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# Bank Sales and Bake Sales: Section 75-1.1 and the *HAJMM* Legacy

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## INTRODUCTION

The owner of Fair Play Bakery ("Fair Play") decides he has had enough of the pastries and that it is time to sell his whole bakery.

Fortunately, We Pastry Inc. ("We Pastry"), a national baking chain, feels that the layout and products of Fair Play are unique and worth copying, and the national baking chain quickly draws up a stock purchase agreement to acquire Fair Play. After both parties execute the stock purchase agreement, Fair Play changes its name to We Play Fair and continues operating at a considerable, but less-than-projected, profit. We Pastry, ever mindful of its profit margins, decides to claw back some of its purchase price by demanding $200,000 out of an escrow account that was set aside to indemnify We Pastry if it suffered a loss due to undisclosed weaknesses in Fair Play's business. The terms of the stock purchase agreement contemplate that We Pastry assumes the responsibility for We Play Fair's continued success, so a demand on the purchase price is sharp dealing but also arguably deceptive and unfair.

However improper We Pastry's activity may appear on its face, North Carolina's "unfair or deceptive practices" statute, commonly known as section 75-1.1,[1] will be unavailable to the baker of Fair Play if he tries to sue for the $200,000 he is due under the stock purchase agreement. Section 75-1.1 is inapplicable—not because North Carolinians would consider We Pastry's activity fair or would think that the baker should pursue litigation under securities laws but because courts have held that section 75-1.1 does not apply to securities transactions. If We Pastry deceived customers about its purportedly gluten-free croissants, it could be liable for treble damages and attorneys' fees,[2] but because it unfairly deprived a baker of $200,000 under a stock purchase agreement, the statute punishing unfairness does not apply.

This hypothetical touches on a key issue in section 75-1.1 cases: At what point does business activity become commerce that affects, and potentially injures, consumers? Section 75-1.1 would apply to unfair or deceptive acts in Fair Play's sale of pastries to a customer because that conduct is undoubtedly consumer related. Courts and lawyers have more difficulty, however, in applying section 75-1.1 to situations that do not involve an injury to an everyday customer. Much of this difficulty arises when section 75-1.1 collides with regulatory structures designed to address fraud or unfairness in

1. N.C. GEN. STAT. § 75-1.1 (2017); *see also* Matthew W. Sawchak & Kip D. Nelson, *Defining Unfairness in "Unfair Trade Practices*,*"* 90 N.C. L. REV. 2033, 2034 n.1 (2012) (explaining why the authors "refer to this statute as 'section 75-1.1'" in their article).

2. N.C. GEN. STAT. § 75-16 (2017) (providing for treble damages for successful claims); *id.* § 75-16.1 (authorizing discretionary attorneys' fees).

particular legal contexts, such as securities laws. A claim under such regulatory structures also generally does not fall within the scope of section 75-1.1 when the regulations adequately address the issue and occupy the field. But when a plaintiff cannot otherwise address unfairness in their business dealings, section 75-1.1 is intended to provide an effective and necessary means of doing so. For more than a quarter century, however, the Supreme Court of North Carolina has left the law in limbo and undermined its potential as a remedial backstop when regulatory schemes do not apply.

This Comment aims to define the contentious boundary between section 75-1.1 jurisprudence and more pervasive regulatory structures to demonstrate unworkable gaps in the law, focusing particularly on securities transactions. This discussion highlights the potential of section 75-1.1 as a tool to address unfairness when regulations fail to provide a remedy for a particular type of misconduct. While many regulatory agencies and laws are finely tuned to the field they regulate, their application cannot extend beyond that field. Section 75-1.1 provides an opportunity to address misconduct that falls between regulatory cracks. The discussion below aims to articulate this role of section 75-1.1 as a regulatory backstop, not a regulatory alternative, using the case law surrounding securities transactions as a template.

The analysis proceeds in five parts. Part I describes the history of section 75-1.1 and illustrates how it became a ubiquitous claim in commercial lawsuits in North Carolina. This Part also explains how section 75-1.1 claims became particularly problematic for courts in North Carolina. Part II addresses the confrontation between section 75-1.1 and regulatory schemes generally and how the statute has been used in, or more commonly held inapplicable to, those interactions. Part III explains how the Supreme Court of North Carolina's decision in *HAJMM Co. v. House of Raeford Farms, Inc.*[3] greatly broadened the securities exemption to section 75-1.1 and details the resulting effect on section 75-1.1 as a potent tool in business disputes. Part IV discusses an important question raised in the *HAJMM* dissent and the impractical standard set forth in the majority opinion. Finally, Part V suggests possible solutions to help tailor section 75-1.1 to the boundary of pervasively regulated areas of law rather than dismissing claims categorically because a regulatory structure might or might not apply.

3. 328 N.C. 578, 403 S.E.2d 483 (1991).

## I. HISTORY OF SECTION 75-1.1 AND "COMMERCE"

Section 75-1.1 provides that "[u]nfair methods of competition in or affecting commerce, and unfair and deceptive acts or practices in or affecting commerce, are declared unlawful."[4] Much of the litigation surrounding this statute focuses on what precisely constitutes "commerce."[5] The statute itself defines "commerce" to "include[] all business activities, however denominated,"[6] but that definition, despite being the product of revision, is still subject to considerable ambiguity upon review by the courts.[7]

The primary appeal of section 75-1.1 claims from the plaintiff's perspective comes in the statute's award of treble damages and possible attorneys' fees.[8] Plaintiffs regularly include section 75-1.1 claims because of the potential windfall and the difficulty courts face when deciding whether a claim can survive a motion to dismiss.

This Part offers background on section 75-1.1's development and details how it evolved to include such a broad definition of commerce. The discussion then turns to the challenges of applying such a broad definition of commerce.

### A. *Section 75-1.1's Increasingly Expansive Scope*

The General Assembly enacted section 75-1.1's current definition of "commerce" after the Supreme Court of North Carolina narrowly interpreted the original version of the statute to apply only to those acts "involved in the bargain, sale, barter, exchange or traffic" of goods.[9] That original version of section 75-1.1, enacted in 1969, provided that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade* or commerce

4. N.C. GEN. STAT. § 75-1.1(a) (2017).

5. *See, e.g.*, *HAJMM*, 328 N.C. at 594, 403 S.E.2d at 493; State *ex rel.* Edmisten v. J. C. Penney Co., 292 N.C. 311, 315–16, 233 S.E.2d 895, 898–99 (1977), *superseded by statute*, Act of June 27, 1977, ch. 747, sec. 2, § 75-1.1(b), 1977 N.C. Sess. Laws 984, 984 (codified at N.C. GEN. STAT. § 75-1.1(b) (2017)).

6. N.C. GEN. STAT. § 75-1.1(b) (2017).

7. The exceptions to section 75-1.1 tend to be the most ambiguous parts of the law. For example, the "professional services" exception precludes section 75-1.1 liability for "learned profession[s]." *Id.* Under North Carolina law, "learned profession" is an undefined category that has expanded from encompassing only doctors, lawyers, and theologians to now include architects and engineers. *See* RCDI Constr., Inc. v. Spaceplan/Architecture, Planning, & Interiors, P.A., 148 F. Supp. 2d 607, 618–19 (W.D.N.C. 2001).

8. *See* N.C. GEN. STAT. § 75-16 (2017) (providing for treble damages for successful claims); *id.* § 75-16.1 (authorizing discretionary attorneys' fees).

9. *Edmisten*, 292 N.C. at 316–17, 233 S.E.2d at 899.

are hereby declared unlawful."[10] Including the word "trade" in the statute allowed for narrower judicial interpretation because activity unrelated to a trade could be excepted.[11] The statute as written did not provide a conduct standard for violations, so courts imposed a narrow standard by seizing on the "trade practices" language.[12] The General Assembly amended section 75-1.1 in 1977 to cover "all business activities, however denominated," but the statute still did not prescribe a conduct standard.[13]

In addition to expansively defining commerce, section 75-1.1 also imposes automatic treble damages and discretionary attorneys' fees on the unsuccessful defendant.[14] These plaintiff-friendly features have rendered section 75-1.1 a "boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina."[15] Accordingly, restraining "section 75-1.1 (along with its promise of extraordinary damages) within its proper legal bounds" is a crucial task for North Carolina's courts.[16] "'[P]iggyback' claims are disfavored by North Carolina and federal courts alike,"[17] leading to the logical conclusion that section 75-1.1 should apply only in cases where a more suitable remedy cannot be found in contract or other applicable law.

Keeping section 75-1.1's severe penalties narrowly constrained highlights its role as a rare and powerful tool. The regulatory

10. Act of June 12, 1969, ch. 833, § 1(b), 1969 N.C. Sess. Laws 930, 930 (codified as amended at N.C. GEN. STAT. § 75-1.1(a) (2017)) (emphasis added).

11. *Edmisten*, 292 N.C. at 316, 233 S.E.2d at 899.

12. Sawchak & Nelson, *supra* note 1, at 2037–38.

13. Act of June 27, 1977, ch. 747, sec. 2, § 75-1.1(b), 1977 N.C. Sess. Laws 984, 984 (codified at N.C. GEN. STAT. § 75-1.1(b) (2017)).

14. N.C. GEN. STAT. § 75-16 (2017) ("If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict."); *id.* § 75-16.1 ("In any suit instituted by a person who alleges that the defendant violated [section] 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party . . . .").

15. 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)).

16. Post v. Avita Drugs, LLC, No. 17 CVS 798, 2017 WL 4582151, at *4 (N.C. Bus. Ct. Oct. 11, 2017).

17. *Id.*

structures that govern many business interactions create difficulty in applying section 75-1.1 appropriately without overextending its reach. Even in the absence of a mandatory regulatory remedy, a court may identify a "pervasive and intricate" regulatory scheme that already occupies the field and thus refuse to apply section 75-1.1.[18] The difficult question for courts and lawyers alike, then, is what to do when allegedly unfair or deceptive conduct arises out of a transaction related to a regulatory scheme but the conduct itself is not actually subject to the scheme's regulations.

### *B. A Consumer Protection Statute That Can Be Applied to Disputes Between Businesses*

The purpose of section 75-1.1 and the attending treble damages provision in section 75-16 is "to establish an effective private cause of action for aggrieved consumers" in North Carolina.[19] That private cause of action empowers consumers to defend themselves from conduct that is not sufficiently covered by existing common law or other regulations. Although section 75-1.1 "was clearly intended to benefit consumers . . . its protections extend to businesses in appropriate contexts."[20] Section 75-1.1 claims address even business-to-business transactions outside the consumer context because "unfair trade practices involving only businesses affect the consumer as well."[21] However, a "business is permitted to assert [a section 75-1.1] claim against another business only when the businesses are competitors (or potential competitors) or are engaged in commercial dealings with each other."[22] Commerce between businesses ultimately affects consumers, so market interactions between businesses fall within section 75-1.1's scope.[23]

Section 75-1.1 claims for unfair or deceptive conduct fall into five general categories:

> 1) general "unfair" conduct that offends public policy . . . [or] is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers; 2) "deceptive" misrepresentations that

18. *See, e.g.*, Skinner v. E.F. Hutton & Co., 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985) (holding that "securities transactions are beyond the scope of [section] 75-1.1").

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

20. HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 592, 403 S.E.2d 483, 492 (1991).

21. United Labs., Inc. v. Kuykendall, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988).

22. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 520 (4th Cir. 1999).

23. *Id.* at 519–20 (quoting *Kuykendall*, 322 N.C. at 665, 370 S.E.2d at 389).

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> have the capacity or tendency to deceive the average person; 3) per se violations of § 75-1.1 established upon proof of a statutory or regulatory violation or the commission of certain torts; 4) a breach of contract accompanied by aggravating circumstances; and 5) anti-competitive conduct.[24]

The discussion in Part II focuses on the first and second categories, which cover unfair conduct and deceptive misrepresentations. These categories allow considerable flexibility and ideally contribute to section 75-1.1's effectiveness as a tool for courts to punish and remedy bad action in the business community. The general unfairness category appears to give the statute broad license to combat unscrupulous business activity and should justify section 75-1.1 as a de facto regulatory tool when other regulatory schemes do not provide a remedy.

Section 75-1.1's potential as a highly effective tool in disputes between businesses, however, is hampered by overbroad or loosely defined exemptions. One such exemption is the Supreme Court of North Carolina's categorical position that "securities transactions are beyond the scope of [section] 75-1.1."[25] While this securities exemption doctrine was founded on the strong principle that section 75-1.1 should not be used to add unnecessary complexity to already complex areas of law, like securities regulation, its ultimate effect illustrates the difficulty of drawing the line between useful section 75-1.1 protection and a pervasive regulatory scheme.

## II. APPLYING SECTION 75-1.1 WHEN REGULATIONS OCCUPY THE FIELD

Though the North Carolina General Assembly intended for section 75-1.1's scope to be broad,[26] courts have limited the statute's scope when other regulations occupy the field. This Part examines section 75-1.1's interaction with, and often its inapplicability to, an area of law that is already subject to sprawling regulatory structures. First, this Part introduces the foundational reasoning of the securities exemption to show how formal regulations can deal with disputes

24. Sparks v. Oxy-Health, LLC, 134 F. Supp. 3d 961, 997–98 (E.D.N.C. 2015) (internal citations omitted); *see also* Sawchak & Nelson, *supra* note 1, at 2042–50 (discussing each type of section 75-1.1 claim).

25. Skinner v. E.F. Hutton & Co., 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985) (adopting the securities exemption of the Fourth Circuit's holding in *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 168 (4th Cir. 1985)).

26. *See supra* Section I.A.

more effectively than section 75-1.1. Second, the discussion turns to the interesting development that private regulations are sufficient to resolve disputes effectively and allow courts to further narrow section 75-1.1's applicability by providing parties another avenue to air their grievances.

### *A. Containing Section 75-1.1's Scope When Formal Regulatory Structures Apply*

The original securities exemption to section 75-1.1 provided courts with a proper and useful reason to dismiss a claim—the transaction at issue clearly fell within the exclusive scope of securities laws. Section 75-1.1's applicability to securities transactions was an issue of first impression as late as 1985, when *Lindner v. Durham Hosiery Mills, Inc.*[27] led the Fourth Circuit to "ascertain what the North Carolina Supreme Court would decide" if determining the scope of section 75-1.1.[28] Referring to the federal law that provided the framework for section 75-1.1,[29] the *Lindner* court relied on "the fact that no federal court decision [had] applied § 5(a)(1) of the [Federal Trade Commission] Act to securities transactions [as] additional evidence of the scope of § 75-1.1."[30] The *Lindner* court ultimately concluded that "securities transactions are beyond the reach of [section 75-1.1]."[31]

In *Skinner v. E.F. Hutton & Co.*,[32] The Supreme Court of North Carolina adopted the *Lindner* securities exemption with its decision.[33] Looking to other jurisdictions in support of its decision, the *Skinner* court noted that its "research reveal[ed] no case in which a state court has held that its unfair trade practices act extends to securities transactions."[34] Importantly, the *Skinner* court reasoned that securities transactions are "already subject to pervasive and intricate regulation under the North Carolina Securities Act"; therefore, applying section 75-1.1's protections to securities "could subject those

27. 761 F.2d 162 (4th Cir. 1985).
28. *Id.* at 165.
29. *See* 15 U.S.C. § 45(a)(1) (2012) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").
30. *Lindner*, 761 F.2d at 167.
31. *Id.* at 168.
32. 314 N.C. 267, 333 S.E.2d 236 (1985).
33. *Id.* at 275, 333 S.E.2d at 241 (holding that "securities transactions are beyond the scope of [section] 75-1.1").
34. *Id.* at 274, 333 S.E.2d at 241.

involved with securities transactions to overlapping supervision and enforcement."[35]

Securities laws are finely tuned to address subtle instances of unfairness and deception related to the exchange of securities within the scope of regulation.[36] The effectiveness of securities laws within their arena should not be confused with the potential or need for robust legal frameworks to address misconduct in business dealings that do not fall within the defined area of securities regulation. Fortunately, securities laws govern only one of many pervasively regulated areas of law.[37]

35. *Id.* at 275, 333 S.E.2d at 241 (quoting *Lindner*, 761 F.2d at 167–68). Securities supervision and enforcement sufficiently provided by securities laws may assist with illustrating section 75-1.1's applicability or inapplicability. *See* Opper v. Hancock Secs. Corp., 250 F. Supp. 668 (S.D.N.Y. 1966), *abrogated by* Asch v. Philips, Appel & Walden, Inc., 867 F.2d 776 (2d Cir. 1989). *Opper* demonstrates how to address deceptive misrepresentations in a securities transaction entirely through federal securities laws. *See id.* at 673. The case also shows that federal securities laws tend to provide the most effective remedy in a conventional securities setting. *Id.* Applying basic principles of agency law, securities laws, and SEC regulations, the *Opper* court found a "garden variety instance of deception, nondisclosure, and self-preferment by a broker purporting to act as a selling agent." *Id.* The broker-defendant in *Opper* misrepresented its efforts to sell securities on behalf of the plaintiff while continuing to sell thousands of its own shares in the same company for considerable profit at prices it fraudulently told the plaintiff were not available. *Id.* Having noted a violation of fiduciary principles in agency law, the court also applied provisions of the Securities Exchange Act of 1934 and SEC Rule 10b-5. *Id.*; *see also* 17 C.F.R. § 240.10b-5 (2018). Analyzing case law, the *Opper* court endorsed the "settled" precedent that Congress meant to address "the particularized problems of 'manipulative, deceptive, or otherwise fraudulent' practices in the securities markets . . . mean[ing] to reach frauds that 'may take on more subtle and involved forms than those in which dishonesty manifests itself in cruder and less specialized activities.'" *Opper*, 250 F. Supp. at 673 (quoting Archer v. SEC, 133 F.2d 795, 798 n.5, 803 (8th Cir. 1943)).

36. Archer v. SEC, 133 F.2d 795, 803 (8th Cir. 1943).

37. Courts continue to identify fields that properly resolve disputes and render section 75-1.1 redundant and inapplicable. *See, e.g.*, Hagy v. Advance Auto Parts, Inc., No. 3:15-CV-509-RJC-DCK, 2016 WL 5661530, at *3 (W.D.N.C. Sept. 28, 2016) (explaining that while a plaintiff's section 75-1.1 claim is not essentially preempted by the Medicare scheme, the scope of section 75-1.1 does not cover an issue already pervasively regulated); Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 420–21, 248 S.E.2d 567, 570 (1978) (declining to extend section 75-1.1 to commodities exchanges, an area Congress aimed to regulate thoroughly and exclusively). Some cases show that state regulatory schemes are equally as effective at occupying the field as federal schemes. *See, e.g.*, Tobias v. Nationstar Mortg., LLC, No. 1:17CV486, 2018 U.S. Dist. LEXIS 48, at *11 (M.D.N.C. Jan. 2, 2018) ("Article 2 of Chapter 75 of the General Statutes of North Carolina, entitled 'Prohibited Acts by Debt Collectors', is the exclusive remedy under North Carolina law for unfair debt collection practices."); State *ex rel.* Cooper v. Ridgeway Brands Mfg., LLC, 184 N.C. App. 613, 624, 646 S.E.2d 790, 798 (2007) (declining to apply section 75-1.1 when a North Carolina law directing tobacco producers to deposit money into an escrow fund "provides an extensive remedy for failure to comply with the escrow obligation" (citing

The Supreme Court of North Carolina has provided some guidance on the effect of regulations that, when violated, do not automatically trigger section 75-1.1 protection. The effect of a regulatory violation on a section 75-1.1 claim, however, remains unclear. When deciding if a licensing violation could constitute a section 75-1.1 claim, the court has "decline[d] to hold that a violation of a licensing regulation is a [section 75-1.1 violation] as a matter of law."[38] Failure to comply with licensing rules could, however, evidence a section 75-1.1 violation.[39] This distinction presumably means that section 75-1.1 could be useful as a force multiplier for minor regulatory violations, but the court declined to state which regulations could support a section 75-1.1 claim and which regulations sufficiently remedy a violation without applying the statute.[40]

Thus, regulatory violations that themselves cannot give rise to a section 75-1.1 claim may nevertheless constitute evidence to support the claim. However, more direct judicial discussion is necessary regarding section 75-1.1's value as a punitive tool to add force in addressing minor violations rather than including the statute as a burdensome addition to more pervasive regulatory schemes. It is possible that the "violation of a regulatory statute designed to protect the consuming public *may* constitute an unfair or deceptive practice, even where the statute itself does not provide for a private right of action."[41] However, this is true "only where the regulatory statute *specifically* defines and proscribes conduct which is unfair or deceptive within" the scope of section 75-1.1.[42]

### *B. Private Dispute Resolution Structures*

Defining the boundary between a regulatory scheme that could substantiate a section 75-1.1 claim and a scheme that may preempt a section 75-1.1 claim ultimately determines whether the claim can survive as a matter of law. The previous section focused on statutory

HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 593, 403 S.E.2d 483, 493 (1991))), *aff'd in part, rev'd in part*, 362 N.C. 431, 666 S.E.2d 107 (2008).

38. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 71, 653 S.E.2d 393, 399 (2007).

39. *Id.*

40. *See id.* at 70–71, 653 S.E.2d at 398–99; Sawchak & Nelson, *supra* note 1, at 2045 n.55 ("The court . . . said little about why licensing regulations are less appropriate triggers for per se section 75-1.1 violations than other types of regulations are.").

41. Noble v. Hooters of Greenville (NC), LLC, 199 N.C. App. 163, 170, 681 S.E.2d 448, 454 (2009) (citing Stanley v. Moore, 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995)).

42. *Id.*

or agency-generated regulatory structures. But the inapplicability of section 75-1.1 to some regulatory schemes is not limited to just public regulatory schemes. As a recent Fourth Circuit case illustrates, section 75-1.1 may also be preempted by private codes of conduct.[43]

In *Champion Pro Consulting Group, Inc. v. Impact Sports Football, LLC*,[44] the Fourth Circuit affirmed the dismissal of a section 75-1.1 claim related to Robert Quinn, a former football star at the University of North Carolina, and his decision to switch agents.[45] Although the *Champion Pro* court admitted that the pervasive and intricate regulation in place, the National Football League Players Association's ("NFLPA") dispute resolution system, was "not a statutory scheme," the court nevertheless applied a preemption reasoning similar to that in *Skinner* based on the fact that "the NFLPA has created an extensive regulatory regime to govern business activities within the industry."[46] The *Champion Pro* court was satisfied that the NFLPA system "provided a remedy for violations in the form of monetary damages and a means to obtain that remedy through arbitration."[47] The court also noted that the NFLPA views itself as a regulatory body over industry issues relating to NFL players and their representatives, and applying section 75-1.1 in that regulatory context would impose overlapping regulations like those rejected by *Skinner*.[48]

*Champion Pro* illustrates that the availability of a remedy under a pervasive and intricate scheme clearly plays a central role in dismissing a section 75-1.1 claim. A plaintiff with an available or more suitable means of recovery through existing regulatory structures, even if those structures are private codes of conduct, will face a high bar to sustain a section 75-1.1 claim.[49] Dismissal as a matter of law may await cases that implicate extensively regulated issues as judges

43. Champion Pro Consulting Grp., Inc. v. Impact Sports Football, LLC, 845 F.3d 104, 110 (4th Cir. 2016) (dismissing a section 75-1.1 claim based on allegations "already subject to an extensive regulatory regime under the NFLPA").

44. 845 F.3d 104 (4th Cir. 2016).

45. *Id.* at 112; *see also* Stephen Feldman, *Can Extensive Regulations Bar a Claim for Unfair Trade Practices?*, ELLIS & WINTERS: WHAT'S FAIR? (Feb. 14, 2017), http://www.unfairtradepracticesnc.com/can-extensive-regulatory-regime-bar-claim-unfair-trade-practices/ [https://perma.cc/7MCF-7EJV].

46. *Champion Pro*, 845 F.3d at 111.

47. *Id.*

48. *Id.*

49. Feldman, *supra* note 45.

defer to the expedience of a system particularly designed to resolve the matter.

A question remains, however, as to what happens to section 75-1.1 claims that relate to a pervasive and intricate body of law but nonetheless fall outside its protections. Unfortunately, the current answer in North Carolina is that section 75-1.1 also fails to cover those claims as a matter of law.

## III. EXTRAORDINARY EVENTS OUTSIDE OF BUSINESS ACTIVITIES: *HAJMM*'S EXPANSION OF SECTION 75-1.1'S SECURITIES EXEMPTION

The reasoning that drove the *Skinner* court to exempt securities transactions from North Carolina's section 75-1.1 protection creates a reasonable scope for the exemption—securities laws are designed to serve as the primary method of recovery and boundary of liability for securities-related transactions. Similarly, the *Champion Pro* plaintiff could find a satisfactory and perhaps more effective resolution through the applicable NFLPA channels.[50] It is reasonable to expect that specifically tailored regulatory schemes can dispose of particular disputes better than section 75-1.1. Imposing liability under section 75-1.1 would seem possible, though, when the regulatory scheme in question clearly has no capacity to regulate unfairness or deception that arises in a transaction. Cases involving modern securities transactions, which are no longer subject to the same reasoning applied in *Skinner*, show that courts still decline to apply section 75-1.1 protections despite the unavailability of a remedy by other means.

This Part identifies gaps in section 75-1.1 jurisprudence since *HAJMM Co. v. House of Raeford Farms, Inc.* was decided in the early 1990s. The discussion first explains the facts of *HAJMM* and analyzes the decision's precedent-setting diversion from *Skinner*. Next, it explores the true impact of the decision, highlighting how it broadened the securities exemption and overly narrowed section 75-1.1's applicability.

### A. HAJMM*'s Unusual Facts and the Broadening of Section 75-1.1's Securities Exemption*

The Supreme Court of North Carolina's decision in *HAJMM* reinterpreted the securities exemption six years after *Skinner*. In *HAJMM*, a case involving unregulated revolving fund certificates

50. *See Champion Pro*, 845 F.3d at 111.

instead of "conventional corporate securities,"[51] the court held "that the legislature simply did not intend for the trade, issuance and redemption of corporate securities or similar financial instruments to be transactions 'in or affecting commerce' as those terms are used in N.C.G.S. § 75-1.1(a)."[52] The court then narrowly defined "business activities," holding the term to mean "the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized."[53]

The defendant in *HAJMM*, House of Raeford Farms, Inc. ("Raeford"), was a "North Carolina agricultural cooperative engaged in the business of processing turkeys and other poultry."[54] Raeford raised money when the plaintiff and two other turkey producers sold their interests in Raeford Turkey Farms, Inc. ("RTF") in exchange for "revolving fund certificates issued by Raeford. The certificates became part of Raeford's capital structure and [were] shown as stockholder's equity on Raeford's balance sheet."[55] The Raeford certificates valued the plaintiff's RTF interests at $387,500 and noted that the certificates would be retired at the sole discretion of Raeford's board with no date of maturity.[56] The certificates were meant to create "a revolving fund for the purpose of building up such an amount of capital as may be deemed necessary by the board of directors from time to time and for revolving such capital."[57]

Raeford redeemed the certificates given to the other turkey producers but refused to retire the plaintiff's certificate.[58] A key piece of the plaintiff's argument in support of its section 75-1.1 claim was that Raeford never intended to retire the certificate or pay it despite having sufficient cash on hand to cover the $387,500 sum.[59] The jury concluded that Raeford's refusal to retire the certificate was not "an open, fair and honest transaction" and awarded the plaintiff $100,000

51. HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991).
52. *Id.*
53. *Id.*
54. *Id.* at 580, 403 S.E.2d at 485.
55. *Id.*
56. *Id.* at 581, 403 S.E.2d at 485–86.
57. *Id.* at 581, 403 S.E.2d at 486.
58. *Id.*
59. *Id.* at 581–82, 403 S.E.2d at 486.

in punitive damages in addition to $387,500 in compensatory damages.[60]

On appeal, a majority of the Supreme Court of North Carolina applied the securities exemption despite admitting that the revolving fund certificates at issue were "not subject to the same extensive statutory provisions and administrative regulation that govern more conventional corporate securities."[61] Without citing a case or other authority, the *HAJMM* majority defined "business activities" for section 75-1.1 purposes to include only "activities the business regularly engages in and for which it is organized."[62] Accordingly, the securities exemption as originally stated in *Skinner* did not provide the main basis for dismissing the section 75-1.1 claim in *HAJMM*, thereby adding an entirely new aspect to the securities exemption doctrine.

Following *HAJMM*, the securities exemption precludes claims based on events that fall outside the business's day-to-day activities, even if those less common activities are vital to running the business.[63] Transactions relating in any meaningful way to securities are therefore not business activities within the scope of section 75-1.1, and unfair or deceptive practices conducted with regard to those securities or other extraordinary events in the life of the business do not form a cause of action under the statute.[64] This unfortunate limitation on the statute highlights section 75-1.1's role in providing a potential remedy when no other avenue is open to a plaintiff and undermines the *Skinner* analysis of pervasive and intricate regulatory schemes that previously formed the heart of the securities exemption doctrine.

### *B. "Extraordinary Events" as a New Basis for Dismissing Section 75-1.1 Claims*

The *HAJMM* majority reasoned that "[t]he issuance of securities is an extraordinary event done for the purpose of raising capital in order that the enterprise can either be organized for the purpose of conducting its business activities or, if already a going concern, to enable it to continue its business activities."[65] Interpreting this

60. *Id.* at 582–83, 403 S.E.2d at 486–87.
61. *Id.* at 594, 403 S.E.2d at 493.
62. *Id.*
63. *See id.*
64. *Id.* at 594–95, 403 S.E.2d at 493.
65. *Id.* at 594, 403 S.E.2d at 493.

reasoning requires further note that "the securities exception is not limited to the purchase and sale of securities—'[s]ecurities transactions are related to the creation, transfer, or retirement of capital.'"[66] The *HAJMM* transmutation of *Skinner*'s securities exemption thus covers the entire life cycle of any capital-raising transaction, whether or not the transaction can be regulated by traditional securities laws.

The problem with this reasoning, as now-Chief Justice Mark Martin correctly noted in his dissent, is that conducting a business necessarily involves capital-raising efforts and transactions.[67] Moreover, the *HAJMM* majority "cite[d] no authority, and our statute and cases provide[d] none, to support its argument that 'commerce' means only the 'regular, day-to-day activities or affairs' of a business."[68] This was true even as the majority reasoned that the revolving fund certificates served the "same function served by issuing more conventional corporate securities," and the court's "conclusion in *Skinner* that [section 75-1.1] does not apply to corporate securities should also extend to revolving fund certificates unless there is good reason to treat the certificates differently."[69]

Accepting the argument that the Supreme Court of North Carolina has a responsibility to hand down precedent-making decisions, the *HAJMM* flaw creates problems because the decision is more akin to legislation on the scope of section 75-1.1 rather than judicial guidance. The *HAJMM* court could not logically apply the *Skinner* exemption because revolving certificates are unregulated forms of securities, but the majority apparently felt the need to restrain the statute's use and create new grounds for dismissing tenuous claims. However valid that goal may have been, the *HAJMM* rule now provides a sweeping basis to dismiss claims whenever unfair or deceptive conduct occurs outside the most core functions of the business. The problem is that doing business involves much more than conducting day-to-day operations, and *HAJMM* makes section 75-1.1 unavailable in those less common business events.

The fatal error in *HAJMM* came in the majority's failure to recognize that "revolving fund certificates are not subject to the same

66. Sloan v. Inolife Techs., Inc., No. 17 CVS 306, 2017 WL 2268401, at *9 (N.C. Bus. Ct. May 22, 2017) (quoting *HAJMM*, 328 N.C. at 594, 403 S.E.2d at 493).

67. *See HAJMM*, 328 N.C. at 596, 403 S.E.2d at 494 (Martin, J., concurring in part and dissenting in part).

68. *Id.*

69. *Id.* at 593, 403 S.E.2d at 493 (majority opinion).

extensive statutory provisions and administrative regulation that govern more conventional corporate securities" and that differentiating between the certificates and conventional securities was thus justifiable.[70] Cases disposing of section 75-1.1 claims in the pervasive regulation context justifiably do so when that regulatory scheme provides a remedial alternative.[71] The *HAJMM* certificates, by contrast, confronted an admittedly "incidental" and "largely advisory rather than mandatory" level of involvement from any regulatory agency.[72] The majority continued on its "extraordinary event" line of reasoning without precedential support, holding that

> [s]ecurities transactions are related to the creation, transfer, or retirement of capital. Unlike regular purchase and sale of goods, or whatever else the enterprise was organized to do, they are not "business activities" as that term is used in [section 75-1.1]. They are not, therefore, "in or affecting commerce," even under a reasonably broad interpretation of the legislative intent underlying these terms.[73]

The *HAJMM* court did not elaborate on or analyze that legislative intent, and the decision left subsequent courts to speculate what a "broad interpretation" of that intent may entail.[74] The majority's conclusory language would have to suffice for precedential value, explaining flatly that "[r]evolving fund certificates are a cooperative's functional equivalent of traditional corporate securities. They are capital-raising devices. We conclude, therefore, that, like more conventional securities, issuance or redemption of revolving fund certificates are not 'in or affecting commerce' and are not subject to [section 75-1.1]."[75] Unlike more conventional securities, of course, the certificates and those misusing them are subject to no regulatory scheme or its accompanying protections or punishments, leaving a gap in the legal coverage that section 75-1.1 could fill.

## IV. THE *HAJMM* DISSENT

Justice Martin dissented from the *HAJMM* conclusion that a section 75-1.1 claim involving capital-raising activity could not survive

70. *Id.* at 594, 403 S.E.2d at 493.
71. *See, e.g.*, Champion Pro Consulting Grp., Inc. v. Impact Sports Football, LLC, 845 F.3d 104, 111 (4th Cir. 2016).
72. *HAJMM*, 328 N.C. at 594, 403 S.E.2d at 493.
73. *Id.*
74. *See id.*
75. *Id.* at 595, 403 S.E.2d at 493.

as a matter of law. In his dissent, Justice Martin questioned "[h]ow . . . raising funds to operate a business" could not be considered a "business activity."[76] This Part discusses why that question is vital to section 75-1.1 jurisprudence moving forward and how *HAJMM* as precedent makes the question only more important to ask. After highlighting the practical realities Justice Martin raised in his dissent, this Part uses cases relying on *HAJMM* to illustrate its unworkable standard.

### A. *Justice Martin's Predictions in* HAJMM

The restrictive effect of the majority's reasoning became clear in later cases,[77] but Justice Martin forecasted the transformational effect the holding would have on the *Skinner* securities exemption and its broader reasoning regarding pervasive regulation. As he noted in dissent:

> The majority relies heavily upon cases involving securities transactions. However, these cases are inapposite, because they were decided upon the theory that securities transactions were *already* subject to extensive regulation under state and federal law, and the application of [section] 75-1.1 would subject such transactions to overlapping supervision and enforcement.[78]

Justice Martin aptly criticized "the startling argument" that the issuance of unregulated certificates intended to raise capital for a business is "not a 'business activity' within the meaning of the statute."[79]

Justice Martin argued that businesses cannot function in a modern economy without raising capital.[80] Additionally, not all businesses have the resources, sophistication, or will to issue traditional securities that allow investors to rely on the regulatory structure surrounding sophisticated securities. Eliminating section 75-1.1 protections in the absence of a regulatory remedy "loses touch

76. *Id.* at 596, 403 S.E.2d at 494 (Martin, J., concurring in part and dissenting in part).

77. *See, e.g.*, Latigo Invs. II, LLC v. Waddell & Reed Fin., Inc., No. 06 CVS 18666, 2007 WL 2570753, at *5 (N.C. Bus. Ct. May 22, 2007) (requiring a North Carolina Business Court judge to dismiss a section 75-1.1 claim because the claim related to unfairness in the context of a capital-raising transaction).

78. *HAJMM*, 328 N.C. at 596, 403 S.E.2d at 494 (Martin, J., concurring in part and dissenting in part).

79. *Id.*

80. *Id.* ("The acquisition of capital in one form or another is the lifeblood today for business.").

with the reality of the business world," where businesspeople need investors and investors need remedies.[81] The *HAJMM* majority created a dangerous loophole in section 75-1.1; a restrictive definition of business activities as "the day-to-day affairs of the business eliminates most of the raising of business capital from the protection of the statute. The most important area of business life is no longer subject to [section 75-1.1], but the sales of a baker, for example, remain."[82]

Section 75-1.1, by its text, applies to "all business activities, however denominated."[83] How then could a baker be liable under section 75-1.1 for unscrupulous sales of baked goods but not deception related to raising money to run his business? Justice Martin correctly asserted in *HAJMM* that "[n]o matter how one twists it, the issuance of the certificate and defendant's refusal to redeem it were business activities within the meaning of [section 75-1.1]."[84] As Justice Martin emphasized, *HAJMM*'s effect in expanding the *Skinner* exemption at best muddies the boundary between section 75-1.1 and pervasively regulated areas of law. At worst, the decision leaves investors holding nontraditional securities, like revolving fund certificates, vulnerable by giving them no protection under section 75-1.1 and allowing unscrupulous businesspeople to evade a statute that could effectively deter unfair and deceptive dealing.

### *B.* HAJMM*'s Rule Makes "Extraordinary Events" Out of Most Regular Business Activities Related to Securities*

The Supreme Court of North Carolina subsequently described *HAJMM* as a simple case of statutory interpretation, noting "that our General Assembly demonstrated with the text of [section 75-1.1] that it intended [section 75-1.1] to regulate a business's regular interactions with other market participants."[85] If *HAJMM*'s effect had remained so limited in its scope, that characterization would have been helpful in differentiating cases where section 75-1.1 should apply to complement existing regulatory structures and those where the regulation sufficiently occupies the field. However, the *HAJMM* restriction of section 75-1.1 to "activities the business regularly

81. *Id.* at 596, 403 S.E.2d at 495.
82. *Id.* at 596–97, 403 S.E.2d at 495.
83. N.C. GEN. STAT. § 75-1.1(b) (2017).
84. *HAJMM*, 328 N.C. at 597, 403 S.E.2d at 495 (Martin, J., concurring in part and dissenting in part).
85. White v. Thompson, 364 N.C. 47, 51, 691 S.E.2d 676, 679 (2010).

engages in"[86] created an entire body of case law that categorically applies the securities exemption to dismiss section 75-1.1 claims related to capital-raising or securities transactions, regardless of whether any other regulatory remedy or oversight applies.[87]

Unfortunately, the malleability of *HAJMM*'s definition of "business activity" has also led North Carolina courts to expand the reach of the capital-raising exemption. Take, for example, *Oberlin Capital, L.P. v. Slavin*.[88] In that case, the North Carolina Court of Appeals affirmed the dismissal of a section 75-1.1 claim relating to alleged misrepresentations made to acquire a loan simply because the loan had a capital-raising aspect.[89] Though not all courts have viewed *HAJMM* favorably, the decision remains good law and generally leaves lower courts with their hands tied, requiring them to dismiss or affirm dismissals of otherwise viable claims.

Prior to his appointment to the Fourth Circuit, Judge Albert Diaz issued an important decision on the *HAJMM* formulation of the securities exemption while serving on the North Carolina Business Court. In *Latigo Investments II, LLC v. Waddell & Reed Financial, Inc.*,[90] Judge Diaz found the plaintiffs' attempts to distinguish *HAJMM* and *Oberlin* "unavailing" because a "[c]ourt's proper focus under the relevant cases is not 'who is a party to the transaction,' but rather 'what is the purpose of the transaction.'"[91] North Carolina Business Court judges decide many motions to dismiss section 75-1.1 claims under the *HAJMM* standard, and the dispositive issue for their analysis under *HAJMM* is simply "whether the transactions at issue involved securities or other financial instruments involved in raising capital."[92]

86. *HAJMM*, 328 N.C. at 594, 403 S.E.2d at 493.

87. *See, e.g.*, Oberlin Capital, L.P. v. Slavin, 147 N.C. App. 52, 62, 554 S.E.2d 840, 848 (2001) (relying on *HAJMM* to find that the trial court properly dismissed the claim for unfair and deceptive trade practices "[b]ecause the loan agreement at issue here, which also granted Oberlin the right to purchase stock in [the debtor corporation] in the future, was primarily a capital-raising device [and] it was not 'in or affecting commerce'").

88. 147 N.C. App. 52, 554 S.E.2d 840 (2001).

89. *Id.* at 62, 554 S.E.2d at 848; *see also* Latigo Invs. II, LLC v. Waddell & Reed Fin., Inc., No. 06 CVS 18666, 2007 WL 2570753, at *4 (N.C. Bus. Ct. May 22, 2007) (explaining that "[i]n *Oberlin*, our Court of Appeals expanded the reach of the [section 75-1.1] securities exception").

90. No. 06 CVS 18666, 2007 WL 2570753 (N.C. Bus. Ct. May 22, 2007).

91. *Id.* at *4.

92. *Id.* at *5 (quoting White v. Consol. Planning, Inc., 166 N.C. App. 283, 304, 603 S.E.2d 147, 161 (2004)).

Judge Diaz, in a moment of judicial candor, said in his *Latigo* opinion that "[w]ere I writing on a clean slate, I would not dismiss Plaintiffs' [section 75-1.1] claim as, like Justice Martin, I find no logical basis for excluding misrepresentations made in the context of capital raising transactions from the reach of what is intended to be a broad remedial statute."[93] Summarizing his *Latigo* holding, however, Judge Diaz explained that "because the undisputed purpose of the transaction in this case . . . was to raise capital . . . it is not a transaction 'in or affecting commerce' as that element has been defined by the cases," and he dismissed the section 75-1.1 claim accordingly.[94] Judge Diaz's commentary indicates the unworkable and overly broad standard Business Court judges are bound to apply when deciding a section 75-1.1 claim under the *HAJMM* precedent.

Even in cases where the ordinary business activities of a company involve the sale of securities, a section 75-1.1 claim cannot survive dismissal based on *HAJMM* and its progeny. In *DeGorter v. Capitol Bancorp Ltd.*,[95] for example, the "Plaintiff allege[d] Defendants' conduct regarding the role of the trust preferred securities offering in the . . . transaction constituted unfair or deceptive trade practices under . . . section 75-1.1."[96] The *DeGorter* claim was based on evidence that the defendant "deceived [the plaintiff] into purchasing the . . . securities by misrepresenting or failing to timely disclose pertinent information about the financial position of [the defendant]."[97] The *DeGorter* court, like Judge Diaz in *Latigo*, was bound to dismiss the section 75-1.1 claim because "whether Plaintiff was unfairly induced to purchase the trust preferred securities as part of a larger misrepresentation . . . [was] irrelevant. The only relevant question [was] whether securities were involved in the transaction. The issue at hand [was] plainly securities-related."[98] Dismissing a section 75-1.1 claim when no other regulatory structure covers unfairness demonstrates that the *HAJMM* formulation of the securities exemption has proven unworkable and contrary to the purpose of a statute that plainly outlaws "unfair or deceptive acts or practices in or affecting commerce."[99]

93. *Id.* at *4.
94. *Id.* at *5.
95. No. 11 CVS 20825, 2011 WL 3300304 (N.C. Bus. Ct. July 29, 2011).
96. *Id.* at *3.
97. *Id.*
98. *Id.* at *6.
99. N.C. GEN. STAT. § 75-1.1(a) (2017).

Perhaps the most recent example of the *HAJMM* conundrum is *Tillery Environmental LLC v. A&D Holdings, Inc.*,[100] another Business Court case that arose after the conclusion of a merger and concerned the final disbursement of the purchase price. The *Tillery* dispute was within the scope of the *HAJMM* securities exemption because the merger between the plaintiff and defendant companies admittedly constituted an extraordinary event for those companies. A&D Holdings, Inc. ("A&D") and JBC Acquisition, Inc. ("JBC") merged as a result of a stock purchase agreement.[101] Thereafter, the allegedly unfair act arose during "a dispute over funds held in escrow."[102] The businesses' day-to-day operations involved industrial cleaning, so a merger undoubtedly qualified as an unusual event in the life of the business.[103] The stock purchase agreement executed a transaction involving securities and formed the foundation of the dispute.[104] The escrow fund left over as the last of the purchase price to be disbursed, however, sustained an ongoing business interaction between the parties even after the transaction closed because "eighteen months after the stock purchase closed and four days before the Escrow Funds were to be distributed to Tillery, A&D (as JBC's successor entity) made an indemnification demand to Tillery."[105]

Tillery, bringing the section 75-1.1 claim over the indemnity demand, alleged that A&D's demand amounted to an adjustment of the purchase price negotiated in the merger because the postmerger business was performing poorly.[106] As a result of the indemnity demand, however, "[t]he Escrow Agent continue[d] to hold the Escrow Funds . . . until it receive[d] either a court order or joint release instructions agreed to by the parties."[107] The demand was therefore successful in blocking the final execution of the agreement regardless of its merit.

Noting the difficulty of placing Tillery's claim in the landscape of post-*HAJMM* case law, Judge Bledsoe wrote that

100. No. 17 CVS 6525, 2017 WL 3335764 (N.C. Bus. Ct. Aug. 4, 2017).
101. *Id.* at *1.
102. *Id.*
103. *See id.*
104. *See id.*
105. *Id.* at *2.
106. *See id.*
107. *Id.*

> [u]nder *Skinner* alone, Plaintiff's [section 75-1.1] claim would likely survive. Plaintiff's allegations focus on Defendants' alleged post-closing attempts to lay claim to the Escrow Funds through improper indemnification demands a year and a half after the stock purchase closed. Although this action arose out of the sale of securities, Plaintiff's allegations of post-closing misconduct under the Escrow Agreement do not appear to involve conduct "already subject to pervasive and intricate regulation."[108]

*HAJMM*, however, bound Judge Bledsoe to dismiss Tillery's section 75-1.1 claim under the securities exemption. As he explained, "[a]lthough Defendants' allegedly wrongful conduct occurred nearly eighteen months after the securities transaction closed, Defendants' conduct is inextricably tied to the sale of securities and the Stock Purchase Agreement."[109] Additional application of *HAJMM* showed that the conduct complained of was not an ordinary business event, as

> Defendants' alleged actions—making improper indemnification demands under a specific Stock Purchase Agreement and Escrow Agreement—are not indicative of a business's regular, day-to-day activities or affairs. Indeed, the indemnification demands made here can only occur once between these parties; after the Escrow Agent has made a final distribution of the Escrow Funds, the parties will have no further ongoing relationship.[110]

Judge Bledsoe explained that the court could not sustain a section 75-1.1 claim when "the facts alleged in the Complaint . . . do not describe the parties' regular, day-to-day business activities. Thus, under *HAJMM*, Plaintiff has failed to allege conduct 'in or affecting commerce' under section 75-1.1, requiring dismissal of Plaintiff's [section 75-1.1] claim."[111]

*Tillery* demonstrates *HAJMM*'s overreach in the securities context. The allegedly unfair and deceptive conduct—the defendant's taking approximately $2.7 million hostage—could not be judged under the statute based only on the fact that the stock purchase agreement represented a securities sale. Judge Bledsoe noted that the "conduct [was] inextricably tied to the sale of securities," but

108. *Id.* at *5 (quoting Skinner v. E.F. Hutton & Co., 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985)).
109. *Id.* at *6.
110. *Id.*
111. *Id.*

*HAJMM* nevertheless equates conduct tied to securities with conduct potentially remedied under securities laws.[112] The *Tillery* decision explicitly notes that such a remedy was not available because the pervasive regulatory scheme that justified *Skinner* was not available to the plaintiff in *Tillery*.[113] On one hand, the *HAJMM* rule simplifies the calculus for lower courts by allowing them to grant motions to dismiss whenever a securities-related transaction is at issue. On the other hand, the rule nullifies the usefulness of section 75-1.1 as a regulatory gap-filler because any potential remedy through the securities regulation apparatus becomes inapplicable. All that matters is whether a security changes hands or capital is raised, not whether an allegedly injured plaintiff can seek redress.

### *C. The Rare Exceptions to* HAJMM*'s Rule*

The absence of regulatory liability in securities-related cases has allowed some courts to deny motions to dismiss section 75-1.1 claims, though these instances appear to represent factually distinguishable exceptions to *HAJMM* rather than the rule. In *Hand v. Ace Hardware Corp.*,[114] for instance, the plaintiffs bought small amounts of stock in a franchise through a franchise agreement.[115] The plaintiffs later sued the franchisor, including a section 75-1.1 claim.[116] The court denied a motion to dismiss the claim under the securities exemption because

> Plaintiffs have not alleged that they were injured as a result of the stock purchase, and none of the remedies sought concern the stock. Additionally, the justifications for excluding securities transactions from the scope of § 75-1.1 do not apply in this case. Defendant's actions would not subject it to liability under any of the federal or state securities law. Also, the relationship between [Defendant] and the [Plaintiffs] more closely resembles an ordinary business transaction than the issuance of stock to raise capital. In this case, the stock sale was ancillary to the main purpose of the transaction, the [Plaintiffs] opening an Ace store in Salisbury. The remainder of the transaction is subject to the requirements of the unfair and deceptive trade practices statute.[117]

112. *Id.*
113. *Id.* at *5.
114. No. 4:92CV00454, 1995 U.S. Dist. LEXIS 10818 (M.D.N.C. July 7, 1995).
115. *Id.* at *18.
116. *See id.* at *13.
117. *Id.* at *19.

In *Katen v. Katen*,[118] the defendants bought the plaintiff out of the family company through a series of agreements over a ten-year period.[119] The plaintiff later brought a slew of claims, including one under section 75-1.1.[120] The court held that the securities exemption did not bar the plaintiff's section 75-1.1 claim because the sale of stock was "but one of this series of agreements alleged to have been reached between the parties from 1981 to 1991. Plaintiff's entire claim [did] not rise or fall upon that one transaction."[121] This decision suggests that more regular or recurring transactions could establish ordinary business activities under the statute and allow claims tenuously related to securities to survive a motion to dismiss.

## V. REAFFIRMING SECTION 75-1.1'S BROAD REMEDIAL PURPOSE

Straightforward remedies correcting the confusion and difficulty of the *HAJMM* standard do exist, and the time is ripe for either judicial or legislative reaffirmation of section 75-1.1 as a useful tool to combat unfairness and deception in business transactions. Narrowness is often a virtue in applying section 75-1.1's extraordinary damages provision, but the categorical dismissals of otherwise viable claims following *HAJMM* highlight the gaps the decision created. This Part first explores possible legislative remedies. The discussion then addresses the possibility that the Supreme Court of North Carolina could overturn *HAJMM* by acknowledging the extraordinary event doctrine's failure to address situations like *Latigo* or *Tillery*.

### A. *Legislative Revision or Guidance*

The most expedient solution for section 75-1.1's weakness in addressing regulation-related issues after *HAJMM* would be a legislative effort to expand section 75-1.1 as a backstop regulatory tool. The General Assembly has an interest in protecting businesses and consumers alike when regulatory structures do not address unfairness or deception in any business transaction. As discussed above, decisions from the Supreme Court of North Carolina restricting the scope of prior versions of section 75-1.1 prompted a legislative restructuring that provided the present statute's broad

118. No. 5:97-CV-275-BR(2), 1997 U.S. Dist. LEXIS 21439 (E.D.N.C. Nov. 18, 1997).
119. *Id.* at *3–4.
120. *Id.* at *4.
121. *Id.* at *18.

powers to combat unfairness and deception.[122] The legislature's previous reluctance to intervene may be related to *HAJMM*'s purported justification that section 75-1.1 ultimately means to protect the consumer, and one-off transactions between businesses do not sufficiently affect the consumer. However, instances like *Latigo* and *Tillery* show that reading section 75-1.1 so narrowly precludes protection that the statute originally meant to provide. It is no longer "a broad remedial statute."[123]

The General Assembly could reinvigorate section 75-1.1's usefulness in one of two ways. First, the legislature could add a subsection to the statute that provides judicial discretion to allow a claim to survive as a matter of law unless the judge can identify another regulatory remedy, whether public or private, which more appropriately or effectively addresses the alleged misconduct. Second, language could be added to ensure section 75-1.1 claims reach the merits of alleged unfairness or deception unless the conduct clearly falls within a pervasive and intricate regulatory scheme. While judges certainly could work to identify an alternative scheme that may apply, the second proposal may clarify the statute's application and allow both more effective litigation and claim resolution based on the merits of the case.

The first option, expanding judicial discretion, would serve as the General Assembly's endorsement of North Carolina's Business Court judges to effectively handle and dispose of complex business litigation matters.[124] The legislature could acknowledge that section 75-1.1 claims provide particularly thorny issues by directing judges to dispose of cases at their discretion when those cases are better resolved elsewhere. Judges should have more discretion to deny motions to dismiss when section 75-1.1 protections could supplement questionably applicable regulations. However, expanding judicial discretion in cases that already involve various unclear definitions of

122. *See* Rebecca A. Fiss, *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*, 92 N.C. L. REV. 2145, 2145–46 (2014) (discussing the North Carolina General Assembly's amendment of "the statute to broadly include 'all business practices, however denominated'").

123. Latigo Invs. II, LLC v. Waddell & Reed Fin., Inc., No. 06 CVS 18666, 2007 WL 2570753, at *4 (N.C. Bus. Ct. May 22, 2007).

124. *See* Mack Sperling, *About This Blog*, BROOKS PIERCE: N.C. BUS. LITIG. REP., https://www.ncbusinesslitigationreport.com/about-this-blog/ [https://perma.cc/MQK7-4FGX] (referring to the North Carolina Business Court as "North Carolina's equivalent of the Delaware Court of Chancery").

unfairness may further the problems created by *HAJMM* rather than limit them.[125] A more definitive stance on the role and scope of section 75-1.1 from the state legislature would enhance a judge's ability to allow or dismiss claims.

The second option essentially involves a legislative endorsement of the *Skinner* reasoning that pervasive and intricate regulation should preclude section 75-1.1 protection, while clarifying that the *HAJMM* expansion does not apply where conduct falls outside of another regulatory scheme. Critics of this approach may argue that expanding section 75-1.1 applicability back to *Skinner* would simply lead to more frivolous claims muddying Business Court dockets after motions to dismiss, but the statute's effect of deterring unfairness and deception relies on the possibility that claims could reach trial. Exemptions like *HAJMM* mean claims with merit may not survive simply because they come too close to a poorly defined category and not because they fail to allege unfairness or deception. If section 75-1.1 claims arguably related to an exempt category, like securities, survived dismissal unless a regulatory scheme clearly precluded them, defendants would need to identify the particular avenue that a plaintiff should pursue instead of a section 75-1.1 claim for general unfairness or deception. Such added clarity in the pleadings would allow judges to make more decisions on the merits rather than acknowledge that the claim falls under a large umbrella of an exemption like *HAJMM*, the bounds of which are unclear and difficult to justify. Clear statutory language designed to regulate all unfair or deceptive conduct—up to the pervasive and intricate regulations governing particular circumstances—would increase the number of section 75-1.1 claims judged on their merits and prevent the proliferation of judicially crafted exemptions that effectively bar paths to a remedy.

### *B. Judicial Solutions*

Absent legislative action, the Supreme Court of North Carolina could emulate the reasoning in *Tillery* and *Latigo* by extending section 75-1.1 protection into circumstances where regulations do not already occupy the field or provide more effective remedies. The court could take further guidance from the Fourth Circuit's logic in

125. *See* Sawchak & Nelson, *supra* note 1, at 2051 (outlining varying definitions and explaining that "[b]ecause of the broad and vague nature of these definitions, courts have struggled to decide whether particular conduct is unfair").

*Champion Pro* and hold that private remedies, like the NFLPA's enforcement apparatus, suffice to preclude section 75-1.1 claims.[126] A binding North Carolina decision to that effect would solidify section 75-1.1 as a regulatory tool while also giving lower courts latitude to dismiss cases employing section 75-1.1 as a settlement multiplier in lieu of another more appropriate remedy. Most importantly, though, the Supreme Court of North Carolina, now under Chief Justice Martin's leadership, should revisit his skepticism towards an expansion of the *Skinner* doctrine of pervasive and intricate regulation to the extraordinary event exemption of *HAJMM* that casts an overbroad and undefined shadow over section 75-1.1 jurisprudence.

## CONCLUSION

Judicial exemptions erode section 75-1.1's effectiveness when lower courts apply the exemption categorically rather than in a discretionary manner. Section 75-1.1 serves to "create a new, private cause of action for aggrieved consumers since traditional common law remedies were often deficient."[127] The Supreme Court of North Carolina additionally notes "that the purposes of the statutory provisions for treble money damages, N.C.G.S. § 75-16, and attorneys' fees, N.C.G.S. § 75-16.1, were to encourage private enforcement in the marketplace and to make the bringing of such a suit more economically feasible."[128] Since "unfairness and deception are gauged by consideration of the effect of the practice on the marketplace,"[129] the state of the law after *HAJMM* leaves section 75-1.1 inapplicable regardless of the availability of a remedy through other channels. A business engaged in a securities transaction of little or no interest to the Securities and Exchange Commission ("SEC") should still have an opportunity to recover under section 75-1.1 when unfairness or deception occurs.

Moreover, fundraising activities are so vitally important to businesses that they may as well qualify as day-to-day even if they

126. *See* Champion Pro Consulting Grp., Inc. v. Impact Sports Football, LLC, 845 F.3d 104, 110 (4th Cir. 2016) (holding that section 75-1.1 was not necessary to address the defendant's conduct because there were already "well-established internal systems of governance . . . in place").

127. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 95, 331 S.E.2d 677, 680 (1985) (citing Marshall v. Miller, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981)).

128. *Id.* (citing *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403–04).

129. Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981).

occur infrequently. The *HAJMM* rule, which precludes claims arising out of unusual circumstances for the business, weakens the statute. Therefore, it is time for section 75-1.1 to regain its utility as "a broad remedial statute."[130] Transactions between businesses generally fall within the scope of section 75-1.1, meaning that a party to a transaction may invoke the statute's protections against its counterpart in appropriate circumstances.[131] Business transactions, though, may also be subject to considerable regulatory structures, such as securities laws. Where these regulatory structures cover the transaction and provide the plaintiff a remedy, applying section 75-1.1 too broadly may only muddy the already murky waters of business regulation. Courts and practitioners must determine if regulatory structures essentially preempt section 75-1.1 claims by providing an alternative path to recovery, such as filing a complaint with the SEC rather than the North Carolina Business Court. When there is no clearly applicable road to recovery in tort or a regulatory structure, however, it would appear section 75-1.1 is uniquely positioned and arguably intended to fill a gap and provide a cause of action against unfairness or deception.[132] These gaps highlight section 75-1.1's utility as a regulatory gap-filler to combat unfairness and deception because section 75-1.1 is redundant if regulatory channels could provide a remedy.[133]

North Carolina does not benefit from litigants asserting baseless claims that business ventures have been unfair or deceptive in dealing with each other, using section 75-1.1 and its damages multiplier to improperly influence their counterpart to settle. The state's business community will operate most efficiently and effectively when businesspeople are confident that their counterparts will not

130. Latigo Invs. II, LLC v. Waddell & Reed Fin., Inc., No. 06 CVS 18666, 2007 WL 2570753, at *4 (N.C. Bus. Ct. May 22, 2007).

131. *See* United Labs., Inc. v. Kuykendall, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988) (holding that section 75-1.1 is "not limited . . . to cases involving consumers only" because "unfair trade practices involving only businesses affect the consumer as well"); 1 NOEL L. ALLEN, NORTH CAROLINA UNFAIR BUSINESS PRACTICE § 6.05, at 6–9 (3d ed. 2018) ("[T]he North Carolina Supreme Court has declared that § 75-1.1 was intended by the General Assembly to 'regulate a business's regular interactions with other market participants.'" (quoting White v. Thompson, 364 N.C. 47, 51, 691 S.E.2d 676, 679 (2010))).

132. *See* Drouillard v. Keister Williams Newspaper Servs., Inc., 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992) ("The statute was created to provide an additional remedy apart from those less adequate remedies afforded under common law causes of action for fraud, breach of contract, or breach of warranty. The result was a broader cause of action with broader remedies.").

133. Feldman, *supra* note 45.

immediately sue them for unfair and deceptive conduct if a deal goes wrong. A negotiation conducted under the cloud of easily accessible windfalls through treble damages encourages transparency and fairness no more than it encourages unnecessary levels of due diligence and tentative forecasting about the future. Conversely, the availability of section 75-1.1 protection may function as a regulatory safety net in appropriate circumstances where no other regulations address bad conduct. A businessperson who has suffered from unfair or deceptive conduct, even during an extraordinary business activity like selling a company, should retain access to section 75-1.1 remedies. In deciding whether a section 75-1.1 exemption applies, courts should only dismiss these claims as a matter of law when the conduct is addressed by another pervasive regulatory structure and a remedy under that structure is reasonably available.

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