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present and able to observe unfairness that he might later appeal. If the defendant is still successful in disturbing the court after he has been bound, a mistrial should be declared and the defendant should be cited and tried for criminal contempt. Since there is no longer the danger of his disrupting the trial, there remains no reason to summarily pass judgment upon him. He should therefore be accorded the right to jury trial on the contempt citation, the right to cross-examine the witnesses against him, the right to present his own witnesses, and the right to be represented by counsel.

The power to restrain or to punish an unruly defendant should be exercised only in accord with its historical justifications and then only by impartial, reflective judges who are "above the battle and the crowd."¹⁶⁸ These summary prerogatives should be subject to constant scrutiny and review; for they place in the hands of judges ominous powers, the misuse of which can result only in social and political prejudice, oppression, and alienation. Judicial actions that exceed these simple restrictions may themselves be described as contemptuous conduct. That conduct, of all contempts, would be the most contemptible.

ROBERT L. EPTING

Consumer Protection and Unfair Competition in North Carolina— The 1969 Legislation

BACKGROUND

Courts in common-law jurisdictions have generally created rules designed to insure that business competition remains "fair."¹ The concept has been imprecisely defined. The North Carolina Supreme Court, using typical language, has said that unfair competition is that "which a court of equity would consider unfair[.]"² North Carolina courts have found a cause of action, in the absence of statute, for infringement of trademarks and tradenames; imitation of appearance and dress of a competitor's product ("passing off"); interference with a competitor's contractual relations; and disparagement of a competitor's product, title,

¹⁶⁸ *Fisher v. Pace*, 336 U.S. 155, 166 (1949) (Douglas, J., dissenting).

¹ See generally S. OPPENHEIM, *UNFAIR TRADE PRACTICES* (1965).

² *Charcoal Steak House v. Staley*, 263 N.C. 199, 204, 139 S.E.2d 185, 189 (1964), *citing* *Carolina Aniline & Extract Co. v. Ray*, 221 N.C. 269, 273, 20 S.E.2d 59, 61 (1942).

or business methods.³ Nevertheless, the North Carolina common law of unfair competition has not been as well developed as that of other states. Furthermore, unfair-competition actions have been hedged with cumbersome rules of procedure and proof in all jurisdictions.⁴ Recovery, therefore, has been difficult anywhere in an action based on a common-law theory of unfair competition, and in North Carolina this observation has in the past proved especially accurate.

The North Carolina Supreme Court in *State v. Craft*⁵ held that a conspiracy to raise the price of a necessary article of life (in this case milk) is indictable at common law. The criminal common law of unfair trade practices may extend further, but there have been no new developments along this line since *Craft* was decided in 1914.

Statutes permitting governmental action or providing private parties with the remedy of treble-damages actions have likewise proved ineffective in controlling unfair-trade practices. Section thirty-one of Article I of the Constitution of North Carolina⁶ declares that “[p]erpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed.” This hoary prohibition has been used only to strike down state restrictions on trade, such as legislative acts granting exclusive franchises⁷ or placing unreasonable restrictions on entry into some trade or profession.⁸

Since 1913, North Carolina has had in section 75-1 of the General Statutes the equivalent of the federal Sherman Act.⁹ In *McNeill v. Hall*,¹⁰ a treble-damages suit under that section, the North Carolina Supreme

³ Comment, *Unfair Competition—Law of Unfair Competition in North Carolina*, 46 N.C.L. REV. 856 (1968).

⁴ *Id.* A note on the adoption of the Uniform Deceptive Trade Practices Act in Iowa at 52 IOWA L. REV. 269, 271-72 (1966) suggests that state rules of unfair competition are underdeveloped because such claims have most often been decided by federal courts, pendent to patent, copyright, or trademark issues, as matters of federal common law prior to the decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). This theory in part overlooks the fact that *Hurn v. Oursler*, 289 U.S. 238 (1933), the basis of the doctrine of pendent jurisdiction, was decided only five years before *Erie*. There is general agreement that the pre-*Erie* federal common law of unfair competition was both more highly developed and “better” than that of most states.

⁵ 168 N.C. 208, 83 S.E.2d 772 (1914).

⁶ This provision was part of the Constitution adopted initially in 1868.

⁷ *E.g.*, *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 84 S.E.2d 390 (1954) (race track).

⁸ *E.g.*, *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949) (photography).

⁹ 15 U.S.C. §§ 1-7 (1964).

¹⁰ 220 N.C. 73, 16 S.E.2d 456 (1941).

Court dealt with evidence that retail merchants agreed among themselves not to purchase pies and cakes from certain salesmen if they continued to sell to the plaintiff-cafe operator so that he was deprived of his supply. The court, holding this evidence insufficient to show a conspiracy in restraint of trade, stated that the defendants had the right to buy from anyone they pleased and that combining in the exercise of a lawful act does not result in a conspiracy.¹¹ The court's definition of "conspiracy" has dissuaded others from seeking relief under section 75-1. Section 75-5(b) of the North Carolina General Statutes, a facsimile of the federal Clayton Act,¹² prohibits conspiracy to lower prices, exclusive dealing contracts, willful destruction of a competitor's business, price discrimination, and setting minimum prices. The latter section has been used more frequently and somewhat more successfully.¹³ In general, however, no effective method of dealing with unfair trade practices has in the past been available under North Carolina law to any state agency or to the parties injured by such actions.

THE NORTH CAROLINA LEGISLATION OF 1969

The North Carolina legislature on June 14, 1969,¹⁴ sought to remedy the situation discussed above by enacting subsection 75-1.1 of the General Statutes.¹⁵ Borrowing the language of section five of the Federal Trade

¹¹ *Accord*, *Lineburger v. Colonial Ice Co.*, 220 N.C. 444, 17 S.E.2d 502 (1941). *But see* *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

¹² 15 U.S.C. §§ 13 & 14 (1964).

¹³ *E.g.*, *Standard Fashion Co. v. Grant*, 165 N.C. 453, 81 S.E. 606 (1914). *But see* *Waldron Buick Co. v. General Motors Corp.*, 254 N.C. 117, 118 S.E.2d 559 (1961).

¹⁴ See *Raleigh News and Observer*, Aug. 14, 1969, at 3, col. 2.

¹⁵ The subsection reads:

75-1.1. *Methods of competition, acts and practices regulated*; legislative policy.—(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) 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.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising

Commission Act,¹⁶ the General Assembly prohibited "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." The legislature, rather than establishing a separate agency to enforce the new provision, chose to incorporate the amendment into Chapter Seventy Five of the General Statutes—the state's general antitrust-laws section. This treatment will give the new provision characteristics of enforcement and procedure paralleled by neither the Federal Trade Commission Act nor the consumer protection acts of other states. The legislature also amended sections 75-6 and 75-7, the chapter's criminal provisions, to exclude violations of subsection 75-1.1 from criminal sanctions.¹⁷ Such an exclusion is in accordance with the federal rule and that of most states.¹⁸

The following sections of the General Statutes are available for use in an action based upon an alleged violation of subsection 75-1.1: 75-9, authorizing the Attorney General to make investigations; 75-10, giving him the right to examine private books and records; 75-12, providing that refusal to furnish information is a misdemeanor and making false swearing perjury; and 75-14 and -15, allowing the Attorney General to prosecute civil actions in the name of the state. These provisions, taken together, mean that the Attorney General may, when he suspects a violation of Chapter Seventy Five, conduct a formal investigation and order the persons being investigated to produce documents and appear for questioning.¹⁹ Section 75-11 in the past granted an exemption from "indictment, prosecution, punishment, or penalty by reason or on account of anything disclosed" to the Attorney General. But the 1969 General Assembly inserted the adjective "criminal" to make it explicit that evidence obtained in a proceeding under sections 75-9 and -10 can later be used in a *civil* action. Such evidence could be used by the Attorney General in an

medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

¹⁶ 15 U.S.C. § 45(a)1 (1964).

¹⁷ Several sections of Chapter 75, which had applied only to corporations, were also amended to include natural persons and unincorporated businesses, N.C. GEN. STAT. 75-9, -10, & -12 (Supp. 1969).

¹⁸ *But see* ARIZ. REV. STAT. ANN. § 44-1532 (1967); MD. ANN. CODE art. 83, § 22(b) (1969); NEV. REV. STAT. § 207.170 (1967); S.D. CODE §§ 37-23-1 to -6 (Supp. 1969).

¹⁹ This legislative scheme seems much stronger than those that allow introduction of the results of a state prosecution in a private action. *E.g.*, HAWAII REV. STAT. § 480-22 (1968); MASS. GEN. LAWS ch. 93A, § 5 (Supp. 1969).

action in the name of the state or by a private party in an action brought under section 75-16, the treble-damages provision of Chapter Seventy Five.

The treble damages provision was broadened in 1969 to include as potential plaintiffs "any person [who] shall be injured" by violations of the chapter. Before the expansion of the provision, only those persons, firms, or corporations whose business was "broken up, destroyed, or injured" by such violations could bring actions for treble damages.²⁰ But the newly amended section 75-16 extends the possibility of treble-damages recoveries to consumers. Such a provision for any class of plaintiffs for injury due to deceptive trade practices is rare, but could be the most significant portion of the new North Carolina legislation. Future state attorneys general may not be interested in consumer protection; moreover, the history of the Federal Trade Commission amply illustrates that the North Carolina Attorney General's Consumer Protection Division cannot discover or prosecute all deceptive or unfair trade practices in the state. The broadened treble-damages provision, under which consumers can become private attorneys general, could make subsection 75-1.1 successful although other statutes have in the past failed to provide adequate consumer protection.

The Consumer Protection Division of the state Attorney General's Office is charged with official enforcement of new subsection 75-1.1 and upon receiving a complaint will, through one of its investigators, make independent factual determinations. The experience of the Division shows that often the complaining party and the party against whom the complaint has been lodged (who is always notified) can work out a mutually satisfactory resolution. If such an agreement adequately protects the public interest, the Division will drop the case.²¹ Although the Attorney General does not issue formal advisory opinions to private parties, the news media have reported in recent months that several persons have received informal opinions from the Division, and in at least one instance, the Division formally met with attorneys for a private firm to discuss the legality of that business' operations.

If several complaints are received about one business or if a violation appears serious, a formal demand for information is served. If then

²⁰ N.C. GEN. STAT. 75-16 (1965), *amended by* N.C. GEN. STAT. 75-16 (Supp. 1969).

²¹ Interview with Mr. T.J. Bolch, Special Assistant Attorney General, Division of Consumer Protection, North Carolina Attorney General's Office, Raleigh, December 17, 1969. [Hereinafter cited as Interview.]

it concludes that court action is warranted, before bringing suit the Division will seek a voluntary assurance of discontinuance of the unlawful activity, a documentary settlement statutorily authorized in some jurisdictions²² but in North Carolina dependent for enforcement on a liquidated-damages clause included in the settlement agreement itself.²³ If a satisfactory assurance cannot be obtained, a restraining order is sought ten days after notice to the alleged offender. In a few instances thus far, consent judgments with provisions for damages on breach have been entered.²⁴

SECTION FIVE OF THE FTC ACT AS AN AID TO UNDERSTANDING
THE SCOPE OF THE N.C. LEGISLATION

Although the scope of subsection 75-1.1 of the North Carolina General Statutes is not yet known, it is impossible to discuss its impact without first examining the federal legislation on which it is based. The Federal Trade Commission Act, which was adopted in 1914 as a part of a general congressional effort to strengthen the antitrust laws, was aimed at a wide range of swindles and unfair and deceptive practices. Congress realized that it would be futile to attack such a problem with a list of specific standards:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined, and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit every business of every sort in every part of the country. Whether competition is fair or unfair generally depends on the surrounding circumstances of the particular case. What may be harmful under certain circumstances may be beneficial under different circumstances.²⁵

²² KAN. STAT. ANN. § 50-610 (1969 Supp.); MASS. GEN. LAWS ch. 93A, § 5 (Supp. 1969); MO. REV. STAT. § 407.030 (Supp. 1969); ORE. REV. STAT. § 646.635 (1967); R.I. GEN. LAWS ANN. §§ 6-13.1-6 (Special Supp. 1968); TEX. REV. CIV. STAT. art. 5069-10.05 (Supp. 1969); VT. STAT. ANN. tit. 9, § 2459 (Cum. pamphlet 1969); WASH. REV. CODE ANN. § 19.86.100 (Supp. 1969).

²³ Would the stipulated damages in such an agreement be viewed as a penalty and hence unenforceable? Compare *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 69 (1968) with *Horn v. Poindexter*, 176 N.C. 620, 97 S.E. 653 (1918). It is contemplated that a recovery, if collected, would go into the state's treasury. Interview.

²⁴ Interview.

²⁵ H.R. REP. No. 1142, 63d Cong., 2d Sess. 19 (1914).

So the Act as originally passed prohibited simply "unfair methods of competition."²⁶

In *FTC v. Raladam Co.*²⁷ the United States Supreme Court ruled that the FTC was without power to find the defendant's cure for obesity an unfair method of competition since competition, by definition, required a competitor and there was no proof of any other similar medicine on the market. Congress, in the Wheeler-Lea amendment of 1938,²⁸ expanded the Act to allow the Commission to protect consumers from "unfair or deceptive acts or practices" even though there was no showing of competition.²⁹

Because of the breadth of the commerce clause in the Constitution, a wide range of activities fall within the scope of the FTC Act. Nevertheless, a significant portion of commerce is not subject to the authority of the FTC due to the decision in *FTC v. Bunte Brothers*.³⁰ The Supreme Court held that the FTC Act does not encompass an unfair trade practice³¹ merely *affecting* interstate commerce within the sense of *United States v. Darby*.³²

Courts that have analyzed the problem have concluded that state trade-regulation statutes, such as subsection 75-1.1, cannot be successfully attacked on the ground that Congress has pre-empted the field.³³ How-

²⁶ Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717.

²⁷ 283 U.S. 643 (1931).

²⁸ Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111, *amending* 15 U.S.C. §§ 41 & 44 (1964).

²⁹ See *Koch v. FTC*, 206 F.2d 311, 319 (6th Cir. 1953) (actions against the seller of a series of medicines, one of which allegedly cured any type or stage of cancer, malaria, coronary occlusion or thrombosis, multiple sclerosis, angioneurotic oedema, hay fever, dementia praecox, epilepsy, psoriasis, poliomyelitis, and syphilis).

³⁰ 312 U.S. 349 (1941).

³¹ Specifically, selling candy in so called "break-and-take" assortments, a practice meaning that the amount of candy received by the purchaser is dependent wholly upon chance.

³² 312 U.S. 100 (1941) (holding the Fair Labor Standards Act constitutional). The Court said:

The power of Congress is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Id. at 118.

³³ *Standard Oil Co. v. Tennessee*, 217 U.S. 413 (1910), upholding Tennessee's antitrust act of 1903, implies that commerce, interstate for some purposes, may be intrastate for others and hence subject to state regulation. Dicta in that case imply that the field of trade regulation had not been pre-empted. There is every indication that there are a number of essentially local transactions that, if interstate in character, would violate the federal antitrust and trade-regulation laws, including

ever, there may still be certain federally required exemptions to state trade-regulation laws. The National Labor Relations Acts and the patent laws are examples of federal legislation that provide exceptions to state trade-regulation laws. Fear that the Federal Communications Act may have similarly pre-empted state activity in the broadcasting field (and perhaps a desire to avoid first-amendment issues) has led to special treatment for the news media in the legislation of North Carolina³⁴ and many other states.³⁵

Some writers believe that section forty-four of the Lanham Federal Trademark Act³⁶ establishes a federal law of unfair competition.³⁷ The Ninth Circuit Court of Appeals has so held.³⁸ If this position is widely accepted, a federal cause of action for unfair competition would be available to private parties. In North Carolina, damaged parties might then have two causes of action for some wrongs, but the majority of the cases hold that the Lanham Act does not create such a federal cause of action.³⁹

The FTC works closely with appropriate state agencies and encourages

section five of the FTC Act; see J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* app. 251-312 (1964).

Those state courts dealing with the question have generally found that federal antitrust laws do not pre-empt the field. *E.g.*, *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P.2d 867 (1946); *People v. National Research Co.*, 201 Cal. App. 2d 765, 20 Cal. Rptr. 516 (Dist. Ct. App. 1962); *Commonwealth v. McHugh*, 326 Mass. 249, 93 N.E.2d 751 (1950); *Peoples Savings Bank v. Stoddard*, 351 Mich. 342, 88 N.W.2d 462 (1958). *Contra*, *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 110 N.W.2d 348 (1961); *Sloan v. Miami Margarine Co.*, 247 S.W.2d 169 (Tex. Ct. Civ. App. 1952). An excellent decision, dealing specifically with the FTC, is *State v. Allied Chem. & Dye, Inc.*, 9 Wis. 2d 290, 101 N.W.2d 133 (1960).

There are apparently no recorded cases in which a state antitrust statute has conflicted with the basic federal statutes and since neither the new North Carolina legislation nor section 5 of the FTC Act provides for criminal sanctions, the possibility of a double criminal prosecution (always raised by defendants in state antitrust prosecutions) does not exist. See *Problems of Compliance—Conflicts in State and Federal Antitrust Enforcement*, 29 A.B.A. SECT. ANTI-TRUST 285, 288 (1965). A double prosecution was allowed in *State v. National Elec. Contr. Ass'n*, 1962 Trade Cas. ¶70,479 (Tex. Ct. App.).

³⁴ N.C. GEN. STAT. §75-1.1 (Supp. 1969).

³⁵ *E.g.*, ARIZ. REV. STAT. ANN. §44-1523 (1967); MINN. STAT. ANN. §325.79 (2) (1966).

³⁶ 15 U.S.C. §1126 (1964). The theory is that subsection (i), which gave United States citizens all benefits granted foreign nationals, has created the federal law.

³⁷ Note, *Adoption of the Uniform Deceptive Trade Practices Act in Iowa*, 52 IOWA L. REV. 269, 273 (1966).

³⁸ *Stauffer v. Exley*, 184 F.2d 962, 964 (9th Cir. 1950).

³⁹ *E.g.*, *City Messenger v. City Bonded Messenger Serv.*, 254 F.2d 531, 533-34 (7th Cir.), *cert. denied*, 358 U.S. 827 (1958); *American Auto. Ass'n v. Speigel*, 205 F.2d 771 (2d Cir.), *cert. denied*, 346 U.S. 887 (1953).

state action in consumer matters.⁴⁰ The North Carolina Attorney General's Consumer Protection Division reportedly has conferred with the FTC about the advisability of proceeding in particular cases.⁴¹ In this connection, it is important to note that section five of the FTC Act, unlike the North Carolina provisions,⁴² confers no private cause of action.⁴³ The FTC, choosing from among many possible violations, will act only when the public interest is affected and when its limited resources will permit. Despite the existence of section five of the FTC Act, it is reasonable to conclude that state statutes such as subsection 75-1.1 are both constitutionally permissible and important to the public.

FEDERAL JUDICIAL PRECEDENT AND OTHER LAWS AS AN
AID TO INTERPRETATION OF THE N.C. LEGISLATION

A crucial question is whether the North Carolina courts will find that adoption by the state legislature of the language of section five of the FTC Act has the effect of incorporating into state law the federal courts' interpretation of that section. The task of deciding what practices are outlawed by section five has proceeded on a case-by-case basis. It has been broadly stated that the section prohibits practices opposed to good morals and practices regarded as against public policy⁴⁴ and that it requires ethical conduct and protects against injury to competition.⁴⁵ Conduct that violates the Sherman and Clayton Acts is prohibited by section five, as are all incipient violations of those Acts.⁴⁶

Judicial interpretations of section five indicate that certain elements must be present if a violation is to be found. For example, it has been held that an actual "method," "act," or "practice" in commerce is re-

⁴⁰ In August, 1969, the FTC conducted a week long training session in Raleigh, North Carolina, on combatting consumer frauds. Raleigh News and Observer, Aug. 18, 1969, at 3, col. 2. The session was attended by officials of consumer-protection units in twelve states and the Virgin Islands. Interview.

⁴¹ Raleigh News and Observer, Dec. 10, 1969, at 1, cols. 7 & 8. It was reported that the Division was considering proceeding on its own even if it determined that the activity in question also violated the federal law.

⁴² N.C. GEN. STAT. §§75-1.1(b) & -16 (Supp. 1969).

⁴³ *La Salle Street Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004 (N.D. Ill. 1968); *Sampson Crane Co. v. United Nat'l Sales, Inc.*, 87 F. Supp. 218 (D. Mass. 1949), *aff'd per curiam*, 180 F.2d 896 (1st Cir. 1950); *Atlanta Brick Co. v. O'Neal*, 44 F. Supp. 39 (E.D. Texas 1942).

⁴⁴ *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

⁴⁵ *FTC v. Keppel & Bro.*, 291 U.S. 304 (1934).

⁴⁶ *FTC v. Cement Institute*, 333 U.S. 683 (1948). See text accompanying note 77 *infra*.

quired;⁴⁷ however, an intent to deceive need not be shown.⁴⁸ The lack of a private cause of action under the federal Act and the consequent necessity of enforcement by a public agency dictate that the public interest as a whole must be adversely affected before the FTC may take action on the conduct in question.⁴⁹ Thus, the person deceived by an unfair trade practice need not have suffered pecuniary loss.⁵⁰ Judicial precedent under the FTC Act could be useful in interpreting the new North Carolina subsection not only on these points but also on other questions common to both statutes, such as what constitutes commerce (as opposed to whether commerce is interstate in nature).

The drafters of the North Carolina legislation, by wording subsection 75-1.1 of the General Statutes to include methods, acts or practices "in the conduct of any *trade* or commerce," may have inadvertently introduced a definitional problem. In *Gardner v. City of Reidsville*,⁵¹ the North Carolina Supreme Court held that, for purposes of Article II, section 29, of the state constitution (which prohibits the legislature from enacting laws locally regulating labor, trade, mining, or manufacturing), the dispensing of intoxicating liquors through the state Alcoholic Beverage Control system is not a trade. The question of what constitutes a trade for various purposes is one with which many other courts have had to grapple. It has been held that the operation of a motion picture theater and the exhibition of films is not "trade or commerce."⁵² The learned professions are generally held not to be trades,⁵³ and at various times the term has been held not to include the gathering of garbage,⁵⁴ the playing of professional baseball⁵⁵ or basketball,⁵⁶ the operation by a

⁴⁷ *Scientific Mfg. Co. v. FTC*, 124 F.2d 640 (3d Cir. 1941).

⁴⁸ *E.g.*, *Koch v. FTC*, 206 F.2d 311 (6th Cir. 1963).

⁴⁹ *FTC v. Klesner*, 280 U.S. 19 (1929). The requirement is illustrated by *United States Retail Credit Ass'n v. FTC*, 300 F.2d 212 (4th Cir. 1962); *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir.), *cert. denied*, 370 U.S. 917 (1961); *Henry Broch & Co. v. FTC*, 261 F.2d 725 (7th Cir. 1958), *modified on other grounds*, 285 F.2d 764 (7th Cir.), *rev'd on other grounds*, 363 U.S. 166 (1960).

⁵⁰ *Dejay Stores v. FTC*, 200 F.2d 865 (2d Cir. 1952).

⁵¹ 269 N.C. 581, 153 S.E.2d 139 (1967).

⁵² *Paramor Theater Co. v. Trade Comm'n*, 95 Utah 354, 81 P.2d 639 (1938). *Contra*, *Campbell v. Motion Picture Mach. Operator's Local 219*, 151 Minn. 220, 186 N.W. 781 (1922).

⁵³ *Deibel v. Wilson*, 150 N.E.2d 448 (Ohio App. 1957).

⁵⁴ *Ex parte Sozzi*, 54 Cal. App. 2d 306, 129 P.2d 40 (Dist. Ct. App. 1942).

⁵⁵ *Kowalski v. Chandler*, 202 F.2d 413 (6th Cir. 1953). *Contra*, *Crook v. Commonwealth*, 147 Va. 593, 136 S.E. 565 (1927).

⁵⁶ *People v. Levy*, 283 App. Div. 383, 128 N.Y.S.2d 275 (1954).

college of a cafeteria,⁵⁷ the business of industrial designing,⁵⁸ or the offering of instruction in singing.⁵⁹ Conversely, the term "trade" has been held to include operating a group health association,⁶⁰ promoting boxing matches,⁶¹ operating a livery service for funeral directors,⁶² and operating an employment placement service.⁶³ In these peripheral areas, precedent offers little guide to the courts or the practitioner in determining the scope of "trade" as employed in any particular statute.

If an activity is found to be within the scope of subsection 75-1.1 of the North Carolina General Statutes, what methods, acts and practices are prohibited? Once again, decisions by federal courts interpreting section five of the FTC Act should be regarded as authoritative. The state's Consumer Protection Division agrees with this suggestion⁶⁴ although the General Assembly did not include in the new legislation a provision referring the courts to federal precedent, as have some states.⁶⁵ The new subsection, at the very least, gives a cause of action for treble damages against common-law unfair competition, but the use of the words "methods of" before "competition" and the phrase "unfair or deceptive acts or practices" indicates a broader scope was intended. The subsection clearly was meant to give a cause of action to noncompetitors⁶⁶ and thus to reverse the decision in *Rice v. Asheville Ice Co.*⁶⁷ The North Carolina Supreme Court held in that case that a complaint alleging a monopoly of the ice business in Asheville by the defendants and their refusal to sell to the plaintiff on the same terms offered to others did not state a cause of action under section 75-5(b) of the General Statutes⁶⁸ or presumably at common law, since the plaintiff was not in competition with the defendants. More-

⁵⁷ *Wheaton College v. Labor Relations Comm'n*, 252 Mass. 731, 227 N.E.2d 735 (1967).

⁵⁸ *Teague v. Graves*, 261 App. Div. 652, 27 N.Y.S.2d 762 (1941).

⁵⁹ *People ex rel. Fullam v. Kelley*, 255 N.Y. 396, 175 N.E. 108 (1931).

⁶⁰ *AMA v. United States*, 317 U.S. 519 (1943).

⁶¹ *United States v. International Boxing Club*, 348 U.S. 236 (1955).

⁶² *State ex rel. Cullitan v. Greater Cleveland Livery Owner's Ass'n*, 74 N.E.2d 104 (Cuyahoga County, Ohio Ct. of C.P. 1947).

⁶³ *Darnell v. Markwood*, 220 F.2d 374 (D.C. Cir. 1954).

⁶⁴ Interview.

⁶⁵ ARIZ. REV. STAT. ANN. § 44-1522(b) (1967); HAWAII REV. LAWS § 480-3 (1968); MASS. GEN. LAWS ch. 93A, § 2 (Supp. 1969); N.M. STAT. ANN. § 49-15-4 (Supp. 1969); R.I. GEN. LAWS ANN. §§ 6-13.1-3 (Special Supp. 1968); TEX. REV. CIV. STAT. § 5069-10.02 (Supp. 1969); VT. STAT. ANN. tit. 9, § 2453(b) (Cum. pamphlet 1969).

⁶⁶ See text at notes 26 & 27 *supra*.

⁶⁷ 204 N.C. 768, 169 S.E. 707 (1933).

⁶⁸ The state's equivalent of the Clayton Act, see p. 898 *supra*.

over, subsection 75-1.1 was undoubtedly intended to reach conduct between competitors that was not actionable at common law.

Many states have, as North Carolina, adopted statutes similar to section five of the FTC Act,⁶⁹ and the court decisions under these state statutes could aid in understanding and interpreting the new North Carolina provisions. Most state laws dealing with unfair trade practices have been enacted within recent years, but the Washington act (which is enforced by the state Attorney General) dates back to 1961, and has been the subject of litigation⁷⁰ and comment.⁷¹ Wisconsin's statute (which is enforced by an agency similar to the FTC) has existed since 1921, and a number of cases have been decided under it. Some states have formulas or lists of forbidden practices⁷² in the field of consumer protection though most of these statutory provisions are very recent and few cases have been decided concerning them. California, however, has been vigorously litigating cases involving unfair competition and consumer protection under section 3369 of its Civil Code since 1933,⁷³ and a large body of case law has developed.

The Uniform Deceptive Trade Practices Act was promulgated in 1964 by the National Conference of Commissioners on Uniform State Laws and has been adopted in several jurisdictions.⁷⁴ There are few

⁶⁹ HAWAII REV. LAWS § 480-1 to -22 (1968); MASS. GEN. LAWS ANN. ch. 93A, §§ 1-10 (Supp. 1969); N.M. STAT. ANN. § 49-15-1 to -14 (Supp. 1969); R.I. GEN. LAWS ANN. § 6-13.1-1 to -13 (Special Supp. 1968); VT. STAT. ANN. tit. 9, § 2451-62 (Cum. pamphlet 1969); WASH. REV. CODE ANN. §§ 19.56.010-020 (Supp. 1969); WIS. STAT. ANN. § 100.20 (1957). Many states have also enacted statutes similar to 75-1.1 in their insurance codes, *e.g.*, ALA. CODE tit. 28, § 90(3) (1958); LA. REV. STAT. ANN. § 22:1213 (1959); MISS. CODE ANN. § 5649-03 (Supp. 1968) in order to avoid federal regulation by complying with the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1964).

⁷⁰ *E.g.*, Gold Seal Chinchillas, Inc. v. State, 69 Wash. 2d 828, 420 P.2d 698 (1966) (press release by the attorney general about alleged violations held absolutely privileged and not subject to a libel suit).

⁷¹ Dewell & Gittinger, *The Washington Anti-Trust Laws*, 36 WASH. L. REV. 239 (1961).

⁷² ARIZ. REV. STAT. ANN. § 44-1521 to -1534 (1967); KAN. STAT. ANN. § 50-601 to -617 (Supp. 1969); MD. ANN. CODE art. 83, § 21A (Supp. 1969); MINN. STAT. § 325.79(1)-(12) (1963); MO. REV. STAT. § 407.010-.130 (Supp. 1969); NEV. REV. STAT. § 207.170 (1958); N.J. REV. STAT. § 56:8-1 to -12 (Supp. 1969); ORE. REV. STAT. § 646.605-55 (1967); S.D. CODE §§ 37-23-1 to -6 (Supp. 1969); TEX. REV. CIV. STAT. art. 5069-10.01-.08 (1960 Supp.).

⁷³ CAL. CIVIL CODE § 3369 (West 1954).

⁷⁴ CONN. GEN. STAT. REV. § 42-115(c) & (d) (Supp. 1969); DEL. CODE ANN. tit. 6, §§ 2531-37 (Supp. 1968); FLA. STAT. §§ 817.69 - .75 (Supp. 1969); GA. CODE ANN. §§ 106.701-706 (1968); IDAHO CODE ANN. § 48-601 to -606 (Supp. 1969); ILL. REV. STAT. ch. 121½, §§ 311-17 (Supp. 1970); ME. REV. STAT. ANN. tit. 10,

cases as yet under its provisions, but future decisions may be of value in interpreting the North Carolina legislation of 1969. The Uniform Act specifies that a person is in violation when he:

- (1) passes off goods or services as those of another;
- (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) uses deceptive representations or designations of geographic origin in connection with goods or services;
- (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (6) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (7) disparages the goods, services, or business of another;
- (9) advertises goods or services with the intent not to sell them as advertised;
- (10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or
- (12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.⁷⁵

It is reasonable to assume that any such forbidden conduct would violate subsection 75-1.1 of the North Carolina General Statutes. The state's Consumer Protection Division has already acted against firms that have deceptive names or are using "bait and switch" sales techniques.⁷⁶

Other conduct that has been held to violate section five of the FTC Act or similar state statutes and that might be actionable under sub-

§ 1211-169 (Legis. Serv. 1969); OHIO REV. CODE ANN. §§ 4165.01-.04 (Page Supp. 1969). Oklahoma has enacted the Uniform Act with several changes. OKLA. STAT. tit. 78, §§ 51-55 (Supp. 1969).

⁷⁵ UNIFORM DECEPTIVE TRADE PRACTICES ACT §§ 2(1)-(12).

⁷⁶ Raleigh News and Observer, Dec. 17, 1969, at 1, cols. 1 & 2.

section 75-1.1 includes Sherman and Clayton Act violations;⁷⁷ statements misleading but not technically false;⁷⁸ a deceptive first contact, even if the truth becomes known before the sale is made;⁷⁹ deceptive representations as to the usual value of items offered at "sale" prices;⁸⁰ small print disclaimers of assertions or definitions used or implied in the body of an advertisement;⁸¹ the filing of a complaint about a competitor's practices and later publicizing the fact;⁸² use of commercial espionage, including the bribing of a competitor's employees;⁸³ the inducement of breach of customer contracts;⁸⁴ physical interference with a competitor or use of unfounded lawsuits as harassment;⁸⁵ use of lottery selling schemes;⁸⁶ use of patents beyond their scope;⁸⁷ sales below cost to damage competition;⁸⁸ and the payment of "push money" to salesmen to encourage sale of goods.⁸⁹ Although there are no decisions, it has been suggested that other possible violations of a statute similar to subsection 75-1.1 may be: (1) paying of demonstrators by a supplier to aid retailers; (2) guaranteeing against price decline; (3) publicizing confidential governmental information; and (4) simulating official stamps to indicate quality, origin, or payment of taxes.⁹⁰

It should be noted that subsection 75-1.1 will have no effect on North Carolina's Fair Trade Act,⁹¹ which allows a manufacturer to set the minimum price a retailer may charge for the products produced by the manufacturer and sold to the retailer. The Act gives an injured party a cause of action against anyone who willfully or knowingly advertises,

⁷⁷ *E.g.*, *FTC v. Cement Institute*, 333 U.S. 683, *rehearing denied*, 334 U.S. 829 (1948).

⁷⁸ *E.g.*, *Bennett v. FTC*, 200 F.2d 362 (D.C. Cir. 1952).

⁷⁹ *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962).

⁸⁰ *E.g.*, *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965).

⁸¹ *Giant Food v. FTC*, 322 F.2d 977 (D.C. Cir. 1963), *cert. dismissed*, 376 U.S. 967 (1964).

⁸² *United States Prod. Co.*, 7 F.T.C. 301 (1924).

⁸³ *E.g.*, *United Rendering Co.*, 3 F.T.C. 284 (1921).

⁸⁴ *E.g.*, *Carpenter Carburetor Corp. v. FTC*, 112 F.2d 772 (8th Cir. 1940).

⁸⁵ *Hastings Mfg. Co. v. FTC*, 153 F.2d 253 (6th Cir.), *cert. denied*, 328 U.S. 853 (1946).

⁸⁶ *Peerless Prod. Inc. v. FTC*, 284 F.2d 825 (7th Cir. 1960), *cert. denied*, 365 U.S. 844 (1961).

⁸⁷ *FTC v. Real Prod. Corp.*, 90 F.2d 617 (2d Cir. 1937).

⁸⁸ *Sears, Roebuck & Co. v. FTC*, 258 F. 307 (7th Cir. 1919).

⁸⁹ *Kinney-Rome Co. v. FTC*, 275 F. 665 (7th Cir. 1921).

⁹⁰ *Dewell & Gittinger, The Washington Antitrust Laws*, 36 WASH. L. REV. 239, 255 (1961).

⁹¹ N.C. GEN. STAT. §§ 66-50 to -57 (1965).

offers for sale, or sells below this price. The provision deprives the consumer of competition by retailers who sell the same brands and often results in horizontal price fixing.

CONCLUSION

By choosing to copy much of section five of the FTC Act, the North Carolina legislature has taken a wise course. The creativity of swindlers knows no bounds, and the Uniform Act, while covering the more pernicious practices in use today,⁹² attempts the impossible in enumerating forbidden conduct. No list can cover the field; although section 2(12) of the Uniform Act, which makes unlawful "any conduct which similarly creates a likelihood of confusion or misunderstanding," is intended as a general protective provision, it has not been accepted in all states adopting the Act.⁹³ Even in states in which section 2(12) has been enacted, the inclusion of a list of prohibited practices implies that relatively dissimilar practices are excluded.

The formulation of a special North Carolina trade-practices statute would have been even less wise. Inevitably, some objectionable practices would have been omitted from such a list, and the adoption of new language would have been an invitation to litigation and confusion. Such an enactment would not have had the benefit of case-law precedent, a criticism also generally applicable to the Uniform Act. Thus the scope of a completely new act or one modeled on the Uniform Act would have to have been established, and those presently indulging in unfair trade practices would have received a temporary reprieve.

If subsection 75-1.1 is to be meaningful, the North Carolina courts must look to federal decisions for guidance. If the FTC's fifty-six years of experience are utilized, attorneys can, with a fair degree of certainty, advise businessmen as to what "methods, acts and practices" are illegal. Furthermore, predictions can be made to injured parties as to whether they have a cause of action. But if federal precedent is ignored, recovery in an action under subsection 75-1.1 would appear so remote and speculative that treble-damages suits would be discouraged. It is the provision in the 1969 legislation for private attorneys general that makes the North Carolina experiment significant.⁹⁴ If recovery is reasonably foreseeable, injured parties can anticipate a substantial judg-

⁹² See p. 908 & note 75 *supra*.

⁹³ *E.g.*, FLA. STAT. § 817.71 (Supp. 1969).

⁹⁴ See p. 900 & note 20 *supra*.

ment, and their lawyers are assured that if the suit is successful, they will receive a fee that will adequately compensate them for their time and effort. Such litigation could result in a business climate beneficial to both the consumer and the honest businessman.

North Carolina, in enacting a supposedly well-explained statute that provides for consumer protection and coupling it with enforcement procedures normally associated with antitrust laws, has taken a unique approach to one of the central legal issues concerning the public. If this approach is to succeed in an area in which other solutions have allegedly failed, attorneys for injured private parties must be convinced that treble-damages actions are effective. If the new legislation is to have significant impact, the North Carolina courts must be willing to look to and follow federal precedent.

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