



8-1-1984

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Recommended Citation

Christopher B. Capel, *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).

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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?

North Carolina General Statutes section 75-1.1 prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."¹ Section 75-16 establishes a private cause of action for "any person, firm or corporation" injured by a violation of section 75-1.1.² Any damages assessed pursuant to section 75-1.1 are trebled automatically.³ Whether a plaintiff seeking relief under section 75-1.1 may recover punitive damages in addition to treble damages is unsettled. North Carolina courts never have awarded both statutory treble damages and punitive damages;⁴ they have, however, stopped short of declaring treble and punitive damages to be mutually exclusive.⁵

Most recently, the availability of the statutory treble damages and punitive damages was considered in *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*⁶ In this diversity action, the United States Court of Appeals for the Fourth Circuit denied an award of treble and punitive damages. Although the result was reached on grounds other than mutual exclusivity,⁷ the majority of the court expressed doubt that the North Carolina courts would uphold an award of punitive damages and statutory treble damages.⁸ A review of the North

1. N.C. GEN. STAT. § 75-1.1 (1981).

2. *Id.* § 75-16.

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

4. See, e.g., *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981); *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975); *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 245 S.E.2d 801, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978).

5. See *supra* note 4. *Accord Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 719 (4th Cir.) (Bryan, J., dissenting), *cert. denied*, 104 S. Ct. 155 (1983).

6. 705 F.2d 712 (4th Cir.), *cert. denied*, 104 S. Ct. 155 (1983).

7. In *Atlantic Purchasers* plaintiffs brought an action for fraud and breach of express warranty in connection with the purchase of an airplane. *Id.* at 714. Plaintiffs alleged that the airplane's engines had been operated for more hours than defendants represented, that the necessary airworthiness inspections had not been performed as claimed, and that the log books had been doctored to substantiate these representations. *Id.* The jury awarded compensatory damages of \$31,000 and punitive damages of \$15,000. *Id.* After the verdict was returned, plaintiffs moved to treble the compensatory damages pursuant to N.C. GEN. STAT. § 75-1.1 (1981), and sought attorneys' fees pursuant to N.C. GEN. STAT. § 75-16.1 (1981). Plaintiffs had made no use of, or reference to, these statutory provisions prior to their motion. They denied that an award of punitive damages was inconsistent with statutory treble damages and suggested that if they were inconsistent, "the punitive damages should be eliminated and the actual damages trebled." *Atlantic Purchasers*, 705 F.2d at 714-15. The district court denied the motion. The court of appeals affirmed. Although the court of appeals recognized that the jury's special verdict supported liability and treble damages under §§ 75-1.1 and 75-16, they determined that granting plaintiffs' motion would unfairly prejudice defendants. The court concluded: "Fundamental fairness requires in such a case, where the statutory remedy may increase greatly the defendant's liability, that the opposing party be notified of the possibility of the unusual relief prior to the plaintiff's tender of a proposed judgment on the verdict." *Id.* at 717.

8. *Atlantic Purchasers*, 705 F.2d at 716 n.4. The dissenting opinion supported the availability of the statutory recovery. Moreover, the dissent argued that an award of punitive damages

Carolina cases considering relief under section 75-1.1, of analogous North Carolina statutes with multiple damage provisions, and of statutes and judicial precedent in other jurisdictions, reveals the soundness of the court of appeals' prediction. Moreover, an award of statutory treble and punitive damages exceeds the parameters of the statutory scheme envisioned by the legislature in enacting section 75-1.1.

Analysis of this issue begins with a consideration of the substantive provisions of section 75-1.1 and the characteristics of treble and punitive damages. Since the 1960's, North Carolina and most other states have enacted consumer protection legislation⁹ designed to parallel and supplement the Federal Trade Commission Act.¹⁰ These state statutes were derived from various alternative legislative schemes suggested to the states by the Federal Trade Commission (FTC)¹¹ and the Commission on Uniform State Laws.¹² The FTC encouraged such statutes because enforcement of the FTC Act's section 5 prohibition against "unfair or deceptive acts or practices"¹³ could not be accomplished solely by the FTC.¹⁴ In 1969 North Carolina adopted the broadest of the suggested forms and enacted section 75-1.1.¹⁵ Although various common-law causes of action for unfair or deceptive trade practices had been recognized in North Carolina,¹⁶ the General Assembly reacted favorably to FTC encouragement of state legislation because the legislature perceived that the common-law remedies were inadequate.¹⁷ Section 75-1.1, however, does not supersede common-law causes of action. A plaintiff may pursue re-

does not preclude an award of treble damages for a violation of § 75-1.1. *Id.* at 718-21 (Bryan, J., dissenting).

9. Although the North Carolina legislation was enacted in part to provide enhanced consumer protection, Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRA. L. REV. 1, 18-20 (1969), relief is not restricted to consumers. See N.C. GEN. STAT. § 75-1.1 (1981). See also *Atlantic Purchasers*, 705 F.2d 712 (4th Cir.), *cert. denied*, 104 S. Ct. 155 (1983); *United Roasters, Inc. v. Colgate Palmolive Co.*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

10. 15 U.S.C. §§ 41-77 (1982).

11. [T]he FTC offered three alternative drafts of an Unfair Trade Practices and Consumer Protection Law: Alternate Form No. 1 contains the broad language of § 5 of the Federal Trade Commission Act prohibiting "unfair methods of competition and unfair or deceptive acts or practices" in trade or commerce; Alternate Form No. 2 outlaws all forms of fraudulent, deceptive and sometimes unfair acts or practices in trade or commerce; and Alternate Form No. 3 itemizes the deceptive practices proscribed, and usually contains a "catch-all" clause reaching all other forms of deception.

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, 521-22 n.2 (1980).

12. *Id.* at 521-22.

13. 15 U.S.C. § 45(a)(1) (1982).

14. Leaffer & Lipson, *supra* note 11, at 522.

15. Act of June 12, 1969, ch. 833, 1969 N.C. Sess. Laws 930.

16. See, e.g., *Roberson v. Williams*, 240 N.C. 696, 83 S.E.2d 811 (1954) (fraud). The North Carolina courts have continued to recognize common-law unfair trade practices since 1969. See *Griffin v. Wheeler Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976) (implied warranty); *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974) (fraud).

17. See *Marshall v. Miller*, 302 N.C. 539, 543-44, 276 S.E.2d 397, 400 (1981).

lief under the common law and section 75-1.1 in the same action.¹⁸

Unlike the FTC Act, which does not provide for a private cause of action based on its violation,¹⁹ section 75-16 allows a private cause of action and provides treble damages²⁰ to encourage private enforcement of section 75-1.1.²¹ Trebling damages "makes more economically feasible the bringing of an action where the possible damages are limited."²² The North Carolina Supreme Court also has recognized that: "The statute is partially punitive in nature in that it clearly serves as a deterrent to future violations."²³ As an additional deterrent, the statutory scheme provides for the award of attorneys' fees for *willful* misconduct.²⁴

The legislature did not define what constitutes "unfair methods of competition" or "unfair or deceptive trade practices"; the scope of section 75-1.1 and the conduct that it proscribes are to be defined by the courts.²⁵ The North Carolina Supreme Court has determined that a violation of section 75-1.1 and an award of treble damages pursuant to section 75-16 do not require intentional wrongdoing by the defendant.²⁶ The defendant is judged on the effect of his actions rather than his intent.²⁷ The court also has established a bifurcated private-action procedure. Initially, the jury determines the facts. The court then determines, as a matter of law, whether the defendant engaged in unfair methods of competition or unfair or deceptive trade practices.²⁸ If it finds a violation, the court *must* treble the compensatory damages that are established by the jury's fact finding.²⁹

18. See *Abernathy v. Ralph Squires Realty Co.*, 55 N.C. App. 354, 358, 285 S.E.2d 325, 327 (1982).

19. See *Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981); *Fulton v. Hecht*, 580 F.2d 1243, 1249 n.2 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). See also 4 R. CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES*, § 24.01 (4th ed. 1983).

20. N.C. GEN. STAT. § 75-16 (1981). Section 75-16 was enacted in 1913 as part of the original Chapter 75: Monopolies, Trusts and Consumer Protection. Act of Mar. 3, 1913, ch. 41, § 14, 1913 N.C. Sess. Laws 66. All provisions of Chapter 75 are subject to the treble damage provision of § 75-16, except § 75-56 (regulating debt collection practices). Accordingly, when § 75-1.1 was enacted in 1969 it became subject to § 75-16 as well. See Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C.L. REV. 205, 258 (1982) [hereinafter cited as Aycock, *North Carolina*]. In 1977, § 75-16 was amended to delete the requirement that damages be assessed by the jury, thus making the award of treble damages automatic if compensatory damages were assessed. See *id.* at 258 n.365. See generally Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C.L. REV. 199 (1972).

21. See *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 235, 259 S.E.2d 1, 5, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

22. *Marshall v. Miller*, 302 N.C. 539, 549, 276 S.E.2d 397, 404 (1981).

23. *Id.* at 546, 276 S.E.2d at 402.

24. N.C. GEN. STAT. § 75-16.1 (1981 & Supp. 1983).

25. See Aycock, *North Carolina*, *supra* note 20, at 211. For a discussion of the judicial interpretation of unfair methods of competition and unfair or deceptive trade practices under 75-1.1, see generally N. ALLEN, *ANTITRUST AND TRADE REGULATION: THE LAW IN NORTH CAROLINA* §§ 10-2, 10-3 (1982); Aycock, *North Carolina*, *supra* note 20 at 211-23; Comment, *The Trouble with Trebles: What Violates G.S. § 75-1.1?*, 5 CAMPBELL L. REV. 119, 123-57 (1982).

26. *Marshall v. Miller*, 302 N.C. 539, 545-46, 276 S.E.2d 397, 401-402 (1981).

27. *Id.* at 548, 276 S.E.2d at 403.

28. *Hardy v. Toler*, 288 N.C. 303, 310, 218 S.E.2d 342, 346-47 (1975).

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

Although both treble and punitive damages are awards in excess of compensatory damages, the justification for awarding statutory treble damages pursuant to section 75-16 contrasts sharply with the common-law justification for punitive damages. The treble damage provision has been recognized as partially punitive in nature and partially an encouragement to private enforcement.³⁰ Punitive damages, however, are awarded for the sole purpose of punishing and deterring others from similar behavior.³¹ Unlike an award of treble damages under section 75-16, an award of punitive damages requires a showing of "intentional wrongdoing,"³² "willful conduct,"³³ or "outrageous conduct."³⁴

Because treble and punitive damages serve different purposes and are not awarded for the same policy reasons, it has been argued that a plaintiff should be able to recover both measures of damage.³⁵ Furthermore, the availability of punitive and treble damages for violations of section 75-1.1 arguably effectuates the state's goals of punishment, deterrence and encouragement of private enforcement.³⁶ Opponents, however, contend that treble and punitive damages are mutually exclusive. They argue that an award of both is duplicative because each measure has a punitive element.³⁷ The resolution of this conflict can be advanced by considering North Carolina cases involving unfair methods of competition or unfair or deceptive trade practices and by analyzing analogous statutes in North Carolina and other jurisdictions. Ultimately, however, legislative intent should govern the resolution of this controversy.

The issue whether treble and punitive damages are mutually exclusive arises when a plaintiff pursues, in the same suit, a cause of action for a violation of section 75-1.1 and a common-law cause of action. The plaintiff could seek treble damages for the statutory violation and punitive damages for the

30. See *supra* notes 21-23 and accompanying text; *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 237, 259 S.E.2d 1, 6, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

31. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112-13, 229 S.E.2d 297, 302 (1976).

32. *Id.*

33. *Hardy v. Toler*, 288 N.C. 303, 306, 218 S.E.2d 342, 344-45 (1975).

34. *Id.* To determine punitive damage, the court submits a separate punitive damage issue to the jury and instructs the jurors that such an award should not be made if they have not found compensatory damages. The propriety and amount of punitive damages, however, is within the complete discretion of the jury. See *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 300-01 (1976); *Phillips v. Universal Underwriters Ins. Co.*, 43 N.C. App. 53, 56, 257 S.E.2d 671, 673 (1979).

35. See, e.g., *Atlantic Purchasers*, 705 F.2d at 718-20 (Bryan, J., dissenting); Roberts & Martz, *Consumerism Comes of Age: Treble Damages and Attorney Fees in Consumer Transactions—The Ohio Consumer Sales Practices Act*, 42 OHIO ST. L.J. 927, 959 (1981); Note, *Consumer Protection—Hardy v. Toler: Applying the North Carolina Deceptive Trade Practices Legislation—What Role for the Jury?*, 54 N.C.L. REV. 963, 965 n.15 (1976). Cf. *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979) (although reversed, the district court awarded treble and punitive damages for a violation of the Sherman Antitrust Act); *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 198 N.W.2d 363 (1972) (although reversed, the Wisconsin Circuit Court awarded treble and punitive damages for a violation of the Wisconsin Antitrust Act).

36. See Parker, *The Deterrent Effect of Punitive Treble Damage Suits: Fact or Fantasy*, 3 N.M.L. REV. 286, 287 (1973).

37. See, e.g., *Atlantic Purchasers*, 705 F.2d at 716 n.4; *Hardy v. Toler*, 288 N.C. 303, 312, 218 S.E.2d 342, 348 (1975) (Huskins, J., concurring); Roberts & Martz, *supra* note 35, at 959. See also *infra* note 78 and accompanying text.

common-law violation.³⁸ The North Carolina Court of Appeals has determined that both theories may be submitted to the jury.³⁹ Consequently, in the same action a jury might award compensatory damages, find a common-law violation, and establish facts constituting a violation of section 75-1.1, which would entitle plaintiff to treble damages.⁴⁰ If the common-law violation involved intentional wrongdoing, the jury conceivably could award punitive damages as well.⁴¹ The North Carolina Court of Appeals, however, has also determined that a plaintiff may recover under the statutory or common-law cause of action, but not under both.⁴² Thus, it appears that the plaintiff would be required to choose a theory of recovery after the verdict is returned.⁴³ Because each measure is tied to a specific theory of recovery, the plaintiff's choice of a theory would be an election of remedies.⁴⁴ A plaintiff could not choose the statutory theory and receive treble as well as punitive damages—the measures of damage would be mutually exclusive.

The foregoing conclusion does not resolve the treble/punitive issue. A plaintiff might pursue a section 75-1.1 cause of action seeking treble damages pursuant to section 75-16 and punitive damages for the statutory violation on the basis of intentional wrongdoing. Again, a jury might award compensatory and punitive damages and find facts constituting a violation of section 75-1.1. Because an election between theories of recovery would be unnecessary, a court would be faced squarely with the mutual exclusivity question. Although the North Carolina courts never have considered the availability of common-law punitive damages in this context, they have considered the availability of punitive damages in connection with other North Carolina statutes that provide for multiple damage recovery.

North Carolina General Statutes section 20-348 provides for an award of treble damages to those injured by a violation of the North Carolina Vehicle Mileage Act.⁴⁵ In *Roberts v. Buffaloe*⁴⁶ the North Carolina Court of Appeals

38. See, e.g., *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975); *Gower v. Strout Realty, Inc.*, 56 N.C. App. 603, 289 S.E.2d 880 (1982); *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E.2d 1, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 245 S.E.2d 801, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978).

39. See *Abernathy v. Ralph Squires Realty Co.*, 55 N.C. App. 354, 358, 285 S.E.2d 325, 327 (1982). See also *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 990-91 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981) (N.C. GEN. STAT. § 75-1.1 (1981) diversity action).

40. See *supra* note 29 and accompanying text.

41. See *supra* notes 32-34 and accompanying text.

42. See *Marshall v. Miller*, 47 N.C. App. 530, 541-42, 268 S.E.2d 97, 103 (1980), *modified on other grounds*, 302 N.C. 539, 276 S.E.2d 397 (1981); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 105-06, 245 S.E.2d 801, 807-08, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978). See also *Atlantic Purchasers*, 705 F.2d at 716 n.4.

43. The North Carolina courts that have considered a suit such as the hypothetical described here did not address the availability of treble and punitive damages. Although none of these courts awarded both remedies, the results were reached on grounds other than mutual exclusivity. See *supra* note 38.

44. Presumably the plaintiff could elect the cause of action and accompanying measure of damage which yielded the largest award.

45. N.C. GEN. STAT. §§ 20-340 to -350 (1983).

46. 43 N.C. App. 368, 258 S.E.2d 861 (1979).

rejected the possibility of an award of punitives along with the treble damage remedy.⁴⁷ The court ruled that common-law punitive damages were precluded by the statute.⁴⁸

North Carolina General Statutes section 1-539.1 provides for an award of double damages to those injured by a wrongful cutting of timber, under trespass. At common law, damages for wrongful timber cutting could be enhanced, as a penal measure, if the trespasser was a "knowing wrongdoer."⁴⁹ Such damages were calculated by valuing the timber where cut and enhancing that measure by the value added by the trespasser's labors. Thus, the plaintiff was awarded the full value of the timber as held or disposed by the defendant.⁵⁰ In *Jones v. Georgia-Pacific Corp.*⁵¹ plaintiff sought double damages pursuant to section 1-539.1 and enhanced damages. The North Carolina Court of Appeals rejected such an award. The court characterized the common-law enhanced damage measure and the statutory damages as mutually exclusive.⁵²

The above decisions suggest that the North Carolina courts would find punitive and treble damages for violation of section 75-1.1 to be mutually exclusive. Court interpretations of the "little FTC Acts" of other states also are instructive in resolving the punitive/treble damage issue. Legislation concerning unfair trade practices and consumer protection now has been enacted in forty-eight other states.⁵³ These statutes, however, offer limited assistance. Of the forty-eight, only one-third provide for multiple damages.⁵⁴ Many of the states that provide for multiple damages also require a showing of intentional misconduct.⁵⁵ Because an award of treble damages under section 75-16 does not require intentional misconduct,⁵⁶ it can be argued that punitive damages should be allowed when such conduct is present. In states where intentional misconduct is required for an award of multiple damages, the argument for punitive damages is less persuasive. These jurisdictions appear to have incorporated a punitive damages remedy into the statute.⁵⁷

47. *Id.* at 372, 258 S.E.2d at 863.

48. *Id.* The analogy between N.C. GEN. STAT. § 75-16 (1981) and *id.* § 20-348 (1983) is defective in one respect. A violation of § 75-1.1 and an award of treble damages under § 75-16 does not require a showing of intentional wrongdoing. *See supra* notes 26-27 and accompanying text. A violation of § 20-348, however, requires a showing that the defendant acted with "intent to defraud." N.C. GEN. STAT. § 20-348 (1983). Although it could be argued that punitive damages should be available for intentional wrongdoing that violates § 75-1.1, such an argument is less persuasive regarding § 20-348. *Roberts*, however, was not decided on this ground.

49. Dobbs, *Trespass to Land in North Carolina: Part II. Remedies for Trespass*, 47 N.C.L. REV. 334, 336-37 (1969).

50. *Id.*

51. 15 N.C. App. 515, 190 S.E.2d 422 (1972).

52. *Id.* at 518, 190 S.E.2d at 424.

53. *See* Leaffer & Lipson, *supra* note 11, at 531.

54. *See id.* at 560-64. "Multiple damages" refers to the doubling or trebling of compensatory damages.

55. *See, e.g.*, GA. CODE ANN. § 10-1-399(c) (1982); LA. REV. STAT. ANN. § 51:1409A (West Supp. 1984); MASS. GEN. LAWS ANN. ch. 93A, § 11 (West 1975 & Supp. 1983); S.C. CODE ANN. § 39-5-140 (Law. Co-op. 1977); TENN. CODE ANN. § 47-18-109(a) (1979).

56. *See supra* notes 26-27 and accompanying text.

57. *But see* Colonial Lincoln-Mercury Sales, Inc. v. Molina, 152 Ga. App. 379, 382, 262 S.E.2d 820, 823 (1979) (although recognizing that a violation of the Georgia unfair trade practice

Those states that do not require intentional misconduct have not addressed the mutual exclusivity issue.⁵⁸ Although the North Carolina courts have emphasized that treble damages serve to encourage private enforcement,⁵⁹ other "nonintentional" jurisdictions highlight the punitive aspect of such an award.⁶⁰ This emphasis weighs against the award of punitive damages in addition to multiple damages.⁶¹ Thus, it appears that many states might find multiple damages and punitive damages to be mutually exclusive in an unfair or deceptive trade practice action. Because the language and interpretation of the North Carolina statutes differ significantly from other jurisdictions, however, the applicability of this conclusion to sections 75-1.1 and 75-16 is limited.

The North Carolina Supreme Court has held that federal decisions interpreting the FTC Act may be used as guidance in determining the conduct that constitutes a violation of section 75-1.1.⁶² Because the FTC Act does not provide for a private cause of action, however, it does not provide an analogy for resolving whether punitive damages may be recovered when treble damages are awarded under section 75-16. As noted by the North Carolina Supreme Court: "[T]he provisions for private enforcement found in [section 75-16] are more closely analogous to Section 4 of the Clayton Act,^[63] which provides for private suits with treble damage recovery for violation of federal antitrust laws."⁶⁴ The federal courts consistently have ruled that punitive damages are unavailable to a plaintiff who is awarded treble damages⁶⁵ for a violation of the Sherman Antitrust Act.⁶⁶ These courts have characterized treble damages as punitive, and accordingly, they view punitive damages as a double recov-

statutes required intentional conduct, the court suggested that punitive damages were "permissible" along with an award of "mandatory" treble damages under the statute).

58. *See, e.g.*, *Roberts & Martz, supra* note 35, at 958 ("not clear" whether a plaintiff can recover treble damages under the Ohio unfair trade practice statutes and also recover punitive damages).

59. *See supra* notes 21-22 and accompanying text.

60. *See, e.g.*, *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 274-75, 390 A.2d 566, 571 (1978) (Pashman, J., concurring). *Cf. Bailey Employment Sys. v. Hahn*, 545 F. Supp. 62, 73 (D. Conn. 1982) (punitive damages allowable under Connecticut unfair trade practice statutes in judge's discretion; court awarded compensatory damages doubled).

61. *But see* D.C. CODE ANN. § 28-3905(k)(1) (1981) (no requirement of intentional conduct to show violation of District of Columbia unfair trade practice statutes, but treble damages and punitive damages enumerated as possible awards).

62. *See* *Marshall v. Miller*, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 262-63, 266 S.E.2d 610, 620-21 (1980); *Hardy v. Toler*, 288 N.C. 303, 308, 218 S.E.2d 342, 345 (1975).

63. 15 U.S.C. § 15(a) (1982).

64. *Marshall v. Miller*, 302 N.C. 539, 542, 276 S.E.2d 397, 399 (1981).

65. *See, e.g.*, *Arnott v. American Oil Co.*, 609 F.2d 873, 888 (8th Cir. (1979)); *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784, 788 (S.D.N.Y. 1936) *Cf. Hometowne Builders, Inc. v. Atlantic Nat'l Bank*, 477 F. Supp. 717, 719-20 (E.D. Va. 1979) (finding "duplicative" an award of punitive damages along with the treble damage recovery of 12 U.S.C. § 1972 (1982), an "addition to the antitrust laws"). *See also* *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 409, 198 N.W.2d 363, 367-68 (1972) (noting that while the Wisconsin version of the Sherman Antitrust Act was designed to encourage private enforcement and punish violators, the award of punitives with statutory trebles "would amount to double recovery of a penalty and thus violate the basic fairness of a judicial proceeding required by the due process clause of the Fourteenth Amendment").

66. 15 U.S.C. §§ 1-7 (1982).

ery.⁶⁷ Treble damages are an exclusive remedy for the violation of the federal antitrust statutes.⁶⁸ Since the North Carolina courts have relied heavily on federal decisions interpreting section 5 of the FTC Act when interpreting section 75-1.1, the federal decisions concerning the availability of punitive and treble damages for violations of the federal antitrust laws also are instructive. These decisions suggest that the North Carolina courts would find punitive and treble damages to be mutually exclusive.

In *Marshall v. Miller*⁶⁹ the North Carolina Supreme Court considered whether a violation of section 75-1.1 should require a showing of intentional wrongdoing. The court recognized that legislative intent should govern its determination.⁷⁰ Likewise, legislative intent ultimately should govern whether punitive and treble damages are mutually exclusive under sections 75-1.1 and 75-16. Although the foregoing consideration of analogous statutes, both within and without the state, is instructive on how the North Carolina courts should resolve this issue, a sounder approach is to attempt to effectuate the legislature's statutory intent.

The void left by the lack of written legislative history regarding section 75-1.1 has been filled by the judiciary. As declared by the courts, the essence of the legislative intent was to supplement the common law in the area of unfair or deceptive trade practices,⁷¹ to encourage private enforcement,⁷² and to provide a punitive measure.⁷³ Thus, the General Assembly enacted section 75-1.1 creating "an entirely statutory cause of action"⁷⁴ and provided the existing treble damage provision of section 75-16 as the remedy for that cause of action. The result was a cause of action "broader than traditional common law actions,"⁷⁵ an "expansion" of the common law,⁷⁶ and a remedy more easily recovered than remedies at common law.⁷⁷ Thus, it is inconsistent with this scheme to interject common-law punitive damages upon the showing of intentional wrongdoing, an element not required under section 75-16.

The inconsistency between punitive damages and legislative intent is most apparent when considering the punitive intent of the treble damage provision. An award of treble damages under section 75-16 represents both an incentive

67. See *supra* note 65.

68. *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784, 788 (S.D.N.Y. 1936).

69. 302 N.C. 539, 276 S.E.2d 397 (1981).

70. *Id.* at 543, 276 S.E.2d at 400.

71. See *id.*

72. See *id.*; *State ex rel. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 320, 233 S.E.2d 895, 900 (1977); *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 237, 259 S.E.2d 1, 6, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

73. *Marshall*, 302 N.C. at 546, 276 S.E.2d at 402; *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 237, 259 S.E.2d 1, 6, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

74. *Marshall*, 302 N.C. at 546, 276 S.E.2d at 402.

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

76. *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 241, 259 S.E.2d 1, 9, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979).

77. For example, although at common law actionable fraud required an "intent to deceive," *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974), an award of treble damages for a violation of § 75-1.1 does not require intentional wrongdoing. See *supra* notes 26-27 and accompanying text.

for private enforcement and a punitive measure. The award is one; it cannot be apportioned between these aspects. Necessarily, an additional award of punitive damages overlaps and duplicates the punitive portion of treble damages. It would be a double recovery, prohibited in North Carolina, to the extent that the treble award represents a punitive element.⁷⁸ Thus, punitive damages and a treble damage recovery under section 75-16 should be deemed mutually exclusive.

It could be argued that because the statutory cause of action does not require intentional wrongdoing, the outrageous conduct associated with intentional wrongdoing demands an additional punitive remedy. This argument is particularly appealing when compensatory damages, even when trebled, result in a minimal award.⁷⁹ The response is two-fold. First, the legislature contemplated intentional conduct in connection with a violation of section 75-1.1. Under North Carolina General Statutes section 75-16.1, a plaintiff injured by a violation of section 75-1.1 may recover attorneys' fees upon a showing that the defendant acted "willfully." Section 75-16.1 also was intended to encourage private enforcement.⁸⁰ Although the award of attorneys' fees is not a punitive provision, it does enable the plaintiff to recover an increased award for intentional wrongdoing.⁸¹ Had the legislature intended punitive damages to be available in connection with violations of section 75-1.1, they would have provided such a remedy for intentional wrongdoing.

Second, in cases involving intentional wrongdoing in which treble damages are minimal, the plaintiff may pursue a common-law cause of action and seek punitive damages. Since a plaintiff may pursue the common-law and the statutory causes of action in the same suit,⁸² if punitive damages are warranted and are awarded by the jury, he may elect such a remedy in lieu of the statutory treble damages.⁸³

78. See *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954); *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified on other grounds*, 302 N.C. 539, 276 S.E.2d 397 (1981).

79. Cf. J. STEIN, DAMAGES AND RECOVERY: PERSONAL INJURY AND DEATH ACTIONS § 198 (1972).

80. See *Marshall*, 302 N.C. at 549, 276 S.E.2d at 404. In *Marshall*, the court stated:

We further note that G.S. 75-16.1 also provides that an unsuccessful plaintiff may be charged with defendant's attorney fees should the court find that "[t]he party instituting the action knew, or should have known, the action was frivolous and malicious." This is an important counterweight designed to inhibit the bringing of spurious lawsuits which the liberal damage provisions of G.S. 75-16 might otherwise encourage.

Id. Thus, it is doubtful that the court would liberalize further the damages available for a violation of § 75-1.1 by legitimizing an award of punitive damages.

81. Like punitive damages, an award of attorneys' fees under § 75-16.1 requires a finding by the jury of some amount of compensatory damages. Compare *supra* note 34 and accompanying text with *Mayton v. Hiatt's Used Cars, Inc.*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864, *disc. rev. denied*, 300 N.C. 198, 269 S.E.2d 624 (1980) (court denied an award of attorneys' fees because plaintiff did not suffer actual injury).

82. See *supra* notes 38-39 and accompanying text.

83. See *supra* notes 40-44 and accompanying text. Cf. *B.B. Walker Co. v. Ashland Chem. Co.*, 474 F. Supp. 651 (M.D.N.C. 1979). In *Walker*, plaintiff sued under both the North Carolina common law of unfair competition and § 75-1.1. Although the statute of limitations applicable to the statute had expired, plaintiff was awarded compensatory damages of \$10 and punitive dam-

One final ground for the mutual exclusivity of punitive and treble damages exists. Punitive damages should not be used to supplement a statutory scheme in which treble damages have been provided explicitly and no provision has been made for additional damages. When considering the availability of punitive damages along with double damages under the North Carolina statute governing wrongful cutting of timber,⁸⁴ the North Carolina Court of Appeals stated:

It is settled law that statutes in derogation of the common law or statutes imposing a penalty must be strictly construed. Strict construction . . . requires that everything be excluded from the operation of the statute which does not come within the scope of the language used, taking the words in their natural and ordinary meaning.⁸⁵

Because section 75-1.1 is in "derogation of the common law" causes of action for unfair or deceptive trade practices⁸⁶ and section 75-16 imposes a penalty,⁸⁷ strict construction is in order. Absent explicit legislative inclusion, punitive damages should be excluded from the statutory scheme.⁸⁸ Punitive damages and treble damages should be mutually exclusive.

In conclusion, the North Carolina cases that have interpreted sections 75-1.1 and 75-16 and the interpretations of analogous statutes within and without North Carolina suggest that the North Carolina courts should conclude that statutory treble damages and punitive damages are mutually exclusive. More importantly, the North Carolina courts' interpretation of the legislative intent suggests that the two measures should be mutually exclusive. Until the courts or legislature resolve this issue, however, the prudent plaintiff should pursue punitive damages under both the common-law and statutory causes of action.

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ages of \$250,000 under the common-law cause of action. Pursuant to § 75-16, recovery would have been limited to treble damages of \$30.

84. N.C. GEN. STAT. § 1-539.1 (1982). See *supra* notes 49-52 and accompanying text.

85. *Jones v. Georgia-Pacific Corp.*, 15 N.C. App. 515, 518, 190 S.E.2d 422, 424 (1972) (citations omitted).

86. See *supra* notes 74-77 and accompanying text.

87. *Marshall*, 302 N.C. at 546, 276 S.E.2d at 402.

88. *Cf. Hometowne Builders, Inc. v. Atlantic Nat'l Bank*, 477 F. Supp. 717, 719 (E.D. Va. 1979) (in construing a federal antitrust treble damage provision, the court stated: "The absence of any discussion [in the legislative history] of punitive damages in excess of treble damages is a strong indication that such damages were not contemplated by Congress and were not implied in the statute."); *Marshall*, 302 N.C. at 547, 276 S.E.2d at 402 ("Absent statutory language making trebling discretionary with the trial judge, we must conclude that the Legislature intended trebling of any damages assessed to be automatic once a violation is shown."); *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 409, 198 N.W.2d 363, 367 (1972) (because the Wisconsin antitrust statute explicitly creates treble damages, the statutory remedy is exclusive of punitive damages).

If the North Carolina legislature had intended punitive damages to be available, it could have enumerated trebles as well as punitives, as has been done in the District of Columbia. See D.C. CODE ANN. § 28-3905(k)(1) (1981).