Oliver, Comm'r, concurring). He observed that such a lawsuit would be uneconomical to pursue. *Id.* In Commissioner Oliver's view, consumers' practical inability to enforce the Orkin contract through individual contract lawsuits was a market failure that justified pursuing an unfairness theory. *Id.* at 379–80 & n.14.

160. *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365–66 (11th Cir. 1988). Other federal courts have reinforced the FTC majority's definition in *Orkin* of what is reasonably avoidable. The Ninth Circuit, for example, recently explained that "[i]n determining whether consumers' injuries were reasonably avoidable, courts look to whether the consumers had a free and informed choice." *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010). Similarly, the D.C. Circuit has written that the "not reasonably avoidable" test "stems from the Commission's general reliance on free and informed consumer choice as the best regulator of the market." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985). As Director Beales has explained, consumers have a free choice if they "could have made a different choice, but did not." Beales, *supra* note 130, at 196.

161. Beales, *supra* note 130, at 195. Congress, indeed, codified most of the 1980 Statement in 1994 as section 5(n) of the FTC Act, 15 U.S.C. § 45(n) (2006). *See infra* notes 170–71 and accompanying text (discussing this enactment).

The FTC has recently relied on its unfairness authority as it has regulated the privacy of consumer data. *See, e.g.*, FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE C-3 (2012) (Rosch, Comm'r, dissenting) (stating that the FTC's 2012 data privacy report "is rooted in [an] insistence that the 'unfair' prong, rather the 'deceptive' prong, of the Commission's Section 5 consumer protection statute, should govern information gathering practices"), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>. To assess the legitimacy of these FTC initiatives, commentators have used the 1980 Statement as a source of standards. *See* Alexei Alexis, *FTC Privacy Goals Could Test Limits of Agency's Authority, Observers Say*, *Antitrust & Trade Reg. Daily (BNA)* (June 5, 2012), [http://news.bna.com/adln/ADLNWB/split\\_display.adp?fedfid=26840242&vname=atdbulallissues&wsn=500732000&searchid=17969021&doctypeid=1&type=date&mode=doc&split=0&scm=ADLNWB&pg=0](http://news.bna.com/adln/ADLNWB/split_display.adp?fedfid=26840242&vname=atdbulallissues&wsn=500732000&searchid=17969021&doctypeid=1&type=date&mode=doc&split=0&scm=ADLNWB&pg=0).

162. Letter from Mary Koelbel Engle, Assoc. Dir., Fed. Trade Comm'n, to George Searle, CEO, Lime Wire LLC (Aug. 19, 2010), available at <http://www.ftc.gov/os/closings/100919limewireletter.pdf>.

163. *Id.*

the alleged peril was reasonably avoidable: “users of some of the older versions of LimeWire may have been able to avoid disclosure of sensitive information.”<sup>164</sup>

In the years since the 1980 Statement, several courts, applying state law, have followed the statement as a standard for unfairness. For example:

- The Louisiana Court of Appeals, in a case against Orkin, relied on the 1980 Statement and FTC decisions that apply it.<sup>165</sup>
- The United States District Court for the District of Massachusetts extensively applied the 1980 Statement when it rejected a state-law challenge to regulations on subprime lending.<sup>166</sup>
- The Washington Court of Appeals paraphrased the 1980 Statement, then held that a failure to disclose the exact problem with a motorcycle that was undergoing warranty repair did not qualify as a substantial injury.<sup>167</sup>
- The Maryland Court of Special Appeals adopted the 1980 Statement and dismissed a tenant’s claim under Maryland’s section 5 analogue because the tenant could have avoided her injury by moving to a different apartment.<sup>168</sup>
- Similarly, Maine’s highest court, citing the 1980 Statement, dismissed a claim under Maine’s section 5 analogue

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164. *Id.*

165. State *ex rel.* Guste v. Orkin Exterminating Co., 528 So. 2d 198, 201 (La. Ct. App. 1988).

166. See *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 198, 200–04 (D. Mass. 1998). *But cf.* Greenfield, *supra* note 139, at 1928–29 (“A review of the Massachusetts cases [as of 2000] suggests that the state has not embraced the [1980] Statement at all, though the federal decision in *United Companies Lending Corporation* may stimulate the state courts to a new application of the statutory admonition to ‘be guided by’ federal interpretations of [section 5].”) (quoting MASS. GEN. LAWS ch. 93A, § 2(b) (2005)).

167. See *Blake v. Fed. Way Cycle Ctr.*, 698 P.2d 578, 583 (Wash. Ct. App. 1985); *cf.* *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 896 (Wash. 2009) (distinguishing unfairness claim from the deception claim at issue, but stating the substance of the 1980 Statement’s test for substantial consumer injury as the test for unfairness, at least in the context of debt collection). The *Blake* court also relied on a number of other standards outside the 1980 Statement. See *Blake*, 698 P.2d at 583.

168. *Legg v. Castruccio*, 642 A.2d 906, 917–18 (Md. Ct. Spec. App. 1994).

because the plaintiff could have avoided his injury by closely reading the terms of his contract.<sup>169</sup>

In 1994, Congress codified most of the 1980 Statement in a new subsection of section 5.<sup>170</sup> Subsection 5(n) states that the FTC cannot declare acts or practices unfair unless those acts or practices “cause[ ] or [are] likely to cause substantial injury to consumers *which is not reasonably avoidable by consumers themselves* and not outweighed by countervailing benefits to consumers or to competition.”<sup>171</sup>

In summary, with the “not reasonably avoidable” test, the FTC has added useful content to the test for unfairness. Part V below<sup>172</sup> discusses the benefits of this test in the context of North Carolina law.

#### IV. THE RELATIONSHIP BETWEEN SECTION 75-1.1 AND SECTION 5

As Parts II and III of this Article show,<sup>173</sup> modern doctrine under section 5 of the FTC Act has features that go beyond current doctrine

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169. *Bangor Publ'g Co. v. Union St. Mkt.*, 706 A.2d 595, 597 (Me. 1998). To be sure, not all state courts have followed current FTC doctrine. *See* 12 ROBERT M. LANGER ET AL., *CONNECTICUT PRACTICE SERIES: UNFAIR TRADE PRACTICES, BUSINESS TORTS AND ANTITRUST* app. M (2011) (presenting, in table form, the unfairness test applied in every U.S. state and territory that has a section 5 analogue); *see also* ASRC Servs. Power & Comm'ns, LLC v. Golden Valley Electric Ass'n, Inc., 267 P.3d 1151, 1161 (Alaska 2011) (deciding not to follow FTC standards because, among other reasons, “interpretations of the FTC Act post-1994 are not authorities that the 1974 [Alaska] legislature identified as proper guidance”).

170. FTC Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified at 15 U.S.C. § 45(n) (2006)). Subsection 5(n) also tightens the 1980 Statement's treatment of public policy as a basis for unfairness enforcement. Under subsection 5(n), the FTC retains authority to consider established public policies, but “[s]uch public policy considerations may not serve as a primary basis for” FTC determinations that an act or practice is unfair. 15 U.S.C. § 45(n).

This codification of the 1980 Statement occurred in legislation that reauthorized the FTC for the first time in fourteen years. The FTC's unfairness jurisdiction had remained controversial in the years since the 1980 Statement. *See, e.g.*, Beales, *supra* note 131, at 193–95; Calkins, *supra* note 139, at 1955. In 1982, the FTC had reaffirmed the 1980 Statement and had recommended that Congress codify the 1980 Statement's definition of unfairness. *See* Letter from FTC Chairman Miller to Sens. Packwood & Kasten (Mar. 5, 1982), *reprinted in* H.R. REP. NO. 98-156, at 27–28 (1983).

171. 15 U.S.C. § 45(n) (emphasis added). The emphasis added to this quotation highlights the language that codifies the “not reasonably avoidable” test.

Some state courts that have not expressly relied on the 1980 Statement have relied on the standards in section 5(n). *See, e.g.*, *Camacho v. Auto. Club of S. Cal.*, 48 Cal. Rptr. 3d 770, 777–78 (Ct. App. 2006); *Swiger v. Terminix Int'l Co.*, No. 14523, 1995 WL 396467, at \*5–6 (Ohio Ct. App. June 28, 1995); *Tucker v. Sierra Builders*, 180 S.W.3d 109, 116–17 (Tenn. Ct. App. 2005).

172. *See infra* notes 211–48 and accompanying text.

173. *See supra* notes 89–172 and accompanying text.



under section 75-1.1. Given this fact, is there a basis for the North Carolina courts to take further guidance from section 5?

There is a considerable basis. As shown below, the language and legislative history of section 75-1.1 support references to section 5 authorities. In addition, courts in section 75-1.1 cases have often turned to section 5 authorities for guidance. Courts have done so less often in recent years, but there is nothing to prevent the courts from renewing this practice.

Section 75-1.1 shares its substantive language with section 5.<sup>174</sup> This similarity is intentional: an early proponent of section 75-1.1, North Carolina Attorney General Robert Morgan, specifically asked the General Assembly to adopt this language.<sup>175</sup> Courts in North Carolina have long cited the parallel language of the two statutes as a reason to take guidance from section 5 authorities.<sup>176</sup>

The history of the enactment of section 75-1.1 encourages these references. Shortly after Attorney General Morgan convinced the General Assembly to enact section 75-1.1, he stated that he hoped to “draw upon many of the decisions rendered pursuant to the Federal Trade Commission Act in enforcing the North Carolina counterpart.”<sup>177</sup>

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174. Compare N.C. GEN. STAT. § 75-1.1(a) (2011) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”), with 15 U.S.C. § 45(a)(1) (2006) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”) (emphasis added).

175. Morgan, *supra* note 19, at 19 (“We concluded that the most useful tool that could be made available to us to stop fraud and deception was the operative language of Section 5 of the Federal Trade Commission Act. Accordingly, the 1969 General Assembly was requested to make several amendments to Chapter 75 of the North Carolina General Statutes.”); accord William B. Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C. L. REV. 199, 207 (1972).

176. See, e.g., *Henderson v. U.S. Fid. & Guar. Co.*, 346 N.C. 741, 749, 488 S.E.2d 234, 239 (1997); *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 345 (1975); see also ALLEN, *supra* note 1, § 4.01[5], at 4-13 to -20 (discussing decisions in which courts in North Carolina have drawn guidance from section 5 authorities); *infra* notes 179–96 and accompanying text (same).

The courts have taken this guidance even though section 75-1.1 does not literally “require or direct reference to the FTC Act for its interpretation.” *State ex rel. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 316, 233 S.E.2d 895, 898 (1977). As of 2006, the section 5 analogues of twenty-seven states had express statutory features that called for adherence to, deference to, or at least guidance from section 5 authorities. See Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 148–51 (2006) (presenting these statutes and others in table form).

177. Morgan, *supra* note 19, at 20; accord Thomas, *supra* note 26, at 906 (reporting in 1970 that “the state’s Consumer Protection Division agrees” that “decisions by federal courts interpreting section 5 of the FTC Act should be regarded as authoritative”); see also

This hope came to fruition in the first decision by the Supreme Court of North Carolina on section 75-1.1. In *Hardy v. Toler*,<sup>178</sup> the court stated that “[s]ome guidance may be obtained by reference to federal decisions on appeals from the Federal Trade Commission, since the language of G.S. § 75-1.1 closely parallels that of the Federal Trade Commission Act.”<sup>179</sup> The court then relied on section 5 decisions when it established two seminal rules for section 75-1.1 claims: (1) “the ultimate determination of what constitutes unfair competition and deceptive practices rests with the courts,”<sup>180</sup> and (2) fraud is sufficient, but not necessary, to make out a deception claim under section 75-1.1.<sup>181</sup>

In the years that followed, the Supreme Court of North Carolina continued to rely on FTC standards in its section 75-1.1 decisions. In *Johnson v. Phoenix Mutual Life Insurance Co.*,<sup>182</sup> the court relied on decisions under section 5 to define unfair and deceptive practices under section 75-1.1.<sup>183</sup> As part of its analysis, the court quoted the Cigarette Rule that the United States Supreme Court had quoted in *S&H*.<sup>184</sup>

Similarly, in *Marshall v. Miller*,<sup>185</sup> the Supreme Court of North Carolina noted several times that section 5 authorities should guide the content of section 75-1.1. The court called it “established” that “federal decisions interpreting the FTC Act may be used as guidance

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Aycock, *supra* note 175, at 201 (agreeing in 1972 that section 5 decisions “should be helpful in interpreting some of the provisions of chapter 75”).

Likewise, the rapid statutory overruling of the *J.C. Penney* decision indirectly suggests a legislative intent that the courts follow section 5 precedents. In *J.C. Penney*, the Supreme Court of North Carolina declined to follow section 5 decisions on point, stating that section 5 decisions were “not controlling in construing the North Carolina Act.” 292 N.C. at 315, 233 S.E.2d at 898. The General Assembly overruled *J.C. Penney* by statute the same year. *See supra* notes 23–24 and accompanying text; *see also* *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 261 n.5, 266 S.E.2d 610, 620 n.5 (1980) (acknowledging that this statutory change occurred “in the wake of our decision in *Penney*”), *overruled on other grounds* by *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988).

178. 288 N.C. 303, 218 S.E.2d 342 (1975).

179. *Id.* at 308, 218 S.E.2d at 345.

180. *Id.* (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *FTC v. Keppel & Bro.*, 291 U.S. 304 (1934); *Wisdom v. Norton*, 507 F.2d 750 (2d Cir. 1974); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973)).

181. *Id.* at 309, 218 S.E.2d at 346 (citing *D.D.D. Corp. v. FTC*, 125 F.2d 679, 682 (7th Cir. 1942)).

182. 300 N.C. 247, 266 S.E.2d 610 (1980).

183. *Id.* at 262–64, 266 S.E.2d at 620–21.

184. *Id.* at 263 n.6, 266 S.E.2d at 621 n.6 (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)); *see supra* text accompanying notes 145–48 (discussing this test).

185. 302 N.C. 539, 276 S.E.2d 397 (1981).

in determining the scope and meaning of G.S. 75-1.1.”<sup>186</sup> The court held that, in a private lawsuit to enforce section 75-1.1, the plaintiff need not show bad faith by the defendant.<sup>187</sup> As the court analyzed this issue, it referred in part to decisions under section 5.<sup>188</sup> Rejecting the earlier reasoning of the court of appeals,<sup>189</sup> the supreme court stated that “nothing in our earlier decisions in *Hardy* and *Johnson* limits the precedential value of FTC jurisprudence to cases or actions brought by the Attorney General.”<sup>190</sup>

Since 1981, the Supreme Court of North Carolina has continued to refer to section 5 authorities in section 75-1.1 cases from time to time.<sup>191</sup> For example, in *Henderson v. United States Fidelity & Guaranty Co.*,<sup>192</sup> the court relied on decisions from several jurisdictions, all based on statutes that resemble section 5.<sup>193</sup> The court went on to say directly that section 75-1.1 “is patterned after section 5 of the Federal Trade Commission Act, and we look to federal case law for guidance in interpreting the statute.”<sup>194</sup> The

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186. *Id.* at 542, 276 S.E.2d at 399.

187. *Id.*

188. *See id.* (citing *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666 (7th Cir. 1967)).

189. *Marshall v. Miller*, 47 N.C. App. 530, 543–45, 268 S.E.2d 97, 103–04 (1980), *modified in relevant part*, 302 N.C. 539, 276 S.E.2d 397 (1981).

190. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403 (citing *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988)). The court also cited a 1980 article that recommends using lawsuits under section 5 analogues “to enforce [FTC] jurisprudence.” Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair and Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 522 (1980), *cited in Marshall*, 302 N.C. at 543, 549, 276 S.E.2d at 400, 403.

191. *See Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 274, 333 S.E.2d 236, 241 (1985) (following and quoting at length *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162 (4th Cir. 1985), which relied on section 5 decisions to exempt securities transactions from the scope of section 75-1.1); *see also HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 591–94, 403 S.E.2d 483, 492–93 (1991) (summarizing *Skinner* and *Lindner* and using them, among other authorities, to craft a broader exemption from the scope of “commerce” under section 75-1.1); *cf. N.C. Steel, Inc. v. Nat’l Council on Comp. Ins.*, 347 N.C. 627, 635, 496 S.E.2d 369, 374 (1998) (citing, but not directly following, *FTC v. Ticolor Title Ins. Co.*, 504 U.S. 621 (1992), a section 5 decision in which the United States Supreme Court applied the state-action doctrine, an immunity from antitrust liability); *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 657, 386 S.E.2d 200, 213 (1989) (summarizing and drawing “fortif[ication]” from United States Supreme Court decisions that refine the state-action doctrine).

192. 346 N.C. 741, 488 S.E.2d 234 (1997).

193. *Id.* at 746–48, 488 S.E.2d at 238–39.

194. *Id.* at 749, 488 S.E.2d at 239.

North Carolina Court of Appeals<sup>195</sup> and the federal courts<sup>196</sup> have likewise referred to section 5 authorities in section 75-1.1 decisions.

Since the early 1980s, however, courts in section 75-1.1 cases have cited section 5 authorities less often than in earlier years. After the Supreme Court of North Carolina developed a body of its own decisions on section 75-1.1, the court simply began citing its own decisions, as opposed to external sources like decisions under section 5.<sup>197</sup>

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195. See, e.g., *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 554, 406 S.E.2d 646, 649 (1991) (“[U]nder Section 5 of the FTC Act, a practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. Consistent with federal interpretations of deception under Section 5, state courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the state’s unfair and deceptive practices act.”) (quoting *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403); *Dull v. Mut. of Omaha Ins. Co.*, 85 N.C. App. 310, 316, 354 S.E.2d 752, 755 (1987) (rejecting section 75-1.1 claims and relying on differences between the facts of *Dull* and the facts of a decision under section 5, “interpretations of which are often looked to by North Carolina courts for guidance in construing the language of G.S. § 75-1.1”); *Cameron v. New Hanover Mem’l Hosp., Inc.*, 58 N.C. App. 414, 444, 293 S.E.2d 901, 919 (1982) (stating in dicta that section 5 decisions are instructive on the meaning of section 75-1.1); ALLEN, *supra* note 1, § 4.01[4], at 4-7 to -9 (citing other similar decisions of the North Carolina Court of Appeals).

Surprisingly, research reveals only one North Carolina Business Court decision that relies on any section 5 authorities: *State ex rel. Cooper v. McClure*, No. 03 CVS 5617, 2004 WL 2965983, at \*4-5 (N.C. Bus. Ct. Dec. 14, 2004) (drawing parallels to *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990)). See also *id.* at \*10 (citing *Ticor*, 505 U.S. at 633, but holding that the state-action doctrine was not satisfied).

196. See, e.g., *Armbruster Prods., Inc. v. Wilson*, No. 93-2427, 1994 WL 489983, at \*6 (4th Cir. June 6, 1994) (stating, to establish claim preclusion by an earlier antitrust lawsuit, that “provisions of the North Carolina act are reproduced verbatim from § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), and . . . it is an accepted tenet of basic antitrust law that § 5 of the Federal Trade Commission Act sweeps within its prohibitory scope conduct also condemned by § 1 of the Sherman Act”) (quoting *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 48 (4th Cir. 1983)); *CBP Res., Inc. v. SGS Control Servs., Inc.*, 394 F. Supp. 2d 733, 739 (M.D.N.C. 2005) (relying in part on a section 5 decision to hold that the plaintiff in a section 75-1.1 case need not plead its claim with particularity, as FED. R. CIV. P. 9(b) requires for fraud claims).

197. None of the most recent section 75-1.1 opinions by the Supreme Court of North Carolina cite section 5 authorities. See *White v. Thompson*, 364 N.C. 47, 51-53, 691 S.E.2d 676, 679-80 (2010); *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 69-71, 653 S.E.2d 393, 398-99 (2007); *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004); *Dalton v. Camp*, 353 N.C. 647, 655, 548 S.E.2d 704, 710-11 (2001); *Gray v. N.C. Ins. Underwriting Ass’n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681-82 (2000); *Sara Lee Corp. v. Carter*, 351 N.C. 27, 31-32, 519 S.E.2d 308, 311-12 (1999); *Stanley v. Moore*, 339 N.C. 717, 722-24, 454 S.E.2d 225, 228-29 (1995); *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 189-90, 437 S.E.2d 374, 378-79 (1993); *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 687-88, 413 S.E.2d 268, 271-72 (1992); *Owens v. Pepsi Cola Bottling Co. of Hickory, N.C.*, 330 N.C. 666, 674-75, 412 S.E.2d 636, 641-42 (1992); *Johnson v. Beverly-Hanks & Assocs., Inc.*, 328 N.C. 202, 208-10, 400 S.E.2d 38, 42-44 (1991); *Bhatti v. Buckland*, 328 N.C. 240, 242-44, 400 S.E.2d 440, 442-43 (1991); see also David L. Belt, *The*

Recent decisions from other North Carolina courts have done likewise.<sup>198</sup> Most of the recent decisions on unfairness simply follow the 1980 decision of the Supreme Court of North Carolina in *Johnson*, the court's 1981 decision in *Marshall*, or decisions that stem from these.<sup>199</sup> *Marshall*, for its definition of unfairness, cites *Johnson*.<sup>200</sup> *Johnson* quotes the United States Supreme Court's quotation of the Cigarette Rule in *S&H*.<sup>201</sup>

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*Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts*, 80 CONN. B.J. 247, 304–05 (2006) (noting this pattern in other state courts as well).

198. See, e.g., *Combs v. City Electric Supply Co.*, 203 N.C. App. 75, 86–87, 690 S.E.2d 719, 727–28 (2010); *I-Conn Healthcare Solutions, LLC v. Advanced Internet Techs., Inc.*, No. COA09-81, 2010 WL 10399, at \*4–5 (N.C. Ct. App. Jan. 5, 2010); *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 170–74, 684 S.E.2d 41, 49–52 (2009); *Noble v. Hooters of Greenville (NC), LLC*, 199 N.C. App. 163, 166, 681 S.E.2d 448, 452 (2009); *Martini v. Companion Prop. & Cas. Ins. Co.*, 198 N.C. App. 39, 46, 679 S.E.2d 156, 161 (2009), *aff'd in part, rev'd in part*, 364 N.C. 234, 695 S.E.2d 101 (2010); *Henson v. Green Tree Servicing LLC*, 197 N.C. App. 185, 190–91, 676 S.E.2d 615, 619–20 (2009); *Eason v. Cleveland Draft House, LLC*, No. COA08-864, 2009 WL 676951, at \*6–7 (N.C. Ct. App. Mar. 17, 2009); *Triton Indus. v. Riverwalk in Highlands, LLC*, No. COA08-583, 2009 WL 368322, at \*4 (N.C. Ct. App. Feb. 17, 2009); *Fisher v. Commc'n Workers of Am.*, No. 08 CVS 3154, 2008 WL 4754850, at \*6–7 (N.C. Bus. Ct. Oct. 30, 2008).

The most recent North Carolina Court of Appeals opinion that directly addresses the role of section 5 authorities is the fourteen-year-old *DKH Corp. v. Rankin-Patterson Oil Co.*, 131 N.C. App. 126, 506 S.E.2d 256 (1998). *DKH* is a decision under a now-repealed North Carolina antitrust statute, not a decision under section 75-1.1. Even so, the court in *DKH* cited and quoted the operative language about section 75-1.1 and section 5 from *Marshall v. Miller*: “federal decisions interpreting the FTC Act may be used as guidance in determining the scope and meaning of § 75-1.1.” *Id.* at 129, 506 S.E.2d at 258 (quoting *Marshall*, 302 N.C. at 542, 276 S.E.2d at 399); see also *id.* (“[I]t is clear that federal decisions, though not binding on this Court, do provide guidance in determining the scope and meaning of chapter 75.”). *But cf.* *Van Dorn Retail Mgmt., Inc. v. Klausner Furniture Indus.*, 132 N.C. App. 531, 532, 512 S.E.2d 456, 457 (1999) (declining in a 75-1.1 case to follow *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477, 482 (M.D.N.C. 1985), which stated, without direct citation, that “[i]t is undisputed that price discrimination among those similarly situated constitutes a clear violation of North Carolina’s unfair trade practice laws”).

199. See ALLEN, *supra* note 1, § 4.01[3], at 4-6 to -7 (noting this pattern).

200. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403 (citing *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 621 (1980)).

201. *Johnson*, 300 N.C. at 263 n.6, 266 S.E.2d at 621 n.6 (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)), *overruled on other grounds* by *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988).

In addition, *Johnson* and several decisions of the North Carolina Court of Appeals cite the Seventh Circuit's 1976 decision in *FTC v. Spiegel, Inc.*, 540 F.2d 287 (7th Cir. 1976). See *Johnson*, 300 N.C. at 262, 266 S.E.2d at 621–22; *Wilder v. Squires*, 68 N.C. App. 310, 314, 315 S.E.2d 63, 66 (1984); *Lee v. Payton*, 67 N.C. App. 480, 482, 313 S.E.2d 247, 249 (1984); *Marshall v. Miller*, 47 N.C. App. 530, 542–43, 268 S.E.2d 97, 103–04 (1980), *modified in relevant part*, 302 N.C. 539, 276 S.E.2d 397 (1981). The *Spiegel* case involved arguable sham litigation by Spiegel: collection lawsuits against numerous consumers, filed in an Illinois trial court without regard to whether that court could

Because of this pattern of references, unfairness doctrine under section 75-1.1 is mired in the past. As Part III of this Article has shown, the available standards for unfairness now go beyond the Cigarette Rule.<sup>202</sup>

Nothing prevents the North Carolina courts from referring to FTC authorities once again. The language of section 75-1.1 still mirrors the language of section 5. In view of this overlapping language, section 5 authorities are still a rational source of guidance on the meaning of section 75-1.1.<sup>203</sup> North Carolina courts, moreover, have expressly acknowledged, and have never disavowed, “the precedential value of FTC jurisprudence.”<sup>204</sup> Indeed, in the most recent decision to touch on this issue, the Supreme Court of North Carolina wrote that “we look to federal case law for guidance in interpreting” section 75-1.1.<sup>205</sup> As Part V of this Article discusses, the time has come for the courts to renew this practice.

#### V. DEVELOPING THE STANDARD FOR UNFAIRNESS UNDER SECTION 75-1.1

The current standard for unfairness under section 75-1.1—in essence, the list of adjectives in the 1964 Cigarette Rule—has been insufficient to allow courts to reach well-explained decisions in direct unfairness cases.<sup>206</sup> Forty years of unfairness decisions under section

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constitutionally assert personal jurisdiction over the consumers. *Spiegel*, 540 F.2d at 290–91.

202. *See supra* notes 125–72 and accompanying text; *cf. Luskis, Inc. v. Consumer Prot. Div.*, 726 A.2d 702, 711 (Md. 1999) (citing the need to avoid freezing the conduct standard for deception as a reason to adopt the FTC’s 1983 policy statement on that subject).

203. *See Leaffer & Lipson, supra* note 190, at 534.

204. *Marshall*, 302 N.C. at 549, 276 S.E.2d at 403. It is true that some North Carolina case law refers to taking guidance from decisions of the federal courts under section 5, rather than the FTC’s own decisions or statements. *See, e.g., Hardy v. Toler*, 288 N.C. 303, 307, 218 S.E.2d 342, 345 (1975); *DKH Corp. v. Rankin-Patterson Oil Co.*, 131 N.C. App. 126, 128, 506 S.E.2d 256, 258 (1998). Federal appellate decisions in section 5 cases, however, embrace the 1980 Statement. *See, e.g., Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1363–64 (11th Cir. 1988); *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985).

205. *Henderson v. U.S. Fid. & Guar. Co.*, 346 N.C. 741, 748, 488 S.E.2d 234, 239 (1997).

206. *See supra* notes 89–124 and accompanying text.

The FTC itself has recognized the problems with the Cigarette Rule. In the years when that standard was in force, the FTC, by its own account, never used it as an independent basis for a finding of unfairness. *See* 1980 Statement, *supra* note 143, at 1073.

75-1.1 offer only individual ball or strike calls, not a coherent strike zone for parties and courts to apply.<sup>207</sup>

It is time for the North Carolina courts to add more rigorous content to the standards for unfairness, as the FTC and the courts of several other states have already done.<sup>208</sup> Specifically, the North Carolina courts should supplement the current standards for unfairness under section 75-1.1 with the “not reasonably avoidable” test that the FTC has applied since the 1980 Statement.<sup>209</sup> That test provides that to be unfair, conduct must cause an injury that plaintiffs could not have reasonably avoided.<sup>210</sup>

This Part of the Article justifies importing the “not reasonably avoidable” test into the law on direct unfairness claims under section

207. See, e.g., ALLEN, *supra* note 1, § 19.02[1], at 19-4 to -9 (describing a series of individual decisions); see also *supra* notes 97–107 and accompanying text (describing, and citing examples of, the conclusory reasoning in unfairness cases); cf. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (containing testimony of Chief Justice Roberts as a nominee, including this statement: “Judges are like umpires. Umpires don’t make the rules; they apply them . . . They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.”); Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1 (calling this description of judging misleading).

208. See *supra* notes 165–71 and accompanying text (citing decisions from eight states).

209. Under the 1980 Statement, the test for unfair practices has other components as well. To qualify as unfair, an injury also must be substantial and must not be outweighed by countervailing benefits to consumers or the competitive process. 1980 Statement, *supra* note 143, at 1072–73. This Article does not argue that the courts should expressly incorporate these other tests into the test for unfairness under section 75-1.1, for the following reasons.

First, incorporating the requirement of a substantial injury is unnecessary. The law under section 75-1.1 already bars recovery for injuries that are de minimis or illusory. See, e.g., *S. States Imps., Inc. v. Subaru of Am., Inc.*, No. 5:05-CV-752-F(2), 2008 WL 2234625, at \*7–8 (E.D.N.C. May 30, 2008) (rejecting Subaru dealer’s 75-1.1 claim because of an absence of injury: “It is difficult to conceive how the Plaintiffs could be injured by the deprivation of an ‘opportunity’ to which they possessed no entitlement.”); *Comer v. Person Auto Sales, Inc.*, 368 F. Supp. 2d 478, 487–88 (M.D.N.C. 2005) (rejecting a truck buyer’s 75-1.1 claim that was based on the seller’s misstatement of how much the buyer would owe in use tax: “[t]here is simply no evidence that Plaintiff incurred any [taxes] that he did not actually owe”); *Walker v. Branch Banking & Trust Co.*, 133 N.C. App. 580, 584–85, 515 S.E.2d 727, 730–31 (1999) (rejecting a 75-1.1 claim that was based on a bank’s attempt to enforce a forged guaranty against a 75-1.1 plaintiff; holding that the plaintiff’s claims of reputational injury were too ephemeral and that his claims of future business disadvantage were too speculative). The 1980 Statement mirrors North Carolina law in this respect. See 1980 Statement, *supra* note 143, at 1073 (“The Commission is not concerned with trivial or merely speculative harms.”).

Second, as discussed below, weighing the costs of a practice against its benefits is a test better suited to agency enforcement decisions than to judicial decisions in private lawsuits. See *infra* notes 261–62 and accompanying text.

210. 1980 Statement, *supra* note 143, at 1073.

75-1.1. Section A explains the benefits of this test. Section B illustrates how the test would make a difference in the context of a decided case. Finally, Section C addresses possible objections to importing the “not reasonably avoidable” test.

A. *Benefits of the “Not Reasonably Avoidable” Test*

Incorporating the “not reasonably avoidable” test into North Carolina law would offer several important benefits in direct unfairness claims under section 75-1.1. First, incorporating this test would fill an analytical void. Under current law, as shown above, decisions on whether a specific practice is unfair are ad hoc.<sup>211</sup> A plaintiff argues that the defendant’s conduct is immoral, unethical, unscrupulous, and the like; the defendant responds that it is not. Because even the appellate courts have trouble interweaving the current standard with the facts, the published decisions are too lacking in content to allow reliable predictions on whose arguments will carry the day.<sup>212</sup> When a new case is decided, moreover, the outcome is just one more unexplained data point. The overall result is a “freewheeling set of interpretations that are difficult to reconcile with consumer welfare.”<sup>213</sup>

Adding the “not reasonably avoidable” test to the standard for unfairness under section 75-1.1 would allow the courts to evaluate direct unfairness cases in greater detail. The “not reasonably avoidable” test provides, for example, that injury from a defendant’s conduct is unfair when “seller behavior . . . unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making.”<sup>214</sup> On the other hand, conduct is reasonably avoidable, and thus not unfair, “[i]f consumers could have made a different choice, but did not.”<sup>215</sup> These and other standards from FTC doctrine<sup>216</sup> would enable parties and courts to evaluate—and, just as importantly, explain—the substance of unfairness cases: Did the plaintiff know his options at the time? Is he now just being opportunistic? Or, for example, did the defendant withhold material

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211. See *supra* notes 89–124 and accompanying text.

212. See *supra* notes 97–100 and accompanying text.

213. Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 29.

214. 1980 Statement, *supra* note 143, at 1074.

215. *Id.*

216. See, e.g., *The Meaning of “Unfair Acts or Practices,” supra* note 129, at 252–67 (discussing these standards).



information that the plaintiff had no reasonable way of obtaining from other sources?<sup>217</sup>

By prompting courts and parties to debate these issues in detail,<sup>218</sup> the “not reasonably avoidable” test would make outcomes under section 75-1.1 more predictable.<sup>219</sup> This would be a significant improvement. Scholars have recognized the importance of establishing standards “flexible enough to adjust to changes in society and achieve fair and just results in individual cases, but rigid enough to ensure predictability, replicability and doctrinal stability.”<sup>220</sup> Predictability in litigation outcomes, moreover, encourages citizens to make choices in conformity with the law for the benefit of society.<sup>221</sup>

As a related benefit, the “not reasonably avoidable” test would make the unfairness doctrine under section 75-1.1 less vague. Attorney General Morgan recognized that the statute is broad and vague. He specifically argued for guidance from section 5 authorities *as a solution for this vagueness*:

That the words used in [subsection 75-1.1(a)] are not too vague to be enforceable has been decided on many occasions by the Supreme Court of the United States in the past half century since the Federal Trade Commission Act was passed by Congress. The Attorney General hopes to be able to draw upon many of the decisions rendered pursuant to the Federal Trade Commission Act in enforcing the North Carolina counterpart.<sup>222</sup>

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217. *See id.* at 257–58 (noting that “the most common application of the unfairness doctrine involves the withholding of material information”).

218. *See, e.g.*, *Orkin Exterminating Co.*, 108 F.T.C. 263, 367 (1986), *aff’d*, 849 F.2d 1354 (11th Cir. 1988); *Int’l Harvester Co.*, 104 F.T.C. 949, 1066–67 (1984).

219. *See, e.g.*, *Leaffer & Lipson*, *supra* note 190, at 558 (arguing that following FTC doctrine under section 5 analogues “will serve the business community’s need for predictability regarding potential liability under . . . UDAP provisions”); *Thomas*, *supra* note 26, at 910 (expressing same view in North Carolina).

220. Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 255 (1997).

221. Richard Lavoie, *Activist or Automaton: The Institutional Need to Reach a Middle Ground in American Jurisprudence*, 68 ALB. L. REV. 611, 613–14 (2005). In 1914, President Wilson made this same point, but with an emphasis on how unpredictable standards affect the economy: “Nothing hampers business like uncertainty. Nothing daunts or discourages [business] like the necessity to take chances, to run the risk of falling under the condemnation of the law before [a business] can make sure just what the law is.” President Woodrow Wilson, Address Before a Joint Session of Congress (Jan. 20, 1914), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=65374>.

222. Morgan, *supra* note 19, at 19–20 (footnote omitted); *see also* *Leaffer & Lipson*, *supra* note 190, at 534 n.83 (citing state court decisions that reject vagueness challenges to section 5 analogues because FTC authorities are available to guide the interpretations of

It is true that every case under section 75-1.1 involves factual variations and that the statute intentionally uses general language.<sup>223</sup> These points, however, cannot negate the “Aristotelian premise that equity should mitigate the defects of generally worded laws.”<sup>224</sup> In the context of section 75-1.1, equity means considering the plaintiff’s options, not just the defendant’s conduct.<sup>225</sup>

Expanding the unfairness test to consider the plaintiff’s choices would also reflect the goal of modern section 5 doctrine: consumer sovereignty.<sup>226</sup> Attorney General Morgan endorsed this goal in 1969 when he wrote that section 75-1.1 seeks to allow “individuals [to make] independent choices of products and services based upon accurate information as to quality and price.”<sup>227</sup>

The “not reasonably avoidable” test provides that injuries that result from voluntary and informed choices are not unfair. Excluding these situations from the scope of unfairness keeps courts out of the role of replacing the transactions chosen by informed plaintiffs with the hypothetical transactions that the courts would have chosen in the same situation.<sup>228</sup> At the same time, the “not reasonably avoidable” test allows recovery when a prudent plaintiff would have no

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the state statutes); Campbell, *supra* note 32, at 1137–38 (opining that because section 5 has been held not unconstitutionally vague, section 75-1.1 is not unconstitutionally vague as applied). *But see* Farr, *supra* note 32, at 430–32 (arguing that the ability to refer to section 5 decisions does not insulate section 75-1.1 from vagueness challenges).

223. *See, e.g.*, Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 261–62, 266 S.E.2d 610, 620–21 (1980) (discussing section 5 as a guide to the standards under section 75-1.1: “It is critical that the generality of these standards of illegality be noted. The broad language of the statute indicates that the scope of its concept and application is not limited to precise acts and practices which can be readily catalogued.”) (citing United States Supreme Court decisions under section 5), *overruled on other grounds by* Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988); H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914) (“It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field.”).

224. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 29 (2001).

225. *See, e.g.*, 1980 Statement, *supra* note 143, at 1074.

226. *See id.*; *see also, e.g.*, Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 715–17, 720–22 (1997) (describing consumer sovereignty as consumers’ ability to make choices and explaining how consumer protection violations impair consumers’ choices); *cf.* Wright, *supra* note 66, at 2239–40 (noting that consumer protection law has long emphasized “the primacy of consumer decisionmaking,” but arguing that new initiatives in consumer financial protection depart from this focus on consumer sovereignty).

227. Morgan, *supra* note 19, at 3 (emphasis omitted); *accord* *The Meaning of “Unfair Acts or Practices,” supra* note 129, at 227, 234.

228. *See, e.g.*, Beales, *supra* note 130, at 196; *see also* Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 345 (2008) (“[C]onsumers choose what to consume. The government does not choose for consumers . . .”).

reasonable chance of avoiding harm—for example, when the plaintiff’s vulnerabilities or the defendant’s actions block the plaintiff from avoiding injury.<sup>229</sup>

Furthermore, the “not reasonably avoidable” test would offer an organizing principle for aspects of the North Carolina case law on unfairness. For example, the North Carolina Court of Appeals has rejected a section 75-1.1 claim against an insurance company when the insured failed to satisfy his obligations under the insurance policy.<sup>230</sup> Similarly, when a contractor did not deliver oil because of the customer’s failure to make timely payment, a section 75-1.1 claim failed.<sup>231</sup> The North Carolina Court of Appeals has likewise explained that when a customer willingly agrees to pay a stated price for a service after being told that other sellers might offer a better price, the seller does not act unfairly by providing the service at the stated price.<sup>232</sup> The “not reasonably avoidable” test explains these decisions and offers a standard for similar cases in the future.

The test also explains the section 75-1.1 decisions that refer to common knowledge. If the cause of a plaintiff’s injury is part of common knowledge in the plaintiff’s field, the plaintiff is unlikely to recover under section 75-1.1. For example, in *Opsahl v. Pinehurst, Inc.*,<sup>233</sup> the plaintiff sought to rescind a real-estate contract based on construction delay. The court rejected the section 75-1.1 claim in *Opsahl* because “[i]t is common knowledge that projected completion dates in the construction industry are often missed for a variety of reasons and may be impossible or impractical to fulfill.”<sup>234</sup> The plaintiff could have avoided its injury by acting on this common knowledge and allowing a margin for error in its plans. The “not reasonably avoidable” test would reinforce this sensible analysis.

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229. See *The Meaning of “Unfair Acts or Practices,” supra* note 129, at 252–67; see also *Clerkin v. MyLife.com, Inc.*, No. C11-00527CW, 2011 WL 3607496, at \*7 (N.D. Cal. Aug. 16, 2011) (holding that for plaintiffs to state a claim under California’s Unfair Competition Law, the plaintiffs must show that they did not benefit from the alleged misconduct and that they could not have reasonably avoided their injuries); *Lyons v. Bank of Am.*, No. 11-01232CW, 2011 WL 3607608, at \*12 (N.D. Cal. Aug. 15, 2011) (holding that the plaintiffs’ unfairness claims failed because the plaintiffs could have avoided their injuries—a lowered credit score and the need to defend against a wrongful-foreclosure proceeding—simply by making timely mortgage payments).

230. *Carter v. W. Am. Ins. Co.*, 190 N.C. App. 532, 540, 661 S.E.2d 264, 271 (2008).

231. *Clinard Oil Co. v. Oil Prods. Co.*, No. COA05-1087, 2006 WL 1529055, at \*5 (N.C. Ct. App. June 6, 2006).

232. *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 669–70, 620 S.E.2d 232, 237–38 (2005).

233. 81 N.C. App. 56, 344 S.E.2d 68 (1986).

234. *Id.* at 69–70, 344 S.E.2d at 77.

Finally, adopting the “not reasonably avoidable” test would provide a degree of balance in the standards under section 75-1.1—balance that is needed because of the high volume of claims under the statute and the powerful remedies that the statute allows. In North Carolina, it is “increasingly rare to see a complaint that does not contain a claim under G.S. § 75-1.1 for unfair or deceptive trade practices.”<sup>235</sup> This popularity results from the automatic treble damages and possible attorney fees available under section 75-1.1.<sup>236</sup> These remedies go far beyond the remedies available under section 5.<sup>237</sup>

The availability of treble damages supports moving the conduct standard under section 75-1.1 closer to the current standard under section 5. Otherwise, section 75-1.1 would offer more for less: more punishing remedies than section 5 offers, based on an unfairness standard that is less demanding than the current standards under section 5. That outcome would be a supreme irony. Historically, one of the main answers to concerns about the open-ended nature of the unfairness doctrine has been not to worry: after all, the answer goes,

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235. Buford, *supra* note 33. This phenomenon is not limited to North Carolina. Across the country, the number of claims under section 5 analogues more than doubled between 2000 and 2007. SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION: PRELIMINARY REPORT, at xii, 19 (2009). Not surprisingly, states (like North Carolina) with vague definitions of prohibited conduct have more litigation under their section 5 analogues than states with more clearly defined proscriptions have. *Id.* at 25.

236. *See* N.C. GEN. STAT. §§ 75-16 to -16.1 (2011); *see also* Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 347 (4th Cir. 1998) (attributing the frequent filing of 75-1.1 claims to the treble damages available for 75-1.1 violations); Butler & Johnston, *supra* note 214, at 94–99 (analyzing how economic incentives affect plaintiffs’ decisions on whether to file suit under section 5 analogues).

The North Carolina House of Representatives recently passed a bill that would expand the remedies for section 75-1.1 violations further. *See* H. 30, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011). The bill would allow judgments based on section 75-1.1 claims, in particular, to be enforced by garnishment of wages. *Id.* sec. 1, § 75-16.3(b). This remedy would be an exception to the general prohibition on wage garnishment under North Carolina law. *See, e.g.,* Harris v. Hinson, 87 N.C. App. 148, 150, 360 S.E.2d 118, 120 (1987) (explaining that N.C. GEN. STAT. § 1-362 (2011) “has been expanded by our Courts to preclude the execution on *any* future earnings to satisfy a judgment”).

237. Most notably, there is no private right of action under section 5. Moore v. N.Y. Cotton Exch., 270 U.S. 593, 603 (1926); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 997 (D.C. Cir. 1973); *see also* Marshall v. Miller, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981) (noting the absence of a private right of action under section 5). *See generally* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 11–15 (2005) (explaining how concerns over the broad conduct standards under section 5 led Congress to reject a private cause of action).

section 5 mainly allows nonmonetary remedies.<sup>238</sup> For section 75-1.1, the fact that every violation automatically generates treble damages<sup>239</sup> negates this soothing answer. The same fact heightens the need to reform the standard for unfairness under section 75-1.1.

In the early days of section 75-1.1, courts and commentators defended the treble-damages remedy under the statute by implying that most claims under the statute involve small damages.<sup>240</sup> Even if this perception of section 75-1.1 was accurate in the early days, it is no longer accurate. In recent years, several of the highest verdicts and settlements reported in North Carolina have involved section 75-1.1 claims.<sup>241</sup> The recipients of these awards have often been substantial

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238. For example, in a companion piece with the 1980 Statement, the FTC offered express reassurance on the limited FTC remedies for unfair acts and practices:

Under the Federal Trade Commission Act, businesses cannot be subjected to sanctions for engaging in an unfair practice until the practice has been defined with specificity in a full-dress adjudication or rulemaking. If, in an adjudication, a firm is found to have engaged in a newly identified unfair act or practice, civil penalties are not assessed; rather, the remedies are limited to preventing the firm from engaging in the same or related practices in the future, and, in appropriate cases, to providing relief for injured parties. Only if the order is violated may penalties then be assessed.

Companion Statement on the Commission's Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in* [1969–1983 Current Comment Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421, at 55,953–94 (footnotes omitted); *see also* 51 CONG. REC. 12,147 (1914) (remarks of Sen. Hollis in the debates over the original FTC Act) (noting that FTC orders would carry no monetary sanction).

239. *See, e.g.,* *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991); *Marshall*, 302 N.C. at 547, 276 S.E.2d at 402; *see also* *Atl. Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 715 (4th Cir. 1983) (recognizing that an “award of treble damages is a right of the successful plaintiff” on a 75-1.1 claim); *State ex rel. Cooper v. McClure*, No. 03 CVS 5617, 2007 WL 2570249, at \*15 (N.C. Bus. Ct. July 19, 2007) (“Automatic trebling of damages leaves no room for judicial discretion.”).

240. *See, e.g., Marshall*, 302 N.C. at 549, 276 S.E.2d at 403; *Aycock*, *supra* note 175, at 253; *see also* *Leaffer & Lipson*, *supra* note 190, at 556 (predicting, in 1980, that lawsuits under section 5 analogues “will not involve enormous monetary recoveries. With smaller stakes, the rewards will be less attractive for prospective bounty hunters.”); *id.* at 556 n.225 (seeking to explain away the effect of treble damages by noting that “they are often limited to knowing or wilfull [sic] violations,” an observation that is not true in North Carolina).

241. *See, e.g., Top Verdicts and Settlements*, N.C. LAW. WKLY., Feb. 6, 2012, at 7 (reporting a verdict for \$8.67 million for “unfair and deceptive trade practices”); *Large Verdicts & Settlements*, N.C. LAW. WKLY., Jan. 31, 2011, at 7 (reporting a \$10.1 million arbitration award on a counterclaim for “unfair/deceptive trade practices” in June 2010); *Largest Verdicts & Settlements*, N.C. LAW. WKLY., Jan. 25, 2010, at 14 (stating that the three largest reported recoveries in North Carolina in 2009, ranging from \$11.2 million to \$42.5 million, included claims for “unfair and deceptive trade practices”); *Large Verdicts & Settlements*, N.C. LAW. WKLY., Jan. 26, 2009, at 12 (reporting as the second-highest

businesses, not consumers.<sup>242</sup> Because section 75-1.1 is now far more than a consumer protection statute, it is important that the test for unfairness under the statute be rigorous and balanced.

*B. How the “Not Reasonably Avoidable” Test Might Affect North Carolina Decisions: An Example*

If the North Carolina courts added the “not reasonably avoidable” test to the standards for unfairness under section 75-1.1, that addition would affect the analysis of at least some section 75-1.1 cases. *Johnson v. Honeycutt*<sup>243</sup> offers a simple example. Honeycutt sold a dump truck bed to Johnson, but Johnson failed to pick it up for more than two years.<sup>244</sup> After Honeycutt agreed to pay someone to move the truck bed to Johnson’s facility and still saw no results, Honeycutt eventually sold the truck bed to someone else.<sup>245</sup> Johnson sued under section 75-1.1.<sup>246</sup> The North Carolina Court of Appeals recited the usual list of adjectives that define unfairness. It ultimately concluded that Honeycutt’s conduct “qualifie[d] as an unfair and deceptive act or practice.”<sup>247</sup>

If the “not reasonably avoidable” test had applied, the court probably would not have reached this conclusion. Along with applying the usual adjectives, the court would have asked whether Johnson’s alleged injury was reasonably avoidable. Had the court done so, it would have focused on Johnson’s opportunities to move

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recovery in 2008 a \$57.5 million recovery that included claims for “unfair and deceptive trade practices”).

242. See, e.g., *Top Verdicts and Settlements*, N.C. LAW. WKLY., Feb. 6, 2012, at 7 (reporting an \$8.67 million verdict in favor of the Venezuelan buyer of a corporate jet); *Large Verdicts & Settlements*, N.C. LAW. WKLY., Jan. 31, 2011, at 7 (reporting a \$5.2 million recovery in May 2010 in a lawsuit between competing medical-equipment businesses); *Largest Verdicts & Settlements*, N.C. LAW. WKLY., Jan. 25, 2010, at 15 (reporting an \$11.2 million recovery in May 2010 in a lawsuit between competing furniture businesses); *Large Verdicts & Settlements*, N.C. LAW. WKLY., Jan. 26, 2009, at 12 (reporting as the second-highest recovery in 2008 a \$57.5 million recovery by drug-development company Serenex, Inc.).

243. No. COA05-295, 2006 WL 279111 (N.C. Ct. App. Feb. 7, 2006).

244. *Id.* at \*1. The trial court excluded evidence that the parties originally agreed that Johnson would remove the truck bed within six weeks. *Id.* at \*2. The same excluded evidence showed that after Johnson breached this agreement, the parties made a novation that required “timely removal” of the truck bed. *Id.* After excluding this evidence, the trial court reasoned that there was no time-of-receipt term, so the law required Johnson to pick up the truck bed within only a reasonable time. *Id.* at \*3 (citing U.C.C. § 2-309(1), enacted in North Carolina as N.C. GEN. STAT. § 25-2-309 (2005)).

245. *Id.* at \*1.

246. *Id.* at \*2.

247. *Id.* at \*5.

the truck bed during his delay of more than two years.<sup>248</sup> In the absence of the “not reasonably avoidable” test, however, the court focused only on the defendant’s conduct.

One key problem with the current standard for unfairness in North Carolina is that it ignores the plaintiff’s options. The current standard holds a defendant liable for *any* injury that appears unfair, regardless of the plaintiff’s actions or inaction. As *Johnson* illustrates, that approach can allow unjust awards of treble damages. The “not reasonably avoidable” test adds clarity to the definition of unfairness by recognizing the importance of plaintiffs’ own choices.

C. *Responses to Arguments Against the “Not Reasonably Avoidable” Test*

Proponents of the status quo might offer several arguments against incorporating the “not reasonably avoidable” test into the standards for unfairness. As shown below, the counterarguments that are likely to arise in North Carolina<sup>249</sup> are not persuasive.

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248. Similarly, in *Turner v. 24 Hour Fitness U.S., Inc.*, No. B227445, 2011 WL 2803579 (Cal. Ct. App. July 13, 2011), the California Court of Appeal for the Second District rejected a claim that a gym committed unfair practices by selling a personal-training package that could be used for only six months. The court held that the plaintiff, Turner,

could easily have avoided her injury by using her training sessions during the six month period. Because they were half sessions, Turner would have used all of her time in eight hours and fifteen minutes (or one hour and fifteen minutes each month). . . . Turner does not allege that 24 Hour Fitness prevented her from using her training sessions during the six month period. Further, the [contract] which Turner signed expressly states the expiration date of the training sessions both before and after her signature.

*Id.* at \*5. Cases like *Turner*, in which a plaintiff tries to use a section 5 analogue to recover treble damages based on honestly disclosed but unfavorable contract terms, contrast sharply with the types of vulnerabilities that the 1980 Statement called not reasonably avoidable. See 1980 Statement, *supra* note 143, at 1074 (citing, as examples of injuries that are not reasonably avoidable, “overt coercion, as by dismantling a home appliance for ‘inspection’ and refusing to reassemble it until a service contract is signed” and “undue influence over highly susceptible classes of purchasers,” such as late-stage cancer patients).

249. Overlapping issues are arising in other states as well, although the specifics of the state statutes and their relationships to FTC standards vary. See, e.g., David J. Federbush, *The Unexplored Territory of Unfairness in Florida’s Deceptive and Unfair Trade Practices Act*, FLA. B.J., May 1999, at 26, 26–32 (discussing the relationship between Florida law and federal law on unfairness); Julie E. Schwartz, *Louisiana’s Unfair Trade Law: An Elusive Remedy and Uncertain Threat*, 41 LA. B.J. 522, 524 (1994) (describing then-open issues under Louisiana’s section 5 analogue, including whether Louisiana would follow the FTC’s 1980 Statement). Compare Paul Sobel, *Unfair Acts or Practices under CUTPA—The Case for Abandoning the Obsolete Cigarette Rule and Following Modern FTC Unfairness Policy*, 77 CONN. B.J. 105, 105 (2003) (arguing that Connecticut’s standard for unfairness should incorporate more recent FTC authorities), with Belt, *supra* note 197, at 317–24 (defending

First, although one might argue that the “not reasonably avoidable” test resembles contributory negligence,<sup>250</sup> the two doctrines are in fact distinct. The Supreme Court of North Carolina has held that contributory negligence does not apply in section 75-1.1 cases.<sup>251</sup> In the court’s assessment, “the legislature did not intend to create a statutory cause of action in N.C.G.S. § 75-1.1 only for the remedy . . . to be limited by a common law defense.”<sup>252</sup> The “not reasonably avoidable” test, however, is part of the definition of unfair practices, not a common-law defense.<sup>253</sup> Nor would the test violate the broader statement by the Supreme Court of North Carolina that the “plaintiff’s alleged conduct . . . is not relevant.”<sup>254</sup> The “not reasonably avoidable” test is not about a plaintiff’s conduct, but about the options and information that a plaintiff has.<sup>255</sup>

Second, the legislative history of the 1994 amendment to section 5 does not limit state courts’ ability to import the “not reasonably avoidable” test into state law. As noted above, in 1994, Congress codified most of the 1980 Statement in new subsection 5(n) of the FTC Act.<sup>256</sup> A passage in the Senate report on this amendment, inserted in response to the concerns of state attorneys general, notes

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existing Connecticut law). *See generally* Greenfield, *supra* note 139, at 1895–1934 (detailing how states have responded to the 1980 Statement); David L. Belt, *Should the FTC’s Current Criteria for Determining “Unfair Acts or Practices” Be Applied to State “Little FTC Acts”?*, ANTITRUST SOURCE, 1, 12, (Feb. 2010), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Feb10\\_Belt2\\_25f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb10_Belt2_25f.authcheckdam.pdf) (discussing how widespread adoption of the standards in the 1980 Statement would be likely to affect enforcement of states’ section 5 analogues).

250. Under contributory negligence, if the plaintiff’s own fault contributes in any degree to her injury, the plaintiff may not recover at all. *Champs Convenience Stores, Inc. v. United Chem. Co.*, 329 N.C. 446, 455, 406 S.E.2d 856, 861 (1991). North Carolina is one of only four U.S. states that continue to allow the defense of contributory negligence. *See, e.g.*, Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 38 (1996).

251. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 96, 331 S.E.2d 677, 681 (1985).

252. *Id.* at 94, 331 S.E.2d at 680; *see also* *Noble v. Hooters of Greenville (NC), LLC*, 199 N.C. App. 163, 172, 681 S.E.2d 448, 455 (2009) (commenting, in a case with obvious contributory negligence, that “Plaintiffs’ attempt to pursue a UDTPA claim, to which contributory negligence is not a defense, is understandable”).

253. *See, e.g.*, *Legg v. Castruccio*, 642 A.2d 906, 918 (Md. Ct. Spec. App. 1994); *Swiger v. Terminix Int’l Co.*, No. 14523, 1995 WL 396467, at \*6 (Ohio Ct. App. June 28, 1995); 1980 Statement, *supra* note 143, at 1073.

254. *Winston Realty*, 314 N.C. at 95, 331 S.E.2d at 680; *cf. supra* notes 230–32 and accompanying text (noting decisions in which the North Carolina Court of Appeals has rejected 75-1.1 liability based on the plaintiff’s failure to use available options).

255. *See, e.g.*, *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010); Beales, *supra* note 130, at 195–96.

256. FTC Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified as amended at 15 U.S.C. § 45(n) (2006)).



that the amendment is not meant to control the interpretation of states' section 5 analogues.<sup>257</sup>

Control of state law by FTC doctrine, however, is not what this Article is advocating. Instead, this Article proposes that courts in North Carolina resume taking *guidance* from interpretations of section 5.<sup>258</sup> Nothing in the legislative history of section 5(n) prohibits that approach. On the contrary, state and federal courts have applied the “not reasonably avoidable” test under section 5 analogues, even after the Senate report at issue.<sup>259</sup>

Finally, the arguments against the balancing test in section 5(n) and the 1980 Statement do not apply to the “not reasonably avoidable” test. In the 1980 Statement, the FTC stated that to qualify as unfair, a practice that injures consumers “must not be outweighed

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257. The passage in the Senate report reads as follows:

The Committee is aware that State attorneys general have expressed a concern that the limitation on unfairness in this section may be construed to affect provisions in State statutes or State case law. Since the mid-1960s, virtually every State has enacted statutes prohibiting deceptive practices, while many States also prohibit unfair practices. These State consumer protection acts are enforced almost exclusively through recourse to State courts. Many of the statutes direct courts to be guided by interpretations of the FTC Act. In other States, the courts have interpreted these laws consistently with developments under Federal law. State courts have applied the unfairness standard in a variety of contexts, including unconscionable pricing practices, high pressure sales tactics, uninhabitable living conditions in leased premises, and abusive debt collection practices. The Committee intends no effect on those or other developments under State law. This section represents a consensus view of an appropriate codification of Federal standards, undertaken after careful assessment of the FTC's past activities. The Committee's action should not be understood as suggesting that the criteria in this section are necessarily suitable in the future development of State unfairness law or that the FTC's future construction of these criteria delimits in any way the range of State decision-making. Sound principles of federalism limit the impact of this section to the FTC only.

S. REP. NO. 103-130, at 13 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1776, 1788.

258. *See, e.g.*, *Henderson v. U.S. Fid. & Guar. Co.*, 346 N.C. 741, 749, 488 S.E.2d 234, 239 (1997); *Hardy v. Toler*, 288 N.C. 303, 308, 218 S.E.2d 342, 345 (1975); *see also supra* notes 183–97 and accompanying text (discussing additional decisions to this effect).

259. *See, e.g.*, *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 203–04 (D. Mass. 1998); *Bangor Publ'g Co. v. Union St. Mkt.*, 706 A.2d 595, 597 (Me. 1998); *Legg v. Castruccio*, 642 A.2d 906, 918 (Md. Ct. Spec. App. 1994); *Swiger v. Terminix Int'l Co.*, No. 14523, 1995 WL 396467, at \*6 (Ohio Ct. App. June 28, 1995).

There is one other reason why the 1994 federal legislative history does not restrict the North Carolina courts from following the “not reasonably avoidable” test. The statement in the 1994 Senate report seeks to limit the effect of the 1994 amendment to section 5. However, the “not reasonably avoidable” test did not begin with that amendment. *See generally supra* note 258. Instead, it first appeared in the FTC's 1980 Statement on unfairness under section 5. *See supra* notes 147–48 and accompanying text.

by any countervailing benefits to consumers or competition that the practice produces.”<sup>260</sup> As commentators have pointed out, this balancing test works better as a tool to guide FTC policymaking than as a rule for litigation.<sup>261</sup> In addition, if litigated “cases are decided by a general weighing of all relevant costs and benefits, companies seeking to comply with the law will not have discrete legal principles to follow.”<sup>262</sup>

The “not reasonably avoidable” test, however, does not involve such a cost/benefit comparison. Instead, as shown above, the test centers on the plaintiff’s choices and information.<sup>263</sup> For this reason, discomfort with a broad balancing test should not bar the North Carolina courts from adding the “not reasonably avoidable” test to their analysis of unfairness under section 75-1.1.

#### CONCLUSION

Vague conduct standards and treble damages do not mix. As a Senator asked in the debates over the original FTC Act,

if no man on earth can know whether he is disobeying the law or not until some time in the future, when some [authority] finds out and tells him that he is disobeying the law, does not the Senator think that mulcting him in treble damages is a little bit harsh?<sup>264</sup>

The North Carolina courts have a long history of referring to FTC authorities as they interpret section 75-1.1. Now is the time for the courts to recall this history and resume taking guidance from FTC authorities. When the courts do so, they will find that the 1980 Statement, and particularly the “not reasonably avoidable” test, adds needed rigor and balance to the standards for unfairness under section 75-1.1.

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260. 1980 Statement, *supra* note 143, at 1073; *accord* 15 U.S.C. § 45(n) (2006).

261. *See, e.g., The Meaning of “Unfair Acts or Practices,” supra* note 129, at 248–50; Greenfield, *supra* note 139, at 1932–33. Notably, when the Cigarette Rule was the standard under section 5, scholars still debated whether FTC standards could carry over to private lawsuits under state law. *See* Leaffer & Lipson, *supra* note 190, at 533 n.81 (cataloguing this debate up to 1980).

262. *The Meaning of “Unfair Acts or Practices,” supra* note 129, at 249. David Belt has speculated that this concern might be one reason why defendants in private litigation have not often argued for state courts to follow the modern FTC unfairness standard. *See* Belt, *supra* note 197, at 305.

263. *See, e.g.,* Beales, *supra* note 130, at 195–96.

264. 51 CONG. REC. 13,114 (1914) (statement of Sen. McCumber).