UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 92
Number 6 *North Carolina Issue*

Article 11

9-1-2014

A Bump in the Road of Consumer Protection: How Bumpers v. Community Bank of Northern Virginia Stripped Section 75-1.1 of Its Ability to Protect Borrowers

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A Bump in the Road of Consumer Protection: How *Bumpers v. Community Bank of Northern Virginia* Stripped Section 75-1.1 of Its Ability to Protect Borrowers*

INTRODUCTION

North Carolina consumers gained the ability to sue for "unfair or deceptive acts or practices" in 1969, when the state adopted a model version of the Unfair Trade Practices and Consumer Protection Law promoted by the Federal Trade Commission.[1] Eight years later, the Supreme Court of North Carolina held that the original version of the statute covered only "bargain, sale, barter, exchange[,] or traffic" in goods and thus did not reach abusive debt collection practices.[2] The North Carolina General Assembly promptly amended the statute to

1. Marshall v. Miller, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981); Matthew W. Sawchak & Kip D. Nelson, *Defining Unfairness in "Unfair Trade Practices,"* 90 N.C. L. REV. 2033, 2037–38 (2012) (noting that the original version of the statute prohibited only unfair or deceptive "trade" practices, but the General Assembly soon revised the statute to ensure that it covered a broad range of business practices); *see infra* notes 2–3 and accompanying text. Forty-eight other states adopted similar statutes around the same time. *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400.

2. State *ex rel.* Edmisten v. J.C. Penney Co., 292 N.C. 311, 316–17, 233 S.E.2d 895, 899 (1977), *superseded by statute*, Act of June 12, 1969, ch. 833, §§ 1–3, 1969 N.C. Sess. Laws 930, 930–31 (1969) (codified as amended at N.C. GEN. STAT. § 75-1.1 (2013)).

broadly include "all business practices, however denominated."[3] Since then, unfair or deceptive acts or practices ("UDAP") claims have become a frequently used litigation tool, amounting to a "boilerplate claim" in almost every commercial or consumer transaction-based complaint in the state.[4]

Around 2007, the national swell in foreclosure rates and the resulting crash of the subprime mortgage market brought public attention to the specific consumer problem of predatory mortgage lending.[5] State legislators around the country realized that the business structures of subprime lenders incentivized lenders to offer their products to high numbers of low-credit borrowers and to ignore existing consumer protection laws.[6] Even before the mortgage crisis, however, North Carolina was already on the forefront of borrower protection: North Carolina passed the nation's first state predatory lending law in 1999 and has since repeatedly expressed strong legislative intent to protect consumers in the mortgage context.[7]

Despite North Carolina's growing repertoire of mortgage-specific statutes,[8] some borrowers still rely on N.C. Gen. Stat. § 75-1.1,[9] the state's general UDAP statute, to contest unethical lending practices that slip through the cracks.[10] To decide what types of conduct fall within the broad prohibition of section 75-1.1,[11] courts

3. N.C. GEN. STAT. § 75-1.1(b) (2013).

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

5. Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C. L. REV. 1501, 1503–04 (2008).

6. *See id.* at 1505–06.

7. *Id.* at 1502, 1506; *see* Act of July 22, 1999, ch. 332, secs. 1–8, 1999 N.C. Sess. Laws 1202, 1202–18 (codified at N.C. GEN. STAT. §§ 24-1.1A, 24-1.1E, 24-2.5, 24-8, 24-10.2 (2013)).

8. *See* Hauser, *supra* note 5, at 1506–07; *see, e.g.*, Mortgage Lending Act, N.C. GEN. STAT. § 53-243.01 to .18 (repealed 2009); N.C. GEN. STAT. § 24-14(f) (2013) (limiting the origination fee that can be charged for most secondary real property loans).

9. N.C. GEN. STAT. § 75-1.1 (2013).

10. *Cf.* David Ranii, *NC Supreme Court Raises Bar for Consumer Lawsuits*, NEWS & OBSERVER (Sept. 20, 2013), http://www.newsobserver.com/2013/09/20/3213201/nc-supreme-court-raises-bar-for.html (quoting consumer advocate Carlene McNulty that the state supreme court's decision in *Bumpers v. Community Bank of Northern Virginia* " 'means that victims of unfair practices . . . won't have a remedy' in many cases").

11. *See* Johnson v. Phx. Mut. Life Ins. Co., 300 N.C. 247, 262, 266 S.E.2d 610, 621 (1980) ("The broad language of the statute indicates that the scope of its concept and application is not limited to precise acts and practices which can be readily catalogued." (citing Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 306 (1963)).

often look to the statute's purpose.[12] As the General Assembly articulated in the original version of section 75-1.1,

> [t]he 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 the consuming public within this State to the end that good faith and fair dealings between buyers and sellers at all level[s] of commerce be had in this State.[13]

The courts have expounded on that purpose, emphasizing that the statute was created because common law remedies—like fraud suits—proved insufficient to protect the interests of consumers.[14]

Because the statute was created to protect consumers from a broad range of abuses, the Supreme Court of North Carolina and consumer advocates have emphasized the importance of allowing consumers to bring actions under section 75-1.1.[15] Without the help of ground-level enforcement by individuals, state consumer protection agencies are hard-pressed to keep up with the ingenuity and volume of merchants looking for new ways to bilk consumers.[16] However, advocates have also recognized the ability of judicial interpretation to

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12. *See, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 520 (4th Cir. 1999) ("In any event, the fundamental purpose of [section 75-1.1] is to protect the consumer, and courts invariably look to that purpose in deciding whether the Act applies." (citation omitted)); Marshall v. Miller, 302 N.C. 539, 549, 276 S.E.2d 397, 403 (1981) ("In an area of law such as this, we would be remiss if we failed to consider also the overall purpose for which this statute was enacted.").

13. N.C. GEN. STAT. § 75-1.1 (1969). This language no longer exists in the current version of the statute. *See id.* § 75-1.1 (2013).

14. *See* Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 95, 331 S.E.2d 677, 680 (1985) (reciting the Supreme Court's past findings that "the legislature's intent in enacting N.C.G.S. § 75-16 was to create a new, private cause of action for aggrieved consumers since traditional common law remedies were often deficient" (citing *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400) (citations omitted)); *Marshall*, 302 N.C. at 543, 276 S.E.2d at 400 ("Such legislation was needed because common law remedies had proved often ineffective.").

15. *See Winston Realty*, 314 N.C. at 95, 331 S.E.2d at 680 ("[T]he purposes of the statutory provisions for treble money damages and attorney's fees were to encourage private enforcement in the marketplace and to make the bringing of such a suit more economically feasible." (citations omitted)); Carolyn L. Carter, *Consumer Protection in the States*, NAT'L CONSUMER L. CTR. 18 (Feb. 2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf.

16. *See* Carter, *supra* note 15, at 18 ("Giving consumers the ability to enforce their state UDAP statute is crucial for consumer justice. Limited state consumer protection enforcement budgets are not able to police the marketplace fully."). Although the state Attorney General also has the power to bring enforcement actions under section 75-1.1, *see* N.C. GEN. STAT. § 75-15 (2013), consumer advocates have stressed the importance of also keeping open avenues for consumer enforcement, *see* Carter, *supra* note 15, at 18.

undermine the effectiveness of UDAP statutes by making it more difficult for consumers to successfully bring suits.[17]

The Supreme Court of North Carolina has taken a large step in that direction in *Bumpers v. Community Bank of Northern Virginia*.[18] In *Bumpers*, two borrowers alleged that the bank that provided their second mortgage loans charged them for something they never received—specifically, a "loan discount fee" without a discounted interest rate.[19] The court of appeals affirmed summary judgment in the plaintiffs' favor, but the supreme court reversed, holding that the plaintiffs had alleged deception and thus had to prove they had actually and reasonably relied on the bank's "misrepresentation" that they had received a discount.[20] The majority's approach has two principle flaws. First, after characterizing the plaintiffs' claims as alleging misrepresentation by the defendants, the court added an inappropriate new element to deception-based claims: consumers alleging deceptive trade practices under section 75-1.1 must now prove reasonable reliance,[21] an element traditionally associated with fraud.[22] By demanding that consumers prove reasonable reliance, the Supreme Court of North Carolina has undermined the consumer-oriented purpose of section 75-1.1 and cleared the way for exploitation of consumers' knowledge gaps. Second, the court failed to question whether the defendants' alleged actions might alternatively violate the unfair trade practices prong of section 75-1.1. By failing to make this inquiry, the supreme court opened the door for defendants to escape liability for unscrupulous business practices merely by reframing a plaintiff's claim.[23]

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17. *See* Carter, *supra* note 15, at 13.

18. __ N.C. __, 747 S.E.2d 220 (2013).

19. Bumpers v. Cmty. Bank of N. Va., __N.C. App. __, __, 718 S.E.2d 408, 409 (2011), *rev'd and remanded*, __ N.C. __, 747 S.E.2d 220 (2013). Because both the trial court and the court of appeals found that Community Bank had not given the plaintiffs a discount, *see Bumpers* __N.C. App. at __, 718 S.E.2d at 409, and because the defendant did not offer any convincing evidence to the contrary, this Recent Development assumes that the plaintiffs received no actual discount.

20. *Bumpers*, __N.C. at __, 747 S.E.2d at 222.

21. *See id.* at __, 747 S.E.2d at 222.

22. *See* Johnson v. Owens, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965) ("When the circumstances are such that a plaintiff seeking relief from alleged fraud must have known the truth, the doctrine of reasonable reliance will prevent him from recovering for a misrepresentation which, if in point of fact made, did not deceive him.").

23. In this case, the plaintiffs did not explicitly allege misrepresentation: they did not allege that they were told they would receive a discount, but merely that they were charged for one but did not receive it. *See Bumpers*, __ N.C. at __, 747 S.E.2d at 233 (Beasley, J., dissenting).

This Recent Development examines the *Bumpers* opinion and suggests an alternate approach that better protects consumers from predatory lending practices. Part I examines the court of appeals' and supreme court's reasoning in *Bumpers*. Part II explores the supreme court's newly articulated reliance requirement—particularly the demand that consumers prove "reasonable" reliance—for misrepresentation-based UDAP claims and its possible effects on the availability of section 75-1.1 actions. Part II then proposes a reduced reliance standard for consumer actions, particularly in cases where the other contracting party has a significant advantage in knowledge and bargaining power. Part III questions why the supreme court did not consider the case under section 75-1.1's unfairness prong and recommends that North Carolina join other jurisdictions in holding that charging consumers for services not provided is an inherently unfair business practice.

I. THE *BUMPERS* DECISIONS AND THE SUPREME COURT'S SURPRISING REVERSAL

A. *The Facts of the Case*

The case involved two consumers, each of whom received and responded to mail solicitations from Community Bank of Northern Virginia ("Community Bank") in 1999.[24] Travis Bumpers, the primary plaintiff in the case,[25] called the toll-free number on the solicitation, submitted a loan application by phone, and faxed the necessary documents.[26] He was then directed to a women's lingerie shop, where he signed the closing documents in the presence of a shop employee who was a notary public.[27] Bumpers was approved for a $28,450 loan with an interest rate of 16.99%.[28] He paid several thousand dollars in fees to Community Bank for the loan, including a loan origination fee of $2,062.63, a "loan discount" fee of $1,280.25, and $280 in other

24. *Bumpers*, __ N.C. App. at __, 718 S.E.2d at 409–10.

25. *Id.* at __, 718 S.E.2d at 411. The other plaintiff, Troy Elliott, ultimately participated in national class-action litigation against Community Bank, which resulted in a settlement agreement that prohibited class members from pursuing further litigation against the bank. *Id.* at __, 718 S.E.2d at 411. *See generally In re* Cmty. Bank of N. Va., 622 F.2d 275 (3d Cir. 2010) (vacating the settlement agreement). Elliott thus did not participate in the relevant appeals to the Court of Appeals and the Supreme Court. *Bumpers*, __ N.C. App. at __, 718 S.E.2d at 411. Bumpers, meanwhile, opted out of the class. *Id.* at __, 718 S.E.2d at 411.

26. *Id.* at __, 718 S.E.2d at 409.

27. *Id.* at __, 718 S.E.2d at 409.

28. *Id.* at __, 718 S.E.2d at 409.

fees.[29] Title America, LLC ("Title America"), the company Community Bank had selected to provide the closing services for the loan, also charged Bumpers $1,205 in fees, including a settlement or closing fee, abstract or title search fee, title examination fee, overnight fee, document review fee, and processing fee.[30] Bumpers paid a total of $4,827.88 in fees to the two businesses.[31]

The other plaintiff, Troy Elliott, received a mail solicitation advertising a 12.99% interest rate and called the 800 number to inquire.[32] Like Bumpers, Elliott submitted a loan application by phone and faxed the necessary documents; he then went to the residence of a notary public to sign.[33] Elliott's loan was for $35,000 with a 12.99% interest rate.[34] Community Bank charged him a loan origination fee of $2,800, a "loan discount" fee of $1,400, and a further $280 in other fees.[35] Title America charged Elliott fees similar to the ones it had charged Bumpers.[36]

The plaintiffs filed a lawsuit in September 2001 against Community Bank for duplicative fees and the loan discount fee, alleging that no discount was given and charging violation of section 75-1.1 and other North Carolina statutes.[37] Over the next few years, the lawsuit bounced between state and federal courts, meeting at times with a national class-action lawsuit against Community Bank that had been filed in the Western District of Pennsylvania.[38] In April 2008, a state trial court granted partial summary judgment for Bumpers and Elliott.[39] The trial court found that Community Bank had charged a loan discount fee without providing a discounted interest rate and held that such a practice violated Chapter 75.[40] The court also concluded that the various itemized fees charged by Community Bank and Title America were duplicative and constituted systematic overcharging in violation of section 75-1.1.[41] The court

29. *See id.* at __, 718 S.E.2d at 410.
30. *See id.* at __, 718 S.E.2d at 410.
31. *Id.* at __, 718 S.E.2d at 410.
32. *Id.* at __, 718 S.E.2d at 410.
33. *Id.* at __, 718 S.E.2d at 410. There was no attorney or mortgage professional present at this closing or at Bumpers's. *See id.* at __, 718 S.E.2d at 409–10.
34. *Id.* at __, 718 S.E.2d at 410.
35. *Id.* at __, 718 S.E.2d at 410.
36. *Id.* at __, 718 S.E.2d at 410.
37. *Id.* at __, 718 S.E.2d at 410.
38. *Id.* at __, 718 S.E.2d at 410–11.
39. *Id.* at __, 718 S.E.2d at 411.
40. *Id.* at __, 718 S.E.2d at 411.
41. Bumpers v. Cmty. Bank of N. Va., __ N.C. __, __, 747 S.E.2d 220, 225 (2013); *Bumpers*, __ N.C. App. at __, 718 S.E.2d at 411.

awarded plaintiffs treble damages pursuant to section 75-16.[42] Community Bank appealed.[43]

B. Bumpers *at the Court of Appeals*

The court of appeals affirmed the trial court's ruling that the loan discount fee was an unfair and deceptive trade practice.[44] The unanimous panel likened the facts to an earlier case, *Sampson-Bladen Oil Co. v. Walters*,[45] in which the court of appeals found that charges over a two-year period for 2,600 gallons of oil that were never delivered violated section 75-1.1.[46] Just as the buyers in *Sampson-Bladen Oil* had been charged for undelivered goods, the court of appeals explained, the *Bumpers* plaintiffs alleged that Community Bank had charged them for something that there was no evidence they had received: a discounted interest rate.[47] In response to the defendants' contention that the plaintiffs failed to show actual reliance, the court of appeals characterized the loan costs not as a misrepresentation, but as a charge for a product not delivered.[48] The court of appeals concluded that the undisputed evidence showed the plaintiffs did not receive reduced interest rates and that "where a defendant charges customers fees for a product that was never provided, defendant's conduct proximately causes injury to those customers" within the meaning of section 75-1.1.[49]

Meanwhile, the court of appeals reversed the trial court's ruling on the fees charged by Title America.[50] The court of appeals pointed out that, in concluding that the closing fees charged by Title America "were excessive and constituted 'systematic overcharging,' " the trial court had relied on a 1998 North Carolina Bar Association survey and the testimony of a real estate specialist.[51] The certified specialist testified that the reasonable and customary cost of Title America's

42. *Bumpers*, __ N.C. App. at __, 718 S.E.2d at 411.

43. *Id.* at __, 718 S.E.2d at 411. The appeal led to more litigation over whether the trial court's order was a non-appealable interlocutory order and more motions by the parties, but the Court of Appeals was eventually obligated to rule on the merits. *See id.* at __, 718 S.E.2d at 411–12.

44. *See id.* at __, 718 S.E.2d at 415.

45. 86 N.C. App. 173, 356 S.E.2d 805 (1987).

46. *Id.* at 174, 177, 356 S.E.2d at 896, 808.

47. *See Bumpers*, __ N.C. App. at __, 718 S.E.2d at 412–13.

48. *Id.* at __, 718 S.E.2d at 413.

49. *Id.* at __, 718 S.E.2d at 413.

50. *See id.* at __, 718 S.E.2d at 414 ("The trial court further concluded that 'Title America, LLC was Community Bank's agent,' and thus attributed Title America's 'systemic over-charging' to defendant.").

51. *Id.* at __, 718 S.E.2d at 414.

closing services, if performed by an in-state attorney, would have been about $400, but the cost could have ranged up to $1,500 if billed at a normal hourly rate.[52] The court of appeals concluded that, based on the specialist's testimony, there was a genuine issue of material fact as to whether Title America's fees of approximately $1,205 constituted overcharging.[53] The court remanded the issue for further proceedings.[54]

C. Bumpers *at the Supreme Court*

The Supreme Court of North Carolina reversed the court of appeals' holding regarding Community Bank's loan discount fees.[55] Rather than adopt the court of appeals' characterization that the defendants had charged for a product that was not delivered, the supreme court framed the loan discount fee issue as one of misrepresentation.[56] The court then determined that there were issues of material fact regarding whether Community Bank actually made a misrepresentation.[57] The court pointed to a statement by a former Community Bank loan officer that the checked box on plaintiffs' loan documents indicating no "buy-down," which plaintiffs held out as evidence that they had not received discounted rates, referred only to temporary rate reductions that were not applicable to the plaintiffs' second mortgage loans.[58] The officer argued that this section of the loan document did not address whether the borrowers had received discounted interest rates.[59]

Even if there had been no issue of fact regarding whether plaintiffs had received a discount, the supreme court contended,

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52. *Id.* at __, 718 S.E.2d at 414.

53. *See id.* __, __, 718 S.E.2d at 410, 415.

54. *Id.* at __, 718 S.E.2d at 415.

55. *See* Bumpers v. Cmty. Bank of N. Va., __ N.C. __, __, 747 S.E.2d 220, 229 (2013).

56. *See id.* at __, 747 S.E.2d at 222 ("First we must decide whether an action for misrepresentation under section 75-1.1 requires reliance by a borrower who accuses a lender of collecting a fee for a discounted loan without actually charging a discounted interest rate.").

57. *Id.* at __, 747 S.E.2d at 222.

58. *Id.* at __, 747 S.E.2d at 224.

59. *Id.* at __, 747 S.E.2d at 224. Justice Robin Hudson responded in her dissent that this "affidavit does not actually contradict the form. At no point does [the officer] say that plaintiffs actually received a discounted rate; instead, he attempts to explain that the 'brought-down rate' space on the form refers to a temporary rate reduction, not a permanent one." *Id.* at __, 747 S.E.2d at 229 (Hudson, J., dissenting). Justice Cheri Beasley similarly argued that "Mr. Grace's affidavit in support of defendant establishes that plaintiffs did not receive a *temporary* loan discount, but it fails to demonstrate that plaintiffs received a *long-term* loan discount." *Id.* at __, 747 S.E.2d at 236 (Beasley, J., dissenting).

plaintiffs did not prove that they had relied on Community Bank's misrepresentation.[60] The court asserted that "[s]uch a requirement has been the law of this state for quite some time."[61] Section 75-1.1, the court explained, "has long encompassed conduct tantamount to fraud, which requires reliance, and we see no reason for departure from that requirement when the actions alleged include the misrepresentation of a loan transaction that caused injury."[62]

The court then set out a reliance test for misrepresentation-based section 75-1.1 claims. To prove detrimental reliance under the statute's deception prong, the supreme court held that a plaintiff must establish "two key elements" of his mental state: (1) actual reliance and (2) reasonable reliance.[63] To establish actual reliance, the plaintiff must show that she "affirmatively incorporated the alleged misrepresentation into his or her decision-making process"—in other words, that "if it were not for the misrepresentation, the plaintiff would likely had avoided the injury altogether."[64] As to the second element, "[r]eliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate."[65] The supreme court rejected the court of appeals' reasoning that plaintiffs had been charged for a product they had not received because, the supreme court said, "a claim for overcharging is not distinct from one based on misrepresentation."[66] Thus, the court of appeals should have required the plaintiffs to demonstrate their actual and reasonable reliance.[67]

Although the supreme court remanded the discount fee claim for further proceedings, it strongly suggested that no detrimental reliance could be found in this case. Notably, the court faulted Bumpers for completing the loan transaction without asking about the amount of the discount he was receiving or shopping around for loans with more

60. *See id.* at __, 747 S.E.2d at 227 (majority opinion).

61. *Id.* at __, 747 S.E.2d at 226 (citing Pearce v. Am. Defender Life Ins. Co., 316 N.C. 461, 471, 343 S.E.2d 174, 180 (1986)). For a discussion of the supreme court's cited support for its reliance requirement, see *infra* notes 104–27 and accompanying text.

62. *Id.* at __, 747 S.E.2d at 222.

63. *Id.* at __, 747 S.E.2d at 227 (citing Pearce v. Am. Defender Life Ins. Co., 316 N.C. 461, 472, 343 S.E.2d 174, 180–81). The Court also cited Forbis v. Neal, 361 N.C. 519, 649 S.E.2d 382 (2007), for the proposition that "any reliance on the allegedly false representations must be reasonable." *Forbis*, 361 N.C. at 527, 649 S.E.2d at 387 (citation omitted).

64. *Bumpers*, __N.C. at __, 747 S.E.2d at 227.

65. *Id.* at __, 747 S.E.2d at 227 (quoting Sullivan v. Mebane Packaging Grp., Inc., 158 N.C. App. 19, 26, 581 S.E.2d 452, 458 (citations omitted)).

66. *Id.* at __, 747 S.E.2d at 227.

67. *See id.* at __, 747 S.E.2d at 227.

favorable terms.[68] The court pointed out that Bumpers had also accepted the services of Title America, the closing service provider, without first shopping around for a less expensive provider.[69] Elliott, too, chose the Community Bank loan over other options and declined to exercise his right to cancel the loan without cost.[70] Because each plaintiff had other options and chose Community Bank, the court seemed to say, neither could object to the terms in their loan agreements.

Finally, the supreme court rejected the court of appeals' recognition of a cause of action for excessive pricing under section 75-1.1.[71] Once again, the court relied on the fact that Bumpers and Elliott had chosen Community Bank over other vendors.[72] "In most cases," the high court explained, "there is nothing unfair or deceptive about freely entering a transaction on the open market .... As a result, when transacting parties willingly and honestly negotiate a transaction, generally the transaction is not said to be unfair or deceptive."[73] Although the court acknowledged that there are exceptions to this rule—such as where a vendor sells "goods or services which are consumed or used as a direct result of an emergency or which are consumed or used to preserve ... life, health, safety, or economic well-being" of a person, where price gouging is prohibited[74]—no such circumstances were present in this case.[75]

Two justices dissented. Justice Robin Hudson argued that the record revealed that the plaintiffs did not receive discounted interest rates on their loans despite being charged a loan discount fee.[76] She pointed out that, despite Community Bank's testimony about the "buy-down" check box and its irrelevance to the plaintiffs, there was no actual evidence that the plaintiffs had in fact been given a loan discount.[77] Justice Hudson argued, "the interest rate for which

68. *See id.* at __, 747 S.E.2d at 223.

69. *See id.* at __, 747 S.E.2d at 223. For a discussion of the difficulties consumers face in shopping for closing service providers, see *infra* notes 133–36.

70. *Id.* at __, 747 S.E.2d at 223.

71. *Id.* at __, 747 S.E.2d at 229. The propriety of the court's holding that Title America's excessive closing fees did not constitute an unfair or deceptive trade practice is beyond the scope of this Recent Development. However, the court's reasoning on this point is very revealing of its attitude toward the borrowers in this case and will be considered along with its other assertions.

72. *See id.* at __, 747 S.E.2d at 229.

73. *Id.* at __, 747 S.E.2d at 228.

74. *Id.* at __, 747 S.E.2d at 228 (quoting N.C. GEN. STAT. § 75-38(a) (2013)).

75. *Id.* at __, 747 S.E.2d at 229.

76. *See id.* at __, 747 S.E.2d at 229 (Hudson, J., dissenting).

77. *See id.* at __, 747 S.E.2d at 229.

plaintiffs qualified was the interest rate they received; no further rate reduction is noted on the Form 1008 or elsewhere."[78] Justice Hudson also objected to the court's holding that actual reliance was a necessary element of the plaintiffs' section 75-1.1 claims.[79] She noted that "the plain language of the statute does not require reliance."[80] The statute's well-established purpose, she argued, was " 'to create a new, private cause of action for aggrieved consumers since traditional common law remedies were often deficient.' "[81]

Justice Cheri Beasley, in turn, argued that "the majority incorrectly characterizes plaintiffs' unfair and deceptive practice claim as one based on misrepresentation and thus incorrectly requires proof of actual reliance to recover under section 75-1.1."[82] Regardless of whether North Carolina's UDAP statute allows recovery for price gouging, "charging for a good or service never received is an unfair and deceptive practice that is distinct from excessive pricing."[83] The plaintiffs claimed neither that the price of the loans was too high (excessive pricing) nor that they were told that they would receive discounted loans (misrepresentation), Justice Beasley argued, but that defendant charged them a fee it should not have charged at all.[84] "The term 'misrepresentation' appears nowhere in the [c]ourt of [a]ppeals' opinion," while the term "overcharge" appeared (in some form) eight times in the appellate court's statement of facts.[85] Further, Justice Beasley argued, prior North Carolina case law did not support a requirement of actual reliance for a section 75-1.1 claim. According to Justice Beasley, the cases that seemed to support the majority's actual reliance requirement required reliance only because the plaintiffs in those cases were basing their UDAP claims on fraud.[86] The majority's reliance analysis "opens the door to an array of fees [that do not] reflect the fair cost of a good or service provided to the consumer," and which the consumer cannot challenge if she had any

78. *Id.* at __, 747 S.E.2d at 229.
79. *Id.* at __, 747 S.E.2d at 230.
80. *Id.* at __, 747 S.E.2d at 230 (quoting N.C. GEN. STAT. § 75-1.1(a) (2013)).
81. *Cf. id.* at __, 747 S.E.2d at 230 (quoting Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 95, 331 S.E.2d 677, 680 (1985)) (describing the legislative intent surrounding "section 75-16, which establishes a civil cause of action for violations of section 75-1.1").
82. *Id.* at __, 747 S.E.2d at 232 (Beasley, J., dissenting).
83. *Id.* at __, 747 S.E.2d at 233 (citing Sampson-Bladen Oil Co. v. Walters, 86 N.C. App. 173, 177, 356 S.E.2d 805, 808 (1987)).
84. *Id.* at __, 747 S.E.2d at 233.
85. *Id.* at __, 747 S.E.2d at 233.
86. *See id.* at __, 747 S.E.2d at 234.

other reason to choose to do business with that loan provider.[87] Justice Beasley concluded that "[i]f entering a transaction freely is now a defense to an unfair and deceptive practice claim, then the entire purpose of Chapter 75 and its corollaries elsewhere in the General Statutes is void."[88]

II. THE SUPREME COURT'S ERROR IN REQUIRING CONSUMERS TO PROVE ACTUAL AND REASONABLE RELIANCE

Perhaps the most immediately notable element of the *Bumpers* majority opinion is its addition of an explicit, two-pronged reliance requirement, which plaintiffs alleging deceptive trade practices must meet.[89] However, the new "reasonable reliance" requirement for deception-based section 75-1.1 claims is highly problematic. First, it lacks the strong support in North Carolina precedent that the *Bumpers* court claims—in fact, Supreme Court of North Carolina precedent examining the statute's purpose suggests strong disapproval for the standard now adopted by the *Bumpers* majority.[90] Second, the heightened standard will likely damage the statute's ability to protect consumers, particularly in the borrowing context. Instead, North Carolina should adopt a rebuttable presumption for deception-based section 75-1.1 claims that the plaintiff relied on the defendant's misrepresentation.[91]

A. The Problems with Requiring Actual and Reasonable Reliance

By unequivocally adding a reliance element to section 75-1.1, the *Bumpers* court joined a minority of states that have explicitly required consumers to prove that they relied on a deception in order to recover under the state's UDAP statute.[92] The problem with

87. *Id.* at __, 747 S.E.2d at 235 ("As long as the customer had some other reason that he might have chosen to do business with the bank, such as being an existing account holder, he can never show that, but for the misrepresentation, he would not have conducted business with the bank.").

88. *Id.* at __, 747 S.E.2d at 236.

89. *See supra* notes 63–65 and accompanying text.

90. *See infra* notes 120–27.

91. *See infra* Part II.B.

92. In 2009, the National Consumer Law Center listed only seven states as offering definitively "weak" protection to consumers by requiring reliance. *See* Carter, *supra* note 15, at 7–10. The Federal Trade Commission Act also arguably requires a showing of reliance: the FTC issued a policy statement that a deceptive practice will be found "if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment." Deceptive Acts and Practices, 4 Trade Reg. Rep. (CCH) ¶ 13,205, at 20,917 (Oct. 14, 1983) (quoting the FTC policy statement for deceptive acts and practices enforcements). However, despite the

requiring reliance in North Carolina is that it contradicts section 75-1.1's primary purpose to provide remedies for consumers where common law causes of action had proven insufficient.[93] If consumers are required to prove reasonable reliance to recover under section 75-1.1, then the statute moves closer to becoming merely a codification of fraud.[94] However, the Supreme Court of North Carolina has itself previously confirmed that section 75-1.1 prohibits a broader range of business activities than fraud: "Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true."[95]

In addition to being at odds with the original purpose of section 75-1.1, the new reasonable reliance requirement has a number of other harmful, potential side effects. First, such a requirement encourages businesses to try to evade liability for their deceptive practices by arguing that the consumer acted unreasonably when she fell for the sales pitch.[96] For instance, a business might contend that a consumer who did not notice or understand a contractual provision was not paying sufficient attention, or might insert clauses stating that the consumer did not rely on what the company's representative said.[97] The latter tactic helped to protect a seller of real estate in *Tucker v. Boulevard at Piper Glen LLC*,[98] in which the seller told the

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persuasive value of the FTC Act, an interpretation of section 5 of the FTC Act as requiring reliance does not mandate that state UDAP statutes require it also. *See* Johnson v. Phx. Mut. Life Ins. Co., 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980) (citing Hardy v. Toler, 288 N.C. 303, 308, 218 S.E.2d 342, 345 (1975)) ("Because of the similarity in language, it is appropriate for us to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of G.S. § 75-1.1.").

93. Marshall v. Miller, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981).

94. *See* Robert G. Byrd, *Misrepresentation in North Carolina*, 70 N.C. L. REV. 323, 325 (1992) ("Actionable fraud consists of (1) a false representation or concealment of a material fact that (2) is intended to and (3) does in fact (4) reasonably induce reliance and (5) results in injury or damage." (citing Pearce v. Am. Defender Life Ins. Co., 316 N.C. 461, 468, 343 S.E.2d 174, 178 (1986))). This is especially true given that North Carolina recognizes a cause of action for negligent misrepresentation. *See id.* at 354–55 (citing Raritan River Steel Co. v. Cherry, Bekaert & Holland, 322 N.C. 200, 207–16, 367 S.E.2d 609, 613–618 (1988)).

95. Hardy v. Toler, 288 N.C. 303, 309, 318 S.E.2d 342, 346 (1975) (citing D.D.D. Corp. v. F.T.C., 125 F.2d 679, 682 (7th Cir. 1942)).

96. Carter, *supra* note 15, at 20.

97. *Id.*

98. 150 N.C. App. 150, 564 S.E.2d 248 (2002). Although this court of appeals opinion stated a need for plaintiffs alleging deception to prove "actual reliance," *see id.* at 154, 564 S.E.2d at 251, North Carolina cases before *Bumpers* were decidedly mixed on whether such a showing was necessary, *see infra* notes 106–11. Further, earlier Supreme Court of North Carolina precedent, which rejected contributory negligence as a defense to section 75-1.1 claims, suggests that the high court would be hostile to the conclusion arrived at in *Tucker*. *See infra* notes 120–23 and accompanying text.

plaintiff that the townhouse it was building for the plaintiff would have a "dramatic," "unparalleled," and "panoramic" view of the neighboring golf course.[99] The North Carolina Court of Appeals stated that, where a plaintiff's section 75-1.1 claim was premised on an alleged misrepresentation by the defendant, the plaintiff must show his "actual reliance" on the defendant's misrepresentation in order to establish the necessary proximate causation.[100] The court of appeals concluded that, because the "Purchase and Sale Agreement" did not mention the promised view and provided that "[n]either party is relying on any statement or representation made by or on behalf of the other party that is not set forth in this Agreement," the evidence did not support actual reliance.[101] A requirement of "reasonable reliance" arguably sets the bar even higher than actual reliance—even without a valid contractual provision disclaiming reliance, a defendant could escape liability merely by convincing a court that the plaintiff "should have known better" than to rely on the defendant's representations. Such a requirement clears the way for businesses to exploit consumers' knowledge gaps about the particular industry.

Further, a need to show reasonable reliance for each class member can defeat class certification, thus preventing consumers from forming class actions against unscrupulous merchants.[102] Private enforcement is instrumental to the effectiveness of UDAP statutes in combatting the many variations and instances of consumer abuse.[103] Where injuries to individual consumers are small, class certification may be essential to enable consumers to bring a section 75-1.1 claim and halt the exploitation.

Even aside from the damage a reliance requirement is likely to do to section 75-1.1's effectiveness, the supreme court's new requirement is also troubling because it significantly overstates the rule's foundation in North Carolina law. The *Bumpers* court proceeded as if even a deceptive *tinge*[104] to a section 75-1.1 claim triggered an automatic requirement of reasonable reliance and

99. *Tucker*, 150 N.C. App. at 152, 564 S.E.2d at 249–50.

100. *Id.* at 154, 564 S.E.2d at 251.

101. *Id.*

102. Carter, *supra* note 15, at 20.

103. *See supra* notes 15–16 and accompanying text.

104. Plaintiffs Bumpers and Elliott indeed alleged that they had been charged for something they had not received, but they did not frame their case as one of deception: they did not allege that Community Bank had lured them in with the promise of a discount and then denied them the discounted rate. *See* Bumpers v. Cmty. Bank of N. Va., __ N.C. App. __, __, 718 S.E.2d 408, 410 (2011), *rev'd and remanded*, __ N.C. __, 747 S.E.2d 220 (2013).

claimed that such a requirement "has been the law of this state for quite some time."[105] However, before *Bumpers*, North Carolina cases were decidedly mixed on whether reliance for deception-related claims was necessary.[106] Though many court of appeals cases had explicitly required reliance,[107] a number had flatly rejected it as a requirement for a section 75-1.1 claim.[108] *Howerton v. Arai Helmet, Ltd.*[109] was the only Supreme Court of North Carolina case before *Bumpers* that appeared to require actual reliance.[110] However, as Justice Hudson argued in her dissent, *Howerton* was distinguishable from *Bumpers* because the *Howerton* plaintiff based his UDAP claim on fraud and testified as to his reliance on the defendant's representations when he made his purchase.[111] By contrast, the *Bumpers* plaintiffs alleged not that they had relied on a

105. Bumpers v. Cmty. Bank of N. Va., __ N.C. __, __, 747 S.E.2d 220, 226 (2013) (citing Pearce v. Am. Defender Life Ins. Co., 316 N.C. 461, 471, 343 S.E.2d 174, 180 (1986)).

106. Carolyn L. Carter, *Consumer Protection in the States*, NAT'L CONSUMER LAW CTR. app. B at 112–13 (Jan. 10, 2009), http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf.

107. *See, e.g.*, Williams v. United Cmty. Bank, __ N.C. App. __, __, 724 S.E.2d 543, 549 (2012); Sunset Beach Dev., L.L.C. v. AMEC, Inc., 196 N.C. App. 202, 211–12, 675 S.E.2d 46, 53–54 (2009) ("We hold that Ball's wetlands delineations and the Master Wetlands Map were so facially flawed that Plaintiff could not have reasonably relied on them in deciding to purchase the GGSH tract. In light of Plaintiff's experience in developing coastal communities and the fact that Plaintiff had unfettered access to the GGSH tract, we cannot determine that Plaintiff actually relied on the Master Wetlands Map that was dated more than two years earlier and signed by an individual no longer employed by the Corps."); Bus. Cabling, Inc. v. Yokeley, 182 N.C. App. 657, 666, 643 S.E.2d 63, 69 (2007); Tucker v. Boulevard at Piper Glen L.L.C., 150 N.C. App. 150, 153–54, 564 S.E.2d 248, 251 (2002); Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 658, 464 S.E.2d 47, 55 (1995) (concluding that "Pleasant Valley offered no evidence demonstrating [that] it detrimentally relied on any statements" without citing a source for the reliance requirement).

108. *See, e.g.*, Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 580, 589 S.E.2d 423, 431 (2003) ("[A]ctual reliance is not a factor."); Nw. Bank v. Roseman, 81 N.C. App. 228, 237, 344 S.E.2d 120, 126 (1986) ("Under the statute, it is irrelevant whether the consumer was in fact deceived or whether the act or practice was conducted in good faith." (citation omitted)), *aff'd per curiam*, 319 N.C. 394, 354 S.E.2d 238 (1987); *cf.* Rucker v. Huffman, 99 N.C. App. 137, 142, 392 S.E.2d 419, 422 (1990) ("Generally, a consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to establish an unfair or deceptive act under G.S. § 75-1.1.").

109. 358 N.C. 440, 597 S.E.2d 674 (2004).

110. *Id.* at 470, 597 S.E.2d at 693 ("In the present case, the record reveals a genuine issue of material fact as to Howerton's reliance on Arai's alleged misrepresentation.").

111. *See id.* at 443, 470, 597 S.E.2d at 678, 693; *see also* Bumpers v. Cmty. Bank of N. Va., __ N.C. __, __, 747 S.E.2d 220, 234 (2013) (Hudson, J., dissenting).

misrepresentation, but that the defendant charged them a fee for something it did not deliver.[112]

Even more troubling than the court's avowal of such an overarching reliance requirement, however, is its claim of a foundation in North Carolina UDAP law for a *reasonable* reliance element. One case the *Bumpers* court cited as support for its "reasonable reliance" rule, *Forbis v. Neal*, was a purely common law fraud case that did not so much as mention section 75-1.1.[113] The *Bumpers* court also cited *Pearce v. American Defender Life Insurance*,[114] both in declaring its two-pronged actual and reasonable reliance test and in claiming that such a rule "has been the law of this state for quite some time."[115] The *Bumpers* court pointed principally to a statement in *Pearce* that

> the second requisite to making out a claim under this statute is similar to the detrimental reliance requirement under a fraud claim. It must be shown that the plaintiff suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation.[116]

Notably, the *Pearce* court did not say that reliance—and especially not reasonable reliance—was required; it stated merely that the detrimental reliance element of a fraud claim was *similar* to

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112. *Bumpers*, __ N.C. at __, 747 S.E.2d at 233 (Beasley, J., dissenting).

113. *See* Forbis v. Neal, 361 N.C. 519, 526, 649 S.E.2d 382, 387 (2007) ("Accordingly, our analysis narrows to whether summary judgment was proper on plaintiffs' fraud claims.").

114. 316 N.C. 461, 343 S.E.2d 174 (1986). In *Pearce*, a widow brought an action against her husband's life insurance provider to collect accidental death benefits after he was killed in a flight training mission as a member of the United States Air Force. *Id.* at 465, 343 S.E.2d at 177. The defendant insurance company had previously told Lt. Pearce that the accidental death portion of his policy would be payable if he was killed while in the Air Force but not as a result of a direct act of war. *Id.* at 464, 343 S.E.2d at 176. However, after his death, the defendant refused to pay the plaintiff's benefits under the accidental death portion of her husband's policy. *Id.* at 465, 343 S.E.2d at 177. The plaintiff sued, alleging fraud, negligence, unfair trade practices, breach of contract, breach of fiduciary duty, and breach of the insurance company's duty to investigate claims in a fair and equitable manner. *Id.* The supreme court affirmed a directed verdict against the plaintiff's fraud claim because the plaintiff had made no showing that the defendant had made a statement with "intent to deceive," an essential element of fraud. *Id.* at 468, 343 S.E.2d at 178. The court then reversed the directed verdict as to the UDAP claim, explaining that "considering the entire evidence . . . in the light most favorable to the plaintiff, we hold that the evidence is sufficient to support a finding that Lt. Pearce relied to his detriment upon the statements in defendant's letter." *Id.* at 472, 343 S.E.2d at 181.

115. *See Bumpers*, __ N.C. at __, 747 S.E.2d at 226, 227 (citing *Pearce*, 316 N.C. at 471, 343 S.E.2d at 180).

116. *Pearce*, 316 N.C. at 471, 343 S.E.2d at 180; *see also Bumpers*, __ N.C. at __, 474 S.E.2d at 226.

the proximate cause element of a section 75-1.1 claim.[117] While the *Pearce* court held that the evidence of the plaintiff's husband's detrimental reliance was *sufficient* to support a section 75-1.1 claim, it did not hold this particular finding to be *necessary* to show proximate cause under section 75-1.1.[118] Additionally, though *Pearce* pointed to evidence that plaintiff's husband had relied on the misrepresentations, it did not breathe the word "reasonableness."[119]

In fact, precedent suggests that the *Pearce* court would have rejected a requirement of reasonable reliance outright. In *Winston Realty Co. v. G.H.G., Inc.*,[120] a case decided at nearly the same time as *Pearce*, the Supreme Court of North Carolina disavowed language of an earlier court of appeals decision that " '[e]ven if defendants misrepresented the location of the trash fill, this sophisticated plaintiff could and should have verified defendants' assertions.' "[121] The court held that contributory negligence was not a defense to a section 75-1.1 claim,[122] reasoning that " '[t]o rule otherwise would produce the anomalous result of recognizing that although [section] 75-1.1 creates a cause of action broader than traditional common law actions, [section] 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie.' "[123] In other words, the cases that the *Bumpers* court cited as evidence that a reasonable reliance requirement "has been the law of this state for quite some time"[124] in fact provide very weak precedential support: one is a pure fraud case;[125] the other never mentioned reasonable reliance[126] and was decided only a year after the supreme court warned that requiring section 75-1.1 claims to meet the same

117. *See Pearce*, 316 N.C. at 471, 343 S.E.2d at 180 ("Unlike a claim based on fraud, proof of actual deception is not necessary."); *see also Bumpers*, __ N.C. at __, 747 S.E.2d at 234 (Hudson, J., dissenting).

118. *See Pearce*, 416 N.C. at 472, 343 S.E.2d at 181.

119. *See id.* at 471–72, 343 S.E.2d at 180–81. Indeed, scholars did not interpret *Pearce* as commanding reasonable reliance. *See, e.g.*, Byrd, *supra* note 94, at 368 ("Proof of *reasonable* reliance, however, is not likely to be required to establish a cause of action for unfair or deceptive trade practices." (emphasis added)).

120. 314 N.C. 90, 331 S.E.2d 677 (1985).

121. *Id.* at 94, 331 S.E.2d at 679 (quoting Libby Hill Seafood Rests., Inc. v. Owens, 62 N.C. App. 695, 700, 303 S.E.2d 565, 569 (1983)).

122. *Id.* at 96, 331 S.E.2d at 680–81.

123. *Id.* at 96, 331 S.E.2d at 680 (quoting Marshall v. Miller, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981)).

124. Bumpers v. Cmty. Bank of N. Va., __ N.C. __, __, 747 S.E.2d 220, 226 (2013).

125. *See supra* note 113 and accompanying text.

126. *See supra* notes 117–19 and accompanying text.

standards as common law actions defeats the purpose of the legislation.[127]

While requiring consumers to prove reasonable reliance is in itself highly questionable, the potential consequences of its application to the mortgage context are simply alarming. The court faulted Bumpers for not inquiring specifically about the loan discount fee.[128] It would thus appear that the court would only deem the plaintiffs to have "reasonably relied" on the "misrepresentation" if they had asked about the fee, received an affirmative assurance that they were receiving a discount, and then later discovered that the discount was not included in the final calculation.[129] By this logic, to ensure her ability to recover under section 75-1.1, a consumer would be required to question every fee—and perhaps every provision—listed in the loan documents, wait for an assurance that each fee represented a real service, and then decide whether it was reasonable to rely on that assurance.

Requiring consumers to engage in such thorough investigation is simply not realistic in the lending context. The numerous fees and provisions which have enabled lenders to tailor their products to the needs of each borrower have also transformed mortgage loans into complex, nontransparent documents that evade the comprehension of even the most educated consumers.[130] The same features make it difficult or even impossible to comparison shop for loan providers.[131] Borrowers often sign documents without having a clear understanding of the terms of the contract, what they will get from the transaction, or the risks they assumed.[132]

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127. *See supra* notes 120–23 and accompanying text.

128. *See Bumpers*, __ N.C. at __, 747 S.E.2d at 223. Technically, the court reprimanded Bumpers for "complet[ing] [his] loan transaction without first asking about the amount of the discount he was receiving," but there was no evidence that Bumpers heard in any other manner that he was receiving a discounted loan. *Id.* Bumpers and Elliott received mailed solicitations inviting them to apply for loans, but neither the supreme court nor the court of appeals notes any evidence that the mailers advertised anything other than a particular interest rate. *Id.* at 222–23.

129. Since the trial court found that several of the fees imposed by Title America were "redundant and duplicative," *id.* at 225—and thus did not correspond with a true service—plaintiffs arguably would have been required to do the same for each individual Title America fee as well.

130. *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 55 (2008) (noting this complexity and discussing payday loans in greater detail); Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REG. 181, 196 (2008).

131. Bar-Gill & Warren, *supra* note 130, at 55.

132. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1286 (2002).

Even after consumers have chosen a loan provider, they face similar problems with regard to closing services. The fees charged by Title America, which the trial court deemed redundant and duplicative,[133] were "deceptive" in the same way Community Bank's loan discount fee was deceptive. Consumers often assume that the market for closing services is competitive and that it is in the lender's interest to direct the borrower to the lowest cost provider, and thus they see little need to shop around for closing-service providers.[134] Accordingly, they often rely on provider recommendations from their loan originator.[135] In reality, the prices of these third-party services vary widely, meaning that consumers regularly miss out on the opportunity to reduce title, closing, and other settlement costs.[136] Because the average consumer does not understand the closing-services market, requiring consumers to prove reasonable reliance on a "misrepresentation" that a fee represents an actual service opens the door to consumer exploitation.

Given that section 75-1.1 was created to protect consumers, it is paradoxical to require consumers to exercise more than usual diligence. Requiring a consumer to prove reasonable reliance effectively collapses common law fraud and section 75-1.1 deceptive practices into the same cause of action, which the Supreme Court of North Carolina has warned should be avoided.[137] Thus, whatever support there is in North Carolina law for requiring some degree of reliance when a plaintiff alleges deceptive practices, the *Bumpers* court's reasonable reliance requirement and its application to the facts before it are plainly against the purpose of section 75-1.1.

B. The Proposal for a Reduced Reliance Requirement

North Carolina courts do not necessarily need to do away with a reliance element altogether for deception-based UDAP claims. The civil-enforcement provision requires that a plaintiff be "injured by

133. *Bumpers*, __ N.C. at __, 747 S.E.2d at 225. Given this finding, the court of appeals and supreme court both arguably erred by analyzing them solely under an excessive-pricing theory.

134. Susan E. Woodward, *A Study of Closing Costs for FHA Mortgages*, URB. INST. 105–06 (May, 2008), www.urban.org/UploadedPDF/411682_fha_mortgages.pdf.

135. *RESPA: Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis*, U.S. DEP'T OF HOUSING & URB. DEV. iv (2008), http://www.hud.gov/offices/hsg/ramh/res/impactanalysis.pdf ("[C]onsumers may not be the best shoppers for third-party service providers due to their lack of expertise and to the infrequency with which they shop for these services.").

136. *Id.*

137. *See* Marshall v. Miller, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981).

reason" of the defendant's act, and it might be difficult to prove such causation without establishing reliance.[138] But if proof of reliance is required for a consumer deception claim under section 75-1.1, it must be a less stringent requirement.[139] This is especially true in situations in which the two parties have unequal bargaining power, as is the case between a borrower and a lending institution. The Supreme Court of North Carolina has already declared such inequality to inform its analysis under the "unfairness" prong of section 75-1.1.[140] The court must consider this lack of bargaining power as well as the typical consumer's ignorance of an industry's business practices when deciding whether to allow a consumer to recover under the "deceptive" prong of the UDAP statute.[141]

This lowered bar for reliance could best be described as a rebuttable presumption in deception-based section 75-1.1 cases that the plaintiff relied on the defendant's representation. Such presumption could be rebutted if the defendant could prove actual knowledge of the misrepresentation on the part of the consumer; that is, courts need not allow a consumer to recover section 75-16's treble damages[142] if there is proof that she knew the defendant's statement was untrue, could have declined to enter into the transaction, and signed the contract anyway. Nonetheless, a consumer should be permitted to assume that his lender's representations to him are accurate[143] and that any service charge, however vaguely named, represents an actual service. The volume of documents associated with some transactions, including loans, makes it fundamentally

138. N.C. GEN. STAT. § 75-16 (2013); *see* Byrd, *supra* note 94, at 367 n.328 ("It is difficult to understand how injury and causation can be present in a private damage action when there is no reliance on the representation on which the claim is based.").

139. *See* Byrd, *supra* note 94, at 367.

140. *See* Johnson v. Phx. Mut. Life Ins. Co., 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980) (explaining that the "essence" of unfairness analysis is that "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position" (citations omitted)). For more on the unfairness prong, see *infra* Part IV.

141. *Johnson*, 300 N.C. at 264, 266 S.E.2d at 622.

142. N.C. GEN. STAT. § 75-16 (2013).

143. An exception can be made if the statement is obvious puffery. *Cf.* Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 403, 248 S.E.2d 739, 745 (1978) ("The statements in [defendant's] advertisements as to which [plaintiff] complains did not, in our opinion, go so far beyond tolerable limits of puffing as to constitute unfair acts proscribed by G.S. 75-1.1."). For example, where a lender's agent claims that the lender's loans are the "best deal you'll find anywhere," the court is not required to let the consumer recover under section 75-1.1 because she later found a loan with a lower interest rate. *Cf. id.* (finding no liability where advertisements were targeted at customers who were likely to recognize exaggerated claims).

impractical and unfair to require a consumer to investigate and absorb the meaning of every single provision.[144] For the same reason, provisions such as the one in *Tucker* that "[n]either party is relying on any statement or representation made by or on behalf of the other party that is not set forth in this Agreement"[145] should not be held to automatically protect a party from a section 75-1.1 claim.[146] Insofar as the goal of section 75-1.1 is to protect consumers and hold businesses liable for unfair and deceptive practices, the presumption should be in favor of the consumer and against the deceptive party.

III. THE UNFAIRNESS PRONG: THE PERFECT VEHICLE FOR ALLEGATIONS OF BOGUS CHARGES

One of the more anomalous features of the North Carolina Supreme Court's decision in *Bumpers* was its insistence that the plaintiffs' claim be evaluated under the "deceptive" prong even though the plaintiffs did not expressly allege misrepresentation.[147] The court rejected the court of appeals' "systematic overcharging" theory,[148] reasoning that "a claim for overcharging is not distinct from one based on misrepresentation."[149] However, section 75-1.1 prohibits "*unfair or* deceptive" conduct,[150] and while the court concluded that the defendant's alleged act was not deceptive, the court never considered whether it might qualify as "unfair." It is clear in North Carolina UDAP law that just because a practice is deemed not deceptive does not in any way bar the court from inquiring whether it

144. *See supra* notes 130–36 and accompanying text.

145. Tucker v. Boulevard at Piper Glen L.L.C., 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002).

146. These provisions are admittedly in line with the parol evidence rule, which "prohibits the admission of [evidence of prior oral agreements] to vary, add to, or contradict a written instrument." Van Harris Realty, Inc. v. Coffey, 41 N.C. App. 112, 115, 254 S.E.2d 184, 186 (1979). However, North Carolina law allows admission of parol evidence to prove that a written contract was procured by fraud. Godfrey v. Res-Care, Inc., 165 N.C. App. 68, 78, 598 S.E.2d 396, 403 (2004). While such provisions may be enforceable in most cases, they should not be accepted as an automatic defense to claims like fraud and section 75-1.1 violations; otherwise, merchants could too easily insulate themselves from UDAP liability by slipping these clauses into the small print.

147. *See* Bumpers v. Cmty. Bank of N. Va., __ N.C. __, __, 747 S.E.2d. 200, 226 (2013); *see also supra* Part I.C.

148. The court of appeals relied on its previous *Sampson-Bladen Oil* decision, *see supra* notes 42–46 and accompanying text, which held "that systematically overcharging a customer for two years, as the jury found was done here . . . is an *unfair trade practice* . . . ." Sampson-Bladen Oil Co. v. Walters, 86 N.C. App. 173, 177, 356 S.E.2d 805, 808 (1987) (emphasis added).

149. *Bumpers*, __ N.C. at __, 747 S.E.2d at 227.

150. N.C. GEN. STAT. § 75-1.1 (2013) (emphasis added).

is unfair[151]: "While an act or practice which is unfair may also be deceptive, or vice versa, it need not be so for there to be a violation of the Act."[152] Thus, the *Bumpers* court committed a fundamental error in not also inquiring whether the defendants' practices were unfair. By doing so, the Supreme Court of North Carolina opened the door for lower courts to pick and choose which parts of North Carolina UDAP law they wish to apply.

Admittedly, judicial guidance as to what practices should be deemed "unfair" under section 75-1.1 is undeveloped compared to the case law on deceptiveness.[153] North Carolina courts have alternated between a number of definitions of unfairness.[154] For example, "[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";[155] alternatively, "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position."[156] But North Carolina is not confined to its own case law for inspiration and guidance on how to determine which practices are "unfair." North Carolina courts have often looked to federal decisions interpreting the Federal Trade Commission Act, as the language of section 75-1.1 closely parallels that legislation,[157] and many other states around the country have similarly modeled their UDAP statutes.[158]

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151. *See* Johnson v. Phx. Mut. Life Ins. Co., 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980) ("The concept of 'unfairness' is broader than and includes the concept of 'deception.' " (citation omitted)).

152. *Id.*

153. *See* Sawchak & Nelson, *supra* note 1, at 2036.

154. *Id.* at 2051.

155. *Johnson*, 300 N.C. at 263, 266 S.E.2d at 621 (citations omitted). The Supreme Court has again relied on this definition to hold that an insurance company that does not " 'attempt[] in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear' . . . also engages in conduct that embodies the broader standards of N.C.G.S. § 75-1.1 because such conduct is inherently unfair, unscrupulous, immoral, and injurious to consumers." Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000) (citations omitted).

156. *Johnson*, 300 N.C. at 264, 266 S.E.2d at 622 (citing Spiegel, Inc. v. F.T.C., 540 F.2d 287, 293 (7th Cir. 1976)).

157. *See* Hardy v. Toler, 288 N.C. 303, 308, 318 S.E.2d 342, 345 (1975). *See generally* Sawchak & Nelson, *supra* note 1 (arguing that North Carolina courts should look to interpretation of section 5 of the FTC Act for guidance in analyzing "unfairness" claims).

158. *See* Marshall v. Miller, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981) ("Between the 1960[s] and [the 1980s], North Carolina was one of forty-nine states to adopt consumer protection legislation designed to parallel and supplement the F.T.C. Act." (citation omitted)).

As it happens, charging fees for services not rendered is commonly considered an "unfair" trade practice outside of North Carolina.[159] For example, in *Commonwealth v. DeCotis*,[160] the Massachusetts high court held that the practice of charging homeowners a fee at the time of a sale without rendering any services in connection with the fee constituted an unfair act or practice.[161] This was so even where the homeowners were willing to pay the fee and knowingly contracted to pay it.[162] Federal consumer protection laws also warn against charging fees other than for services actually provided.[163]

North Carolina courts should hold that charging fees not connected to an actual service is an unfair trade practice. The "essence" of an unfair trade practice under North Carolina law is that "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position."[164] Charging a consumer for a made-up service is certainly an inequitable assertion of power, since only one party—the one that wrote the contract—is in a position to carry out such an abuse.

CONCLUSION

The business of mortgage lending has grown increasingly complex, far beyond the comprehension of the average consumer. By requiring consumers to prove the same standard of reliance demanded in fraud claims, the Supreme Court of North Carolina goes squarely against the purpose of section 75-1.1 and opens the door for fraudulent businesses to deceive all but the savviest of consumers. The *Bumpers* decision threatens not only the integrity of the

159. *See* 36 AM. JUR. 3D *Proof of Facts* § 8 (1996).

160. 316 N.E.2d 748 (Mass. 1974).

161. *See id.* at 753–54.

162. *Id.* ("Although deception may not have been involved where the disclosure by the defendants to the prospective [buyer] was timely and complete, we believe that the practice of charging a fee for no service whatsoever was an unfair act or practice within the intent of [the Massachusetts UDAP statute] and that it was therefore unlawful.").

163. *See, e.g.*, 12 U.S.C. § 2607(b) (2012) ("No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."). The Supreme Court of the United States recently held that this language "covers only a settlement-service provider's splitting of a fee with one or more other persons; it cannot be understood to reach a single provider's retention of an unearned fee." Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034, 2040 (2012). However, the warning against retention of a fee for services not actually performed remains significant.

164. Johnson v. Phx. Mut. Life Ins. Co., 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980) (citing Spiegel, Inc. v. F.T.C., 540 F.2d 287, 293 (7th Cir. 1976)).

consumer loan situation but *any* business transaction in which the contracting party has the opportunity to slip language into the small print or in which the consumer depends on that party for information about the transaction. The more difficult the court makes it for consumers to enforce section 75-1.1, the more freedom dishonest merchants have to take advantage of North Carolina consumers without consequence.

REBECCA A. FISS**

** The author would like to thank Jerry Hartzell, who represented Mr. Bumpers, for sharing his knowledge and invaluable feedback. The author would also like to thank Chris Olson for his feedback and the Board of the North Carolina Law Review for its extreme patience and care.

North Carolina Law Review

VOLUME 92 SEPTEMBER 2014 NUMBER 6

The University of North Carolina

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Publication Information: The text and citations of the *Review* conform to the nineteenth edition of *The Bluebook: A Uniform System of Citation*. The *Review* is printed by Joe Christensen, Inc., in Lincoln, Nebraska. ISSN 0029-2524.

Materials cited "on file with the North Carolina Law Review" will be retained for a maximum of five years from date of publication.

Periodicals postage paid at Chapel Hill, North Carolina and additional mailing offices.

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