

9-1-1991

Ellis v. Northern Star Co.: Libel in a Business Setting Subject to Mandatory Treble Damages under North Carolina General Statutes Sections 75-1.1 and 75-16

Paul M. Saraceni

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Paul M. Saraceni, *Ellis v. Northern Star Co.: Libel in a Business Setting Subject to Mandatory Treble Damages under North Carolina General Statutes Sections 75-1.1 and 75-16*, 69 N.C. L. REV. 1739 (1991).

Available at: <http://scholarship.law.unc.edu/nclr/vol69/iss6/11>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

***Ellis v. Northern Star Co.*: Libel in a Business Setting Subject to Mandatory Treble Damages Under North Carolina General Statutes Sections 75-1.1 and 75-16**

In the United States, commercial activities take place in a market system in which private buyers and sellers trade money for goods and services. Federal and state governments provide structure and order to the market system through selective regulation. The realm of regulation includes prohibitions against unfair competition and trade practices. In North Carolina, General Statutes section 75-1.1¹ stands at the center of the law of unfair competition and trade practices. Section 75-1.1, enacted in 1969,² is enforceable in a private damage action brought by an aggrieved competitor or consumer; the accompanying section 75-16 provides automatic trebling of damages awarded in such an action.³ To establish a violation of section 75-1.1, a plaintiff must prove that the defendant engaged in “[u]nfair methods of competition” or “unfair or deceptive acts or practices in or affecting commerce.”⁴ The statutory language of section 75-1.1 does not delineate the scope of its protection; rather, the courts define the parameters of the statute through the process of “judicial inclusion and exclusion.”⁵

In *Ellis v. Northern Star Co.*⁶ the North Carolina Supreme Court broadened the realm of protection provided by section 75-1.1 by holding that libel per se in a business setting constitutes an unfair or deceptive practice in or affecting commerce in violation of the section.⁷ The significance of this holding stems from the automatic treble damages that accompany a violation of section 75-1.1,⁸ whereas the common-law remedy for libel per se consists merely of actual and punitive damages.⁹ This extension of the protective shield of section 75-1.1 oc-

1. N.C. GEN. STAT. § 75-1.1 (1988). Section 75-1.1 provides, in pertinent part, that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” *Id.* § 75-1.1(a). For a thorough discussion of § 75-1.1, see Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C.L. REV. 205, 210-23 (1982).

2. Act of June 12, 1969, ch. 833, 1969 N.C. Sess. Laws 930 (codified as amended at N.C. GEN. STAT. § 75-1.1 (1988)).

3. N.C. GEN. STAT. § 75-16 (1988). Section 75-16 provides:

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 if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

Id.

4. *Id.* § 75-1.1(a). For the text of section 75-1.1(a), see *supra* note 1.

5. Federal Trade Comm’n v. Raladam Co., 283 U.S. 643, 648 (1931); see *infra* text accompanying note 58.

6. 326 N.C. 219, 388 S.E.2d 127 (1990).

7. *Id.* at 225, 388 S.E.2d at 131. For the North Carolina common-law definition of libel per se, see *infra* text accompanying notes 47-48.

8. See *supra* note 3 and accompanying text.

9. *Ellis*, 326 N.C. at 227, 388 S.E.2d at 132.

curred with minimal justification by the court,¹⁰ and despite a strong dissent that the communication in question was not even a libel *per se*.¹¹

This Note analyzes the *Ellis* decision's broadening of section 75-1.1 in light of prior case law concerning libel *per se* in a business context and unfair trade practices. The analysis includes a comparison of the North Carolina unfair trade practices scheme with that used in several major jurisdictions. This Note concludes that the expansion of section 75-1.1 in *Ellis* was not well supported, and was a step towards over-restriction of commercial transactions.

Ellis Brokerage Company, Inc. (Ellis Brokerage) was a North Carolina food broker that served as a middleman between large-quantity food buyers, such as hospitals and school systems, and food producers.¹² The defendant, Northern Star Company (Northern Star), was a potato processor based in Minnesota and a client of Ellis Brokerage since 1981.¹³ Between 1981 and 1986 Ellis Brokerage increased Northern Star's annual sales in eastern North Carolina from zero to approximately \$640,000.¹⁴

On June 20, 1986, Earl Ellis, the only full-time employee of Ellis Brokerage, received Northern Star potato pricing information over the telephone from Thomas Kenney, Northern Star's senior vice president for sales.¹⁵ On June 23 Ellis sent price lists based on the information to several potential buyers.¹⁶ By a letter dated August 29, 1986, Kenney notified Ellis that Northern Star was terminating its brokerage arrangement with Ellis Brokerage.¹⁷ Finally, on September 5 Kenney sent a letter to several of the buyers who received the June 23 price list from Ellis Brokerage.¹⁸ The letter contained the following language:

We have recently received copies of a price list sent to you from Ellis Brokerage Company regarding pricing on Northern Star potato products. These prices were noted for *bids only*, delivered by Northern Star.

We at Northern Star Company did not authorize such a price list and therefore cannot honor the prices as quoted on June 23, 1986.¹⁹

On the basis of this letter, Earl Ellis and Ellis Brokerage sued Northern Star and Thomas Kenney individually.²⁰

The plaintiffs' original action asserted that the letter of September 5, 1986, was "libelous *per se* and an unfair or deceptive act affecting commerce" in viola-

10. *Id.* at 225-26, 388 S.E.2d at 131.

11. *Id.* at 228-31, 388 S.E.2d at 132-34 (Meyer, J., dissenting).

12. *Id.* at 221, 388 S.E.2d at 128.

13. *Id.* at 221, 388 S.E.2d at 128-29.

14. *Id.* at 221-22, 388 S.E.2d at 129. Ellis Brokerage received a 3% commission for orders brokered on behalf of Northern Star. Defendant-Appellants' Brief at 4, *Ellis* (No. 192PA89). Commissions from Northern Star constituted "at least 80% of [the] commissions" of Ellis Brokerage. *Id.*

15. *Ellis*, 326 N.C. at 221-22, 388 S.E.2d at 128-29.

16. *Id.* at 222, 388 S.E.2d at 129.

17. *Id.*; Plaintiffs' Exhibit 2, *Ellis* (No. 192PA89).

18. *Ellis*, 326 N.C. at 222, 388 S.E.2d at 129.

19. *Id.*; Plaintiffs' Exhibit 14, *Ellis* (No. 192PA89).

20. *Ellis*, 326 N.C. at 222, 388 S.E.2d at 129.

tion of section 75-1.1.²¹ The plaintiffs amended their complaint to include allegations of "breach of a covenant of good faith, breach of contract through unreasonable termination, tortious interference with business relations, and unjust enrichment The defendants counterclaimed for breach of fiduciary duty and breach of contract."²² Earl Ellis's testimony at trial included a discussion he had with a customer of Ellis Brokerage who received the Northern Star letter, stating that the customer "was going to look for other sources to get his potatoes because he didn't know whether he could trust me or Northern Star."²³ The jury found that the defendants had libeled Ellis Brokerage and awarded \$32,500 in compensatory damages and \$12,500 in punitive damages.²⁴ The trial court, however, granted the defendants' motions for directed verdicts on all other claims, including the defendants' alleged violation of section 75-1.1.²⁵

Both plaintiffs and defendants appealed the decision of the trial court and the North Carolina Supreme Court considered two issues: whether the Northern Star letter of September 5, 1986, was libelous *per se*, as found by the jury, and whether libel *per se* of a plaintiff relating to its business "constitutes an unfair or deceptive act affecting commerce in violation of" section 75-1.1.²⁶ The supreme court affirmed the trial court's finding that the letter was libelous *per se*, rejecting the defendants' argument that the letter was "not defamatory at all or, alternatively . . . susceptible of both defamatory and nondefamatory interpretations."²⁷ Justice Mitchell, writing for the court, stated that "[w]hether a publication is one of the type that properly may be deemed libelous *per se* is a question of law to be decided initially by the trial court," and he asserted that the trial court properly decided that issue.²⁸ After that step, the jury must decide if the publication was actually libelous *per se*, and the supreme court agreed with the jury's affirmative resolution of that issue in this case.²⁹ The court, however, was not unanimous on the issue of libel *per se*. In a dissenting opinion, Justice Meyer, joined by Justice Whichard, stated that the "defendant's letter was clearly *not* defamatory *per se*, and the issue should *not* have been submitted to the jury."³⁰

The court then considered an issue of first impression: whether libel *per se* in a business setting is an unfair or deceptive trade practice in violation of section 75-1.1.³¹ In holding that libel *per se* of this type is within the realm of section 75-1.1, the court analogized libel *per se* in a business setting to false

21. *Id.*

22. *Id.* The parties settled the breach of contract claim and counterclaim prior to trial. *Id.*

23. *Id.* at 224, 388 S.E.2d at 130.

24. *Id.* at 222, 227, 388 S.E.2d at 129, 132. The jury found that "the defendants had not libeled the individual plaintiff Earl Ellis." *Id.* at 222, 388 S.E.2d at 129.

25. *Id.* at 222, 388 S.E.2d at 129.

26. *Id.* at 221, 388 S.E.2d at 128.

27. *Id.* at 224, 388 S.E.2d at 130. For "words to be libelous *per se* [they] must be susceptible of but one meaning." *Flake v. Greensboro News Co.*, 212 N.C. 780, 786, 195 S.E. 55, 60 (1938).

28. *Ellis*, 326 N.C. at 224, 388 S.E.2d at 130; *see Flake*, 212 N.C. at 785, 195 S.E. at 59.

29. *Ellis*, 326 N.C. at 224-25, 388 S.E.2d at 130-31.

30. *Id.* at 230, 388 S.E.2d at 134 (Meyer, J., dissenting).

31. *Id.* at 225-26, 388 S.E.2d at 131.

advertising and fraud, both of which the court previously had found to violate the statute.³² Because libel per se in a business setting did not fall within the category of "transactions already subject to pervasive and intricate statutory regulation,"³³ the court summarily deemed it to be an act in violation of section 75-1.1, justifying an award of treble damages under section 75-16.³⁴ The court applied this decision to the facts at hand and decided that the trial court erred in granting the defendants' motion for directed verdicts on the unfair trade practice claim.³⁵ Because the defendants' act violated section 75-1.1, and since the jury found that Ellis Brokerage suffered actual damages to its business reputation caused by the libel, the court directed the jury on remand to award Ellis Brokerage a choice of damages: \$32,500 in actual damages automatically trebled to a sum of \$97,500 under section 75-16, or the previously calculated libel award of \$45,000.³⁶

As a backdrop to analysis of the *Ellis* decision, North Carolina law covering trade libel, defamation, and unfair trade practices will be discussed. The doctrine of trade libel, or disparagement, provides a common-law cause of action for injured plaintiffs engaged in business in North Carolina, as well as a number of other jurisdictions.³⁷ One definition of the cause of action is as follows:

[D]isparagement . . . may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, or even to some element of his personal affairs, of a kind calculated to prevent others from dealing with him, or otherwise to interfere with his relations with others to his disadvantage.³⁸

The development of the trade libel cause of action in North Carolina reached its peak in the 1942 case of *Carolina Aniline & Extract Co. v. Ray*.³⁹ In *Carolina Aniline*, the plaintiff sold almost its entire production operation to the defendant, then purchased new equipment and continued its business at another location.⁴⁰ The defendant wrote the plaintiff's customers letters that explained the purchase, stated that it would "manufacture identically the same products under [its] own trade names," and directly compared its lower prices with those of the plaintiff.⁴¹ The plaintiff alleged that the letters were "false, deceptive and

32. *Id.* at 225, 388 S.E.2d at 131; see *infra* notes 98-106 and accompanying text.

33. *Ellis*, 326 N.C. at 225, 388 S.E.2d at 131. The court previously applied this limitation to securities transactions in *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985); see *infra* notes 74-76 and accompanying text.

34. *Ellis*, 326 N.C. at 226, 388 S.E.2d at 131.

35. *Id.*

36. *Id.* at 227-28, 388 S.E.2d at 132; see *supra* note 24 and accompanying text. Plaintiffs may elect to recover either punitive damages under a common-law claim or treble damages under § 75-16, but not both. See *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981).

37. See *infra* notes 121-24 and accompanying text. Other names for the tort of trade libel include "injurious falsehood," "commercial disparagement," "disparagement of property," and "slander of goods." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 128, at 962-63 (5th ed. 1984) [hereinafter LAW OF TORTS].

38. LAW OF TORTS, *supra* note 37, § 128, at 967.

39. 221 N.C. 269, 20 S.E.2d 59 (1942).

40. *Id.* at 270, 20 S.E.2d at 60.

41. *Id.* at 270-71, 20 S.E.2d at 60.

intended to deceive and did deceive plaintiff's customers."⁴² In reversing the trial court's grant of nonsuit for the defendant, the court expressed the rationale that unfair competition occurs whenever "the public is likely to be deceived."⁴³ The court clarified very little about the trade libel cause of action, however, and did not even label the action by any of the traditional phrases such as "trade libel", "disparagement", or "injurious falsehood".⁴⁴ Since *Carolina Aniline*, the cause of action for disparagement has not developed and injured plaintiffs in similar circumstances instead have pursued a cause of action for defamation.⁴⁵

Defamation is that which tends "to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."⁴⁶ North Carolina courts recognize three categories of defamatory material:

- (1) Publications which are obviously defamatory and which are termed libels per se;
- (2) publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not;
- and (3) publications which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances.⁴⁷

Furthermore,

a publication is libelous per se, or actionable *per se*, if, when considered alone without innuendo: (1) It charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt, or disgrace; or (4) it tends to impeach one in his trade or profession.⁴⁸

The courts have interpreted the fourth category of libel per se, applied in *Ellis*, in a number of cases. In *Badame v. Lampke*,⁴⁹ the plaintiff alleged that the defendant, a direct competitor, spoke words over the telephone to a customer that implied that the plaintiff engaged in "shady deals," and thereby impaired the plaintiff's business reputation.⁵⁰ Holding that the words spoken by the defendant were actionable per se for "charg[ing] the plaintiff with a dishonorable

42. *Id.* at 270, 20 S.E.2d at 60.

43. *Id.* at 272, 20 S.E.2d at 61 (quoting 63 C.J. *Trade-Marks, Trade-Names, and Unfair Competition* § 112, at 415 (1933)).

44. One point of clarification made by the court was the following:

[I]n order to escape liability for unfair competition, statements made for the purpose of inducing a competitor's customers to purchase the advertiser's products by making the express statement that his products possess all the qualities of the products of another . . . must be true, or the injured party will be entitled to relief.

Id.

45. See Comment, *Unfair Competition—Law of Unfair Competition in North Carolina*, 46 N.C.L. REV. 856, 877-78 (1968). For a discussion of *Carolina Aniline* and the status of the disparagement cause of action in North Carolina, see *id.* at 874-78.

46. LAW OF TORTS, *supra* note 37, § 111, at 773.

47. *Flake v. Greensboro News Co.*, 212 N.C. 780, 785, 195 S.E. 55, 59 (1938).

48. *Id.* at 787, 195 S.E. at 60.

49. 242 N.C. 755, 89 S.E.2d 466 (1955).

50. *Id.* at 755-56, 89 S.E.2d at 467.

course of business conduct,"⁵¹ the supreme court noted that the words "must contain an imputation necessarily hurtful in its effect on [the plaintiff's] business."⁵² More recently, in *Matthews, Cremins, McLean, Inc. v. Nichter*,⁵³ the court of appeals held that letters sent by defendant media buying service to television stations, which asserted that the plaintiff advertising agency breached its contract and failed to pay its bills, were libelous per se.⁵⁴ The court's rationale was that the communication of such assertions to third parties "clearly tend[ed] to disparage plaintiff's integrity in its business dealings."⁵⁵

While the trade libel and defamation causes of action exist within the common law of North Carolina, the law of unfair trade practices flourishes within the confines of North Carolina General Statutes section 75-1.1. In 1977 the general assembly amended the original language of section 75-1.1⁵⁶ in order to conform to the exact wording of its federal counterpart, section 5 of the Federal Trade Commission Act.⁵⁷ Rather than enumerate a list of specific illegal acts, practices, and methods of competition, the general assembly chose to follow Congress's definition in "adopt[ing] a phrase which . . . does not 'admit of precise definition, but the meaning and application of which must be arrived at by what [the Supreme Court] elsewhere has called 'the gradual process of judicial inclusion and exclusion.' " "⁵⁸

The North Carolina Supreme Court examined section 75-1.1 for the first time in *Hardy v. Toler*.⁵⁹ In that case, the plaintiff alleged that the defendant automobile dealer made false representations concerning the condition of a car at the time of purchase.⁶⁰ In holding that as a matter of law the false representations made by defendant to plaintiff violated section 75-1.1,⁶¹ the court noted that "[s]ome guidance may be obtained by reference to federal decisions on appeals from the Federal Trade Commission since the language of [section] 75-1.1 closely parallels that of the Federal Trade Commission Act."⁶² The court also

51. *Id.* at 757, 89 S.E.2d at 468.

52. *Id.*

53. 42 N.C. App. 184, 256 S.E.2d 261, *disc. rev. denied*, 298 N.C. 569, 261 S.E.2d 123 (1979).

54. *Id.* at 188, 256 S.E.2d at 264.

55. *Id.* For other North Carolina cases dealing with the business impeachment category of libel per se, see, e.g., *Lay v. Gazette Publishing Co.*, 209 N.C. 134, 183 S.E. 416 (1936) (libel per se found when a newspaper incorrectly published that the plaintiff was the leader of a strike and had been arrested for trespassing); *Broadway v. Cope*, 208 N.C. 85, 179 S.E. 452 (1935) (statement by butcher that his competitor had slaughtered a cow bitten by a mad dog was defamatory per se); *U v. Duke Univ.*, 91 N.C. App. 171, 371 S.E.2d 701 (statements by defendant to plaintiff's colleague that plaintiff was a liar, deceitful, absolutely useless, and a fraud impeached plaintiff in his profession and were slanderous per se), *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 590 (1988); *Talbert v. Mauney*, 80 N.C. App. 477, 343 S.E.2d 5 (1986) (allegations that president of bank published statements imputing that plaintiff forged his letters of credit and was a drug dealer alleged slander per se).

56. Act of June 27, 1977, ch. 747, §§ 1-2, 1977 N.C. Sess. Laws 984 (codified as amended at N.C. GEN. STAT. § 75-1.1 (1988)). For the amended text of § 75-1.1(a), see *supra* note 1.

57. 15 U.S.C. § 45(a)(1) (1988).

58. *Federal Trade Comm'n v. R.F. Keppel & Bros.*, 291 U.S. 304, 312 (1934) (quoting *Federal Trade Comm'n v. Raladam Co.*, 283 U.S. 643, 648 (1931)).

59. 288 N.C. 303, 218 S.E.2d 342 (1975).

60. *Id.* at 304, 218 S.E.2d at 343.

61. *Id.* at 311, 218 S.E.2d at 347.

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

established the bifurcated process used in cases under section 75-1.1, whereby "the jury . . . determine[s] the facts, and based on the jury's finding, the court . . . determine[s] as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce."⁶³

In *Johnson v. Phoenix Mutual Life Insurance Co.*,⁶⁴ plaintiff real estate developers alleged that the defendant mortgage broker and mortgagor "entered into a deliberate course of conduct which was designed to force [the plaintiff] into an untenable economic position so that it would be unable to complete" the development of a shopping center.⁶⁵ The court provided some guidance on the scope of section 75-1.1 by stating that "[w]hat is an unfair or deceptive trade practice usually depends upon the facts of each case and the impact the practice has in the marketplace."⁶⁶ Furthermore, a practice is unfair when it "offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers,"⁶⁷ or when it "amounts to an inequitable assertion of [a party's] power or position."⁶⁸ The court applied these guidelines to the defendants' conduct and concluded that it was not unfair or deceptive.⁶⁹

The court made two significant points in *Marshall v. Miller*,⁷⁰ an action by a consumer for misrepresentation. First, the court held that the intent or good faith belief of a party is irrelevant to the determination of the unfairness or deceptiveness of a particular act.⁷¹ Second, the court justified automatic treble damages. While discussing section 75-16 and treble damages, the court concluded that "[a]bsent statutory language making trebling discretionary with the trial judge . . . the Legislature intended trebling of any damages assessed to be automatic once a violation [of section 75-1.1] is shown."⁷² The rationale offered for the automatic trebling scheme under section 75-16 was that "it makes more economically feasible the bringing of an action where the possible money damages are limited, and thus encourages private enforcement" and "it increases the incentive for reaching a settlement."⁷³

The court limited the application of section 75-1.1 in *Skinner v. E.F. Hutton & Co.*,⁷⁴ when it held that because securities transactions "were already subject

63. *Id.* at 310, 218 S.E.2d at 346-47.

64. 300 N.C. 247, 266 S.E.2d 610 (1980).

65. *Id.* at 251, 266 S.E.2d at 614. The defendants' course of conduct included the tendering of a mortgage for the shopping center, which was conditioned on the plaintiffs' ability to secure an interim construction loan as well as particular lease commitments. *Id.* at 250, 266 S.E.2d at 613. When the plaintiffs failed to obtain the construction loan or a lease commitment from a bank, the defendant mortgagor terminated the mortgage. *Id.* at 251, 266 S.E.2d at 614.

66. *Id.* at 262-63, 266 S.E.2d at 621.

67. *Id.* at 263, 266 S.E.2d at 621. The court also noted that "[t]he concept of 'unfairness' is broader than and includes the concept of 'deception.'" *Id.*

68. *Id.* at 264, 266 S.E.2d at 622.

69. *Id.* at 266, 266 S.E.2d at 623.

70. 302 N.C. 539, 276 S.E.2d 397 (1981).

71. *Id.* at 548-49, 276 S.E.2d at 403.

72. *Id.* at 547, 276 S.E.2d at 402.

73. *Id.* at 549, 276 S.E.2d at 403-04.

74. 314 N.C. 267, 333 S.E.2d 236 (1985).

to pervasive and intricate regulation under the North Carolina Securities Act, as well as the Securities Act of 1933, and the Securities Exchange Act of 1934,' " they were beyond the scope of the statute.⁷⁵ The judicial exclusion of transactions subject to statutory regulation apart from section 75-1.1 reflected the court's concern for over-penalizing a party already subject to sanctions.⁷⁶

The court attempted to interpret "commerce," as used in section 75-1.1(b), in *Olivetti Corp. v. Ames Business Systems, Inc.*⁷⁷ For legislative intent, the court looked to the original version of section 75-1.1(b), which applied to "dealings between persons engaged in business, and between persons engaged in business and the consuming public."⁷⁸ The court noted that "individual consumers are not the only ones protected" by the language of the statute,⁷⁹ but found that "section [75-1.1(b)] is not broad enough . . . to encompass 'all forms of business activities.' "⁸⁰

The development of North Carolina law on libel and unfair trade practices converged in the *Ellis* decision. The first question answered by the court in *Ellis* concerned the libelous nature of the letter mailed by defendant Northern Star.⁸¹ Arguably, plaintiff Ellis Brokerage could have brought a common-law action for trade libel or disparagement. After all, the plaintiff's libel per se claim, which was premised on injury to its business relationships with customers allegedly caused by Northern Star's letter, appears to fit within the definition of disparagement.⁸² The failure of the plaintiff to raise this cause of action in an appropriate fact scenario testifies to the lifeless state of the disparagement cause of action in North Carolina,⁸³ despite its viability in other jurisdictions.⁸⁴

75. *Id.* at 275, 333 S.E.2d at 241 (quoting *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 167 (4th Cir. 1985) (citations omitted)); see also *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 420-21, 248 S.E.2d 567, 570 (1978) (commodities transactions not within the scope of § 75-1.1 due to the existence of a federal scheme of regulation), *disc. rev. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979).

76. *Skinner*, 314 N.C. at 274, 333 S.E.2d at 241 ("[A]pplication of the statute . . . would expose a party violating the statute to a host of legislatively created sanctions in addition to those sought in the private action.").

77. 81 N.C. App. 1, 22-23, 344 S.E.2d 82, 94-95 (1986), *aff'd in part and rev'd in part on other grounds*, 319 N.C. 534, 356 S.E.2d 578 (1987). Section 75-1.1(b) provides: "For purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. GEN. STAT. § 75-1.1(b) (1988).

78. N.C. GEN. STAT. § 75-1.1(b) (1969). The original version of § 75-1.1(b) provided:

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.

Id.

79. *Olivetti*, 81 N.C. App. at 23, 344 S.E.2d at 95.

80. *Id.* at 22, 344 S.E.2d at 94 (quoting *Threatt v. Hiers*, 76 N.C. App. 521, 523, 333 S.E.2d 772, 773 (1985), *disc. rev. denied*, 315 N.C. 397, 338 S.E.2d 887 (1986)).

81. See *supra* text accompanying notes 27-30.

82. See *supra* text accompanying note 38.

83. See *supra* note 45 and accompanying text; see also UNITED STATES TRADEMARK ASSOCIATION, STATE TRADEMARK AND UNFAIR COMPETITION LAW NC-14 (1991) [hereinafter UNFAIR COMPETITION] ("There are no reported decisions on [the] subject [of trade disparagement or trade libel] by North Carolina courts.").

84. See *infra* text accompanying note 124.

In the absence of a body of common law on disparagement on which to rely, Ellis Brokerage brought a successful action for libel per se. The supreme court provided the following explanation for its affirmation of the trial court's finding of libel per se:

The language "[w]e at Northern Star did not authorize such a price list," taken in the context of the entire letter, can only be read to mean that Ellis Brokerage Company, acting in its capacity as broker for Northern Star, did an unauthorized act. Whether that act was publishing certain unauthorized prices within a price list or publishing the entire price list itself without authorization is of no import; either reading is defamatory and impeaches Ellis Brokerage in its trade as a food broker.⁸⁵

It is not entirely clear why this language is defamatory and impeaching. As pointed out by Justice Meyer in his dissenting opinion, the language in question, "when read by a typical recipient of [the] letter, could very reasonably be interpreted to mean that there was a simple breakdown in communications or an inadvertent mistake in the price list through the fault of either or both parties."⁸⁶ If the accusation that a food broker acted without authority connotes a lack of scrupulous business practices or integrity in the eyes of its customers, and the customers have come to expect those qualities from the broker, the case for libel per se is clear. If the defendant communicated an accusation of repeated mistakes in price listings or habitual unauthorized listings on the part of the plaintiff, there is also a sound basis for a libel per se claim.⁸⁷

In this case, however, Northern Star's letter "does not rise to the level of accusing [Ellis Brokerage] of incompetence or untrustworthiness, nor would a typical buyer automatically reach that conclusion."⁸⁸ Whereas the findings of libel per se in *Badame*, *Matthews*, and other North Carolina cases dealing with defamation in a business context⁸⁹ were based on language "contain[ing] an imputation which [was] necessarily harmful in its effect on plaintiffs' business,"⁹⁰ Justice Meyer presented a strong argument that the court's finding in *Ellis* did not rest on so solid a foundation.⁹¹ Conversely, Justice Mitchell, writing for the majority, provided scant justification for the holding, thereby accepting a minimal standard for finding libel per se in a business setting. While this part of the court's holding is of only secondary importance, it is noteworthy for the shadow that it casts over business communications.

The substance of *Ellis* lies in the supreme court's treatment of the question of first impression whether libel per se is an unfair or deceptive trade practice in violation of section 75-1.1. The court emphasized that the existence of "perva-

85. *Ellis*, 326 N.C. at 224, 388 S.E.2d at 130.

86. *Id.* at 229, 388 S.E.2d at 133 (Meyer, J., dissenting).

87. *Id.* (Meyer, J., dissenting).

88. *Id.* (Meyer, J., dissenting).

89. See *supra* notes 49-55 and accompanying text.

90. *Ellis*, 326 N.C. at 229, 388 S.E.2d at 133 (Meyer, J., dissenting).

91. *Id.* (Meyer, J., dissenting) ("[O]ur courts have tended to recognize more blatantly derogatory statements than the one at issue here as defamatory *per se* in the business context."); see *supra* note 55.

sive and intricate statutory regulation" for a particular type of transaction would provide an exception to the protective shield of section 75-1.1, but that no such limitation applied to libel per se of a type impeaching a party in its business.⁹² While the court did not explain the exception, the probable rationale is that an injured plaintiff would have a sufficient avenue of recourse under the specifically tailored statutory regulation and would not need the protections of section 75-1.1.⁹³ Although libel per se is not addressed by statute in North Carolina, it is the subject of a well-developed common-law cause of action.⁹⁴ As in *Ellis*, a plaintiff who can show that an injury was proximately caused by a libelous statement likely will receive compensatory and punitive damages.⁹⁵ Common law, in this instance, thus provides as effective and sufficient a remedy for the injured party as statutory regulation provides in the securities arena.⁹⁶ A party suing for libel has the option of selecting higher damages under section 75-1.1 and the accompanying section 75-16, while a plaintiff injured under a statutorily regulated transaction is limited to actual and compensatory damages.⁹⁷ The common-law protection from libel is pervasive, like that of a statutory scheme, and logically the court should exclude libel per se from protection under section 75-1.1.

As further justification for the categorization of libel per se in a business setting as an unfair or deceptive trade practice in violation of section 75-1.1, the *Ellis* court pointed out that both false advertising and fraud had been found to violate the statute.⁹⁸ The court cited a fraud case, *Hardy v. Toler*,⁹⁹ in which a plaintiff consumer recovered under sections 75-1.1 and 75-16 for misrepresentations made by the defendant automobile dealer at the time of purchase of a car.¹⁰⁰ The court also cited a false advertising case, *Winston Realty Co. v. G.H.G., Inc.*,¹⁰¹ in which the plaintiff corporation hired the defendant personnel agency for the purpose of filling a bookkeeping position.¹⁰² The plaintiff filled the position with someone who ultimately embezzled \$24,000 and committed

92. *Ellis*, 326 N.C. at 225, 388 S.E.2d at 131.

93. Additionally, it would be inequitable to penalize a defendant already subject to statutory sanctions. The court employed such reasoning in cases involving securities and commodities transactions. See *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 274, 333 S.E.2d 236, 241 (1985) (securities transactions); *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 420-21, 248 S.E.2d 567, 570 (1978) (commodities transactions), *disc. rev. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979).

94. See *supra* text accompanying notes 47-48.

95. *Ellis*, 326 N.C. at 225, 388 S.E.2d at 130-31.

96. This result occurs notwithstanding the legislative intent behind the enactment of § 75-1.1, which noted that "common law remedies had proved often ineffective." See, e.g., *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981).

97. See *supra* note 75 and accompanying text.

98. *Ellis*, 326 N.C. at 225, 388 S.E.2d at 131.

99. 288 N.C. 303, 218 S.E.2d 342 (1975); see *supra* text accompanying notes 59-63.

100. *Hardy*, 288 N.C. at 311, 218 S.E.2d at 347. The misrepresentations included the following: The automobile had 79,000 miles on it instead of the 21,000 registered on the odometer; the vehicle had been sold twice before, but was represented as having only one previous owner; and the purchaser was not told that the automobile had been damaged in a collision. *Id.* at 304, 218 S.E.2d at 343.

101. 314 N.C. 90, 331 S.E.2d 677 (1985).

102. *Id.* at 92, 331 S.E.2d at 678.

other financial improprieties.¹⁰³ The defendant advertised that it "pre-screened" job applicants, but failed to conduct a reference check or background investigation with regard to any criminal activity by the job applicant.¹⁰⁴ The court held that the plaintiff could recover for the defendant's false advertising under section 75-1.1.¹⁰⁵ In both *Hardy* and *Winston Realty*, the injured plaintiff was a consumer of the defendant's goods or services. This is a significant distinction from *Ellis*, in which plaintiff Ellis Brokerage was not a consumer of defendant Northern Star's products, but rather a conduit for its products. In the cited cases the plaintiffs' direct reliance on the acts of the defendants necessitated the broad protections of section 75-1.1 to provide the plaintiffs with recourse. Conversely, in *Ellis* the alleged libel did not cause Ellis Brokerage to rely on Northern Star, and Ellis did have an available common-law remedy. The court did not address these differences and failed to explain its reliance on the cited examples in reaching its conclusion.¹⁰⁶ The court's silence calls into question the soundness of its holding.

Another concern prompted by the court's inclusion of libel per se in a business context within section 75-1.1 is the danger that communications found to be libelous may vary widely as to the degree of harm and injury they cause. Justice Meyer reflected this concern by pointing out that the language found to be libelous in *Ellis* was much less derogatory than statements the North Carolina courts traditionally have found to be libelous in a business context.¹⁰⁷ Viewing the libel in *Ellis* as occurring near the low end of the libel spectrum, in terms of degree of imputed harm, the supreme court has paved the way for lower courts to treat many business communications that, prior to *Ellis*, flowed with impunity, as unfair acts under section 75-1.1. Communications between persons engaged in business are undoubtedly activities within the realm of "commerce" and thereby trigger analysis under section 75-1.1.¹⁰⁸ The court's prior interpretation of unfair acts in *Johnson* as those that are "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers,"¹⁰⁹ however, provides little in the way of limitations. With the exception of "substantially injurious to consumers," each of the delineated characteristics is subjective, thereby providing minimal guidance. In the case of libel per se, an extremely defamatory statement in a business context very well could fall under one or more of those labels and have a devastating effect on a plaintiff. Such a strong libel, however, certainly would be actionable for under a libel suit, which would obviate the need for the protection of section 75-1.1. *Ellis* does not present such a strong case and it is very difficult to label the *Ellis* language, "[w]e at Northern

103. *Id.* at 93, 331 S.E.2d at 679.

104. *Id.*

105. *Id.* at 97, 331 S.E.2d at 681.

106. The court's entire commentary was: "We have concluded, for example, that both false advertising and fraud violate [§ 75-1.1]. . . . [L]ike fraud and false advertising, a libel *per se* of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of [§] 75-1.1." *Ellis*, 326 N.C. at 225-26, 388 S.E.2d at 131.

107. *See supra* note 91.

108. *See supra* notes 77-80 and accompanying text.

109. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980).

Star did not authorize such a price list," as satisfying the *Johnson* interpretation.¹¹⁰ The court failed to apply the useful test of "the impact the practice has in the marketplace,"¹¹¹ which appears to be minimal in the case of libel, due to the infrequency of the transgression. Thus, the *Ellis* holding expands the applicability of section 75-1.1, but provides no analytical framework to guide the lower courts in determining what constitutes a violation of the statute.¹¹²

The holding that libel per se in a business context violates section 75-1.1 is not significant simply because it classifies libel as an unfair or deceptive trade practice. Rather, it is the attachment of automatic treble damages provided by section 75-16 that provides the real bite.¹¹³ If the court finds a violation of section 75-1.1, it must treble the compensatory damages established by the jury.¹¹⁴ The legislative intent behind section 75-16 included a desire to increase the economic feasibility of "bringing . . . an action where the possible money damages are limited, and thus encourage[] private enforcement."¹¹⁵ In a libel case such as *Ellis*, monetary damages would be "limited" to compensatory and punitive damages—a sufficient common-law remedy. Providing the plaintiff with the choice between a common-law remedy and automatically trebled actual damages under section 75-16¹¹⁶ exceeds the legislative intent. The automatic trebling does not take into account the nature of the particular transaction; in *Ellis* for example, the existence of libel was strongly questioned.¹¹⁷ Judicial determination of libel is too uncertain a process to subject to automatic treble damages; the imposition of such damages could inequitably penalize a defendant.

A brief survey illustrates where the North Carolina unfair or deceptive trade practices act stands in relation to the schemes of other states.¹¹⁸ The statutes of thirty-two states proscribe unfair or deceptive acts or practices.¹¹⁹ Thirty-four states list certain acts or practices as unlawful; North Carolina does not.¹²⁰ Statutory lists serve the important function of providing predictability as to potential liability for unfair trade practices. North Carolina is one of twenty

110. *Ellis*, 326 N.C. at 222, 388 S.E.2d at 129; see *Johnson*, 300 N.C. at 263, 266 S.E.2d at 621.

111. *Johnson*, 300 N.C. at 263, 266 S.E.2d at 621.

112. For a list of the types of activities to which § 75-1.1 has been applied, see Note, Olivetti Corp. v. Ames Business Systems, Inc.: *Recovery of Lost Profits for a Violation of North Carolina General Statutes Section 75-1.1*, 65 N.C.L. REV. 1169, 1178-79 (1987).

113. For the text of § 75-16, see *supra* note 3.

114. See *Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981); N.C. GEN. STAT. § 75-16 (1988).

115. *Marshall*, 302 N.C. at 549, 276 S.E.2d at 403-04.

116. A plaintiff may elect either a common-law remedy including punitive damages or trebled actual damages under § 75-16, but not both. See *supra* note 36 and accompanying text. For an examination of the availability of punitive or treble damages, see Note, *Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Are Both Treble and Punitive Damages Available for Violations of Section 75-1.1?*, 62 N.C.L. REV. 1139 (1984).

117. *Ellis*, 326 N.C. at 228-31, 388 S.E.2d at 132-34 (Meyer, J., dissenting); see *supra* notes 86-91 and accompanying text.

118. For purposes of this summary, the District of Columbia is treated as a state.

119. See Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 531, 560-64 app. (1980).

120. See *id.* Some of the state statutes that list unlawful practices also include a catch-all phrase designed to include nonlisted practices. *Id.* at 531.

states that make available double or treble plaintiff's actual damages in private actions for injuries resulting from unfair or deceptive trade practices.¹²¹ Among the states that provide treble damages, only five, including North Carolina, provide mandatory treble damages.¹²² Eighteen states have statutory provisions specifically prohibiting disparagement or trade libel,¹²³ while fourteen states recognize a common-law disparagement cause of action.¹²⁴ In ten states, including North Carolina, a common-law libel cause of action allows plaintiffs to recover for disparagement-type injuries, while in several other states, libel statutes provide for recovery.¹²⁵ Overall, North Carolina's unfair or deceptive trade practices act, with its automatic treble damages and lack of statutory list, is broader and more generous than the parallel acts of many other states; its common-law remedy for disparagement or trade libel is on par with about half of the states.

Finally, application of the disparagement and unfair trade practice schemes of three leading commercial states—California, New York, and Texas—to the facts of *Ellis* yields significantly different results from those of the North Carolina approach. In California there is an established common-law cause of action for trade libel.¹²⁶ The cause of action requires a publication that induces others not to deal with the plaintiff, as well as a showing of special damages.¹²⁷ Applying the facts of *Ellis*, the plaintiff could successfully bring such a cause of action if it could prove that the letter from Northern Star injured its reputation and thereby caused customers to terminate their business relationships. Under this cause of action, Ellis Brokerage could recover specific lost sales and punitive damages upon proof of actual damages.¹²⁸ This result parallels the one under

121. See UNFAIR COMPETITION, *supra* note 83 (includes "Trade Disparagement or Trade Libel" subsections for each state).

122. The other four are California, Colorado, Hawaii, and New Jersey. See CAL. BUS. & PROF. CODE § 17082 (West 1987); COLO. REV. STAT. § 6-1-113(2)(a) (Supp. 1990) (treble damages or \$250, whichever is greater); HAW. REV. STAT. § 480-13(a)(1) (Supp. 1990) (treble damages or \$1000, whichever is greater); N.J. STAT. ANN. § 56:8-19 (West 1989). In states with treble damages that are not mandatory, such damages may be awarded at the discretion of the court, or for violations that are "knowing or intentional." Leaffer & Lipson, *supra* note 119, at 532.

123. See, e.g., ALASKA STAT. § 45.50.471(b)(7) (1986); ARK. STAT. ANN. § 4-88-106(a)(2) (1987); COLO. REV. STAT. § 6-1-105(1)(h) (Supp. 1990); DEL. CODE ANN. tit. 6, § 2532(a)(8) (1974); D.C. CODE ANN. § 28-3904(g) (1981); GA. CODE ANN. §§ 10-1-372(a)(8), -393(b)(8) (1989 & Supp. 1990); HAW. REV. STAT. § 481A-3(a)(8) (1985); IDAHO CODE § 48-603(8) (Supp. 1990); ILL. ANN. STAT. ch. 121½, para. 312, § 2(8) (Smith-Hurd Supp. 1990); ME. REV. STAT. ANN. tit. 10, § 1212(1)(H) (1964); MINN. STAT. ANN. § 325D.44(1)(8) (West Supp. 1991); NEB. REV. STAT. § 87-302(a)(8) (Supp. 1990); NEV. REV. STAT. § 598.410(8) (1985); N.M. STAT. ANN. § 57-12-2(D)(8) (Supp. 1990); OHIO REV. CODE ANN. § 4165.02(H) (Anderson 1991); OKLA. STAT. ANN. tit. 78, § 53(a)(8) (West 1987); OR. REV. STAT. § 646.608(1)(h) (1989); TEX. BUS. & COM. CODE ANN. § 17.46(b)(8) (Vernon 1987). A typical statute contains language that prohibits "disparaging the goods, services, or business of another by false or misleading representation of fact." IDAHO CODE § 48-603(8) (Supp. 1990). An example of a more explicit statute, which leaves less room for misinterpretation, is: "It shall be a violation of this chapter, whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to . . . disparage the goods, services or business of another by false or misleading representations of material facts." D.C. CODE ANN. § 28-3904(g) (1981).

124. See UNFAIR COMPETITION, *supra* note 83.

125. *Id.*

126. *Id.* at CA-18.1.

127. *Id.* at CA-19.

128. *Id.*

the North Carolina common-law libel cause of action.¹²⁹ Application of California's unfair and deceptive trade practices act provides different results, however. The act contains a broad statement of scope,¹³⁰ like North Carolina, and it also provides mandatory treble damages.¹³¹ The important distinction, however, is that under California's law only consumers and direct competitors may bring actions.¹³² Thus, a California plaintiff in the situation of *Ellis* Brokerage would be entitled to equitable common-law damages but not statutory treble damages, unlike the result in North Carolina.

New York has a common-law cause of action for disparagement that requires a showing of malice, falsity of the statement, and special damages.¹³³ Since there is no indication that the statement made by Northern Star was false, it is unlikely that *Ellis* Brokerage would succeed under New York's disparagement cause of action. Like North Carolina, New York also has a broadly worded deceptive trade practices act that provides a private cause of action for both consumers and other persons injured by violations.¹³⁴ This consumer-oriented act, however, limits remedies to the greater of actual damages or fifty dollars, and places a cap on discretionary treble damages of \$1000.¹³⁵ Under the facts of *Ellis*, a best-case scenario for the plaintiff in New York would be recovery of \$32,500 in actual damages plus \$1000 in discretionary treble damages—well below the \$97,500 provided by North Carolina law.¹³⁶

Texas recognizes a common-law cause of action for disparagement that protects "the economic interests of the injured party against pecuniary loss."¹³⁷ Disparagement requires "publication . . . , falsity, malice, lack of privilege, and special damages."¹³⁸ The *Ellis* facts likely would not satisfy the element of falsity and therefore would not lead to recovery of damages for lost profits, which are available under the cause of action.¹³⁹

129. See *supra* text accompanying note 24.

130. CAL. BUS. & PROF. CODE § 17001 (West 1987). The statute provides in part that the purpose of the act is to "foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented." *Id.*

131. *Id.* § 17082.

132. *Id.* §§ 17021, 17070; see *Harris v. Capitol Records Distrib. Corp.*, 64 Cal. 2d 454, 460-61, 413 P.2d 139, 143-44, 50 Cal. Rptr. 539, 543-44 (1966) (requiring that a competitor be in "primary" or direct competition with wrongdoer in order to bring an action under California's Unfair Practices Act).

133. UNFAIR COMPETITION, *supra* note 83, at NY-23.

134. N.Y. GEN. BUS. LAW § 349(a) (McKinney 1988).

135. Discretionary treble damages will only be awarded if a violation of the statute is willful or knowing. UNFAIR COMPETITION, *supra* note 83, at NY-8.

136. The best-case scenario is unlikely, as the courts have interpreted the scope of New York's deceptive practices act to exclude "private, non-consumer transactions of a non-recurring type without implications for the public." *Id.* at NY-7; see *Genesco Entertainment v. Koch*, 593 F. Supp. 743, 752 (S.D.N.Y. 1984). Arguably, a transaction like that of *Ellis* would not meet the limited interpretation of the scope of the act, since it was between business entities (food supplier, broker, and institutional buyers), and was a one-time communication. See *supra* text accompanying notes 12-19.

137. *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). There is a separate cause of action for defamation, which is intended "to protect the personal reputation of the injured party." *Id.*

138. *Id.*

139. UNFAIR COMPETITION, *supra* note 83, at TX-38.1 to TX-38.2.

The Texas deceptive trade practices act includes a broad prohibition against any "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce," as well as a list of twenty-four acts considered per se false, misleading, or deceptive.¹⁴⁰ Included among the enumerated acts is "disparaging the goods, services, or business of another by false or misleading representation of facts."¹⁴¹ The cause of action provided by the statute is available to "consumers," with "consumer" defined as "an individual, partnership, corporation . . . who seeks or acquires by purchase or lease, any goods or services."¹⁴² Remedies for an injured consumer include actual damages and discretionary treble damages "[i]f the trier of fact finds that the conduct of the defendant was committed knowingly."¹⁴³ Thus, unlike North Carolina's scheme, the Texas statutory scheme is explicit as to its inclusion of disparagement as a violation and does not mandate automatic treble damages. A plaintiff such as Ellis Brokerage could recover treble damages nearly equivalent to those provided by the North Carolina statute, but only if the defendant's conduct was intentional. The application of the *Ellis* scenario to appropriate law in California, New York, and Texas illustrates that North Carolina's statutory scheme is out of step, due to its combination of broadness and unconditional, unlimited treble damages.

When the general assembly enacted North Carolina General Statutes sections 75-1.1 and 75-16, it intended to "provide civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public . . . and to enable a person injured by [unfair or] deceptive acts or practices to recover . . . damages from a wrongdoer."¹⁴⁴ The legislature created a repository into which the courts could selectively place practices deemed to be unfair or deceptive through the continuous process of judicial inclusion and exclusion. The legislature also provided a substantial remedy for injured parties in the form of treble damages. Standing apart from all but a handful of states,¹⁴⁵ the legislature implemented, and the courts have enforced, automatic treble damages. While this protection provides sufficient recourse for injured parties, and actually may improve the ethics of the marketplace, there is the potential for the protection to become too restrictive. The decision of the supreme court in *Ellis* is a step in that direction. With brevity and minimal justification, and without any analysis of marketplace impact, the court added libel per se in a business context to the stockpile of unfair acts. In so doing, the court displayed an eagerness to expand section 75-1.1 to include a practice that already had sufficient

140. TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987).

141. *Id.* § 17.46(b)(8).

142. *Id.* § 17.45(4). The term "consumer" excludes a "business consumer" with assets of \$25 million or more, or under the ownership or control of a corporation or entity with assets of \$25 million or more. *Id.*

143. *Id.* § 17.50(b)(1) (Vernon Supp. 1991). The statute defines the discretionary treble damages as "[no] more than three times the amount of actual damages in excess of \$1000." *Id.*

144. *Hardy v. Toler*, 24 N.C. App. 625, 630-31, 211 S.E.2d 809, 813, *modified on other grounds*, 288 N.C. 303, 218 S.E.2d 342 (1975). For the statement of this intent in the original version of § 75-1.1(b), see *supra* note 78.

145. See *supra* note 122 and accompanying text.

remedies under common law.¹⁴⁶ This willingness to summarily expand protections in commerce could ultimately have a chilling effect on business transactions and the marketplace in general. North Carolina should consider the protective, yet more moderate, unfair trade practice schemes of other states that are leaders in commerce.¹⁴⁷

One option for improving the effectiveness of section 75-1.1 would be for the North Carolina General Assembly to clarify the statute by expressly including or excluding of particular practices. By amending the statute in that way, the legislature would provide warning to potential transgressors as well as concrete guidance to the courts. Alternatively, the legislature might consider implementing discretionary treble damages instead of the automatic treble damages of section 75-16. Discretionary trebling would eliminate the harshness of uniformly applying treble damages to all unfair trade practices, regardless of the nature of a particular act, while retaining the penalty for egregious acts.

In the absence of any legislative action, the onus will fall on the North Carolina judiciary to effectively define the parameters of the statute. The courts should view each decision involving the statute as an opportunity to clarify the analytical framework for determining what constitutes an unfair or deceptive trade practice. The courts should include in this framework an analysis of the impact the alleged violation has upon the marketplace. This analysis should consider the availability of remedies through other causes of action, as well as the derivative effects of automatic treble damages; the *Ellis* court ignored these considerations. It is imperative that the courts carry out the process of judicial inclusion and exclusion with a high degree of care and strike a balance between over-inclusion and over-exclusion. Failure to do so will have a detrimental impact on the commercial climate in North Carolina.

PAUL M. SARACENI

146. The expansion occurred in a case in which the court's standard for libel was particularly lenient. See *supra* notes 88-91 and accompanying text.

147. See *supra* notes 126-43 and accompanying text.