

2-1-1972

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ANTITRUST AND UNFAIR TRADE PRACTICE LAW IN NORTH CAROLINA—FEDERAL LAW COMPARED†

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†This article was prepared in cooperation with the North Carolina Law Center and with the assistance of Francis R. Lawther, Jr., third year law student at the University of North Carolina School of Law.

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I. INTRODUCTION

In North Carolina restraints of trade and unfair trade practices were subject to judicial scrutiny under the common law even before the enactment of antitrust legislation.¹ The General Assembly, in passing antitrust legislation, did not abrogate the common law. Instead, the common law was incorporated into the statutory scheme. Section 75-2 of the *North Carolina General Statutes* provides that "[a]ny act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law" also violates section 75-1 of the antitrust statute.² The main purpose of this article is to deal with chapter 75 of the *North Carolina General Statutes*, entitled "Monopolies, Trusts and Consumer Protection."³ In 1969 chapter 75 was expanded to include "unfair methods of competi-

¹*Culp v. Love*, 127 N.C. 457, 37 S.E. 476 (1900); *Smith v. Morganton Ice Co.*, 159 N.C. 151, 74 S.E. 961 (1912) (violation of common law and the antitrust statute); *State v. Craft*, 168 N.C. 208, 83 S.E. 772 (1914) (conviction under common law for conspiracy to fix the price of milk). In *Craft* neither the solicitor nor the trial judge was aware of an antitrust statute, although the first such statute had been passed twenty-five years before the trial of this case. *Id.* at 214, 83 S.E. at 775. See S. OPPENHEIM & G. WESTON, *FEDERAL ANTITRUST LAWS: CASES AND COMMENTS* 8 (3d ed. 1968) for a diversity of views concerning the state of the common law authorities with respect to non-ancillary restraints of trade prior to the enactment of the Sherman Act in 1890. Before the North Carolina General Assembly adopted the substantive portions of § 1 of the Sherman Act as part of the North Carolina antitrust law in 1913 (now N.C. GEN. STAT. § 75-1 (1965)), the United States Supreme Court made it clear that the Sherman Act had a broader application than the common law. *Loewe v. Lawlor*, 208 U.S. 274, 297 (1908).

²N.C. GEN. STAT. § 75-2 (1965).

³The 1969 legislation which expanded chapter 75 changed the title from "Monopolies and Trusts" to its present form. Ch. 833, § 1(a), [1969] N.C. Sess. L. 930. Chapter 75 is reprinted in its entirety in the Appendix, *infra* p. 256.

tion" and "unfair or deceptive acts or practices."⁴ Thus, it is also essential to consider the common law of unfair competition in North Carolina.

In addition to looking to the common law as applied by the North Carolina Supreme Court, reference to the United States Supreme Court decisions on federal antitrust laws should be helpful in interpreting some of the provisions in chapter 75. This is particularly true of sections 75-1⁵ and 75-1.1,⁶ since these provisions were borrowed, respectively, from section one of the Sherman Act⁷ and section five of the Federal Trade Commission Act.⁸ Further, in predicting the legality of a particular business practice that may be in interstate commerce or affect interstate commerce, consideration should be given to federal laws as well as to state laws. The doctrine of federal preemption, for the most part, does not apply in the antitrust area; consequently, both state law and federal law apply in many situations.⁹ Of necessity, comparisons of state and federal law must be limited.

Neither state nor federal law dealing with the so-called regulated industries—such as public utilities, banks, insurance, and water and air resources—is included.

II. A BIT OF HISTORY

Prior to the enactment of the Sherman Antitrust Act in 1890,¹⁰ North Carolina had both constitutional and statutory provisions directed against monopolies, trusts, and similar devices to restrict compe-

⁴Ch. 833, § 1(b), [1969] 930. This provision, enacted on June 12, 1969, is presently codified as N.C. GEN. STAT. § 75-1.1 (Supp. 1971).

⁵N.C. GEN. STAT. § 75-1 (1965).

⁶*Id.* § 75-1.1 (Supp. 1971).

⁷"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209, presently codified at 15 U.S.C. § 1 (1970).

⁸"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 15 U.S.C. § 45(a)(1) (1970).

⁹See J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* (1964). But the national policy as expressed in the federal patent laws will prevail over the state law of unfair competition. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). Further, a state cannot give immunity to those who violate the federal antitrust laws by authorizing them to violate it or by declaring that their action is lawful. *Parker v. Brown*, 317 U.S. 341 (1943).

¹⁰Act of July 2, 1890, ch. 647, 26 Stat. 209, now 15 U.S.C. §§ 1-7 (1970).

tition.¹¹ The North Carolina Constitution of 1776 declared that "perpetuities and Monopolies are contrary to the Genius of a free State and ought not to be allowed."¹² In 1970 "shall" was substituted for "ought." Thus today, article 1, section thirty-four of the North Carolina Constitution reads: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."¹³

On March 11, 1889 the North Carolina General Assembly enacted an antitrust statute.¹⁴ This occurred only nine days after the passage of a Kansas statute that is frequently cited as the first in the nation.¹⁵ Justice Walter Clark (later Chief Justice) of the North Carolina Supreme Court described the situation that gave impetus to the enactment of both state and federal antitrust legislation:

First, consider the nature of the operation of these illegal combinations. They combine vast masses of capital; then whenever they find an

¹¹Article I, § 33 of the 1970 Constitution of North Carolina provides: "No hereditary emoluments, privileges, or honors shall be granted or conferred in this State." This provision was § 22 of the Declaration of Rights, Constitution of 1776 and was carried forward in article I, § 30 of the Constitution of 1868. Article II, § 24 of the 1970 Constitution provides: "The General Assembly shall not enact any local, private, or special act or resolution: . . . (j) Regulating labor, trade, mining, or manufacturing" This provision was added to article II, § 29 of the 1868 Constitution in 1916.

¹²N.C. CONST. Declaration of Rights, § 23 (1776).

¹³Licensing statutes must pass muster under this constitutional provision. See Hanft & Hamrick, *Haphazard Regmentation Under Licensing Statutes*, 17 N.C.L. REV. 1 (1938). In *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949), the North Carolina Supreme Court held that a licensing statute for photographers was unconstitutional on several grounds including the provision against monopolies. The court thus overruled its prior decision in *State v. Lawrence*, 213 N.C. 674, 197 S.E. 586 (1938). Justice S.J. Ervin, Jr., writing for the majority in *Ballance*, did not consider the court's split decision in *Lawrence* as invoking the doctrine of *stare decisis*. "Besides, [he said,] the doctrine of *stare decisis* will not be applied in any event to preserve and perpetuate error and grievous wrong." 229 N.C. at 767, 51 S.E.2d at 733.

¹⁴Ch. 374, [1889] N.C. Sess. L. 372.

¹⁵During 1888 bills against Trusts were introduced both in Congress and in many state legislatures. The state debates resulted earlier in laws, so that before the first Federal anti-trust statute was passed, July 2, 1890, no less than eight of the states had written anti-trust laws on their books. This began the first important wave of state anti-trust legislation.

Kansas, which even in 1887 had passed a law against monopolies in grain, led the procession, passing its general anti-trust act March 2, 1889. In order followed Maine, North Carolina, Tennessee, and Michigan, all in 1889, and South Dakota, Kentucky, and Mississippi in 1890, before the passage of the Federal Act.

J. JENKS & W. CLARK, *THE TRUST PROBLEM* 213 (5th ed. rev. 1929). See also *MARKETING LAWS SURVEY*, STATE ANTITRUST LAWS (1940); H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 155 (1955).

honest dealer or a competing manufacturer making a reasonable profit on goods similar to theirs, they put an agent, or open a store nominally in the name of another, alongside of him and undersell him till they have broken him up or forced him to sell out to the Trust; whereupon immediately the price of the manufactured article is put up to the consumer, and the price paid to the producer for raw material is reduced. The monopoly having no longer any competition, the producer is forced to take an unjustly low price and the consumer is compelled to pay an unjustly high one, and the opportunity of countless thousands of men, who would have been dealers and manufacturers, to support their families is destroyed. Those dealers and manufacturers would by their competition have guaranteed just prices to the creator of the raw material and reasonable prices to the consumer; but the Trusts destroy both classes alike, and put the profits into their own coffers.¹⁶

The statute enacted in North Carolina in 1889 was aimed at combinations that fixed prices or curtailed production and at individual businessmen who sold below cost for the purpose of "breaking down" competitors. The penalties for attempting to form or for forming a "trust" were fines up to ten thousand dollars or imprisonment for not more than ten years.¹⁷

From 1889 to 1913 the General Assembly in five different sessions

¹⁶Clark, *How Trusts Can Be Crushed*, 25 THE ARENA 264, 266 (1901).

¹⁷Ch. 374, [1889] N.C. Sess. L. 372. The full text of this historic statute follows:

An act to prohibit trusts in the State of North Carolina, and to provide for the punishment of persons connected with them.

The General Assembly of North Carolina do enact:

SECTION 1. That all combinations and trusts as defined by this act are unlawful, dangerous to the liberty of the people, and are hereby forbidden to be formed or carried on in this State.

SEC. 2. That a trust is an arrangement, understanding or agreement, either private or public, entered into by two or more persons or corporations for the purpose of increasing or reducing the price of the shares of stock of any company or corporation, or of any class of products, materials or manufactured articles, beyond the price that would be fixed by the natural demand for or the supply of such shares, products, materials or manufactured articles; and any attempt to carry out such purpose shall be evidence that such arrangement (*sic*), understanding or agreement exists.

SEC. 3. That any persons, company or corporation who shall form, or attempt to form, a trust in this State, or the agent or representative of any trust in any State or county, who shall attempt to carry on operations in this State, shall be guilty of a misdemeanor, and upon conviction may be fined not more than ten thousand dollars or may be imprisoned not more than ten years for each offence.

SEC. 4. That any person, company or corporation who enter into an arrangement, understanding or agreement not to mine, manufacture, buy, sell, or transport more than a certain specified amount of any goods, products or commodities within a specified

either amended or rewrote the antitrust statute.¹⁸ But it was not until 1912 that the first case involving the antitrust statute reached the North Carolina Supreme Court. In *Smith v. Morganton Ice Co.*¹⁹ the court upheld an award for damages to an ice dealer who claimed that his business was destroyed by the unlawful practices of a competitor. Chief Justice Clark, writing for the court, had the following to say about enforcement of the antitrust statute:

It is, however, singular, that with numerous and glaring instances of the violation of law and right, in the manner herein shown by other parties and to a far vaster extent in the twenty-one years since this statute was passed [reference must have been to the 1889 statute], and

time, will have violated section three of this act and will be liable to indictment therefor; and any person, company or corporation who give bond or make a forfeit of any kind not to break such arrangement, understanding or agreement shall be guilty of a misdemeanor and on conviction thereof shall be fined or imprisoned, or both, in the discretion of the court.

SEC. 5. That any merchant, broker, manufacturer or dealers in raw materials of any kind, or the agent of such persons, who shall sell any particular class of goods, raw materials or manufactured articles for less than actual cost for the purpose of breaking down competitors, shall be guilty of a misdemeanor, and upon conviction may be fined or imprisoned, or both, in the discretion of the court: *Provided*, that nothing contained in this act shall operate or be construed so as to forbid or prevent any person or persons who desire and intend to purchase any article or commodity for his or their own use or consumption, from combining or otherwise lawfully acting so as to protect or help themselves from imposition in the cost or purchase price of such articles or commodities as they or either of them may design and intend to use or consume.

SEC. 6. That this act shall be in full force and effect from and after the first day of May of the year one thousand eight hundred and eighty-nine.

Ratified the 11th day of March, A.D. 1889.

¹⁸The antitrust statute was rewritten in 1899, ch. 666, [1899] N.C. Sess. L. 852, and in 1901, ch. 586, [1901] N.C. Sess. L. 820. In 1907 a new statute was passed, ch. 218, [1907] N.C. Sess. L. 254. This statute was amended in 1909, ch. 448, [1909] N.C. Sess. L. 772. The 1907 Act, as amended in 1909, was rewritten in 1911, ch. 167, [1911] N.C. Sess. L. 321. North Carolina was without an antitrust statute during the years 1905-1907 because the 1901 statute was not carried forward by the Code Commission in the North Carolina Revisal of 1905. In 1907 the chairman of the Code Commission gave the following explanation for the deletion:

My recollection is that we did not bring forward the antitrust law because we were advised that the North Carolina statute was a copy of the Texas statute and as the Supreme Court of the United States had declared the Texas statute unconstitutional, we thought it not wise to bring it forward, but to leave it to the General Assembly to enact an act that would meet the objections of the Supreme Court if that body deemed it advisable to do so . . .

Raleigh News and Observer, Jan. 10, 1907, at 4, col. 2. The case referred to is *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902), which was overruled in *Tigner v. Texas*, 310 U.S. 141 (1940).

¹⁹159 N.C. 151, 74 S.E. 961 (1912).

indeed in violation of the common law, which punishes such offenses, that this case, in which a small infraction of the law is involved, is the only one that has come to this Court. The enforcement of the law and the protection of the plaintiff and the public in this instance is noteworthy when with a statute so widely known and discussed and when the evil has been so great and manifest there has been no attempt to enforce the law in other cases.²⁰

In 1913 Governor Locke Craig, in his inaugural address to the General Assembly, said the following about the trust problem and the need for stronger legislation:

NORTH CAROLINA'S TRIBUTE TO MONOPOLY

North Carolina has paid, too, her quota of tribute to the rapacity of unlawful monopoly. We have been preyed upon by trusts abroad and by trusts at home. They take from the earnings of all. The poor must suffer most. The farmers especially have been plundered and oppressed in the open day, without hindrance, by a great concern adjudged now to be in violation of law. We have been a patient, long-suffering people. In our platform there is promised legislation that "will make the existence of these concerns impossible." There is promised the enforcement of the civil and criminal law against the trust and against the man behind the trust.

TRUST LAWS WITH HANDCUFFS

In the fulfillment of this promise we need a trust law, clad in blue uniform, that can raid a trust den with a warrant and handcuffs in its hand. The guilty should be made to tremble, the innocent may fear not. While I am Governor no innocent man shall suffer by the criminal law.

The cry will be raised that such legislation will injure business. The trust will shield itself, if possible, behind legitimate industry. It will paralyze, if it can, the hand of justice by warnings of disaster from the interference with business.

DESTRUCTION OF PIRACY PROTECTION OF BUSINESS

The destruction of piracy is the protection of industry. It is the duty of the State to protect and to encourage every enterprise, small and great. And this is the age of large enterprises. They are essential in the economy of our civilization and are the agencies of its tremendous power and accomplishment. "All the currents of the time run to

²⁰*Id.* at 156-57, 74 S.E. at 964.

centralization. To successfully resist it we must throttle steam and discharge electricity from human service." But these forces should be for the service and not for the oppression of mankind.²¹

Under the leadership of Representative Edward J. Justice of Guilford County, a new antitrust statute was enacted in 1913 without discussion in the House of Representatives and, after minor amendments, without a dissenting vote in the senate.²² Although Governor Craig gave impetus to this legislation, credit for its provisions should go to three persons—namely, former Governor William W. Kitchen, Representative Justice, and former Senator Reuben D. Reid. On two occasions Kitchen, while Governor, suggested adoption of sections one and two of the Sherman Act as part of the state antitrust law.²³ The 1913 General Assembly adopted a counterpart of section one of the Sherman Act²⁴ but did not adopt section two. However, prohibitions against six specific types of business practices were reenacted. These provisions closely resembled those originally advocated by Senator Reid in 1907. They were directed, for the most part, at the exercise of monopoly power. Hence, it may have been deemed unnecessary to adopt section two of the Sherman Act. For the first time the General Assembly, in 1913, provided for effective enforcement procedures in the antitrust law. Representative Justice deserves credit for this achievement. These procedures were similar to those that had been advocated unsuccessfully by him in the 1907 session of the General Assembly.²⁵ All of the substantive provisions of the 1913 legislation currently appear in chapter 75 of the *General Statutes* in sections 75-1 and 75-5(b) subsections (1) through (6).²⁶ Except for minor editorial revisions, these six subsections remain intact. In 1961 subsection (7) was added by the General Assembly at the suggestion of Gover-

²¹PUBLIC LETTERS AND PAPERS OF LOCKE CRAIG 11 (M. Jones ed. 1916).

²²Ch. 41, [1913] N.C. Sess. L. 66. "The House passed the Justice antitrust bill, which applies the Federal anti-trust law to the State, enacts the provisions of the old Reid anti-trust bill of the 1907 session and provides machinery for the Attorney General to enforce the law. The bill passed without discussion." Charlotte Daily Observer, Jan. 29, 1913, at 1, col. 7. See Steelman, *Edward J. Justice: Profile of a Progressive Legislator, 1899-1913*, 48 N.C. HIST. REV. 147 (1971).

²³PUBLIC DOCUMENTS OF THE STATE OF NORTH CAROLINA no. 1, at 14 (1911) (Governor's Biennial Message to the General Assembly); PUBLIC DOCUMENTS OF THE STATE OF NORTH CAROLINA no. 1, at 10-11 (1913) (same).

²⁴Ch. 41, § 1, [1913] N.C. Sess. L. 66.

²⁵These enforcement procedures are discussed at page ____ *infra*.

²⁶N.C. GEN. STAT. §§ 75-1, 75-5(b)(1) to (6) (1965).

nor Terry Sanford.²⁷ Although this subsection was deemed essential to stop the practice by suppliers of making identical bids for state contracts, it is a broadly worded price-fixing statute. In 1969 section 75-17 was added to prohibit a lender from requiring a borrower to deal with a particular insurer.²⁸ In the same year, largely due to the initiative of Attorney General Robert Morgan and Deputy Attorney General Jean A. Benoy, the General Assembly adopted, in substance, section five of the Federal Trade Commission Act as section 75-1.1 of the antitrust law.²⁹ Thus, as previously indicated, section 75-1 is borrowed from the Sherman Act, and section 75-1.1 is copied from the Federal Trade Commission Act. Although section 75-5 resembles the Clayton Act³⁰ in that both are aimed at specific practices, the North Carolina provisions are not taken from the federal act. All but subsection (7) of section 75-5 antedated the passage of the Clayton Act, and subsection (7) did not come from federal law.

Chapter 75 is primarily directed at non-ancillary restraints of trade, such as price fixing, exclusive territorial arrangements, exclusive dealing, refusals to deal, monopolization, attempts to monopolize, combinations and conspiracies to monopolize, unfair methods of competition, and unfair trade practices. The substantive law of ancillary restraints of trade is a product of the judiciary and not of the legislature. However, chapter 75 has two provisions concerning ancillary restraints. Section 75-4 specifies that agreements limiting the rights of any person to do business in the state must be in writing and signed by the party sought to be bound.³¹ Section 75-5(d) declares:

²⁷Ch. 407, § 1, [1961] N.C. Sess. L. 563, now N.C. GEN. STAT. § 75-5(b)(7) (1965). According to Representative I.C. Crawford the "bill" was designed to stop identical bidding on state contracts. *Raleigh News and Observer*, May 6, 1961, at 7, col. 6.

²⁸Ch. 1032, § 1, [1969] N.C. Sess. L. 1185, now N.C. GEN. STAT. § 75-17 (Supp. 1971). Also § 75-27 of the General Statutes was added in 1969 to deal with the problem of unsolicited merchandise through the mail. Ch. 70, § 1, [1969] N.C. Sess. L. 52, now N.C. GEN. STAT. § 75-27 (Supp. 1971).

²⁹Ch. 833, § 1(b), [1969] N.C. Sess. L. 930, now N.C. GEN. STAT. § 75-1.1 (Supp. 1971), adopted from Federal Trade Commission Act § 5, 15 U.S.C. § 45(a) (1970). See 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 INTRA. L. REV. 1 (1969).

³⁰15 U.S.C. §§ 12-27 (1970).

³¹Prior to the enactment of N.C. GEN. STAT. § 75-4 (1965) in 1913, no writing was required. *Wooten v. Harris*, 153 N.C. 43, 68 S.E. 898 (1910). Restrictions in employment contracts as well as vendor-vendee contracts are required to be in writing. *Orkin Exterminating Co. v. Griffin*, 258 N.C. 179, 128 S.E.2d 139 (1962).

This section does not make it illegal for a person to sell his business and good will to a competitor, and agree in writing not to enter business in competition with the purchaser in a limited territory if such agreement does not violate the principles of the common law against trusts and does not otherwise violate the provisions of this chapter.³²

In North Carolina the cases involving ancillary restraints far outnumber those dealing with non-ancillary restraints. Although the focus of this article is on non-ancillary restraints, a brief summary of the law of ancillary restraints is given in order to provide a context for the discussion of non-ancillary restraints in the larger body of law known as trade regulation.

III. ANCILLARY RESTRAINTS OF TRADE

An ancillary restraint is an agreement that is subordinate to the main lawful purpose of a larger transaction that it is designed to effectuate.³³ Typical examples are covenants not to compete in connection with the sale of a business or professional practice and in partnership agreements and employment contracts. Mutual promises provide the consideration for a covenant not to compete.³⁴ Covenants extracted from an employee subsequent to employment must be supported by additional consideration, such as a promotion or a raise in salary.³⁵ In North Carolina a promise of continued employment is not sufficient consideration.³⁶ In several cases the covenants of employees not to compete were unenforceable because the court found a lack of consideration.³⁷

³²N.C. GEN. STAT. § 75-5(d) (1965).

³³See generally Breckenridge, *Restraint of Trade in North Carolina*, 7 N.C.L. REV. 249 (1929); Note, *Injunction—Employee's Agreement Not to Compete*, 26 N.C.L. REV. 402 (1948); Note, *Covenants Not To Compete*, 38 N.C.L. REV. 395 (1960); Note, *Restraints on Trade—Covenants in Employment Contracts not to Compete within the Entire United States*, 49 N.C.L. REV. 393 (1971). Land use restrictions imposed in connection with the conveyance of land reflect a type of ancillary restraint. For example, in *Quadro Stations, Inc. v. Gilley*, 7 N.C. App. 227, 172 S.E.2d 237 (1970), the court of appeals upheld a promise of a grantor made at the time of sale that he would not permit the sale or advertising of petroleum products on a four-acre tract of retained land for a period of twenty-five years.

³⁴*Scott v. Gillis*, 197 N.C. 223, 148 S.E. 315 (1929); *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961).

³⁵*James C. Greene Co. v. Arnold*, 266 N.C. 85, 145 S.E.2d 304 (1965) (employee became a manager, which jury found to be sufficient consideration).

³⁶*Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944).

³⁷*James C. Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E.2d 166 (1964); *Worth Chemical Corp. v. Freeman*, 261 N.C. 780, 136 S.E.2d 118 (1964); *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944).

In determining the validity of a covenant not to compete, the North Carolina courts apply the rule of reason. An agreement found to be unreasonable is void.³⁸ In *Beam v. Rutledge*³⁹ Chief Justice Stacy, writing for the court, stated:

The test to be applied in determining the reasonableness of a restrictive covenant is to consider whether the restraint affords only a fair protection to the interest of the party in whose favor it is given, and is not so broad as to interfere with the rights of the public.⁴⁰

Whether or not an ancillary restraint is reasonable is a question of law.⁴¹ The court will examine the circumstances of each case. Thus, the decided cases at most provide guidelines and should not be relied upon as precedents. In each case the court will examine the reasonableness of the time and the territorial aspects of the restraint.

A. Time

In earlier cases involving sales of a medical practice⁴² and a milling business,⁴³ the court upheld a promise not to compete for the lifetime of the covenantor. However, recently in *Jewel Box Stores Corp. v. Morrow*⁴⁴ Justice Sharp, writing for the court, carefully analyzed the facts of that case, which involved the sale of a jewelry business, before deciding that a promise not to engage in a competing business for ten years in the City of Morganton or within ten miles thereof was reasonable. Today, it is probable that a ten-year restriction on the practice of medicine in a specified locality would be found to be against the public interest and thus unreasonable.

The time element is scrutinized more carefully in employment contracts than in contracts involving the sale of a business or a professional

³⁸*Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944).

³⁹217 N.C. 670, 9 S.E.2d 476 (1940) (partnership agreement of doctors).

⁴⁰*Id.* at 673, 9 S.E.2d at 478. The court in considering the validity of a covenant not to compete in an employment contract stated that it would enforce such a covenant if it is "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions [,] (5) fair to the parties, and (6) not against public policy." *Orkin Exterminating Co. v. Griffin*, 258 N.C. 179, 181, 128 S.E.2d 139, 140-41 (1962), quoting *Asheville Associates, Inc. v. Miller*, 255 N.C. 400, 121 S.E.2d 593 (1961).

⁴¹*Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 158 S.E.2d 840 (1968).

⁴²*Hauser v. Harding*, 126 N.C. 295, 35 S.E. 586 (1900).

⁴³*Kramer v. Old*, 119 N.C. 1, 25 S.E. 813 (1896).

⁴⁴272 N.C. 659, 158 S.E.2d 840 (1968).

practice or in partnership agreements. In *Welcome Wagon International, Inc. v. Pender*,⁴⁵ the court in a four-to-three decision upheld a five-year restriction. The dissent considered three years or less to be ample time to protect the interest of the employer in that case. Subsequently, in upholding a four-year restriction, the court commented that four years approached the maximum that it was inclined to approve in employment contracts.⁴⁶

B. Territory

A covenant may be invalidated either because the territory is not accurately defined⁴⁷ or because it is too broad in scope.⁴⁸ In an early case the court permitted to pass unnoticed a covenant that the vendors "will not continue [the] business of milling in the vicinity of Elizabeth City."⁴⁹ Later, the court held that the "territory surrounding Yadkinville" was too indefinite; nevertheless, the restraint was enforced within the corporate limits.⁵⁰ More recently, the court stated that it "cannot by splitting up the territory make a new contract for the parties—it must stand or fall integrally."⁵¹

Suppose, however, that the territorial restriction is expressed in divisible terms. Will the court enforce as many units as are reasonable and "blue pencil" the remainder? In *Welcome Wagon International, Inc. v. Pender*,⁵² the defendant had been employed as a "hostess" in "Fayetteville and the surrounding trade territory." She resigned and began to compete with her former employer in Fayetteville. Suit was instituted by her former employer to enjoin the violation of the following provision in the employment contract:

⁴⁵255 N.C. 244, 120 S.E.2d 739 (1961).

⁴⁶*James C. Greene Co. v. Arnold*, 266 N.C. 85, 145 S.E.2d 304 (1965).

⁴⁷*Shute v. Heath*, 131 N.C. 281, 42 S.E. 704 (1902) (sale of lumber and cotton ginning business).

⁴⁸*Maola Ice Cream Co. v. Maola Milk & Ice Cream Co.*, 238 N.C. 317, 77 S.E.2d 910 (1953) (division of territory in connection with partial assignment of a trade mark); *Comfort Springs Corp. v. Burroughs*, 217 N.C. 658, 9 S.E. 2d 473 (1940) (employment contract).

⁴⁹*Kramer v. Old*, 119 N.C. 1, 9, 25 S.E. 813, 814 (1896). Later the court cast some doubt on the validity of such a provision. *Shute v. Heath*, 131 N.C. 281, 42 S.E. 704 (1902).

⁵⁰*Hauser v. Harding*, 126 N.C. 295, 35 S.E. 586 (1900) (sale of medical practice).

⁵¹*Noe v. McDevitt*, 228 N.C. 242, 245, 45 S.E.2d 121, 123 (1947), noted in 26 N.C.L. Rev. 402 (1948) (employment contract).

⁵²255 N.C. 244, 120 S.E. 2d 739 (1961). The court, in effect, applied the "blue pencil" rule in *Sonotone Corp. v. Baldwin*, 227 N.C. 387, 42 S.E. 2d 352 (1947).

Now, therefore, for and in consideration of this employment and the compensation to be earned and paid to the Hostess hereunder, said Hostess covenants and agrees that she will not during the term of this employment, and for a period of five whole years thereafter, engage directly or indirectly for herself or as agent, representative or employee of others, in the same kind or similar business as that engaged in by the Company (1) in Fayetteville, North Carolina, or (2) in any other city, town, borough, township, village or other place in the State of North Carolina, in which the Company is then engaged in rendering its said service, (3) in any city, town, borough, township, village or other place in the United States in which the Company is then engaged in rendering its said service, or (4) in any city, town, borough, township or village in the United States in which the Company has been or has signified its intentions to be, engaged in rendering its said service.⁵³

In a four-to-three decision the court applied the "blue pencil" rule and held that it was patent that (1) was not unreasonable; (2) was for the chancellor to decide; and (3) and (4) were unreasonable. Justice Bobbitt (now Chief Justice), writing for the dissent, considered the "blue pencil" rule unsound and argued that the agreement's legality depended on form rather than substance. He stated further:

In testing the reasonableness of a covenant restricting competition after termination of employment, the impact upon the employee so restricted should receive due consideration. The covenant, in its entirety, hangs over him. He cannot foresee whether a court, at the end of protracted litigation, will enforce the covenant as written or only within a segment of the territory therein explicitly described.⁵⁴

The "blue pencil" rule in territorial limitations is far from being firmly established in North Carolina. Moreover, the court has refused to apply it when the prohibited "activities" (not territory) were expressed in the alternative; instead, the entire covenant was struck down because it was too broad.⁵⁵

In applying the rule of reason, the court does not adhere to the old notion that a restraint throughout the "Kingdom" is a general restraint and therefore void. In an early case the court upheld a state-wide re-

⁵³255 N.C. at 246, 120 S.E.2d at 740.

⁵⁴*Id.* at 256-57, 120 S.E.2d at 748.

⁵⁵*Henley Paper Co. v. McAllister*, 253 N.C. 529, 117 S.E.2d 431 (1960) ("manufacture, sale or distribution").

straint in connection with the sale of a newspaper.⁵⁶ Recently, in *Harwell Enterprises v. Heim*,⁵⁷ a nation-wide restraint was upheld in an employment contract. Justice Moore, writing for the court, said:

Because of the increased technical and scientific knowledge used in business today, the emphasis placed upon research and development, the new products and techniques constantly being developed, the nation-wide activities (even world-wide in some instances) of many business enterprises, and the resulting competition on a very broad front, the need for such restrictive covenants to protect the interests of the employer becomes increasingly important. If during the time of employment new products are developed and new activities are undertaken, reason would require their protection as well as those in existence at the date of the contract, and to a company actually engaged in nation-wide activities, nation-wide protection would appear to be reasonable and proper.⁵⁸

C. Conclusion

The reasonableness of time and territory restrictions will be considered in relation to each other.⁵⁹ But a finding that they are reasonable is not conclusive of the validity of the covenant. Public policy also must be considered, and, as Chief Justice Clark pointed out, the statute does not authorize ancillary restraints of trade to be used as a device to establish a trust or otherwise to violate the antitrust laws.⁶⁰

IV. NON-ANCILLARY RESTRAINTS OF TRADE

Direct or non-ancillary restraints of trade fall into many categories. Some of the important ones are price-fixing, exclusive territorial arrangements, exclusive dealing, refusals to deal, monopolization, attempts to monopolize, combinations and conspiracies to monopolize, and pricing policies designed to injure or destroy competition.⁶¹ Each of

⁵⁶*Cowan v. Fairbrother*, 118 N.C. 406, 24 S.E. 212 (1896).

⁵⁷276 N.C. 475, 173 S.E.2d 316 (1970), noted in 49 N.C.L. REV. 393 (1971).

⁵⁸*Id.* at 480-81, 173 S.E.2d at 320.

⁵⁹*Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 665, 158 S.E.2d 840, 844 (1968).

⁶⁰*Moorehead Sea Food Co. v. Way*, 169 N.C. 679, 688-89, 86 S.E. 603, 607-08 (1915) (dissenting opinion). See Note, *Antitrust Significance of Covenants Not to Compete*, 64 MICH. L. REV. 503, 505 n.14 (1965).

⁶¹For an excellent bibliography on each of these topics, see S. OPPENHEIM & G. WESTON, *FEDERAL ANTITRUST LAWS* (3d ed. 1968, Supp. 1970). S. OPPENHEIM, *UNFAIR TRADE PRACTICES* (2d ed. 1965). A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES* (2d ed. 1970); REPORT OF

these selected types of non-ancillary restraints is discussed in order.

A. Price-Fixing

Price-fixing arrangements appear in a variety of settings. Sellers or buyers may band together and exert joint power (a horizontal arrangement) over prices rather than competing with each other. A producer or distributor may enter into vertical agreements or pursue some other course to control resale prices. An individual or firm may adopt pricing policies that involve price discriminations among customers, or prices may be unreasonably lowered for the purpose of injuring a competitor.

(1) Horizontal Price-Fixing

In *State v. Craft*⁶² milk dealers who controlled sixty percent of the milk supply in Wilmington combined to raise the price of milk and published their agreement in a newspaper. They were convicted of the common law offense of price-fixing and fined. Chief Justice Clark, in commenting on the nature of the offense, said:

A conspiracy to raise the prices of the necessities of life being a crime at common law, it could be no defense to show that another person than one of the conspirators sold the same commodity at as high a price as these defendants had agreed upon, or that the witness might think the price agreed on a reasonable one, or that the article could not be produced profitably at less than the price agreed on, in view of the conditions under which the defendants were carrying on the business. The indictment is not for raising the price, but for the combination and agreement to do so.⁶³

This case could have been prosecuted under section 75-1, which makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina."⁶⁴ However, neither the solicitor nor the trial judge was aware that the General Assembly had borrowed this section from the Sherman

THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955); AMERICAN BAR ASS'N, ANTITRUST DEVELOPMENTS 1955-1968 (1968) (Supplement to Report of the Attorney General's National Committee to Study the Antitrust Laws, 1955). For a discussion of exemptions under the federal antitrust laws see Committee on Antitrust Exemptions, ABA Section of Antitrust Law, *Antitrust Exemptions*, 33 ANTITRUST L.J. 1 (1967).

⁶²168 N.C. 208, 83 S.E. 772 (1914).

⁶³*Id.* at 211, 83 S.E. at 773.

⁶⁴N.C. GEN. STAT. § 75-1 (1965).

Act in 1913.⁶⁵ Section 75-1 has remained virtually unnoticed by the state and by private litigants in challenging price fixing arrangements. On the other hand, section one of the Sherman Act,⁶⁶ its parent statute, has proved highly effective. In *United States v. Trenton Potteries*,⁶⁷ the United States Supreme Court made it clear that the reasonableness of the price fixed had no bearing on the illegality of the agreement. Later, in *United States v. Socony-Vacuum Oil Co.*,⁶⁸ the Court went further and concluded that any "combination" that tampers with price structures is engaged in an unlawful activity. In this case the following rule was enunciated: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."⁶⁹ Subsequently, agreements to fix maximum prices have been held to be within the ban of the *per se* rule set forth in *Socony*.⁷⁰ Further, the rule itself has been modified to the extent that it is not necessary to prove purpose *and* effect. Proof of either purpose *or* effect is sufficient to invoke the rule.⁷¹ In *United States v. Container Corp. of America*,⁷² the Court held that exchanges of information about the most recent price charged or quoted among sellers, albeit on an irregular basis, constituted concerted action which had the effect of stabilizing prices even though at a downward level. Thus, there was an unlawful chilling of the vigor of price competition. This decision does not hold all exchanges of price information unlawful *per se*, but it drastically limits the circumstances under which price data can be shared by competitors. The Court summarized the federal law on horizontal price fixing as follows:

⁶⁵*Id.* at 214, 83 S.E. at 775.

⁶⁶15 U.S.C. § 1 (1970).

⁶⁷273 U.S. 392 (1927).

⁶⁸310 U.S. 150 (1940).

⁶⁹*Id.* at 223.

⁷⁰*Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum resale price fixing).

⁷¹In *Socony* the Court stated in footnote 59 that it did not mean that both purpose and power to fix prices are necessary for the establishment of a conspiracy under section one of the Sherman Act. 310 U.S. at 225 n.59. One may be guilty of conspiring although incapable of committing the objective offense. 310 U.S. at 224-25; *United States v. Container Corp. of America*, 393 U.S. 222 (1969) (effect); *Sun Oil Co. v. Vickers Ref. Co.*, 414 F.2d 383 (8th Cir. 1969) (neither purpose nor effect; hence, no violation).

⁷²393 U.S. 333 (1969). Several trade association cases involving exchange of price information are reviewed by the Court.

[P]rice fixing is contrary to the policy of competition underlying the Sherman Act . . . [I]ts illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.⁷³

Although the North Carolina Supreme Court has occasionally looked to federal interpretation of the Sherman Act for guidance in deciding cases under the North Carolina antitrust laws,⁷⁴ litigants, including the state, as previously indicated, have not utilized section 75-1 in price-fixing cases. In 1960 the State Division of Purchase and Contract began receiving identical bids for bread.⁷⁵ Instead of attacking this practice under section 75-1, new legislation was sought by state officials.⁷⁶ In 1961 the General Assembly responded by enacting section 75-5(b)(7), which makes the following conduct unlawful:

Except as may be otherwise provided by article 10 of chapter 66, entitled "Fair Trade", while engaged in buying or selling any goods in this State to make, enter into, execute or carry out any contract, obligation or agreement of any kind by which the parties thereto or any two or more of them bind themselves not to sell or dispose of any goods or any article of trade, use or consumption, below a common standard figure, or fixed value, or establish or settle the price of such goods between them, or between themselves and others, at a fixed or graduated figure, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchase or consumers in the sale of such goods.⁷⁷

Although triggered by the practice of sellers making identical bids for state contracts, this is a very comprehensive statute inasmuch as it applies to buyers and to sellers and prohibits horizontal and vertical (except

⁷³United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309-10 (1956) (footnotes omitted).

⁷⁴E.g., State v. Craft, 168 N.C. 208, 83 S.E. 772 (1914); Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937); Waldron Buick Co. v. General Motors Corp., 254 N.C. 117, 118 S.E.2d 559 (1961).

⁷⁵Raleigh News and Observer, Mar. 24, 1961, at 1, col. 3.

⁷⁶Raleigh News and Observer, Apr. 22, 1961, at 5, col. 4.

⁷⁷N.C. GEN. STAT. § 75-5(b)(7) (1965).

fair trade)⁷⁸ price-fixing agreements. Moreover, it is not confined to situations in which the state is a buyer or seller. This statute refers to "any goods or any article of trade." Section 75-5(a)(2) defines "goods" to include "goods, wares, merchandise, articles or other things of value."⁷⁹ The court has held that the "service" of transporting gasoline is a *thing of value*,⁸⁰ thus indicating that price fixing in the service industries would be covered by section 75-5 (b)(7).

The inclusion of "buyers" in the 1961 statute renders unnecessary section 75-5(b)(1), which makes it unlawful "[t]o agree or conspire with any other person to put down or keep down the price of any goods produced in this State by the labor of others which goods the person intends, plans or desires to buy."⁸¹ This provision was designed to outlaw a practice of the tobacco trust whereby instructions were given by the members of the trust to their buyers not to bid beyond a previously agreed upon price for leaf tobacco. First introduced in 1907, it was deleted by committee amendment. Several senators complained that "[b]y the amendment . . . the chief trust doing [the] most harm in North Carolina is virtually exempted."⁸² In 1909 section 75-5(b)(1) was enacted.⁸³ Apparently, no effort has been made to use it. A possible explanation is that in 1911 the United States successfully prosecuted the tobacco trust under the Sherman Act.⁸⁴

Section 75-5(b)(7) is a statutory deterrent to horizontal price fixing by buyers and sellers that is as broad as the standard that the United States Supreme Court established for price fixing agreements under section one of the Sherman Act in *United States v. Socony-Vacuum Oil Co.*⁸⁵ Proof of a "contract, obligation or agreement" to fix prices is all

⁷⁸Discussed under "vertical" price-fixing.

⁷⁹N.C. GEN. STAT. § 75-5(b)(7) (1965).

⁸⁰*Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937). *But see* *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 29 (1968) (exclusive-dealing aspect of a joint undertaking).

⁸¹N.C. GEN. STAT. § 75-5(b)(1) (1965).

⁸²JOURNAL OF THE SENATE OF NORTH CAROLINA 1004 (1907).

⁸³Ch. 448, § 1, [1909] N.C. Sess. L. 772.

⁸⁴In 1907 suit was brought by the United States under the Sherman Act which culminated in a dissolution of the tobacco trust in 1911. *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). In 1944 three major tobacco companies were convicted of violations of the Sherman Act including agreements fixing price ceilings for leaf tobacco. *American Tobacco Co. v. United States*, 147 F.2d 93 (1944). The United States Supreme Court reviewed and affirmed one aspect of this case. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

⁸⁵10 U.S. 150 (1940). See p. 214 *supra*.

that is required to show a violation.⁸⁶ There is no basis in this statute for applying the rule of reason. In *Patterson v. Southern Railway*,⁸⁷ the court, in construing section 75-5(b)(3),⁸⁸ rejected a defense that the effect of the rate agreement had been to lower the price of gasoline to the consumer. Justice Seawell, writing for the court, eliminated the rule of reason approach in the following language:

Generalizations respecting monopoly statutes, their purpose and effect, cannot be expected equally to fit them all, but it may be laid down as a principle common to our own laws that where an act has been directly condemned by the statute, no power resides in the court to balance the advantages of continuing the situation produced by defendants' violation of law against the advantages of granting the relief sought in the action, thereby making such a violator of the law a sort of economic Robin Hood who may, with judicial approval, plunder the individual in the interest of the needy public.

. . . .
. . . .

. . . The law looks at the transaction "in the long run," adopting the philosophy that the public is more interested in continuing competition than in reaping the temporary rewards of a fight in which it is extinguished.⁸⁹

Former section 75-3,⁹⁰ enacted in 1913, was intended to make it

⁸⁶N.C. GEN. STAT. § 75-5(c) (1965) provides:

Nothing herein shall be construed to make it illegal for an agent to represent more than one principal, but this provision shall not be deemed to authorize two or more principals to employ a common agent for the purpose of suppressing competition or preventing the lowering of prices.

⁸⁷214 N.C. 38, 198 S.E. 364 (1938).

⁸⁸N.C. GEN. STAT. § 75-5(b)(3) (1965).

⁸⁹214 N.C. at 44, 198 S.E. at 367-68.

⁹⁰[A]ll contracts, combinations in the form of trust, and conspiracies in restraint of trade or commerce prohibited in [§§ 75-1 and 75-2] are hereby declared to be unreasonable and illegal, unless the persons entering into such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce can show affirmatively upon an indictment or civil action for violation of [§§ 75-1 and 75-2] that such contract, combination in the form of trust, [or] conspiracy in restraint of trade or commerce does not injure the business of any competitor, or prevent anyone from becoming a competitor because his or its business will be unfairly injured by reason of such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce.

Ch. 41, § 3, [1913] N.C. Sess. L. 66. N.C. GEN. STAT. § 106-266.19 (Supp. 1971) prohibits the sale of milk below cost. Evidence of a sale below cost shall constitute prima facie evidence of a violation of the statute, and the burden of rebutting the prima facie case is placed on the defendant. For example, the defendant must show that milk was not used as a "loss leader" or to induce the public to patronize his store.

easier to prove a violation of the antitrust laws by establishing a prima facie case. A defense was provided in this section when an accused was able to show that no competitor was injured. Obviously, all competitors could agree among themselves to submit identical bids for state contracts. This statutory "loophole" was closed by the repeal of section 75-3 in 1961.⁹¹

(2) *Vertical Price-Fixing*

Vertical agreements in the chain of distribution imposed by manufacturers or distributors for the purpose of controlling minimum or specified resale prices violated the common law.⁹² Prior to 1937 it became well established that such agreements were per se unreasonable and thus illegal under section one of the Sherman Act.⁹³ Further, practices of manufacturers that were designed to achieve resale price maintenance and went beyond a simple refusal to deal were condemned as an unfair method of competition in violation of section five of the Federal Trade Commission Act.⁹⁴ In 1937 Congress passed the Miller-Tydings Amendment⁹⁵ to section one of the Sherman Act, and in 1952 the Federal Trade Commission Act was amended by the McGuire Act.⁹⁶ Each of these acts, in effect, amends both the Sherman Act and the Federal Trade Commission Act. These two enabling statutes exempt from the Sherman Act and the Federal Trade Commission Act certain resale price maintenance agreements when resales are made of products subject to fair trade agreements in states having operative Fair Trade Acts.

In 1937 the North Carolina General Assembly adopted a Fair Trade Act.⁹⁷ In *Ely Lilly & Co. v. Saunders*,⁹⁸ the North Carolina Su-

⁹¹Ch. 1153, § 1, [1961] N.C. Sess. L. 1582.

⁹²*Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373, 409 (1911).

⁹³*United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1921); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

⁹⁴*FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922), noted in 1 N.C.L. REV. 36 (1922). For a case on refusal to deal with price cutters see *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

⁹⁵Act of Aug. 17, 1937, ch. 690, 50 Stat. 693, presently embodied in 15 U.S.C. § 1 (1970).

⁹⁶Act of July 14, 1952, ch. 745, 66 Stat. 631, presently embodied in 15 U.S.C. § 45 (1970).

⁹⁷Ch. 350, §§ 1-7, 10, [1937] N.C. Sess. L. 683, codified at N.C. GEN. STAT. §§ 66-50 to -57 (1965), as amended, (Supp. 1971).

⁹⁸216 N.C. 163, 4 S.E.2d 528 (1939). Justice Barnhill wrote a vigorous dissent. Subsequently, a trial judge ruled that the Fair Trade Act was unconstitutional, but the Supreme Court of North Carolina held that the issue was not properly before him in a hearing on whether or not to continue a temporary restraining order. *Union Carbide Corp. v. Davis*, 253 N.C. 324, 116 S.E.2d 792 (1960).

preme Court decided that this Act did not contravene the anti-monopoly provisions of the state constitution. Thus, a manufacturer or distributor of a commodity which bears the trademark, brand, or name of the producer or distributor may stipulate in a contract the minimum resale price. Further, a non-signer who has knowledge of such contract must abide by the minimum stipulated price or be subject to suit for unfair competition by any person damaged thereby. But exemption is made for purchases made by the State of North Carolina or any of its agencies or political subdivisions.⁹⁹

The policy behind fair trade acts is generally stated to be that of permitting trademark owners to protect good will by preventing "loss-leader" selling.¹⁰⁰ However, such acts go beyond combatting promotional price-cutting and strike at all price reductions that would pass to the consumer the economies of competitive distribution.¹⁰¹ Insofar as "fair traded" items are involved, price competition may be non-existent at the retail level. The impact on competition is the same as if all retailers in the state had entered into an horizontal price-fixing agreement not to sell below a stipulated minimum.

Since the North Carolina Supreme Court upheld the North Carolina Fair Trade Act, five state supreme courts have held their laws unconstitutional in their entirety, and twenty others have held the non-signer clause to be unconstitutional.¹⁰² Legislatures in four states have repealed their fair trade laws.¹⁰³ On the other hand, the North Carolina General Assembly, in enacting section 75-5(b)(7) in 1961, expressly provided that its adoption should not affect the Fair Trade Act.

In 1971 the General Assembly authorized the Milk Commission to engage in vertical price fixing.¹⁰⁴ Henceforth the Commission has the

⁹⁹N.C. GEN. STAT. § 66-57 (Supp. 1971). See also N.C. GEN. STAT. § 66-55 (1965) for several situations in which fair trade contracts are inapplicable including commodities sold to religious, charitable, or educational organizations for use and not for resale.

¹⁰⁰In 1971 the General Assembly enacted a provision designed to prohibit loss-leader selling of milk. Ch. 779, § 1, [1971] N.C. Sess. L. —, codified at N.C. GEN. STAT. § 106-266.19 (Supp. 1971). Apparently the amendment was designed to overrule *North Carolina Milk Comm'n v. National Food Stores, Inc.*, 270 N.C. 323, 154 S.E.2d 548 (1967).

¹⁰¹See generally REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 149-55 (1955). Intrabrand competition in services and terms of sale and other non-price competitive practices are not affected by fair trade laws.

¹⁰²AMERICAN BAR ASS'N, ANTITRUST DEVELOPMENTS 1955-1968, at 112 (1968).

¹⁰³These were Hawaii, Kansas, Nebraska, and Nevada. Alaska, Texas, Missouri, Vermont, and the District of Columbia have never had fair trade laws. *Id.*

¹⁰⁴Ch. 779, § 1, [1971] N.C. Sess. L. —, codified at N.C. GEN. STAT. § 106-266.8(10)(b) (Supp. 1971).

power not only to fix the price paid to producers but also to establish minimum wholesale and resale prices in any market area.

Vertical price-fixing agreements not exempt by legislation¹⁰⁵ should be per se illegal under section 75-5(b)(7). Moreover, such agreements also are a restraint of trade at common law and hence a violation of section 75-1.¹⁰⁶

(3) *Conclusion on Price-Fixing*

Section 75-5(b)(7) is sufficiently comprehensive to deal with both horizontal and vertical price-fixing agreements that are not exempted from the antitrust laws.¹⁰⁷ Thus, it is not necessary to resort to the common law or to section 75-1. On the other hand, some business practices may fall short of being a price-fixing arrangement but, nevertheless, may affect prices in such a manner and to such a degree as to constitute a restraint of trade. In such an even section 75-1 may be invoked. An agreement not to bid was proscribed by the common law and is subject to scrutiny under section 75-1.¹⁰⁸ Further, exchanges of price data among competitors should be examined under section 75-1 to determine if a particular practice constitutes a restraint of trade.¹⁰⁹ Section 75-5(b)(7) and section 75-1 together provide adequate legislation to cope with combinations, conspiracies, and contracts that fix or affect prices in such a manner as to result in a restraint of trade.

¹⁰⁵Relief may be denied to one enforcing a fair trade agreement where it can be shown that such agreements have not been enforced in a diligent and nondiscriminatory manner. See 2 CCH TRADE REG. REP. ¶ 6322 (1971).

¹⁰⁶Such common law restraints are made a violation of N.C. GEN. STAT. § 75-1 (1965) by *id.* § 75-2.

¹⁰⁷In construing a statute the North Carolina Supreme Court looks to the intent of the Legislature.

[I]ntent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied. Testimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent evidence upon which the court can make its determination as to the meaning of the statutory provision.

North Carolina Milk Comm'n v. National Food Stores, Inc., 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967).

¹⁰⁸Lamm v. Crumpler, 233 N.C. 717, 65 S.E.2d 336 (1951); Smith v. Greenlee, 13 N.C. 126 (1829).

¹⁰⁹See United States v. Container Corp. of America, 393 U.S. 333 (1969).

B. Territorial Arrangements

Territorial arrangements may be horizontal or vertical. In a horizontal arrangement, actual or potential competitors may agree not to compete by dividing markets. The division may relate solely to a geographic market, or there may be a product division, a division of customers, or a combination of these. A vertical division may be between a seller and a buyer or between a supplier who retains title to the goods and a distributor who is an agent or consignee of the supplier. Vertical arrangements fall into three categories: (1) the seller or supplier agrees not to sell or to supply another in a territory assigned to a buyer or agent; (2) the buyer or agent agrees not to promote or to make sales in the territory assigned to another; and (3) the buyer or agent agrees not to sell to anyone who resides outside his assigned territory.

(1) Horizontal Division of Markets

Prior to 1907 there was no statutory provision in North Carolina concerning horizontal division of markets. The legality of such arrangements was determined under the common law. In *Culp v. Love*,¹¹⁰ decided in 1900, the North Carolina Supreme Court refused to enforce a contract in which the parties had agreed not to compete with each other for a specified number of months in the sale of flour and other commodities in several counties. The court sated that the intent of the parties was immaterial and that the contract was against public policy.¹¹¹ This case has continuing vitality inasmuch as section 75-2, enacted in 1913, provides that any contract in restraint of trade which violates the principles of the common law is a violation of section 75-1.

When *Shute v. Shute*¹¹² was decided in 1918, there was a specific statutory provision dealing with division of territories. Section 75-5(b)(6), first enacted in 1907, makes the following unlawful:

While engaged in buying or selling any goods in this State, to have any agreement or understanding, express or implied, with any other person not to buy or sell such goods within certain territorial limits within the

¹¹⁰127 N.C. 457, 37 S.E. 476 (1900).

¹¹¹*Id.* at 461-62, 37 S.E. at 477-78. The court also concluded that the contract was a fraud on a third party. The manufacturer of "Sweetwater" flour shifted its agency from defendant to plaintiff at defendant's request. Defendant, however, did not inform the manufacturer of the agreement not to compete. *Id.* at 461, 37 S.E. at 477.

¹¹²176 N.C. 462, 97 S.E. 392 (1918).

State, with the intention of preventing competition in selling or to fix the price or prevent competition in buying such goods within these limits.¹¹³

In *Shute* plaintiff sold defendant a cotton gin and agreed that for ten years he would not compete with defendant *south* of Bear Skin Creek in the business of ginning or buying cotton seed and seed cotton. The contract further provided that defendant, the buyer, would not compete with plaintiff, the seller, *north* of Bear Skin Creek during a like period. Plaintiff sought to enjoin defendant from erecting a gin *north* of Bear Skin Creek in violation of the contract. The North Carolina Supreme Court quickly discerned that the agreement was not the usual ancillary restraint of trade designed to protect the good will purchased by the vendee. This contract involved a division of territory, and the court dismissed the suit on the ground that it violated section 75-5(b)(6), the common law, and section 75-1.

In *Maola Ice Cream Co. v. Maola Milk & Ice Cream Co.*,¹¹⁴ the North Carolina Supreme Court reached the high water mark in expressing its disdain for division of territories. The plaintiff owned the trademark "Maola" and sold ice cream manufactured in two plants—one in Washington, North Carolina and the other in New Bern. There was a well-defined division of territory as between the two plants. When plaintiff sold the New Bern plant to defendant, an agreement was made that the trademark "Maola," partially assigned to defendant, should be used by defendant in a territory to the *south* of Vanceboro, the territory theretofore served by the New Bern plant. When defendant began to distribute dairy products under the name "Maola" from a dairy *north* of Vanceboro, plaintiff alleged unfair competition and sought a restraining order. The court decided that the restriction on the defendant's mark, "Maola," was invalid as a division of territory. The court emphasized that it was not shown that plaintiff had sold ice cream products in all of Eastern North Carolina *north* of Vanceboro before the sale of the

¹¹³N.C. GEN. STAT. § 75-5(b)(6) (1965) does not apply to ancillary restraints of trade unless they are employed to "monopolize any given business, or the sale of any article, within the territory named." *Wooten v. Harris*, 153 N.C. 43, 46, 68 S.E. 898, 899 (1910). An agreement by a grantor at the time of sale that he will not permit the sale or advertising of petroleum products on a four acre tract of retained land for a period of twenty-five years does not violate this statute. *Quadro Stations, Inc. v. Gilley*, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

¹¹⁴238 N.C. 317, 77 S.E.2d 910 (1953). See also Steed & Hunter, *Trade-Mark Assignments and Restraints of Trade: The Maola Ice Cream Case*, 33 N.C.L. REV. 399 (1955).

New Bern plant and thus the agreement would suppress and stifle competition.

The court indicated that plaintiff might have been successful had defendant signed an agreement not to compete with plaintiff in the area served by plaintiff's *retained* plant at the time the partial assignment of the trademark was made. This seems too harsh because the restriction related solely to the use of the trademark "Maola." It did not preclude the assignee from selling ice cream products under *another* name in any locality. Consequently, a restriction on the use of the trademark by the partial assignee unrelated to the area served by the retained plant should not be prohibited. Such a restriction would not have such serious adverse effects on competition as occur in a horizontal division of territories when no competition at all is permitted between the parties.

The jurisdictional sweep of the Sherman Act is extensive. In *Burke v. Ford*¹¹⁵ the lower federal court held that a state-wide division of markets—both territories and brands—by wholesalers of liquor in Oklahoma did not affect interstate commerce sufficiently to come within the scope of the Sherman Act. The Supreme Court of the United States reversed and had the following to say:

Horizontal territorial divisions almost invariably reduce competition among the participants . . . When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers [there were no liquor distilleries in Oklahoma]—than would have occurred had free competition prevailed among the wholesalers. In addition the wholesalers' division of brands meant fewer wholesale outlets available to any one out-of-state distiller. Thus the state-wide wholesalers' market division inevitably affected interstate commerce.¹¹⁶

Since market-splitting among competitors—whether keyed to geography, products, or customers—completely eliminates competition among the parties, it is more anticompetitive than a price-fixing agreement. Such an agreement is likely to fall under the unreasonable-per se rule and thus be illegal under section one of the Sherman Act.¹¹⁷

¹¹⁵246 F. Supp. 403 (N.D. Okla. 1965), *aff'd* 377 F.2d 901 (10th Cir. 1967).

¹¹⁶*Burke v. Ford*, 389 U.S. 320, 321-22 (1967) (per curiam) (footnotes omitted).

¹¹⁷A horizontal division of territories is a per se violation of the Sherman Act whether or not the arrangement contains other restraints such as price-fixing. *United States v. Topco Associates*, 40 U.S.L.W. 4343 (U.S. March 29, 1972).

(2) *Vertical*¹¹⁸(a) *Exclusive Selling*

Ordinarily a seller is free to select his customers and to refuse to deal with others. Hence a seller may establish an exclusive dealership in a specified territory. Section 75-4 requires a writing for such an agreement to be enforceable by the buyer.¹¹⁹ The seller is usually free to shift from one dealer to another at the end of the contract period.¹²⁰ At first blush section 75-5(b)(6) appears to outlaw an exclusive selling arrangement.¹²¹ However, in *Mar-Hof Co. v. Rosenbaker*,¹²² the court resorted to the rule of reason and upheld a seller's agreement to deal only with the defendant buyer in Winston-Salem.¹²³ On this point the United States Supreme Court recently stated:

[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. Cf. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). If the restraint stops at that point—if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.¹²⁴

In the absence of evidence of monopolization, or an attempt to monopolize, or another illegal purpose such as price-fixing, an exclusive selling arrangement will be upheld as a reasonable restraint of trade under North Carolina and federal antitrust laws.

¹¹⁸See generally Day, *Exclusive Territorial Arrangements under the Antitrust Laws—A Reappraisal*, 40 N.C.L. REV. 223 (1961).

¹¹⁹*Radio Electronics Co. v. Radio Corp. of America*, 244 N.C. 114, 92 S.C.2d 664 (1965).

¹²⁰Under The Automobile Dealer Franchise Act of 1956, 15 U.S.C. §§ 1221-25 (1970), an automobile manufacturer may be liable if there is a lack of good faith in refusing to renew a franchise contract.

¹²¹N.C. GEN. STAT. § 75-5(b)(6) (1965). The statute is set forth at p. 221 *supra*.

¹²²176 N.C. 330, 97 S.E. 169 (1918).

¹²³An automobile franchise agreement providing for an exclusive dealership in a specified territory was upheld in *Waldron Buick Co. v. General Motors Corp.*, 254 N.C. 117, 118 S.E.2d 559 (1961).

¹²⁴*United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967).

(b) *Closed Territories and Customer Limitations*

An exclusive selling arrangement binds the seller (manufacturer) not to sell to another buyer (dealer) in a specified territory. The buyer (dealer) is not prevented by an exclusive selling arrangement from making sales outside his territory. To try to prevent a buyer (dealer) from selling in the territory of another buyer (dealer) the seller (manufacturer) may extract from each of his buyers (dealers) a promise to sell only in his assigned territory. Intra-brand competition can be further reduced if the seller (manufacturer) can impose on the buyer (dealer) a limitation to sell only to customers who reside in his territory.

In *Waldron Buick Co. v. General Motors Corp.*,¹²⁵ plaintiff, a "franchised" Buick dealer in Concord, sought treble damages against General Motors Corporation and a "franchised" Buick dealer in Charlotte, alleging that he had been forced by defendants to cease sales activities in the Charlotte area. General Motors had an exclusive *selling* arrangement with both plaintiff and defendant dealers in Concord and Charlotte respectively. However, neither dealer had entered into a "closed-territory" agreement, which would have bound the dealer to sell only in his assigned territory. The court, in affirming a judgment of involuntary nonsuit, in effect upheld a "closed-territory" agreement that was not actually there. The court reasoned that the agreement of General Motors to sell only to the Charlotte dealer in the Charlotte area meant that the Charlotte dealer and General Motors had a right to keep the Concord dealer from selling in the Charlotte area. A possible inference to be drawn from this decision is that closed-territory agreements, like exclusive selling agreements, are reasonable restraints. If so, a strange situation would be created in the law on division of territories. North Carolina law is harsh on horizontal divisions.¹²⁶ Clearly, if the Concord and Charlotte dealers (*owners* of automobiles purchased from General Motors and not agents) had agreed among themselves not to sell in the other's territory, they would have violated section 75-5(b)(6), section 75-1, and the common law of this state. Nevertheless, if General Motors is permitted to impose on its dealers a closed-territory arrangement in connection with an exclusive selling arrangement, the result is a horizontal division of territories between the dealers.

The United States Supreme Court considered its first case involving

¹²⁵254 N.C. 117, 118 S.E.2d 559 (1961).

¹²⁶*Supra* p. 221.

vertical closed-territory and customer-limitation arrangements two years after *Waldron Buick Co.* was decided. In *The White Motor Co. v. United States*,¹²⁷ the lower court held that these vertical restrictions were per se violations of the Sherman Act and granted summary judgment. The United States Supreme Court sent the case back for trial because it concluded that from a summary judgment record it did not "know enough of the economic and business stuff out of which these arrangements emerge to be certain."¹²⁸ *United States v. Arnold, Schwinn & Co.*,¹²⁹ decided four years later, involved a variety of territorial and customer restrictions both on goods sold and goods on consignment. The trial lasted seventy days. Defendant was enjoined from limiting the territory within which any wholesaler or jobber could sell any "Schwinn" product that had been *purchased* from defendant. The trial court ruled that this arrangement was a division of territory and was a per se violation of the Sherman Act. No appeal was taken from this ruling. The trial judge took a different view on customer limitations and upheld a restriction that confined resale by the distributors to franchised retailers and a restriction on franchised retailers that forbade them to resell to non-franchised retailers, including discount houses. The government appealed from this ruling, contending that under the rule of reason these customer limitations violated the Sherman Act. As to goods *sold*, the Supreme Court of the United States had this to say about territorial and customer restrictions:

Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act.¹³⁰

The Court indicated that a possible exception to the per se rule on goods sold might be made for newcomers and failing companies.¹³¹

¹²⁷372 U.S. 253 (1963).

¹²⁸*Id.* at 263.

¹²⁹388 U.S. 365 (1967).

¹³⁰*Id.* at 382. In *Waldron Buick Co. v. General Motors Corp.*, 254 N.C. 117, 118 S.E.2d 559 (1961), the North Carolina Supreme Court emphasized the absence of a customer limitation on the plaintiff.

¹³¹388 U.S. at 374. Notwithstanding the broad sweep of the per se rule, the Court of Appeals for the Third Circuit held that a customer restriction on a product designed for professional use should be tested by the rule of reason. *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970).

Is an owner of goods free to impose territorial and customer restrictions on his agent or consignee? Such restrictions are not per se legal but, according to the Court, will be examined under the rule of reason.¹³² In *Arnold, Schwinn & Co.* these restrictions were found to be reasonable because the agents and consignees were permitted to obtain bicycles from competing firms, and there was no evidence of resale price control.

C. *Exclusive Arrangements*

Bargains to deal exclusively with another are almost universally upheld at common law unless they effect or form part of a plan to effect a monopoly.¹³³ The common law view still prevails in North Carolina and under federal law in respect to exclusive selling arrangements.¹³⁴ A seller may bind himself to sell to a particular buyer or a particular class of buyers. As previously discussed, this includes an agreement by a seller to sell to only one buyer in a specified locality.¹³⁵ Such a limitation on the seller often appears in so-called franchise agreements. On the other hand, serious antitrust problems arise when a buyer gets involved in an arrangement in which he is bound to deal only with the seller. Statutes that specifically treat exclusive dealing restrictions on buyers are section 75-5(b)(2) of the *General Statutes* and section three¹³⁶ of the Clayton Act.¹³⁷ Further, *General Statutes* sections 75-1¹³⁸ and 75-1.1,¹³⁹ section one of the Sherman Act,¹⁴⁰ and section five of the Federal Trade Commission Act¹⁴¹ may also apply.

(1) *Restriction on a Buyer*

(a) *Exclusive Buying*

Section 75-5(b)(2) provides that it is unlawful for any person to do

¹³²United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380 (1967).

¹³³RESTATEMENT OF CONTRACTS § 516(e) (1932).

¹³⁴Mar-Hof Co. v. Rosenbacker, 176 N.C. 330, 97 S.E. 169 (1918); Waldron Buick Co. v. General Motors Corp., 254 N.C. 117, 118 S.E.2d 559 (1961); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967).

¹³⁵See section IV, B, (2)(a) of the text *supra* p. 224.

¹³⁶N.C. GEN. STAT. § 75-5(b)(6) (1965).

¹³⁷15 U.S.C. § 14 (1970).

¹³⁸N.C. GEN. STAT. § 75-1 (1965).

¹³⁹*Id.* § 75-1.1 (Supp. 1971).

¹⁴⁰15 U.S.C. § 1 (1970).

¹⁴¹*Id.* § 45.

directly or indirectly or to have any contract expressly or knowingly implied "[t]o sell any goods in this State upon condition that the purchaser thereof shall not deal in the goods of a competitor or rival in the business of the person making such sales."¹⁴²

Unlike section 75-5(b)(6), there is no requirement of intent or other qualifying feature in section 75-5(b)(2); therefore, the rule of reason that applies in the former has no application in the latter.¹⁴³ *Standard Fashion Co. v. Grant*,¹⁴⁴ decided in 1914, was the first case involving the validity of an exclusive buying contract under section 75-5(b)(2). The seller sought to recover for patterns delivered to the buyer. Defendant contended that the contract of sale was invalid inasmuch as it contained a provision that bound him not to sell any other make of patterns. The court agreed with defendant and held the contract unenforceable as a direct violation of section 75-5(b)(2). Because it was not raised in the record, the court declined to pass on the possibility of the seller collecting for the patterns on the theory of *quantum valebat*.

The severity with which the court applies section 75-5(b)(2) is demonstrated in *Florsheim Shoe Co. v. Leader Department Store, Inc.*¹⁴⁵ In that case the seller sued the buyer to recover on an open account for shoes and an electric sign. The buyer counterclaimed, alleging that the seller had breached its agreement to sell exclusively to the buyer in Asheville. The buyer ordinarily would have been entitled to prevail on the counterclaim;¹⁴⁶ however, the evidence disclosed that the *buyer* had agreed not to sell other shoes within a competitive price range of those of the seller. Because the buyer's agreement violated section 75-5(b)(2), the court held the entire contract illegal. The result was that an otherwise legal exclusive selling provision was unenforceable by the buyer because

¹⁴²N.C. GEN. STAT. § 75-5(b)(2) (1965). This provision was originally § 1(a) of the 1907 Session Laws, Ch. 218, § 1(a), [1907] N.C. Sess. L. 254. It was reenacted as § 1(a) of the 1911 Session Laws, ch. 167, § 1(a), [1911] N.C. Sess. L. 321, and it became § 5(b) of the 1913 Session Laws, Ch. 41, § 5(b), [1913] N.C. Sess. L. 67.

¹⁴³In *Mar-Hof Co. v. Rosenbacker*, 176 N.C. 330, 97 S.E. 169 (1918), the court observed that § 75-5(b)(6) permits a standard of reasonableness because it requires a finding of intent. In *Florsheim Shoe Co. v. Leader Dep't Store, Inc.*, 212 N.C. 75, 193 S.E.9 (1937), the court distinguished the two sections.

¹⁴⁴165 N.C. 453, 81 S.E. 606 (1914).

¹⁴⁵212 N.C. 75, 193 S.E. 9 (1937).

¹⁴⁶*Mar-Hof Co. v. Rosenbacker*, 176 N.C. 330, 97 S.E. 169 (1918).

of an illegal buying provision in the agreement. In *Arey v. Lemons*¹⁴⁷ the owners of land leased the premises rent-free to an oil company for ten years, and the oil company, as lessee, subleased the same property rent-free to the owners of the land. The only possible consideration for this "startling document" was the promise of the oil company to sell to the owners of the fee its petroleum products and an agreement by the owners of the fee to handle such products to the exclusion of similar products of other sellers. The entire agreement was decreed to be void as a clear violation of section 75-5(b)(2).

In *Lewis v. Archbell*,¹⁴⁸ unlike previous cases, plaintiff was a competitor of the seller. Plaintiff alleged that he had been forced out of business by an exclusive buying contract for cross ties entered into by the plaintiff's competitor and the Norfolk and Southern Railroad. The North Carolina Supreme Court concluded that under the facts of this case a jury would have to decide whether the railroad had agreed to refrain from dealing with the defendant seller's competitors. Subsequently, plaintiff proved that the exclusive arrangement actually existed and that he was injured as a result. He was awarded *treble* damages.¹⁴⁹

The foregoing cases reveal that a promise by a buyer not to deal in the goods of a competitor of the seller is per se illegal under section 75-5(b)(2).

Under the federal antitrust laws, exclusive buying arrangements are usually tested under section three of the Clayton Act. This section reaches only those exclusive buying arrangements that are reasonably likely "to substantially lessen competition or tend to create a monopoly in any line of commerce."¹⁵⁰ Exclusive contracts, whether involving

¹⁴⁷232 N.C. 531, 61 S.E.2d 596 (1950). In *Grubb Oil Co. v. Garner*, 230 N.C. 499, 53 S.E.2d 441 (1949), the pleadings did not allege any agreement that the buyer was not to deal in competitors' products. The court indicated that if the hearing revealed a sublease with such a restriction as part of a single transaction, a different situation might arise. As presented by the pleadings, the case involved a permissible restriction in a lease; that is, the lessor agreed not to sell from the demised premises or other premises within a radius of two thousand feet any petroleum products other than those of the lessee.

¹⁴⁸199 N.C. 205, 154 S.E. 11 (1930).

¹⁴⁹*Lewis v. Fry*, 207 N.C. 852, 175 S.E. 717 (1934).

¹⁵⁰It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on

"commodities" or a service, may also violate the Sherman Act and section five of the Federal Trade Commission Act.¹⁵¹

(b) *Requirements Contracts*

It is not uncommon for a buyer to agree to purchase all of his requirements from a particular seller. This arrangement will foreclose a market to the competitors of a seller as effectively as a covenant by a buyer not to deal with a competitor of the seller. A seller should not be permitted to escape the sanctions of section 75-5(b)(2) by imposing a requirements contract on the buyer. On the other hand, a buyer may desire a requirements contract to assure himself a source of supply in times of scarcity. In such a situation the per se rule of section 75-5(b)(2) should not apply. Instead, all requirements contracts not designed to circumvent section 75-5(b)(2) should be examined under sections 75-1 and 75-1.1 and tested for legality under the rule of reason.

Section three of the Clayton Act makes illegal only those requirements contracts which are reasonably likely "to substantially lessen competition or tend to create a monopoly in any line of commerce." The meaning of this qualifying clause is often the subject of litigation. A comparison of two cases decided by the United States Supreme Court, in which different results were reached, provides some guidance for understanding the qualifying clause as it is applied to requirements contracts. In *Standard Oil Co. v. United States*,¹⁵² the Court held that the requirements contracts of defendant with sixteen percent of the independent service stations in the Western Area (several states) which foreclosed 6.7 percent of the gasoline market in that area were enough to "substantially lessen competition or tend to create a monopoly" in violation of section three of the Clayton Act. In *Tampa Electric Co. v. Nashville Coal Co.*,¹⁵³ plaintiff, a public utility, entered into a contract with defendant, a coal supplier, in which defendant agreed to furnish the

the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Clayton Act § 3, 15 U.S.C. § 14 (1970).

¹⁵¹FTC v. Motion Picture Adv. Serv. Co., 344 U.S. 392 (1953).

¹⁵²337 U.S. 293 (1949). (The defendant's major competitors had similar contracts with other outlets.)

¹⁵³365 U.S. 320 (1961).

total requirements of plaintiff in certain plants for a period of twenty years. Before the first delivery was made, defendant advised plaintiff that it considered the contract illegal under the antitrust laws and refused to make delivery. The United States Supreme Court in upholding the contract, followed the technique that it had used in *Standard Oil* to ascertain the percentage of market foreclosed to the seller's competitors. After determining that the line of commerce was coal, the Court found that the relevant market was the area in which the seven hundred producers of coal in the Appalachians competed with the defendant. This contract, although involving 128,000,000 dollars over a twenty-year period, nevertheless foreclosed only .77 percent of the market. This percentage of foreclosure by a contract that offered a public utility the assurance of a steady and ample supply of fuel was not enough "to substantially lessen competition or tend to create a monopoly."

(c) *Tying Clauses*

The usual tying contract forces the customer to take a product or brand that he does not necessarily want in order to secure one that he does desire.¹⁵⁴ Such an arrangement is inherently anticompetitive even if it is not accompanied by an exclusive arrangement feature. A patentee or producer of a unique and desirable product is in a powerful position to impose a tying arrangement. The result is to foreclose to competitors a market in the tied product as well as to coerce the buyer. Section 75-5(b)(2) is directed at foreclosing markets, and it should be construed to cover tying clauses. In any event, most of these arrangements clearly would be a restraint of trade under section 75-1 and an unfair method of competition under section 75-1.1.

The federal courts have taken a harsh attitude toward tying clauses, and the jurisdictional sweep of the federal statutes is broad enough to reach most of these clauses. Whether in a sale, lease, or license, the present rule under both the Clayton Act and Sherman Act is that a tying arrangement is per se illegal when the tying item, by virtue of either uniqueness or customer appeal, gives enough power in the tying product to accomplish the tie-in¹⁵⁵ and a not insubstantial amount of commerce in the tied product.¹⁵⁶ Unlike in requirements contracts, the dollar vol-

¹⁵⁴*Brown Shoe Co. v. United States*, 370 U.S. 294, 323-34 (1962).

¹⁵⁵*Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

¹⁵⁶*International Salt Co. v. United States*, 332 U.S. 392 (1947).

ume is the test. In *United States v. Loew's Inc.*,¹⁵⁷ 60,800 dollars was found to be not insubstantial. In a treble damage suit to determine whether the amount of commerce foreclosed is sufficient to warrant prohibition of the practice, the relevant figure is the total volume of sales tied by the sales policy under challenge and not the portion of this total accounted for by the plaintiff who brings the treble damage suit. Thus, if the tied sales to all purchasers made by the defendant is not insubstantial, an individual purchaser may sue for treble damages even though his purchases amount to only a "fraction" of the tied sales.¹⁵⁸

Occasionally, the federal courts have accepted a special justification for a particular tying arrangement. For example, in *United States v. Jerrold Electronics Corp.*¹⁵⁹ a tie-in of various items of equipment needed for a community television antenna plus the servicing of the equipment by the seller was upheld. The court concluded that the seller had a legitimate interest in assuring the proper functioning of this complex equipment in a new industry.

A tie-in involving commodities may be illegal either under section three of the Clayton Act,¹⁶⁰ section one of the Sherman Act,¹⁶¹ or section five of the Federal Trade Commission Act.¹⁶² Tying arrangements not involving commodities, and hence not within the coverage of section three of the Clayton Act, have been attacked successfully under section one of the Sherman Act. These include tying railway services to leases of land,¹⁶³ block-booking of motion pictures for television exhibition,¹⁶⁴ tying the sale of houses to credit,¹⁶⁵ and tying cooking equipment and food items to a franchise agreement involving a trademark license.¹⁶⁶

¹⁵⁷371 U.S. 38 (1962).

¹⁵⁸*Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969).

¹⁵⁹187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). Other examples are: *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *petition for cert. dismissed*, 381 U.S. 125 (1965). *But see Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847 (N.D. Cal. 1970).

¹⁶⁰*International Business Mach. Corp. v. United States*, 298 U.S. 131 (1936).

¹⁶¹*International Salt Co. v. United States*, 332 U.S. 392 (1947). Section 3 of the Clayton Act and § 1 of the Sherman Act were involved.

¹⁶²The Federal Trade Commission may bring proceedings under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970), for conduct which violates § 3 of the Clayton Act, 15 U.S.C. § 14 (1970), or § 1 of the Sherman Act, 15 U.S.C. § 1 (1970).

¹⁶³*Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

¹⁶⁴*United States v. Loew's Inc.*, 371 U.S. 38 (1962).

¹⁶⁵*Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), *noted in* 48 N.C.L. Rev. 309 (1970).

¹⁶⁶*Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3410 (U.S. Feb. 28, 1972).

Recently, the tie-in concept has been expanded to cover arrangements in which a seller requires a buyer to purchase products of a third party. In two cases gasoline suppliers violated section five of the Federal Trade Commission Act by coercing their "dealers" to handle a particular brand of tires, batteries, and accessories of a third party.¹⁶⁷ The gasoline supplier in each instance received a commission from the supplier of the tires, batteries and accessories.

In 1969 the General Assembly dealt specifically with the tie-in concept in a narrow area. Section 75-17 makes it a criminal offense for a lender of money to require a borrower to insure property that is offered as security with a particular insurer.¹⁶⁸

(2) *Restrictions on Lessees, Licensees, and Franchisees*

Section 75-5(b)(2) applies only to buyers. But suppose restrictions are imposed on lessees, licensees and franchisees? In *Knutton v. Cofield*¹⁶⁹ plaintiff and defendant executed a contract for the installation of an electric phonograph in defendant's place of business. Defendant agreed that during the term of the five-year contract he would not permit the installation of any competing device. After defendant breached this agreement, plaintiff sued for damages. Defendant demurred on the ground that the contract violated the laws of the state as a restraint of trade and was thus void. The court held that this "joint undertaking" did not violate the antitrust laws. Clearly, section 75-5(b)(2) did not apply because there was no sale, but the court went on to indicate that only sales were reached by chapter 75. Contracts in restraint of trade may involve parties other than a buyer and seller; therefore, it would have been preferable had the court concluded that the restraint on the defendant was a reasonable one and did not violate section 75-1.

In *FTC v. Motion Picture Advertising Service, Inc.*,¹⁷⁰ a producer of motion picture advertising films had exclusive contracts with forty percent of the theater owners in the area in which it operated. Although section three of the Clayton Act did not apply because no commodity was involved, the United States Supreme Court held that these exclusive contracts fell within the prohibitions of the Sherman Act and were, therefore, an unfair method of competition under section five of the

¹⁶⁷*Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965); *FTC v. Texaco Inc.*, 393 U.S. 223 (1968).

¹⁶⁸N.C. GEN. STAT. § 75-17 (Supp. 1971). See also *id.* §§ 75-18, -19.

¹⁶⁹273 N.C. 355, 160 S.E.2d 29 (1968).

¹⁷⁰334 U.S. 392 (1953).

Federal Trade Commission Act.

Section five of the Federal Trade Commission Act was adopted as section 75-1.1 of chapter 75 after the decision in *Knutton* and should provide a means of redress for lessees, licensees, and franchisees who are subjected to unreasonable exclusive dealing arrangements.

D. *Refusals to Deal*

(1) *Individual Refusals to Deal*

A businessman may have a variety of commercial and personal reasons not to deal with another person or firm. Ordinarily, a single trader may choose not to deal with another without violating the anti-trust statutes of North Carolina or of the United States.¹⁷¹ However, an individual refusal to deal, when coupled with other conduct, may fall into a forbidden category. If done with the intent to destroy or injure the business of any competitor with the purpose of attempting to fix the price of any goods when the competition is removed, then the refusal to deal would amount to a violation of section 75-5(b)(3).¹⁷² The refusal of the only newspaper in a city to deal with advertisers who patronized the local radio station has been held an attempt to monopolize under section two of the Sherman Act.¹⁷³

When a trader agrees to deal only with certain traders, the effect is to refuse to deal with all others. Exclusive dealerships whereby the seller agrees to deal only with a particular distributor in a given locality have been upheld under both the law of North Carolina¹⁷⁴ and the federal

¹⁷¹United States v. Colgate & Co., 250 U.S. 300 (1919). Unless state resale price maintenance laws are in effect, a seller cannot enforce resale price maintenance by cutting off price cutters without running a grave risk of violating § 1 of the Sherman Act. This is due to the fact that the Supreme Court of the United States has little difficulty in finding a combination in restraint of trade in this area. See United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Albrecht v. Herald Co., 390 U.S. 145 (1968). The North Carolina law providing for resale-price-maintenance is entitled the "Fair Trade Act." N.C. GEN. STAT. §§ 66-50 to -57 (1965), as amended, (Supp. 1971). For a discussion of this Act, see § IV (A), (2) *supra* p. 218.

¹⁷²It is unlawful "for any person directly or indirectly to do or have any contract express or knowingly implied . . . [t]o willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed." N.C. GEN. STAT. § 75-5(b)(3) (1965).

¹⁷³Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

¹⁷⁴An exclusive dealing arrangement in which the seller agrees to deal only with a buyer in a specified locality appears to be proscribed by N.C. GEN. STAT. § 75-5(b)(6) (1965), but, by applying the rule of reason, the court upheld such an arrangement in *Mar-Hof Co. v. Rosenbacker*, 176 N.C. 330, 97 S.E. 169 (1918). The legality of this type of exclusive dealing arrangement was

law.¹⁷⁵ On the other hand, a seller cannot extract from a buyer a promise not to deal with a competitor of the seller without running afoul of an express provision of the North Carolina antitrust law.¹⁷⁶ Likewise, such an arrangement is proscribed by federal law when a seller makes a sale on condition that the buyer will not deal in the goods of a competitor and its effect may be "to substantially lessen competition or tend to create a monopoly in any line of commerce."¹⁷⁷

(2) *Concerted Refusals to Deal*

There is no specific statutory provision in either the North Carolina or federal antitrust laws that governs concerted refusals to deal. Under federal law such conduct is considered a restraint of trade in violation of section one of the Sherman Act and an unfair method of competition under section five of the Federal Trade Commission Act. The North Carolina Supreme Court has handed down decisions on concerted refusals to deal that are not consistent with its own views in other antitrust cases. Further, federal precedents in this area are yet to be considered by this court in the interpretation of sections 75-1 and 75-1.1.

In *Rice v. Asheville Ice Co.*,¹⁷⁸ plaintiff sued for damages under the antitrust laws, alleging that defendants refused to sell ice to him and thus prevented him from engaging in the business of retailing ice in the Asheville area. In a per curiam opinion, the North Carolina Supreme Court affirmed a dismissal of the action apparently on the ground that plaintiff could not show any damages. The court did not consider whether there was a concert of action by defendants and, if so, whether it would constitute a restraint of trade under section 75-1.

reaffirmed in *Waldron Buick Co. v. General Motors Corp.*, 254 N.C. 117, 118 S.E.2d 559 (1961). See Section IV (B)(2) *supra* p. 224.

¹⁷⁵*United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967), the Court by way of dictum stated: "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods."

¹⁷⁶N.C. GEN. STAT. § 75-5(b)(2) (1965).

¹⁷⁷Clayton Act § 3, 15 U.S.C. § 14 (1970). This Act extends to leases, contracts to sell, and to sales, whereas § 75-5(b)(2) is confined to sales.

¹⁷⁸204 N.C. 768, 169 S.E. 707 (1933). The court relied on *Lewis v. Archbell*, 199 N.C. 205, 154 S.E. 11 (1930). Further, N.C. GEN. STAT. § 75-5(b)(3) (1965) was held inapplicable on the ground that plaintiff was not a competitor of defendants. Plaintiff, of course, was trying to buy from defendants in order to compete with them at the retail level inasmuch as they were also retailers. N.C. GEN. STAT. § 75-1.1 (Supp. 1971), enacted in 1969, has a provision which does not require the defendant to be in competition with the plaintiff. See section V, *C infra* 251.

In 1941 two cases involving concerted refusals to deal were decided by the North Carolina Supreme Court. In *McNeill v. Hall*,¹⁷⁹ plaintiff, an operator of a cafe, was forced to go out of business because he was unable to secure supplies from salesmen representing baking houses and packing houses that served the village of Micaville. The salesmen ceased to sell to plaintiff because a combination of retail businessmen threatened to withhold patronage from the salesmen should they continue to sell to plaintiff. Plaintiff suffered a nonsuit in the trial court, and the North Carolina Supreme Court, in affirming, stated:

The gravamen of the action alleged is a boycott of the plaintiffs' business. A requisite of any boycott is a conspiracy. Boycott is defined by Black's Law Dictionary (Second Edition) as "a conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business . . ." A conspiracy is "an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." The determination of the defendants to decline to buy from the salesmen if they continued to sell to the plaintiffs was not an unlawful act. It was simply the exercise of the right they had to buy from or to refrain from buying from whomsoever they pleased. "If these acts are not wrongful or illegal, no agreement to commit them can properly be called an illegal and wrongful conspiracy." *S. v. Martin*, 191 N.C., 404, 132 S.E., 16.

In the absence of intimidation and coercion, and in a peaceable manner, a person has a right to endeavor to prevent other firms procuring certain articles to be sold in competition with the sale of the same articles by them in a given territory.¹⁸⁰

In *Lineberger v. Colonial Ice Co.*,¹⁸¹ a retailer of ice alleged violations of sections 75-1 and 75-5(b)(6).¹⁸² He contended that by concerted action all six manufacturers of ice in the area refused to sell to him. Paragraph eight of the complaint stated:

[t]hat immediately after refusing to sell ice to the plaintiff, as a part of said conspiracy and in furtherance thereof, and to procure for themselves the unlawful gain from the plaintiff's established business, the said conspirators employed the plaintiff's drivers and helpers to point out to them all of the plaintiff's customers and the various routes

¹⁷⁹220 N.C. 73, 16 S.E.2d 456 (1941).

¹⁸⁰*Id.* at 74, 16 S.E.2d at 457.

¹⁸¹220 N.C. 444, 17 S.E.2d 502 (1941).

¹⁸²N.C. GEN. STAT. § 75-5(b)(6) is discussed in section IV (B)(1) *supra* p. 221.

upon which said customers resided, and did thereafter and now continues to sell said customers to the loss of the said plaintiff and the unlawful enrichment of said defendants.¹⁸³

The complaint survived a demurrer in the trial court, but the North Carolina Supreme Court in a per curiam opinion, reversed, declaring that the suit involved a controversy of a private nature and hence no public interest was involved.

A brief summary of federal cases will reveal a sharp contrast to these decisions of the North Carolina Supreme Court. As early as 1904 the United States Supreme Court ruled that a concerted refusal by traders to deal with other traders violated section one of the Sherman Act.¹⁸⁴ In 1914 in *Eastern States Retail Lumber Dealers' Ass'n v. United States*,¹⁸⁵ an agreement by a group of retailers not to deal with wholesalers who sold directly to consumers was held to be unlawful as an unreasonable restraint of trade. The Supreme Court repeated the following from a decision in which it had upheld the Supreme Court of Mississippi in a similar interpretation of the Mississippi Antitrust Statute:

An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or *to the individual against whom the concerted action is directed*.¹⁸⁶

Later, the Supreme Court declared that group boycotts (concerted refusal by traders to deal with other traders) were unreasonable per se.¹⁸⁷ In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,¹⁸⁸ plaintiff, a small retailer, sued for treble damages and for an injunction under the federal antitrust laws. He alleged that a chain store outlet located next door had induced several suppliers to boycott him or to sell to him only on unfavorable terms. The lower federal courts dismissed the complaint on the ground that the controversy was a purely private quarrel between Klor's and Broadway Hale that did not amount to a public wrong proscribed

¹⁸³Record at 5.

¹⁸⁴*Montague & Co. v. Lowry*, 193 U.S. 38 (1904).

¹⁸⁵234 U.S. 600 (1914).

¹⁸⁶*Id.* at 614, quoting *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 440-41 (1909) (emphasis added).

¹⁸⁷*Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958), citing *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941).

¹⁸⁸359 U.S. 207 (1959).

by the Sherman Act. The Supreme Court, in rejecting this view, stated:

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. *Cf. United States v. Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213, "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Cf. United States v. Patten*, 226 U.S. 525, 542.

Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its "nature" and "character," a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.¹⁸⁹

In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*,¹⁹⁰ the United States Supreme Court, relying on its decision in *Klors*, held in a per curiam opinion that it was error for the district court to dismiss for failure to state a claim a complaint alleging that defendant trade association and its members had violated section one of the Sherman Act by

¹⁸⁹*Id.* at 212-13 (footnotes omitted).

¹⁹⁰364 U.S. 656 (1961).

establishing and enforcing "capricious and arbitrary" standards for gas burners which plaintiff's quality burners could not meet and thus effectively excluding plaintiff as a competitor.

A combination of businessmen that exerts economic power to injure or destroy another businessman wields the same kind of power as the "trusts" that brought about the enactment of antitrust laws. The public interest is served when a competitor is protected from the evils of monopoly power whether it be exercised by a "trust" or a group. There is no more effective way to victimize a businessman than to make him the object of a group boycott. Economic coercion through combinations and conspiracies is what section one of the Sherman Act is about. North Carolina can make its counterpart, section 75-1, a viable statute in this area by following federal precedents. Group boycotts are also a violation of section five of the Federal Trade Commission Act.¹⁹¹ Since this provision was adopted as section 75-1.1 of the North Carolina antitrust statute in 1969, it provides an opportunity for a new approach in dealing with this type of concerted action. To cope effectively with group boycotts does not require the adoption of a per se rule.¹⁹² All that is needed is to eliminate the obstacles erected in *McNeill v. Hall*¹⁹³ and *Lineberger*

¹⁹¹*Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941).

¹⁹²The per se rule is not uniformly applied in the federal courts. In *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) two suppliers dealing with distributor *A* agreed with *B* to shift to *B*. This arrangement was found to be reasonable under the circumstances. In *Instant Delivery Corp. v. City Stores Co.*, 284 F. Supp. 941, 947 (E.D. Pa. 1968), four retailers had been using a single delivery service. They changed to two different services and then returned to a single service. The complaining carrier who lost out in the bidding was found to be "a disappointed competitor, not the object of an illegal boycott." In *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, 308 F. Supp. 988 (D.D.C. 1970), the per se rule was rejected in considering a provision in a long-term lease that gave certain lessees the right to select and approve tenants who in the judgment of these lessees would contribute to the success of the enterprise.

¹⁹³220 N.C. 73, 16 S.E.2d 456 (1941). The court quoted the following from 15 C.J.S. *Conspiracy* § 12g (1939): "It has been held that a combination of retail dealers in merchandise, which for a legitimate purpose interferes with another's right to buy goods by persuasion or other peaceful means exerted against the sellers, does not amount to an actionable conspiracy, there being no intimidation or coercion." *Id.* at 74-75, 16 S.E.2d 457. This statement is supported in *Corpus Juris Secundum* by a single lower federal court case decided in 1907: *Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Ass'n*, 150 F. 413 (C.C.S.D. 1907). A later edition of *C.J.S.* gives a broader meaning to boycott by requiring intimidation, although it may be passive. 15A C.J.S. *Conspiracy* § 12a (1967).

v. *Colonial Ice Co.*¹⁹⁴ and then to consider each case on its merits under the rule of reason.

E. *Monopolization, Attempt to Monopolize, Combination or Conspiracy to Monopolize*

The North Carolina antitrust statute has no provision with language similar to section two of the Sherman Act:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor¹⁹⁵

However, section 75-5(b)(3) covers some of the same ground. It makes it unlawful for any person to do directly or indirectly, or have any contract express or knowingly implied to "willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed."¹⁹⁶ One similarity to be noted at the outset is that both statutes are directed at individual misconduct as well as at concerted action. Two North Carolina cases illustrate the application of section 75-5(b)(3) to an individual. In *Smith v. Morganton Ice Co.*,¹⁹⁷ defendant, the owner of an ice plant in Morganton, secured a monopoly of the ice business in Morganton by a series of acts that froze out plaintiff, a competitor at the retail level. Defendant first procured an agreement with the Deaf and Dumb School in Morganton, a manufacturer of ice, not to sell ice to anyone. Defendant then procured agreements with ice plants in neighboring towns not to sell ice to plaintiff unless he would agree to resell at a minimum price in Morganton of fifty cents per one hundred pounds. Plaintiff was buying ice from a plant in

¹⁹⁴220 N.C. 444, 17 S.E.2d 502 (1941) (no public interest involved). *But see* *Lewis v. Archbell*, 199 N.C. 205, 154 S.E. 11 (1930); *Lewis v. Frye*, 207 N.C. 852, 175 S.E. 698 (1935) (treble damages awarded when plaintiff injured by an exclusive buying contract between plaintiff's former customer and a competitor).

¹⁹⁵15 U.S.C. § 2 (1970).

¹⁹⁶N.C. GEN. STAT. § 75-5(b)(3) (1965). This section was enacted in 1907. Ch. 218, § 1(b), [1907] N.C. Sess. L. 254. In 1911 it was restricted to "circulating false reports" and thus severely narrowed in scope. Ch. 167, § 1(b), [1911] N.C. Sess. L. 321. In 1913 the language of the 1907 Act was restored. Ch. 41, § 5(c), [1913] N.C. Sess. L. 66. The present version was held to be constitutional in *State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 188 S.E. 412 (1936).

¹⁹⁷159 N.C. 151, 74 S.E. 961 (1912).

Newton for 17.5 cents per hundred pounds and reselling it for a profit at thirty-five cents. Defendant threatened the Newton supplier with a trade war. As a result, the Newton supplier ceased dealing with plaintiff. Defendant was successful in securing a monopoly and thereafter sold its ice for fifty cents per one hundred pounds in Morganton. Plaintiff recovered damages under the common law and under a 1907 antitrust statutory provision that is now section 75-5(b)(3). Jurisdictional considerations aside, defendant in this case would be guilty of "monopolizing" under section two of the Sherman Act. In *State v. Atlantic Ice & Coal Co.*,¹⁹⁸ defendant, a Georgia corporation, was convicted of and fined one thousand dollars for violating section 75-5(b)(3). Defendant, the largest of approximately twenty-five coal dealers in Winston-Salem, had drastically cut the price of coal. The justification offered for this action by the president of defendant corporation was that he wanted sales and that there already were too many coal dealers in Winston-Salem. There was no evidence that any of defendant's competitors had been driven out of business; nevertheless, the court stated:

It goes without saying that reducing the price of coal to the consumer below what the defendant paid for same, with the other evidence above set forth, is sufficient evidence to be submitted to the jury that defendant formed a purpose to monopolize, and willfully undertook to injure its competitors.¹⁹⁹

Defendant, in effect, was convicted of an attempt to monopolize. This offense is specifically set forth in section two of the Sherman Act.

Three cases have come before the North Carolina Supreme Court involving an alleged conspiracy in violation of section 75-5(b)(3).²⁰⁰ In each case the plaintiff was a truck carrier that was suing several railroads for combining to lower rates to injure truck carriers with the intent to restore the rates at a later time. The lowering of rates by railroads is now within the jurisdiction of the Utilities Commission,²⁰¹ but at the time these three cases were litigated, the Utilities Commissioner had jurisdiction over the raising of but not the lowering of such rates. Three impor-

¹⁹⁸210 N.C. 742, 188 S.E. 412 (1936).

¹⁹⁹*Id.* at 753, 188 S.E. at 419.

²⁰⁰*Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R.*, 210 N.C. 36, 185 S.E. 479 (1936); *Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937); *Patterson v. Southern Ry.*, 214 N.C. 38, 198 S.E. 364 (1938).

²⁰¹N.C. GEN. STAT. § 62-32 (Supp. 1971).

tant points in these cases, nevertheless, have continuing vitality in the antitrust laws. First, although private persons or corporations may sue for damages, injunctive relief is *not* available to them under the antitrust provisions which subject them to criminal prosecution.²⁰² Second, the fixing of rates is within the definition of "goods" under section 75-5.²⁰³ Third, the fact that the rate agreement had been to lower the price of gasoline to consumers did not constitute a defense under section 75-5(b)(3) because this section is not subject to the rule of reason.²⁰⁴ In Sherman Act terms the defendants in each of these cases would have been charged with a combination or a conspiracy to monopolize.

Because the language of section 75-5(b)(3) and that of section two of the Sherman Act differ so widely, a summary of the cases under the federal act will not be undertaken.²⁰⁵ Nevertheless, the jurisdictional sweep of section two of the Sherman Act to reach local attempts to monopolize should be emphasized. In *Lorain Journal Co. v. United States*,²⁰⁶ a newspaper publisher was enjoined from attempting to monopolize the advertising business in Lorain, Ohio by refusing to accept local advertising from any business that patronized the local radio station. The defendant operated the only newspaper in the city. This decision makes it clear that a business practice designed to destroy a competitor in a single locality which would, if successful, achieve a monopoly and which, though falling short, nevertheless approaches so close as to create a dangerous probability of achieving a monopoly is an attempt to monopolize under section two of the Sherman Act.

F. Pricing Policies Designed to Injure or Destroy Competitors

Sections 75-5(b)(4) and (5) have the obvious purpose of protecting the weak businessman from certain pricing practices of a powerful rival.²⁰⁷ Section 75-5(b)(4) makes the following conduct unlawful:

²⁰²*Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R.*, 210 N.C. 36, 39, 185 S.E. 479, 481 (1936).

²⁰³*Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937) (suit for damages).

²⁰⁴*Patterson v. Southern Ry.*, 214 N.C. 38, 198 S.E. 364 (1938).

²⁰⁵Illustrative recent cases involving monopolization and conspiracies to monopolize are *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *International Boxing Club v. United States*, 358 U.S. 242 (1959); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

²⁰⁶342 U.S. 143 (1951). See generally Hiber, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 ANTITRUST L.J. 165 (1967).

²⁰⁷N.C. GEN. STAT. §§ 75-5(b)(4), (5) (1965). Both sections were, in substance, first enacted in 1907. Ch. 218, §§ 1(c), (d), [1907] N.C. Sess. L. 254.

While engaged in buying or selling any goods within the State, through himself or together with or through any allied, subsidiary or dependent person, to injure or destroy or undertake to injure or destroy the business of any rival or competitor, by unreasonably raising the price of any goods bought or by unreasonably lowering the price of any goods sold with the purpose of increasing the profit on the business when such rival or competitor is driven out of business, or his business is injured.

In *State v. Atlantic Ice & Coal Co.*,²⁰⁸ the trial judge ruled that this section was so indefinite that its enforcement would violate the due process clause of the Federal and State Constitutions. In this case the North Carolina Supreme Court upheld the conviction under section 75-5(b)(3) and thus did not review the ruling of the lower court on section 75-5(b)(4). State and federal courts have considerable experience in deciding what is an unreasonable restraint of trade. To determine what is an unreasonable lowering or raising of prices should pose less difficulty for the courts.

In 1936 Congress adopted the substance of the Borah-Van Nuys Bill by enacting section three of the Robinson-Patman Act.²⁰⁹ Its provisions concerning pricing practices of sellers are broader than section 75-5(b)(4), but unlike the North Carolina law, it does not apply to buyers.²¹⁰ A clause in section three of the Robinson-Patman Act makes it a crime "to sell . . . goods at unreasonably low prices for the purpose of de-

²⁰⁸210 N.C. 742, 188 S.E. 412 (1936).

²⁰⁹Act of June 19, 1936, ch. 592, § 3, 49 Stat. 1528. The Borah-Van Nuys bill is § 3 of the Robinson-Patman Act, 15 U.S.C. § 13a (1970).

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both. 15 U.S.C. § 13a (1970).

²¹⁰A buyer might be reached under § 2 of the Sherman Act, 15 U.S.C. § 2, under the attempt to monopolize clause or under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), under the unfair method of competition clause.

stroying competition or eliminating a competitor." In *United States v. Natinal Dairy Products Corp.*,²¹¹ the United States Supreme Court held this clause to be constitutional. The Court made it clear that all sales below cost do not violate section three. Only those sales made below cost without legitimate commercial objective (such as meeting the price of a competitor) *and* with specific intent to destroy competition would be covered. Only a few cases have been prosecuted under this section.²¹² Contrary to provisions in the Sherman Act and the Clayton Act, treble damage relief is not available under section three of the Robinson-Patman Act.²¹³ On the other hand, section 75-5(b)(4) subjects a violator to both criminal prosecution and to a suit for treble damages.

Section 75-5(b)(5) is a price discrimination statute, and, like section 75-5 (b)(4), it reaches individual as well as concerted conduct. It makes unlawful the following conduct:

While engaged in dealing in goods within this State, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another place, when there is not good and sufficient reason on account of transportation or the expense of doing business for charging less at the one place than at the other, or to give away such goods, with a view to injuring the business of another.²¹⁴

In *State v. Atlantic Ice & Coal Co.*,²¹⁵ the jury found an individual defendant guilty of violating this section. On appeal the conviction was upheld under section 75-5(b)(3), and the North Carolina Supreme Court did not consider the count involving section 75-5 (b)(5). In another case, the court upheld a ruling of the trial court that had sustained charges in the complaint of violations of sections 75-5(b)(3) and (5) against several defendants.²¹⁶ Other than as involved in these two cases section 75-5(b)(5) as well as section 75-5 (b)(4) remain as virtually dead provisions in the antitrust statute. Enforcement of federal price discrimination statutes has been more effective.

²¹¹372 U.S. 29 (1963).

²¹²The maximum fine under § 3 of the Robinson-Patman Act is five thousand dollars, 15 U.S.C. § 13a (1970), whereas, since 1955, the maximum fine under the Sherman Act is fifty thousand dollars. *Id.* §§ 1-3 (1970).

²¹³*Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958).

²¹⁴N.C. GEN. STAT. § 75-5(b)(5) (1965).

²¹⁵210 N.C. 742, 188 S.E. 412 (1936).

²¹⁶*Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937).

Section two of the Clayton Act, passed in 1914,²¹⁷ was designed to prohibit the destruction of competition through price discrimination. Congress desired to provide more protection for small businessmen, and, in 1936, it enacted the Robinson-Patman Act as an amendment to section two of the Clayton Act.²¹⁸ Section two, as amended, has five subsections—(a) through (f).²¹⁹ These subsections are too lengthy to be reproduced. Summarized, the Robinson-Patman Act prohibits a seller from discriminating in prices charged for goods of like grade and quality if such discrimination causes the requisite probable competitive injury, unless the discrimination is permissible under one of the several defenses (such as cost defense and good faith in meeting the price of a competitor) found in various parts of subsections (a) and (b). Payments of brokerage and similar allowances to buyers are regulated by subsection (c), which makes such payments in violation of the section *illegal per se*. Subsections (d) and (e) prohibit promotional allowances and services not made available or accorded to all competing customers or purchasers on proportionally equal terms. The only defense in these two subsections is a good faith meeting of competition. Buyers are covered under subsection (c) in the brokerage clause and in subsection (f), which prohibits buyers from knowingly inducing or receiving a discriminatory price which the seller is forbidden to grant under subsection (a). There is no provision in the Robinson-Patman Act that prohibits buyers from inducing or receiving discriminatory allowances or services. However, the Federal Trade Commission may issue cease and desist orders against such practices under section five of the Federal Trade Commission Act.²²⁰

The Robinson-Patman Act is a highly controversial statute. Its proponents regard it as providing essential protection for small business against the power of large sellers and buyers. Opponents regard the

²¹⁷Act of Oct. 15, 1914, ch. 323, § 2, 38 Stat. 730.

²¹⁸Act of June 19, 1936, ch. 592, §§ 2(a)-(f), 49 Stat. 1526. The 1936 enactment which amended § 2 of the Clayton Act, now 15 U.S.C. §§ 13(a)-(f), also added three sections, now 15 U.S.C. §§ 13a, b, 21a (1970). Selections from the voluminous bibliography on the Robinson-Patman Act are: C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (2d ed. 1959); C. EDWARDS, THE PRICE DISCRIMINATION LAW (1959); S. OPPENHEIM & G. WESTON, ROBINSON-PATMAN ACT (1971)(4 volumes); W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT (1963); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962), Supp. 1964; H. TAGGART, COST JUSTIFICATION (1959).

²¹⁹15 U.S.C. §§ 13(a)-(f) (1970).

²²⁰FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968), noted in 47 N.C.L. REV. 243 (1969).

statute as providing too rigid control with unintended anticompetitive effects.²²¹ Notwithstanding many amendatory efforts, it has been amended only once.²²² Although the Department of Justice may enforce this Act, primary responsibility for public enforcement is left to the Federal Trade Commission. Private enforcement via treble damage suits is extensive. Although the outer limits of the jurisdictional sweep of the Robinson-Patman Act are yet to be defined by the United States Supreme Court, decided cases nevertheless reveal that the Act is far reaching. In *Moore v. Mead's Fine Bread Co.*,²²³ the United States Supreme Court sustained a section 2(a) treble-damage suit against a New Mexico bakery for a discriminatory reduction of its wholesale bread prices in a single New Mexico town where it had competition with plaintiff. The defendant had not reduced its prices elsewhere, including a Texas community served with a bread truck operating out of New Mexico. The Court reasoned that the price cut directed at plaintiff, defendant's competitor, was supported by an interstate "treasury." Recently, the United States Supreme Court declined to review a decision of a lower court in which it was held that when all of the activities are in a single state, there is no jurisdiction under the Robinson-Patman Act.²²⁴

V. UNFAIR COMPETITION, UNFAIR METHODS OF COMPETITION, AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES

In 1969 the General Assembly made a significant addition to chapter 75 by enacting section 75-1.1 which is set forth in full below:

(a)Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared

²²¹Recently recommendations have been made to repeal or make important changes in the Robinson-Patman Act. A summary of the recommendations of the *White House Task Force Report on Antitrust Policy* and the *President's Task Force Report on Productivity and Competition* is contained in HOUSE SPECIAL SUBCOMM. ON SMALL BUSINESS AND THE ROBINSON-PATMAN ACT TO THE SELECT COMM. ON SMALL BUSINESS, SMALL BUSINESS AND THE ROBINSON-PATMAN ACT, H.R. REP., 91st Cong., 2d Sess. (1970). Extensive hearings were held by this special subcommittee. *Hearings on H. Res. 66 Before the Special Subcomm. on Small Business and the Robinson-Patman Act of the House Select Comm. on Small Business*, 91st Cong., 2d Sess., vols. 1, 2 (1970).

²²²Act of May 26, 1938, ch. 283, 52 Stat. 446, now 15 U.S.C. § 13c (1970) provides that the Act shall not apply to purchases of supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions.

²²³348 U.S. 115 (1954).

²²⁴*Abramson v. Colonial Oil Co.*, 390 F.2d 873 (5th Cir.), cert. denied, 393 U.S. 831 (1968).

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 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.²²⁵

The first sentence, section 75-1.1(a), is borrowed from section five of the Federal Trade Commission Act.²²⁶ However, subsections (b), (c), and (d) are not derived from the federal law.

Prior to 1969 the General Assembly enacted in piece-meal fashion legislation designed to protect competitors and consumers from unfair trade practices. For example, in 1957 the General Assembly adopted an elaborate scheme to control unfair trade practices in the diamond industry.²²⁷ This special statute drew upon section five of the Federal Trade Commission Act by defining an unfair trade practice as "unfair methods of competition, unfair or deceptive acts or practices and other illegal practices which are prohibited by law."²²⁸

The General Assembly has charged the Commissioner of Agriculture with extensive duties in the area of unfair trade practices. He administers the law of weights and measures;²²⁹ he is charged with responsibility to establish rules and regulations designed to protect producers of fruits and vegetables against unfair trade practices;²³⁰ and he is required

²²⁵N.C. GEN. STAT. § 75-1.1 (Supp. 1971).

²²⁶15 U.S.C. § 45 (1970). See note 8 *supra*.

²²⁷Ch. 585, §§ 1-3, [1957] N.C. Sess. L. 523, codified at N.C. GEN. STAT. §§ 66-73 to -75 (1965) (a criminal provision).

²²⁸N.C. GEN. STAT. § 66-73(4) (1965).

²²⁹*Id.* § 81-2.

²³⁰*Id.* § 106-496 (Supp. 1971).

to report the existence of fertilizer trusts to solicitors and to the General Assembly.²³¹ The foregoing are but a few illustrations of the duties of the Commissioner of Agriculture to protect the public.²³² Statutes dealing with trademarks and brand names to supplement the common law provide another illustration of legislative control of unfair trade practices.²³³

Apart from legislation, the courts of North Carolina have applied the common law in dealing with deceitful practices.²³⁴ Misrepresentation and a variety of other business practices have been frowned upon by the judiciary under the common law of unfair competition.²³⁵ A brief summary of the common law of unfair competition is necessary in order to show its relationship with section 75-1.1

A. *Unfair Competition*

The concept of unfair competition had its origin in the sense of justice of common law judges. The North Carolina Supreme Court defines unfair competition as that "which a court of equity would consider unfair."²³⁶ Trademark and trade name infringement provided a fruitful setting for the early development of the law of unfair competition.²³⁷ A businessman might "pass off" his goods as those of a competitor by using an identical or confusingly similar mark. This practice came to be regarded as unfair competition. Other practices have been added to a growing list. A recent study of the law of unfair competition in North Carolina discusses the following topics: trademark and trade name infringement; imitation of a competitor's product and its appearance; interference with a competitor's contractual relations; disparagement of product; title or business methods; and misappropriation

²³¹*Id.* § 106-22(2) (1966).

²³²See generally *id.* ch. 106 (1966), as amended, (Supp. 1971) for other responsibilities of the Commissioner of Agriculture.

²³³*Id.* §§ 80-1 to -14 (Supp. 1971). Civil remedies provided include profits, damages, and penalties. *Id.* § 80-12.

²³⁴*Irwin v. Sherrill*, 1 N.C. 99 (1799).

²³⁵*Yellow Cab Co. v. Creasman*, 185 N.C. 551, 117 S.E. 787 (1923), noted in 2 N.C.L. REV. 54 (1923).

²³⁶*Charcoal Steak House, Inc. v. Staley*, 263 N.C. 199, 204, 139 S.E.2d 185, 189 (1964), quoting *Carolina Aniline & Extract Co. v. Ray*, 221 N.C. 269, 20 S.E.2d 59 (1942).

²³⁷See R. CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES* (3d ed. 1967, Supp. 1971)(5 vols.); S. OPPENHEIM, *UNFAIR TRADE PRACTICES* (2d ed. 1965, Supp. 1969).

of a competitor's values.²³⁸ Since the time when this study was made, a case involving the doctrine of misappropriation of a competitor's values has been decided. In *Liberty/UA, Inc. v. Eastern Tape Corp.*,²³⁹ decided by the Court of Appeals of North Carolina in 1971, defendants were restrained from copying plaintiff's uncopyrighted records on tapes through an electronic device and then selling the tapes in competition with plaintiff's records. The North Carolina court followed the reasoning of *International News Service v. Associated Press*,²⁴⁰ decided by the United States Supreme Court in 1918, in concluding that it is unfair competition for defendant "to reap where he has not sown." Thus, the common law of unfair competition in North Carolina extends beyond the traditional concept of "passing off." This brief summary provides a context in which to explore the question of the relationship of this body of law to the substantive provisions of section 75-1.1. First, consideration will be given to the phrase "unfair methods of competition."

B. *Unfair Methods of Competition*

In 1914 Congress created the Federal Trade Commission and gave it jurisdiction over "unfair methods of competition in commerce."²⁴¹ Congress deliberately avoided the phrase "unfair competition" and chose instead the phrase "unfair *methods* of competition" because it wanted to provide a broader and more flexible phrase the meaning of which would be formulated by a process of judicial inclusion and exclusion.²⁴² Put another way, Congress did not want to confine the Federal Trade Commission to the common law of unfair competition. Instead, it chose to permit the Commission, subject to approval by the federal courts, to develop a body of law under the new concept of "unfair

²³⁸Comment, *Unfair Competition—Law of Unfair Competition in North Carolina*, 46 N.C.L. REV. 856 (1968).

²³⁹11 N.C. App. 20, 180 S.E.2d 414, cert. denied, 278 N.C. 702 (1971). The North Carolina Court of Appeals did not think that decisions of the United States Supreme Court holding that the copying of unpatented products is permissible despite any state laws to the contrary applied in this situation. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1965); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). N.C. GEN. STAT. § 66-28 (1965) eliminates any common law right to restrict the use of a recording sold for use in this state. This, of course, is not the same as to permit it to be copied on tape and sold in competition with the record.

An effort to make tape "piracy" a criminal offense failed in the 1971 General Assembly. Raleigh News and Observer, June 23, 1971, at 6, col. 7.

²⁴⁰248 U.S. 215 (1918).

²⁴¹Act of Sept. 26, 1914, ch. 311, 38 Stat. 717, presently codified at 15 U.S.C. §§ 41-51 (1970).

²⁴²FTC v. Keppel & Bros., 291 U.S. 304 (1934).

methods of competition." The multitude of cases involving "unfair methods of competition" reveal beyond doubt that this phrase has a substantive reach far beyond the common law of unfair competition in North Carolina.²⁴³ Inasmuch as section 75-1.1 adopts the language "unfair methods of competition," it should follow that practices heretofore deemed unfair competition under the common law of North Carolina should now be a violation of section 75-1.1 as an unfair *method* of competition. The effect of proceeding under the statute rather than under the common law would provide for public enforcement, and a private litigant could sue for treble damages. Thus in *Liberty/UA, Inc. v. Eastern Tape Corp.*,²⁴⁴ plaintiff by bringing his case under section 75-1.1 could sue for treble damages in addition to seeking injunctive relief.²⁴⁵ Further, the Attorney General should now be authorized to investigate and to bring civil actions in the name of the state to stop practices which violate the North Carolina law of unfair competition.²⁴⁶ An injured party is permitted to utilize the fruits of the investigation conducted by the Attorney General in a suit for treble damages.²⁴⁷

A limitation imposed on the phrase "unfair methods of competition" by the federal courts will, no doubt, influence the North Carolina courts in interpreting the same provision. In *FTC v. Raladam Co.*,²⁴⁸ the United States Supreme Court decided that proof of injury to competition was a jurisdictional prerequisite to a proceeding charging "unfair methods of competition." The impact of this limitation was to foreclose the Federal Trade Commission from utilizing this provision to attack a practice engaged in by all competitors. More importantly, the Commission was barred from protecting consumers directly from unfair trade practices. As a consequence of this decision, Congress in 1938 passed the Wheeler-Lea Amendment²⁴⁹ to section five of the Federal Trade Commission Act. This amendment, now embodied in section 75-1.1 of the

²⁴³See *FTC v. Texaco Inc.*, 393 U.S. 223 (1968); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941).

²⁴⁴11 N.C. App. 20, *cert. denied*, 278 N.C. 702 (1971).

²⁴⁵In 1971 Congress amended the copyright law to provide for limited copyright of sound recordings. Pub. L. No. 92-140 (Oct. 15, 1971), *amending* 17 U.S.C. § 1 (1970).

²⁴⁶N.C. GEN. STAT. §§ 75-9, -10, -12, -14, -15 (1965), *as amended*, (Supp. 1971).

²⁴⁷*Id.* §§ 75-9, -10, -16 (Supp. 1971).

²⁴⁸283 U.S. 643 (1931).

²⁴⁹Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111, now embodied in 15 U.S.C. § 45(a)(1) (1970).

North Carolina law, gave the Federal Trade Commission jurisdiction over "unfair or deceptive acts or practices" in commerce. Inasmuch as "unfair or deceptive acts or practices" is a broader prohibition than "unfair methods of competition," judicial development in North Carolina will probably be centered on it rather than on the more limited phrase "unfair methods of competition."

C. Unfair or Deceptive Acts or Practices in the Conduct of Any Trade or Commerce

This provision²⁵⁰ is sufficiently comprehensive to include the common law of unfair competition and unfair methods of competition. Since it covers unfair trade practices, it will protect competitors as well as consumers from such practices. Thus it may prove to be the most important single provision in chapter 75.

Certain deficiencies in other sections of chapter 75 can be corrected by use of this unfair trade practice provision. For example, in *Rice v. Asheville Ice Co.*,²⁵¹ plaintiff, a retailer of ice, sued for damages under section 75-5(b)(3), alleging that defendants, wholesalers of ice, had refused to sell to him. The North Carolina Supreme Court concluded that plaintiff was not a competitor or rival in business with either of defendants and dismissed the action. Today, however, the plaintiff could sue on the theory that the defendants were engaged in an unfair trade practice, and his suit could proceed to the merits without proof that he was a competitor of the plaintiffs. Although the North Carolina Supreme Court has held that the service of transporting gasoline is a "thing of value" and hence within the definition of "goods" in section 75-5(a)(2),²⁵² it is not yet firmly established that all service industries are covered by the seven subsections of section 75-5(b). Until this doubt is resolved, a safer course to follow when dealing with a service industry is to include a charge of an unfair trade practice under section 75-1.1. Section IV, D, (2) of this article discusses the serious deficiency of the law in North Carolina in coping with concerted refusals to deal. By following the decision of the United States Supreme Court in *Fashion*

²⁵⁰N.C. GEN. STAT. § 75-1.1(a) (Supp. 1971).

²⁵¹204 N.C. 768, 169 S.E. 707 (1933). Defendants were also retailers of ice but this fact was ignored by the court.

²⁵²*Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937).

Originators' Guild of America, Inc. v. FTC,²⁵³ which interpreted section five of the Federal Trade Commission Act to outlaw concerted refusals to deal, the situation in North Carolina could be rectified by applying section 75-1.1.

Apart from providing supplementary legislation for the restraint of trade provisions of chapter 75, the major thrust of the unfair trade practices provision is to provide extensive protection to consumers. Unlike most federal regulatory legislation, including the Sherman and the Clayton Acts, section five of the Federal Trade Commission Act is limited to acts in interstate commerce and does not extend to acts affecting interstate commerce.²⁵⁴ Consequently, there is a vast area of exclusive jurisdiction for application of section 75-1.1. A Consumer Protection Division has been established in the Department of Justice.²⁵⁵ The Attorney General has stated that he 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."²⁵⁶ This body of law is too extensive to summarize.²⁵⁷ However, a few illustrative examples reveal the type of practices that the Federal Trade Commission has sought to discourage through cease and desist orders pursuant to section five of the Federal Trade Commission Act:

- (1) The use of false or misleading advertising concerning, and the misbranding of, commodities, respecting the materials or ingredients of which they are composed, their quality, purity, origin, sources, attributes, or properties, or nature of manufacture, and selling them under such names and circumstances as to deceive the public.
- (2) Various schemes to create the impression that the customer is being offered an opportunity to make purchases under unusually favorable conditions when such is not the case, such schemes including—
 - (a) Sales plans in which the seller's usual price is falsely represented as a special reduced price for a limited time or to a limited class, or false claim of special terms, equipment, or

²⁵³312 U.S. 457 (1941).

²⁵⁴*FTC v. Bunte Bros.*, 312 U.S. 349 (1941).

²⁵⁵See 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 INTRA. L. REV. 1 (1969).

²⁵⁶*Id.* at 20. See also Note, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896 (1970).

²⁵⁷See generally CCH TRADE REG. REP.; R. CALLMANN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES (3d ed. 1967, Supp. 1971)(5 vols.); S. OPPENHEIM, UNFAIR TRADE PRACTICES (2d ed. 1965, Supp. 1969).

other privileges or advantages.

(b) The use of the "free goods" or service device to create the impression that something is actually being thrown in without charge, when it is fully covered by the amount exacted in the transaction as a whole, or by services to be rendered by the recipient.

(3) Obtaining business through undertakings not carried out, and not intended to be carried out, and through deceptive, dishonest and oppressive devices calculated to entrap and coerce the customer or prospective customer.²⁵⁸

Recently, in *FTC v. Sperry-Hutchinson Co.*²⁵⁹ the Supreme Court held that the Federal Trade Commission, in measuring the standard of fairness under section five, may consider public values beyond those "enshrined in the letter or encompassed in the spirit of the antitrust laws."²⁶⁰

Although treble damages are available to victims of unfair trade practices,²⁶¹ the amount involved is often too small to result in a private suit. The civil remedies available to the Consumer Protection Division of the Department of Justice provide the most effective means to cope with unfair trade practices. In many situations the Attorney General has stopped unfair trade practices by the use of a "Voluntary Assurance of Compliance." This is a contract entered into by the Attorney General and a business operation if the business operation is considered sufficiently responsible to honor its contractual obligations. In the agreement the Attorney General agrees not to take court action to terminate a practice alleged to be unfair or deceptive, and the business operation, without admitting the commission of an unfair or deceptive act or practice, agrees to discontinue the specified activity. When necessary, a temporary restraining order or a permanent injunction may be sought.²⁶²

The enactment of section 75-1.1 and other consumer legislation, together with the active role of the Consumer Protection Division in enforcement, makes it abundantly clear that the old rule of caveat emptor is rapidly being replaced by a new admonition—caveat vendor!²⁶³

²⁵⁸1943 FTC ANN. REP. 49-56.

²⁵⁹40 U.S.L.W. 4241 (U.S. March 1, 1972).

²⁶⁰*Id.* at 4244.

²⁶¹N.C. GEN. STAT. § 75-16 (Supp. 1971).

²⁶²This description is taken from an address by North Carolina Attorney General Robert Morgan, *The States' Roles in Consumer Protection*, Conference on Consumer Legislation, New Orleans, La., Oct. 29, 1971.

²⁶³See N.C. GEN. STAT. § 75-27 (Supp. 1971) (unsolicited merchandise through the mail); *id.* ch. 25A (Retail Installment Sales Act); *id.* § 14-291.2 (pyramid and chain schemes prohibited); *id.* §§ 143-144 to -151.1 (Uniform Standards Code for Mobile Homes).

VI. CONCLUSION

Concentration of economic power in the hands of a few occurs today not through the trust arrangement but primarily through mergers of various types—horizontal, vertical, and conglomerate. The Federal Department of Justice and the Federal Trade Commission undertake to prevent mergers that violate section seven of the Clayton Act and the Sherman Act.²⁶⁴ The foregoing analysis of chapter 75 does not reveal any effort to prevent mergers under North Carolina law. As a practical matter the responsibility to prevent undue concentration of economic power must remain largely that of the federal government. On the other hand, there is need for the states to take an active role in insuring adherence to the rules of the game of competition by protecting competitors and consumers from unfair practices. Heretofore, enforcement of the North Carolina statutes dealing with restraints of trade has been meager compared to federal enforcement of similar federal statutes. Recently, however, the Attorney General of North Carolina began to take an active role in the enforcement of the new unfair trade practice provisions²⁶⁵ as well as the historical restraint of trade prohibitions set forth in chapter 75.²⁶⁶

Public enforcement of the unfair trade practice provisions in section 75-1.1 is by injunctive relief,²⁶⁷ whereas both criminal and injunctive remedies are available for enforcement of the restraint of trade provisions in sections 75-1 and 75-5 and some of the other provisions in chapter 75.²⁶⁸ Further, in 1969 the Attorney General was given broad

²⁶⁴These two agencies of the federal government filed ninety two anti-merger suits during the four year period from June 30, 1966 to June 30, 1970. ABA SECTION OF ANTITRUST LAW, MERGER CASE DIGEST vii (1971). See generally S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS ch. 8 (3d ed. 1968, Supp. 1970).

²⁶⁵For example, suit was instituted against several individuals to restrain them from using the name "Unclaimed Freight" to describe a company which apparently never sold merchandise fitting that description but used the name to lure unsuspecting customers into a place of business where "bait and switch" was a standard operating procedure. Address by North Carolina Attorney General Robert Morgan, *supra* note 260.

²⁶⁶Several defendants were charged under N.C. GEN. STAT. § 75-1 (1965) for conspiring to foreclose competition in telephone construction work and telephone installation work by fixing prices to eliminate competition and by cancelling contracts which were competitively entered into. They pleaded nolo contendere. Individual defendants were fined 1,500 dollars each and given suspended jail sentences. The corporate defendant was fined five thousand dollars. *State v. Pyramid Constr. Co.*, No. 68-190 (Buncombe County, N.C. Super. Ct. 1968).

²⁶⁷N.C. GEN. STAT. § 75-14 (Supp. 1971).

²⁶⁸The criminal provisions in chapter 75 appear in the following sections: § 75-6, § 75-7, § 75-8, § 75-19 and § 75-28. Each of these sections is set forth in the appendix.

authority to protect consumer interests before various state regulatory agencies.²⁶⁹

Private litigants may bring treble damage suits for violation of any provision in chapter 75,²⁷⁰ but injunctive relief is not available to them to enforce any of the criminal provisions of that chapter.²⁷¹ However, since section 75-1.1 is not a criminal statute, there appears to be no bar to a suit for injunction brought by a victim of an unfair trade practice proscribed by that section.

²⁶⁹N.C. GEN. STAT. § 114-2 (8)a (Supp. 1971).

²⁷⁰N.C. GEN. STAT. § 75-16 (Supp. 1971). In Union County plaintiffs were awarded treble damages under this statute in a suit in which the defendant was charged with misrepresenting the size of a lot, several essential features of a house, and the warranty that plaintiffs would receive upon the purchase of the house and lot. Address by North Carolina Attorney General Robert Morgan, *supra* note 260. The seller of an automobile was found guilty of turning back the mileage register of a used car. The buyer was awarded treble damages. Raleigh News and Observer, Apr. 8, 1972, at 7, col. 5.

²⁷¹Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R., 210 N.C. 36, 185 S.E. 479 (1936).

VII. APPENDIX: CHAPTER 75²²

§ 75-1. **Combinations in restraint of trade illegal.**—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars.

§ 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 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.

§ 75-2. **Any restraint in violation of common law included.**—Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of § 75-1.

§ 75-3: Repealed by Session Laws 1961, c. 1153.

§ 75-4. **Contracts to be in writing.**—No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the State of North Carolina, or at any point in the State of North Carolina, which contract is now illegal, or which contract is made illegal by any other section of this chapter.

§ 75-5. **Particular acts prohibited.**—(a) As used in this section:

- (1) "Person" includes any person, partnership, association or corporation;
- (2) "Goods" include goods, wares, merchandise, articles or other things of value.

(b) In addition to the other acts declared unlawful by this chapter, it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:

- (1) To agree or conspire with any other person to put down or keep down the price of any goods produced in this State by the labor of others which goods the person intends, plans or desires to buy.
- (2) To sell any goods in this State upon condition that the purchaser thereof shall not deal in the goods of a competitor or rival in the business of the person making such sales.

²²This text of chapter 75 is taken from the *North Carolina General Statutes* and the most recently published supplement thereto.

(3) To willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed.

(4) While engaged in buying or selling any goods within the State, through himself or together with or through any allied, subsidiary or dependent person, to injure or destroy or undertake to injure or destroy the business of any rival or competitor, by unreasonably raising the price of any goods bought or by unreasonably lowering the price of any goods sold with the purpose of increasing the profit on the business when such rival or competitor is driven out of business, or his business is injured.

(5) While engaged in dealing in goods within this State, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another place, when there is not good and sufficient reason on account of transportation or the expense of doing business for charging less at the one place than at the other, or to give away such goods, with a view to injuring the business of another.

(6) While engaged in buying or selling any goods in this State, to have any agreement or understanding, express or implied, with any other person not to buy or sell such goods within certain territorial limits within the State, with the intention of preventing competition in selling or to fix the price or prevent competition in buying such goods within these limits.

(7) Except as may be otherwise provided by article 10 of chapter 66, entitled "Fair Trade", while engaged in buying or selling any goods in this State to make, enter into, execute or carry out any contract, obligation or agreement of any kind by which the parties thereto or any two or more of them bind themselves not to sell or dispose of any goods or any article of trade, use or consumption, below a common standard figure, or fixed value, or establish or settle the price of such goods between them, or between themselves and others, at a fixed or graduated figure, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale of such goods.

(c) Nothing herein shall be construed to make it illegal for an agent to represent more than one principal, but this provision shall not be deemed to authorize two or more principals to employ a common agent for the purpose of suppressing competition or preventing the lowering of prices.

(d) This section does not make it illegal for a person to sell his business and good will to a competitor, and agree in writing not to enter business in competition with the purchaser in a limited territory if such agreement does not violate the principles of the common law against trusts and does not otherwise violate the provisions of this chapter.

§ 75-6. Violation a misdemeanor; punishment.—Any corporation, either as agent or principal, violating any of the provisions of § 75-5 shall be guilty of a misdemeanor, and such corporation shall upon conviction be fined not less than one thousand dollars for each and every offense, and any person, whether acting for himself or as officer of any corporation or as agent of any corporation or persons violating any of the provisions of this chapter, with the exception of [§] 75-1.1 (the violation of which does not constitute a crime), shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

§ 75-7. Persons encouraging violation guilty.—Any person, being either within or without the State, who encourages or willfully allows or permits any agent or associates in business in this State, to violate any of the provisions of this chapter, with the exception of [§] 75-1.1 (the violation of which does not constitute a crime), shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in § 75-6.

§ 75-8. Continuous violations separate offenses.—Where the things prohibited in this chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense.

§ 75-9. **Duty of Attorney General to investigate.**—The Attorney General of the State of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations or persons doing business in this State, which are or may be embraced within the meaning of the statutes of this State defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations or persons in North Carolina doing business in violation of law; and all other corporations of every character engaged in this State in the business of transporting property or passengers, or transmitting messages, and all other public service corporations of any kind or nature whatever which are doing business in the State for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the Utilities Commission or Commission of Banks is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted.

§ 75-10. **Power to compel examination.**—In performing the duty required in § 75-9, the Attorney General shall have power, at any and all times, to require the officers, agents or employees of any such corporation or business, and all other persons having knowledge with respect to the matters and affairs of such corporations or businesses, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such corporations or businesses, or which are in any way connected with the business thereof; and the Attorney General is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any justice or judge of the appellate or superior court divisions, after five days' notice of such application, for an order on any such person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge.

§ 75-11. **Person examined exempt from prosecution.**—No natural person examined, as provided in [§] 75-10, shall be subject to indictment, criminal prosecution, criminal punishment or criminal penalty by reason of or on account of anything disclosed by him upon examination, and full immunity from criminal prosecution and criminal punishment by reason of or on account of anything so disclosed is hereby extended to all natural persons so examined. The immunity herein granted shall not apply to civil actions instituted pursuant to this chapter.

§ 75-12. **Refusal to furnish information; false swearing.**—Any corporation or person unlawfully refusing or willfully neglecting to furnish the information required by this chapter, when it is demanded as herein provided, shall be guilty of a misdemeanor and fined not less than one thousand dollars: Provided, that if any corporation or person shall in writing notify the Attorney General that it objects to the time or place designated by him for the examination or inspection provided for in this chapter, it shall be his duty to apply to a justice or judge of the appellate or superior court division, who shall fix an appropriate time and place for such examination or inspection, and such corporation or person shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this chapter. False swearing by any person examined under the provisions of this chapter shall constitute perjury, and the person guilty of it shall be punishable as in other cases of perjury.

§ 75-13. **Criminal prosecution; solicitors to assist; expenses.**—The Attorney General in carrying out the provisions of this chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of the solicitors in the State, who shall, upon being required

to do so by the Attorney General, send bills of indictment and assist him in the performance of the duties of his office.

§ 75-14. Action to obtain mandatory order.—If it shall become necessary to do so, the Attorney General may prosecute civil actions in the name of the State on relation of the Attorney General to obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders, to carry out the provisions of this chapter, and the venue shall be in any county as selected by the Attorney General.

§ 75-15. Actions prosecuted by Attorney General.—It shall be the duty of the Attorney General, upon his ascertaining that the laws have been violated by any trust or public service corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the State, or any officer or department thereof, as provided by law, or in the name of the State on relation of the Attorney General, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it.

§ 75-16. Civil action by person injured; treble damages.—If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and in damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

§ 75-17. Lender may not require borrower to deal with particular insurer.—No person, firm, or corporation engaged in lending money on the security of real or personal property, and no trustee, director, officer, agent, employee, affiliate, or associate, of any such person, firm, or corporation, shall either directly or indirectly require or impose as a condition precedent.

To financing the purchase of such property,

To lending money upon the security of a mortgage, deed of trust, or other security instrument,

For the renewal or extension of any such loan, mortgage, or deed of trust

For the performance of any other act in connection therewith,

that such person, firm, or corporation,

For whom such purchase is to be financed,

To whom the money is to be loaned,

For whom such extension, renewal, or other act is to be granted,

negotiate, procure, or otherwise obtain any policy of insurance or renewal, or extension thereof, covering such property, or a security interest therein, by or through a particular insurance company, agent, broker, or other person so specified or otherwise designated in any manner by the lenders, or their agents or employees or affiliated or related companies.

§ 75-18. Lender may require nondiscriminatory approval of insurer.—Although the lender and other persons enumerated in § 75-17 may not specify or designate as a condition precedent a particular insurance company or agent, those persons, firms, or corporations engaged in lending money may approve the insurer selected by the borrower on a reasonable, nondiscriminatory basis, related to the solvency of the company and the type and provisions of policy coverage.

§ 75-19. Violators subject to fine and injunction.—The superior court, on complaint by any person that § 75-17 or 75-18 is being violated, may issue an injunction against such violation and may fine all persons, firms, corporations, and officers, directors, trustees, agents, employees, or affiliates of such up to two thousand dollars (\$2,000.00) per person for such violation. In event of a disregard of such injunction or other court order, the superior court shall hold such parties in contempt and prescribe such further penalties as the court in its discretion shall so determine.

§§ 75-20 to 75-26: Reserved for future codification purposes.

§ 75-27. Unsolicited merchandise through the mail.—Unless otherwise agreed, where unsolicited goods are delivered by mail or common carrier to a person, he has a right to refuse to accept delivery of the goods and is not bound to return such goods to the sender. If such unsolicited goods

are addressed to and intended for the recipient, they shall be deemed a gift to the recipient, who may use them or dispose of them in any manner without any obligation to the sender.

§ 75-28. Unauthorized disclosure of tax information; violation a misdemeanor.—Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for any person, firm or corporation employed or engaged to prepare, or who or which prepares or undertakes to prepare, for any other person or taxpayer any tax form, report or return, to disclose, divulge or make known in any manner or use for any purpose or in any manner other than in the preparation of such form, report or return, without the express consent of the taxpayer or person for whom the form or return is prepared, the name or address of the taxpayer or such other person, the amount of income, income tax or other taxes, or any information shown on or included in such form, report or return, or any information which may be or may have been furnished by the taxpayer or such other person to the preparer of such form, report or return or to the person, firm or corporation so employed or engaged.

Nothing in this section shall be construed to amend or modify the authority specified in [chapter 105, § 105-276(6) or any statute enacted in substitution therefor.

Nothing in this section shall be construed to prohibit the inspection of such forms, reports or returns required under Subchapter I of Chapter 105 of the General Statutes in accordance with the authority provided in [§] 105-259, or the examination of any person, books, papers, records or other data in accordance with the authority provided in [§] 105-258.

Any person, firm or corporation, or any officer, agent, clerk, employee, or former officer or employee, of any firm or corporation engaged or formerly engaged in the preparation of tax forms, reports or returns for others, whether acting for himself or as agent for such corporation, who or which shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court.