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# Consumer Protection -- Hardy v. Toler: Applying the North Carolina Deceptive Trade Practices Legislation -- What Role for the Jury?

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not deter mitigation of loss and would prevent the lender from making a supernormal profit while others go unpaid. North Carolina can go one step further and reduce the number of loan misappropriation cases without unduly burdening lenders by granting equitable liens to general contractors who relied on construction loan funds but were not paid for completed work.

WILLIAM H. HIGGINS

### Consumer Protection—Hardy v. Toler: Applying the North Carolina Deceptive Trade Practices Legislation—What Role for the Jury?

Shortly after the enactment of the North Carolina unfair trade practices legislation in 1969,<sup>1</sup> the hope was expressed that the state had taken a "unique approach" to consumer protection that might well succeed in curbing deceptive trade practices: a consumer protection statute to be enforced in large part by consumers themselves.<sup>2</sup> For almost six years, however, the potential of these sections had remained

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1. The main provisions of the legislation are to be found in the newly created section 75-1.1 which provides as follows:

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

(b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

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

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

N.C. GEN. STAT. § 75-1.1 (1975). In addition, the following sections were amended to make them applicable to all potential defendants in a deceptive trade practice action: *id.* §§ 75-9, -10, -11, -12, -16 (1975).

2. See Comment, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896, 911 (1970) [hereinafter cited as Comment].

untested.<sup>3</sup> Finally, in *Hardy v. Toler*<sup>4</sup> the North Carolina Supreme Court was squarely confronted with the case that necessitated an initial judicial construction of the statute. Although in *Hardy* defendant's actions were held to violate section 75-1.1 of the North Carolina General Statutes,<sup>5</sup> the court may well have vitiated the impact of these provisions by its apparent ruling on the critical question whether it is for the judge or the jury to decide if alleged conduct constitutes an unfair or deceptive trade practice.<sup>6</sup> If *Hardy* is to be read as requiring a determination of liability under the statute by the court alone, the corresponding lack of significant jury involvement could effectively deprive the legislation of much of its consumer orientation.

In 1971 plaintiff Hardy purchased a used car from defendants, relying on representations that it was a low mileage, previously unwrecked, one-owner vehicle carrying a transferable manufacturer's warranty.<sup>7</sup> Upon learning that in fact these representations were untrue, and known by defendants to be false, plaintiff brought suit in Craven County Superior Court seeking damages for breach of warranty, punitive damages, and treble damages under section 75-16 of the General Statutes,<sup>8</sup> alleging that defendant's actions amounted to unfair or deceptive trade practices under section 75-1.1.<sup>9</sup> The trial court granted defendant's motion for a directed verdict on the question of punitive damages and refused to allow the jury to determine whether defendant's conduct was indeed unfair or deceptive within the statute.<sup>10</sup> After a jury verdict for plaintiff for breach of warranties, the judge refused to treble the award, holding as a matter of law that "the acts

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3. In no previous case had liability been found under section 75-1.1, and in only three appellate opinions had the section even been noted: *Harrington Mfg. Co. v. Powell Mfg. Co.*, 26 N.C. App. 414, 216 S.E.2d 379 (1975); *Smith v. Ford Motor Co.*, 26 N.C. App. 181, 215 S.E.2d 376 (1975); *State v. Dare to be Great, Inc.*, 15 N.C. App. 275, 189 S.E.2d 802 (1972).

4. 288 N.C. 303, 218 S.E.2d 342 (1975).

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

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

7. *Id.* at 305-06, 218 S.E.2d at 344.

8. N.C. GEN. STAT. § 75-16 (1975) provides:

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

9. 288 N.C. at 304-05, 218 S.E.2d at 343-44.

10. *Id.* at 305, 218 S.E.2d at 344.

of the defendants did not constitute unfair or deceptive acts or practices in the conduct of trade or commerce, which are declared unlawful by Section 75-1.1(a) . . . ."<sup>11</sup>

The court of appeals upheld the trial court on the issue of punitive damages, but remanded the case for a new trial on the ground that the issue of deceptive trade practices should have been presented to the jury.<sup>12</sup> The supreme court granted certiorari<sup>13</sup> to review the denial of punitive damages, and presumably to address the question of the allocation of the decision-making responsibility between judge and jury as to what constitutes an unfair trade practice.<sup>14</sup>

After somewhat summarily disposing of plaintiff's claim for punitive damages<sup>15</sup> the court turned to the critical judge/jury issue. Reviewing federal court decisions interpreting the provisions of the Federal Trade Commission Act,<sup>16</sup> and language from two Massachusetts opinions discussing a similar statute,<sup>17</sup> the North Carolina Supreme Court declared that "traditionally" and "[o]rdinarily it would be for the jury to determine the facts, and based on the jury's finding, the court

11. Record at 41, *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975).

12. 24 N.C. App. 625, 630-31, 211 S.E.2d 809, 813 (1975).

13. 287 N.C. 259, 214 S.E.2d 431 (1975).

14. Although in his petition for certiorari plaintiff raised only the question of punitive damages, Petitioner's Brief for Certiorari at 4-5, the Attorney General asked the court to resolve the conflict which had developed in the courts below on the judge/jury issue. Brief for Attorney General as Amicus Curiae at 2-4.

15. The entire court treated the question of punitive damages as though raised in an action alleging common law fraud. Whereas the majority insisted that punitive damages were not warranted because plaintiff had failed to demonstrate "insult, indignity, malice, oppression or bad motive other than the same false representations" upon which his claim was based, 288 N.C. at 306, 218 S.E.2d at 344-45, the concurring Justices contended that, even under the rigorous standard of the majority, defendant's conduct called for the imposition of punitive damages. *Id.* at 312, 218 S.E.2d at 348. However, because the treble damages provision was thought to supersede any other recovery of punitive damages, the concurring Justices joined with the majority in ordering that plaintiff's judgment be trebled.

If, however, proof of fraudulent intent is not a requisite element of plaintiff's case under this new statutory scheme, neither the majority nor the concurring opinion seems particularly well founded. Not only is the majority's premise for denying punitive damages severely eroded; the concurring Justices' interpretation of legislative intent in providing for treble damages also becomes suspect, since in fact "oppressive" conduct need not be shown to establish recovery under the statute. The legislature may rather have intended that treble damages finance litigation costs or represent unprovable actual damages, leaving the availability of punitive damages for "willful" conduct undisturbed. Thus, in an appropriate case both treble and punitive damages could be awarded.

16. Federal Trade Commission Act § 5(a)(1), 15 U.S.C. § 45(a)(1) (1970). See note 28 *infra* for the language of this federal statute. See note 35 *infra* for the case cited by the court.

17. MASS. GEN. LAWS ANN. ch. 93A, § 2 (1975). See cases cited notes 49-50 *infra*.

would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce."<sup>18</sup> But given the facts as stipulated by defendant in *Hardy*,<sup>19</sup> the court concluded that there simply was never even a questionable role for a jury to have assumed: clearly section 75-1.1 had been violated. The court held that such obviously unfair and deceptive conduct must always be found to offend concepts of fairness and good faith.<sup>20</sup> Therefore, the trial judge should have directed a verdict against defendant as a matter of law and awarded treble damages pursuant to section 75-16.<sup>21</sup> With these instructions, the case was remanded to the trial court to enter judgment for the plaintiff.<sup>22</sup>

Prior to the passage of section 75-1.1 of the General Statutes, the North Carolina consumer had been virtually without any meaningful protection against, or remedy for, many unfair and deceptive trade practices. This section was enacted by the legislature in part "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 levels of commerce be had in this State."<sup>23</sup> Perhaps recognizing that "[i]t is impossible to frame definitions which embrace all unfair practices,"<sup>24</sup> the legislature sought to provide for a flexible maximum of deterrence and compensation. Thus, in broadly declaring "unfair or deceptive acts or practices" unlawful,<sup>25</sup> the legislature chose not to attempt to enumerate specific prohibited conduct,<sup>26</sup> but rather to delegate to the judicial process the

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18. 288 N.C. at 310, 218 S.E.2d at 346-47.

19. Defendant admitted that at the time of the sale to plaintiff Hardy the odometer showed mileage of at most 23,000 miles, well under actual mileage of almost 80,000 miles, that it, defendant, knew at that time that the car had been sold twice previously and that therefore its representations as to the transferability of warranties were false, and that it had knowingly failed to disclose to plaintiff that the automobile had been involved in a wreck. *Id.* at 310-11, 218 S.E.2d at 347.

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

21. *Id.*

22. *Id.*

23. N.C. GEN. STAT. § 75-1.1(b) (1975).

24. Although the words are those of the United States Congress explaining its reluctance to enumerate specific standards in the Federal Trade Commission Act, H.R. REP. No. 1142, 63d Cong., 2d Sess. 19 (1914), the North Carolina legislature must have appreciated the futility of any attempt to list all proscribed activities. See Comment, *supra* note 2.

25. N.C. GEN. STAT. § 75-1.1(a) (1975).

26. See note 24 *supra*. THE UNIFORM DECEPTIVE TRADE PRACTICES ACT, §§ 2(a)(1)-(12), and the UNIFORM CONSUMER SALES PRACTICES ACT, §§ 3(b)(1)-(11), do pro-

responsibility for determining on a case by case basis whether in fact a breach of "good faith and fair dealings" had occurred.<sup>27</sup> Until *Hardy v. Toler*, however, the potential scope of section 75-1.1 had not been explored.

Because the language of section 75-1.1 was drawn almost verbatim from the Federal Trade Commission Act,<sup>28</sup> it was reasonable to suggest that the North Carolina courts turn to the federal court decisions interpreting that Act when faced with cases brought under the North Carolina legislation.<sup>29</sup> Indeed, several states having similar statutes have held the federal interpretations to be incorporated into their statutes, either explicitly by legislative provision,<sup>30</sup> or through judicial construction.<sup>31</sup> And the North Carolina Supreme Court indicated in *Hardy* that it too would at least look to the federal opinions for "[s]ome guidance" when construing section 75-1.1.<sup>32</sup> On the judge or jury question, however, the court conceded that FTC cases involving administrative rather than jury determinations on the issue of unfair trade practices are not "directly in point."<sup>33</sup> Policy considerations appropriate in the administrative agency context clearly differ from those important to an appreciation of the jury's role in the judicial process.<sup>34</sup>

Nevertheless, the North Carolina Supreme Court did rely heavily upon the United States Supreme Court and lower federal court opinions which had held that judicial construction of the meaning of the phrase "deceptive trade practices" is to be given priority over Federal Trade Commission rulings.<sup>35</sup> Because administrative agencies possess a special expertise, they are "often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the

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pose to forbid a list of specified practices, and several states have adopted similar lists in their consumer statutes. See note 88 *infra*.

27. See generally Comment, *supra* note 2.

28. 15 U.S.C. § 45(a)(1) (1970) provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

29. Comment, *supra* note 2, at 910.

30. *E.g.*, Commonwealth v. DeCotis, — Mass. —, 316 N.E.2d 748 (1974).

31. *E.g.*, Commonwealth v. Monumental Properties, Inc., — Pa. —, 329 A.2d 812 (1974).

32. 288 N.C. at 308, 218 S.E.2d at 345.

33. *Id.* at 309, 218 S.E.2d at 346.

34. See note 41 and accompanying text *infra*.

35. 288 N.C. at 308, 218 S.E.2d at 345, citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *FTC v. Keppel & Bro., Inc.*, 291 U.S. 304 (1934); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973); and *Wisdom v. Norton*, 507 F.2d 750 (2d Cir. 1974).

[Federal Trade Commission] Act.”<sup>36</sup> Agency judgments therefore are to be given extensive weight by reviewing courts before they are rejected.<sup>37</sup> But, “in the last analysis the words ‘deceptive practices’ set forth a legal standard . . . .”<sup>38</sup> Thus it is for appellate courts to correct administrative errors in statutory interpretation or application.<sup>39</sup> Turning from the national model, the North Carolina Supreme Court must have then reasoned that the fact-law distinction of the federal analogy should translate into a judge/jury distinction in state court litigation.<sup>40</sup>

It would seem that not only do the federal cases serve as poor analogies, but also that the court in *Hardy* unnecessarily enmeshed itself in the fact-law dichotomy which has so confounded numerous courts and commentators in the past.<sup>41</sup> It has been submitted that this classification is nothing more than shorthand for a choice by the courts of a particular standard of review.<sup>42</sup> Since the scope of review is thought to differ depending upon the “label” applied,<sup>43</sup> courts unwilling to review administrative decisions “are tempted to explain by the easy device of calling the question one of ‘fact’; and when otherwise disposed, they say it is a question of ‘law.’ ”<sup>44</sup> If then freedom of review is the real goal, whether it is sought to avoid problems of delegation

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36. See, e.g., *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922), in which the Court declared that “[t]he Commission, in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the act.”

37. The federal statutory scheme depends primarily upon agency expertise for effective enforcement:

It [the FTC] was created with the avowed purpose of lodging the administrative functions committed to it in “a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected,” and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would “give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.”

*FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934), quoting SENATE COMM. ON INTERSTATE COMMERCE, S. DOC. NO. 597, 63d Cong., 2d Sess. 9-11 (1914).

38. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

39. *FTC v. Curtis Publishing Co.*, 260 U.S. 568, 579-80 (1972); *FTC v. Gratz*, 253 U.S. 421, 427 (1920).

40. 288 N.C. at 309, 218 S.E.2d at 346.

41. See, e.g., *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *NLRB v. Marcus Trucking Co.*, 286 F.2d 583 (2d Cir. 1961); O.W. HOLMES, *THE COMMON LAW* (1881); Weiner, *The Civil Trial Jury and the Law—Fact Distinction*, 54 CALIF. L. REV. 1867 (1966).

42. L. GREEN, *JUDGE AND JURY* 279 (1930).

43. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 380 (5th ed. 1970).

44. J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 55 (2d ed. 1955).

and separation of powers,<sup>45</sup> or merely to extricate appellate courts from the limitations upon judicial review imposed by the "substantial evidence" rule,<sup>46</sup> resolutions of the fact-law debate in the field of administrative law cast little light on an analysis of the proper functions of judge and jury in a civil case.

The North Carolina Supreme Court also noted that legislation similar to section 75-1.1 had recently been interpreted by the courts of other states.<sup>47</sup> Unfortunately, the court chose to focus its attention on Massachusetts cases which, arising in equity, "did not specifically address . . . the division of function between judge and jury in determining whether a violation had occurred."<sup>48</sup> Furthermore, it seems that the cases cited are better read as announcing reasons for setting aside<sup>49</sup> or directing<sup>50</sup> verdicts, than as declaring any policy on the judge or jury allocation. And most of the decisions from other jurisdictions in which similar legislation was involved are likewise of little value on the judge/jury issue, either because they too arose in equity,<sup>51</sup> or because the particular statute more specifically spelled out the conduct proscribed.<sup>52</sup>

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45. Although for many years the courts had resisted legislative attempts to delegate legislative and "executive" power to administrative agencies, when the substantive due process era came to an end, so in large measure did the courts' resistance to delegation. Consistent with principles of separation of powers, courts today will not interfere with agency determinations made within their delegated authority. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 28-86 (1965). By the single expedient of calling a particular conclusion a finding of fact, the court in many cases will have avoided a potential confrontation with separation of powers concepts.

46. Since *ICC v. Union Pac. R.R.*, 222 U.S. 541 (1912), the United States Supreme Court has insisted that agency rulings are not to be displaced unless unsupported by "substantial evidence." *Id.* at 547-48. The effect of this rule is to preclude courts from an extensive review of agency findings, at least those that are classified as "of fact."

47. 288 N.C. at 308, 218 S.E.2d at 346. See cases cited note 88 *infra*.

48. 288 N.C. at 308, 218 S.E.2d at 346.

49. *Commonwealth v. DeCotis*, — Mass. —, 316 N.E.2d 748 (1974). The North Carolina Supreme Court seems to have misinterpreted this Massachusetts opinion: the quoted language (288 N.C. at 308, 218 S.E.2d at 346) simply reaffirms that plaintiff's judgment will be overturned only if as a matter of law defendant should have had a directed verdict even before the case was presented to the trier of fact. See text accompanying note 20 *supra*.

50. *PMP Associates, Inc. v. Globe Newspaper Co.*, — Mass. —, 321 N.E.2d 915 (1975). Again, the North Carolina Supreme Court may have misread the Massachusetts decision, which did no more than sustain defendant's demurrer in the lower court. Clearly, courts can, as a matter of law, exempt certain practices from statutory attack if they are in no way "immoral, unethical, oppressive nor unscrupulous." *Id.* at 918.

51. *E.g.*, *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362 (Mo. App. 1973).

52. *E.g.*, *Crawford Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656 (Tex. Civ. App. 1975).

Significantly, the North Carolina Supreme Court had previously held in *Carolina Aniline & Extract Co. v. Ray*<sup>53</sup> that “[u]nfair competition is a question of fact. The universal test question is whether the public is likely to be deceived.”<sup>54</sup> Although phrased in fact-law terminology, it is clear that the court envisioned a definite jury function. While *Carolina Aniline* was decided on a common-law unfair competition claim some years before the enactment of section 75-1.1, the juxtaposition of the terms “unfair competition” and “unfair trade practices” in that section evidences that the two concepts are of similar import.<sup>55</sup> The North Carolina legislation was drawn to encompass any unfair or deceptive practice, whether between a merchant and his competitors or the merchant and his customers.<sup>56</sup> Should not the court, therefore, have given consideration to the jury preference implicit in *Carolina Aniline* as precedent when evaluating the judge or jury issue posed by section 75-1.1? The State of Washington, as did North Carolina, patterned its consumer protection statute after the FTC Act.<sup>57</sup> Yet when given the opportunity to construe its legislation in the context of a jury trial, the Washington Court of Appeals was emphatic about the jury’s role: “We believe that whether defendant’s conduct amounted to an unfair method of competition was a factual question for the jury and instructing as a matter of law was improper.”<sup>58</sup>

Instead of obfuscating analysis by couching its conclusions in the language of the fact-law paradox, the court in *Hardy v. Toler* might well have attempted to articulate the policies behind its decision to take from the jury meaningful involvement in the application of section 75-1.1. It has often been pronounced, for example, that statutory interpretation is a function particularly within the special province of the courts.<sup>59</sup>

53. 221 N.C. 269, 20 S.E.2d 59 (1942).

54. *Id.* at 272, 20 S.E.2d at 61, quoting 63 C.J. *Trade-Marks, Trade-Names and Unfair Competition* § 112, at 414-15 (1933).

55. Section 75-1.1(a) reflects the parallel meanings of the two terms: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”

56. Section 75-1.1 effectively overrules *Rice v. Asheville Ice Co.*, 204 N.C. 768, 169 S.E. 707 (1933) (per curiam). On the federal level, the Wheeler-Lea Amendment of 1938 had brought otherwise prohibited conduct within FTC jurisdiction by removing the requirement of actual competition. 15 U.S.C. § 45(a) (1970).

57. WASH. REV. CODE ANN. § 19.86.020 (1974) provides: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”

58. *Ivan’s Tire Serv. Store, Inc. v. Goodyear Tire & Rubber Co.*, 10 Wash. App. 110, —, 517 P.2d 229, 238 (1973), *aff’d*, — Wash. —, 546 P.2d 109 (1976).

59. *See, e.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 135-36 (1944) (Roberts, J., dissenting); 2 H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS*

Such a pronouncement certainly has validity in relation to judicial definition of the broad parameters of legislative intent<sup>60</sup> or constitutional review.<sup>61</sup> On the other hand, the United States Supreme Court has frequently stated that agency determinations will not be overturned unless clearly erroneous or unsupported by evidence.<sup>62</sup> And in *Byrd v. Blue Ridge Electric Cooperative, Inc.*<sup>63</sup> the United States Supreme Court refused to allow a contrary state rule to prevent a jury from determining if plaintiff were indeed an "employee" within the meaning of South Carolina's Workmen's Compensation Act.<sup>64</sup> Perhaps the fact-law distinction has again obscured "the real inquiry . . . , namely to which decision-maker *should* the task of law *application* be entrusted, and why."<sup>65</sup> It can be argued that Congress should allocate the job of statutory application in administrative cases between courts and agencies to reflect respective expertise, or lack of it, in specific areas.<sup>66</sup> When the allocation must be between judge and jury, "[a] basis for differentiation [might be] whether the issue involves a sensitive area that warrants a 'popular' or 'communal' judgment."<sup>67</sup> Moreover, just as administrative rulings are generally considered to be competent as long as the agency does not exceed its congressionally mandated authority,<sup>68</sup> legislative intent, if discernable, should dictate the proper division of function between judge and jury when the application of other statutes is at issue.

Since legislative intention on the judge/jury question is not clear from the statute itself,<sup>69</sup> it must be inferred indirectly. Although the court in *Hardy* must have presumed a particular legislative preference,

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IN THE MAKING AND APPLICATION OF LAW 1345-47 (tent. ed. 1958); Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 904-05 (1943); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 105-07 (1944).

60. See, e.g., *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120, 129 (1944).

61. See, e.g., *Commonwealth v. Monumental Properties, Inc.*, 10 Pa. Commw. Ct. R. 596, 314 A.2d 333 (1973).

62. See, e.g., *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 117-18 (1937).

63. 356 U.S. 525 (1958).

64. *Id.* at 533-40.

65. Weiner, *supra* note 41, at 1873 (second emphasis added).

66. See note 37 *supra*.

67. J. COUND, J. FRIEDENTHAL, & A. MILLER, *CIVIL PROCEDURE: CASES AND MATERIALS* 686 (1968).

68. W. GELLHORN & C. BYSE, *supra* note 43, at 380-81, quoting REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 87-91 (1941).

69. Even the Attorney General conceded in his brief that section 75-16 "may be taken by some as tending to indicate that the jury should find not only the facts but also as to whether or not there has been a violation of the statute." Brief for Attorney General as Amicus Curiae at 4.

fuller consideration might well have yielded a different conclusion. In addition to electing not to attempt a listing of all forbidden practices, the North Carolina legislature also declined to establish a special agency to administer the statute.<sup>70</sup> Presumably the legislature also intended to create a new statutory tort that would not simply subsume the common-law action of fraud.<sup>71</sup> Although not independently indicative, taken together these choices would seem to support an inference of a legislative bias for jury determinations. The generality of the statutory scheme necessitates that its prohibitions find specific meaning in its application "to the facts of particular cases arising out of unprecedented situations."<sup>72</sup> No administrative agency was created to assume this responsibility. Juries, however, are particularly adapted to ad hoc decision making, and it has been contended that "courts should not take it upon themselves to convert a deliberately flexible standard into something more concrete by preventing juries from determining the reasonableness of human conduct."<sup>73</sup> Juries are permitted to find "actionable fraud and deceit,"<sup>74</sup> as well as negligence.<sup>75</sup> If then the gravamen of this new statutory tort is unethical and unfair conduct,<sup>76</sup> should not a jury be allowed to find a deceptive trade practice as well? For as the *Hardy* court admitted, deceptive trade practices amount in practical effect to lesser included degrees of fraud.<sup>77</sup> And because section

70. See Comment, *supra* note 2, at 899.

71. The court itself reached this conclusion. 288 N.C. at 309, 218 S.E.2d at 346, citing *D.D.D. Corp. v. FTC*, 125 F.2d 679 (7th Cir. 1942) and *Garland v. Penegar*, 235 N.C. 517, 70 S.E.2d 436 (1952).

72. The quotation is from the United States Supreme Court opinion in *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

73. *Weiner*, *supra* note 41, at 1904-05.

74. *Garland v. Penegar*, 235 N.C. 517, 519, 70 S.E.2d 486, 487 (1952).

75. "Even when the historical facts are undisputed, the jury rather than the judge will normally decide whether they will be characterized as negligence." *Weiner*, *supra* note 41, at 1876-77. Thus, in a negligence case it is the jury that makes the ultimate determination of liability.

76. N.C. GEN. STAT. § 75-1.1(b) (1975).

77. 288 N.C. at 309, 218 S.E.2d at 346. Ironically, the court quotes with approval from *Garland v. Penegar*, a case whose facts were virtually identical to those before the court in *Hardy*:

"Plaintiff alleged and offered evidence tending to show that the defendant, an automobile dealer, falsely and fraudulently represented that the automobile then being sold him was a 'new demonstrator,' that it had been driven only 1,000 miles as the speedometer apparently indicated, and that the automobile was in perfect condition. Plaintiff testified that instead of it being as represented the automobile was not a new one but had been previously sold to another person who drove it 8,000 miles and then turned it back to the defendant. Plaintiff also testified the automobile was not in good condition, and that he had incurred trouble and expense in repairs.

It is apparent from an examination of the record that the plaintiff offered

75-1.1 was designed to accomplish more than a codification of existing case law,<sup>78</sup> it would not be appropriate to allow state judges to construe the statute according to common-law concepts. However, if the jury is to have no role in determining liability under the statute, it is likely that trial judges may continue to require proof of a common-law tort in consumer actions.<sup>79</sup> Such a practice would undoubtedly frustrate the legislative purpose of providing a potent statutory remedy for unfair or deceptive trade practices.

In addition to the difficulties of discerning legislative purpose on the issue, several other policies converge that must be reconciled before deciding the judge/jury question. Foremost among these is the extent to which "a fixed standard that applies to all members of the community impartially" is to be valued over an ad hoc determination that better takes into account the peculiar circumstances of an individual case.<sup>80</sup> The North Carolina Attorney General argued in *Hardy*, as amicus curiae, that a consistent interpretation of section 75-1.1 was vital both to insure uniform application on a state-wide basis, and to encourage private actions by providing "guidance . . . to both courts and attorneys for the future trial of such actions."<sup>81</sup> Implicit in such a position must be the fear of a free-wheeling, plaintiff-consumer oriented jury, especially when treble damages automatically accrue.<sup>82</sup> Yet in *Byrd* the United States Supreme Court rejected just such a contention as an insufficient justification for denying plaintiff the right to have a jury determine his status<sup>83</sup> in an analogous situation.

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sufficient evidence to carry the case to the jury on the issue of actionable fraud and deceit, and that defendant's motion for judgment of nonsuit was properly denied."

*Id.* at 309, 218 S.E.2d at 346, quoting *Garland v. Penegar*, 235 N.C. 517, 518-19, 70 S.E.2d 486, 487 (1952). The net effect of the court's ruling on the judge/jury issue in *Hardy*, therefore, is to deny that which plaintiff would have had prior to the passage of section 75-1.1: a jury judgment on defendant's conduct. Surely it was not the legislature's intent to deprive consumer plaintiffs of the considerable protection already provided by the prospect of a jury determination in the fraud cases.

78. See note 71 and accompanying text *supra*.

79. The lower court judge in *Hardy* must have done so himself.

80. J. COUND, J. FRIEDENTHAL, & A. MILLER, *supra* note 67, at 685-86.

81. Brief for Attorney General as Amicus Curiae at 4.

82. It has been argued that a jury can effectively impose strict liability upon any defendant brought before it, unless its function is severely controlled. See J. FRANK, COURTS ON TRIAL 110-11 (1949). And courts are likely to be extremely reluctant to let a jury find liability when any award it returns will be tripled. In this context it is important to note, however, that whereas the Federal Trade Commission Act makes no provision for private actions or treble damages, the North Carolina legislation provides for both, and in the context of a jury trial. N.C. GEN. STAT. § 75-16 (1975).

83. 356 U.S. at 538.

Even were an extensive role assumed for the jury, the court would in no way be displaced from an important supervisory function in the administration of the statute. Certain specific practices, proven through experience to be unfair, could still be declared deceptive by rule of law.<sup>84</sup> Clearly, when such conduct is before the jury, courts would be justified in directing a verdict for the plaintiff,<sup>85</sup> or setting aside a jury verdict clearly against the weight of common experience.<sup>86</sup> For these purposes North Carolina courts *should* look to federal<sup>87</sup> and other state<sup>88</sup> decisions for "some guidance." But when confronted with

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84. See note 50 *supra*.

85. See *Commonwealth v. DeCotis*, — Mass. —, 316 N.E.2d 748 (1974).

86. See *PMP Associates, Inc. v. Globe Newspaper Co.*, — Mass. —, 321 N.E.2d 915 (1975).

87. Since the enactment of the North Carolina legislation, the United States Congress passed a federal odometer statute which makes it unlawful to sell any vehicle whose actual mileage is not reflected on the vehicle's odometer. 15 U.S.C. §§ 1984, 1989 (1970). Several cases have recently been reported in which liability has been found under these sections. *Coulbourne v. Rollins Auto Leasing Corp.*, 392 F. Supp. 1198 (D. Del. 1975); *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D.W. Va. 1975); *Edgar v. Fred Jones Lincoln-Mercury*, 383 F. Supp. 583 (W.D. Okla. 1974); *Delay v. Hearn Ford*, 373 F. Supp. 791 (D.S.C. 1974). In addition to suits brought under this special statute, numerous cases have been decided under section 5 of the F.T.C. Act which might reveal the potential scope of section 75-1.1. *E.g.*, *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (door to door selling practices); *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934) (product misrepresentations); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973) (unsubstantiated product claims); *Tashof v. FTC*, 437 F.2d 707 (D.C. Cir. 1970) (bait & switch advertising); *All-State Indus., Inc. v. FTC*, 423 F.2d 423 (1970) (failure to disclose that a promissory note would be transferable to a holder in due course, cutting off buyer's defenses); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666 (1967) (misrepresenting warranties); *Charles of the Ritz Distribs. Corp. v. FTC*, 143 F.2d 676 (2d Cir. 1944) (deceptive advertising); *Fresh Grown Preserve Corp. v. FTC*, 125 F.2d 917 (2d Cir. 1942) (labeling).

88. The North Carolina legislature has also enacted an odometer statute since the commencement of the litigation in *Hardy*, which provides that its violation constitutes an unfair trade practice under section 75-1.1. N.C. GEN. STAT. § 20-349 (1975). The legislature has added further definition to the provisions of section 75-1.1 through the passage of *id.* § 25A-44(a) (Cum. Supp. 1975), the Retail Installment Sales Act, which declares that a violation of that section also violates section 75-1.1.

Furthermore, other conduct has been recognized to be unfair under the deceptive trade practices legislation of several states. *See, e.g.*, *Scott Imports v. Orton*, 27 Ariz. App. 354, 527 P.2d 513 (1974) (turning back odometer); *Nash v. Hoopes*, 332 A.2d 411 (Del. Super. Ct. 1975) (failure to disclose existing mortgage default and impending foreclosure); *In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24 (Del. Super. Ct. 1973) (misrepresenting condition of automobile); *Slaney v. Westwood Auto, Inc.*, — Mass. —, 322 N.E.2d 768 (1975) (automobile); *PMP Associates, Inc. v. Globe Newspaper Co.*, — Mass. —, 321 N.E.2d 915 (1975) (refusal to accept newspaper advertising not a violation); *Commonwealth v. DeCotis*, — Mass. —, 316 N.E.2d 748 (1974) (resale fee without furnishing services); *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362 (Mo. App. 1973) (automobile); *Brown v. Lyons*, 43 Ohio Misc. 14, 332 N.E.2d 380 (Hamilton County C.P. 1974) (failure to honor warranties, misrepresentation of product qualities, failure to provide prior written estimates of repairs); *Commonwealth v. Monumental Properties, Inc.*, — Pa. —, 329 A.2d 812 (1974) (terms in

new and unique circumstances, the courts should give a jury the first chance to pass on the "fairness" of the defendant's actions. Perhaps the standard for a jury instruction on the meaning of "unfair and deceptive" practices should be that proposed by the court in *Carolina Aniline*: "Whether the public is likely to be deceived."<sup>89</sup> Although less freely reviewable, a jury finding in such a case would be supported by the weight of a community judgment on a sensitive public issue. Furthermore, rather than hampering the instigation of private actions to enforce the statute, the prospect of a jury verdict would seem to encourage such actions. Indeed, if section 75-1.1 is to fulfill its promise, a jury drawn from the consuming public must be given a substantial involvement in the denunciation of unfair or deceptive trade practices.

The North Carolina Supreme Court need not be deterred from a thorough reconsideration of the judge/jury question by its decision in *Hardy v. Toler*. For the court in *Hardy* did no more than refer to the historical functions of judge and jury, assuming without further analysis that they were to be grafted into the statutory scheme of section 75-1.1. The ultimate disposition of the case, however, did not itself depend upon a resolution of this issue, for even had the court decreed a major role for the jury in determining liability under the statute in future cases, a directed verdict was clearly dictated by the facts of this case. In the face of defendant's stipulations, no reasonable jury could have been allowed to find otherwise than that the statute had been violated. As a consequence, the court should feel free to undertake an independent evaluation of the differing policies at issue before restricting itself to a superficial resolution of the judge/jury question. *Hardy* need not be directly overruled; it certainly should continue to serve as a declaration that the specific acts therein alleged constitute deceptive trade practices as a matter of law. But as suggested above, the better reasoned analysis on the more critical judge or jury issue must result in a significant role for the jury in deciding whether particular conduct amounts to an unfair or deceptive trade practice if the North Carolina legislation is to have any real impact.

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an agreement); *Crawford Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656 (Tex. Civ. App. 1975) (misrepresentation of agent's authority). See also *People v. Jack Dykstus Ford, Inc.*, 52 Mich. App. 337, 217 N.W.2d 99 (1974) (violation of odometer statute).

89. 221 N.C. at 272, 20 S.E.2d at 61.