

1-1-1982

# North Carolina Law on Antitrust and Consumer Protection

William B. Aycock

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

## Recommended Citation

William B. Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C. L. REV. 205 (1982).Available at: <http://scholarship.law.unc.edu/nclr/vol60/iss2/1>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# NORTH CAROLINA LAW ON ANTITRUST AND CONSUMER PROTECTION

WILLIAM B. AYCOCK

|      |  |     |
|------|--|-----|
| I.   | INTRODUCTION .....   | 207 |
| A.   | <i>G.S. 75-1</i> .....   | 208 |
| B.   | <i>G.S. 75-5(b)</i> .....  | 209 |
| C.   | <i>G.S. 75-1.1</i> .....   | 210 |
| II.  | UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE<br>ACTS OR PRACTICES UNDER G.S. 75-1.1 ..... | 211 |
| A.   | <i>Scope</i> .....   | 211 |
| 1.   | Legislative Exclusions .....   | 211 |
| 2.   | Legislative Inclusions .....   | 212 |
| 3.   | Judicial Exclusions .....  | 214 |
| 4.   | Judicial Inclusions .....  | 215 |
| B.   | <i>The Meaning of Unfair or Deceptive in G.S. 75-1.1</i> .....                                     | 217 |
| 1.   | Unfair Methods of Competition .....  | 217 |
| 2.   | Unfair or Deceptive Acts or Practices .....  | 220 |
| C.   | <i>Conclusion Concerning G.S. 75-1.1</i> .....   | 222 |
| III. | DIRECT RESTRAINTS OF TRADE .....   | 224 |
| A.   | <i>Pricing Practices</i> .....   | 224 |
| 1.   | Horizontal Price Fixing .....  | 224 |
| (a)  | <i>Common law</i> .....  | 224 |
| (b)  | <i>Statutes</i> .....  | 225 |
| 2.   | Resale-Price Maintenance .....   | 229 |
| 3.   | Pricing Policies Designed to Injure or Destroy<br>Competitors .....                                | 231 |
| 4.   | Price Discrimination .....   | 232 |
| B.   | <i>Territorial Arrangements</i> .....  | 234 |
| 1.   | Horizontal Division of Markets .....   | 234 |
| 2.   | Vertical Division of Markets .....   | 237 |
| (a)  | <i>Exclusive selling</i> .....   | 237 |
| (b)  | <i>Closed territories and customer limitations</i> .....   | 237 |
| C.   | <i>Exclusive Arrangements</i> .....  | 239 |
| 1.   | Restrictions on a Buyer .....  | 240 |
| (a)  | <i>Exclusive buying</i> .....  | 240 |
| (b)  | <i>Requiring contracts</i> .....   | 242 |
| (c)  | <i>Tying arrangements</i> .....  | 243 |
| 2.   | Restrictions on Lessees, Licensees and Franchisees .....   | 244 |
| D.   | <i>Refusals to Deal</i> .....  | 245 |

|   |     |
|---|-----|
| 1. Individual Refusals to Deal .....  | 245 |
| 2. Concerted Refusals to Deal.....  | 246 |
| <i>E. Monopolization, Attempt to Monopolize, Combination or<br/>Conspiracy to Monopolize, and Mergers .....</i> | 250 |
| 1. Individual Misconduct .....  | 251 |
| 2. Concerted Action .....   | 252 |
| 3. Mergers.....   | 253 |
| IV. ANCILLARY RESTRAINTS .....  | 253 |
| <i>A. Time .....</i>  | 254 |
| <i>B. Territory .....</i>   | 255 |
| <i>C. Conclusion .....</i>  | 257 |
| V. ENFORCEMENT AND REMEDIES .....   | 257 |
| <i>A. Private Enforcement .....</i>   | 257 |
| 1. Statute of Limitations .....   | 257 |
| 2. Damages.....   | 258 |
| 3. Injunction .....   | 259 |
| 4. Attorney's Fees .....  | 259 |
| <i>B. Public Enforcement .....</i>  | 260 |
| 1. Civil.....   | 261 |
| (a) <i>Statute of limitations</i> .....   | 261 |
| (b) <i>Damages</i> .....  | 261 |
| (c) <i>Injunction</i> .....   | 261 |
| (d) <i>Restitution</i> .....  | 261 |
| (e) <i>Parens patriae</i> .....   | 261 |
| (f) <i>Civil penalty</i> .....  | 262 |
| (g) <i>Res judicata</i> .....   | 262 |
| 2. Criminal Penalties .....   | 262 |
| VI. CONCLUSION.....   | 263 |
| APPENDIX—CHAPTER 75 OF THE NORTH CAROLINA GENERAL<br>STATUTES.....  | 265 |

# NORTH CAROLINA LAW ON ANTITRUST AND CONSUMER PROTECTION

WILLIAM B. AYCOCK†

*The recent flurry of state antitrust litigation indicates that the North Carolina antitrust and consumer protection laws are becoming increasingly important to practitioners. In this Article, Professor Aycock discusses these laws, focusing initially on the development of the unfair-methods-of-competition and unfair-trade-practices statute, G.S. 75-1.1. He next reviews direct restraints of trade, including pricing practices, territorial arrangements, exclusive arrangements, refusals to deal, and monopolization and then examines ancillary restraints. After discussing enforcement of the antitrust laws and available remedies, Professor Aycock concludes with suggested revisions that should be made in North Carolina's antitrust and consumer-protection statutory scheme.*

*Readers may recall the Article in this Review ten years ago in which Professor Aycock initially compared the North Carolina and federal antitrust and consumer protection law.‡*

## I. INTRODUCTION

An attorney who counsels a client on the risk of liability in the areas of antitrust and consumer protection needs to know both state and federal law. The main thrust of this Article is directed to the law of North Carolina; nevertheless, it is essential to refer frequently to federal law. In trade regulation cases the doctrine of preemption is rarely applied, and often the same conduct may violate both state and federal statutes. Thus, in seeking redress, an injured party may have a choice of law. Further, a prudent pleader who chooses federal law often will append a state claim to the federal claim.<sup>1</sup> And, when a local activity does not come within the jurisdictional sweep of the federal statutes, a knowledge of federal law may still be useful because a court's interpretation of uncertain state law might be influenced by the more fully developed federal law.

The three principal federal statutes are the Sherman Act,<sup>2</sup> the Clayton Act<sup>3</sup> and the Federal Trade Commission (FTC) Act.<sup>4</sup> North Carolina also has

---

† Kenan Professor of Law, University of North Carolina at Chapel Hill. Special thanks are due to Stewart Wayne Fisher, third-year law student, for his invaluable research and editorial assistance and to Mrs. Kitty White for her splendid secretarial assistance.

‡ Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C.L. Rev. 199 (1972).

1. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *Pinehurst Airlines, Inc. v. Resort Air Serv., Inc.*, 476 F. Supp. 543, 558-59 (M.D.N.C. 1979).

2. 15 U.S.C. §§ 1-7 (1976).

3. *Id.* §§ 12-27.

three principal statutes: sections 75-1, 75-5(b) and 75-1.1 of the North Carolina General Statutes.<sup>5</sup> The North Carolina statutes parallel the three federal statutes respectively, and G.S. 75-1 and 75-1.1 were derived from federal law.

### A. G.S. 75-1

G.S. 75-1 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal."<sup>6</sup> This section is nearly identical to section 1 of the Sherman Act. Although the North Carolina Supreme Court has rejected the notion that the body of law applying the Sherman Act is binding in the application of G.S. 75-1,<sup>7</sup> the court agrees that the federal law is "instructive" in determining the full reach of the state statute.<sup>8</sup>

The Sherman Act, according to the United States Supreme Court, "has a generality and adaptability comparable to that found to be desirable in constitutional provisions,"<sup>9</sup> and cases interpreting section 1 of the Sherman Act are legion.<sup>10</sup> The Sherman Act is the flagship of federal antitrust law, but its progeny, G.S. 75-1, is by comparison almost an empty vessel.

4. Id. §§ 41-58 [hereinafter cited as the FTC Act].

The bibliography on federal law is voluminous. A few selected sources include: American Bar Association, *Antitrust Law Developments* (1975 & Supp. 1974-1980); P. Areeda & D. Turner, *Antitrust Law* (1978-1980) (5 vols.); S. Oppenheim & G. Weston, *Unfair Trade Practices and Consumer Protection* (3d ed. 1974 & Supp. 1981); S. Oppenheim, G. Weston & J. McCarthy, *Federal Antitrust Laws* (4th ed. 1981); L. Sullivan, *Handbook of the Law of Antitrust* (1977).

5. Chapter 75 of the N.C. General Statutes is entitled "Monopolies, Trusts and Consumer Protection." N.C. Gen. Stat. § 75 (1981). The full text appears in the Appendix to this Article. Chapter 66, "Commerce and Business," has several provisions concerned with trade regulation. Id. § 66.

The North Carolina General Assembly enacted an antitrust statute in Law of Mar. 11, 1889, ch. 374, 1889 N.C. Pub. Laws 372. The antitrust statute was rewritten in Law of Mar. 8, 1899, ch. 666, 1899 N.C. Pub. Laws 852, and in Law of Mar. 11, 1901, ch. 586, 1901 N.C. Pub. Laws 820. In 1907, a new statute was passed. Law of Mar. 11, 1907, ch. 218, 1907 N.C. Pub. Laws 254. This statute was amended in Law of Mar. 8, 1909, ch. 448, 1909 N.C. Pub. Laws 772. The 1907 Act, as amended in 1909, was rewritten in Law of Mar. 8, 1911, ch. 167, 1911 N.C. Pub. Laws 321. North Carolina was without an antitrust statute during the years 1905-1907 because the 1901 statute was not carried forward by the Code Commission in the North Carolina revision of 1905. In 1907 the chairman of the Code Commission gave the following explanation for the deletion:

My recollection is that we did not bring forward the antitrust law because we were advised that the North Carolina statute was a copy of the Texas statute and as the Supreme Court of the United States had declared the Texas statute unconstitutional, we thought it not wise to bring it forward, but to leave it to the General Assembly to enact an act that would meet the objections of the Supreme Court if that body deemed it advisable to do so . . . .

Raleigh News and Observer, Jan. 10, 1907, at 4, col. 2. The case referred to is *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902), which was overruled in *Tigner v. Texas*, 310 U.S. 141 (1940). For a brief history of chapter 75 and its predecessor provisions, see Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C.L. Rev. 199 (1972).

6. N.C. Gen. Stat. § 75-1 (1981).

7. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973).

8. Id. The Sherman Act is broader than the common law. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Similarly, G.S. 75-1 is limited to the common law only when its applicability is triggered by G.S. 75-2. N.C. Gen. Stat. § 75-2 (1981).

9. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933).

10. E.g., *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978); *United States v. Trenton Pottery Co.*, 273 U.S. 392 (1927).

Most of the judicial cargo in G.S. 75-1 is attributable to G.S. 75-2, which states, "Any act, contract, combination in the form of trust or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of G.S. 75-1."<sup>11</sup> The Supreme Court of North Carolina has noted that G.S. 75-2 means that the common law on restraint of trade is determinative of at least the minimum scope of G.S. 75-1.<sup>12</sup> In 1981 the General Assembly provided for harsh penalties for "bid rigging" on government contracts; this legislation specifies that these penalties apply to violations of G.S. 75-1 and 75-2.<sup>13</sup>

### *B. G.S. 75-5(b)*

Subsections (1) through (6) of G.S. 75-5(b) were adopted in 1913 at the same time G.S. 75-1 was enacted.<sup>14</sup> Unlike the generalized expression "restraints of trade" employed in G.S. 75-1, the provisions in section 75-5(b) make certain specific practices unlawful. Subsection (1) is directed against agreements to pay a low price for goods produced in this state; subsection (2) is concerned with exclusive dealing arrangements; subsections (3) and (4) are designed to protect competitors against the overreaching power of rivals; subsection (5) is concerned with price discrimination; and subsection (6) is directed against territorial divisions. In 1961 state officials were concerned with suppliers making identical bids to the Division of Purchase and Contract.<sup>15</sup> Because there was some doubt about the adequacy of G.S. 75-1 to deal with these alleged price-fixing arrangements, the General Assembly enacted subsection (7), a price-fixing statute.<sup>16</sup>

It is important to discern which of these subsections require proof of concert of action. Subsections (1), (6) and (7) of G.S. 75-5(b) resemble G.S. 75-1 in that more than one person must be involved in the alleged misconduct. On the other hand, subsections (2), (3), (4) and (5) proscribe individual as well as concerted conduct.

Analysis of the cases involving G.S. 75-5(b) will reveal that each subsection has its detailed requirements and that it is essential to examine the specialized language of each.

---

11. N.C. Gen. Stat. § 75-2 (1981).

12. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973). Some decisions that preceded G.S. 75-2 are now by virtue of this section incorporated into G.S. 75-1: *Smith v. Morganton Ice Co.*, 159 N.C. 151, 74 S.E. 961 (1912) (agreements to impose minimum resale price violative of common law and the 1907 antitrust law); *Culp v. Love*, 127 N.C. 457, 37 S.E. 476 (1900) (division of territories).

13. Law of July 2, 1981, ch. 764, § 1, [1981] 7 N.C. Adv. Legis. Serv. 545 (to be codified at N.C. Gen. Stat. § 133-22).

14. Law of Mar. 3, 1913, ch. 41, § 5, 1913 N.C. Pub. Laws 66.

15. *Raleigh News and Observer*, Mar. 24, 1961, at 1, col. 1-3.

16. Law of May 12, 1961, ch. 407, § 1, 1961 N.C. Sess. Laws 563.

## C. G.S. 75-1.1

G.S. 75-1.1, originally enacted in 1969,<sup>17</sup> is directed against unfair methods of competition and unfair or deceptive acts or practices.<sup>18</sup> In *Hardy v. Toler*<sup>19</sup> the Supreme Court of North Carolina, examining G.S. 75-1.1 for the first time, commented: "Some guidance may be obtained by reference to federal decisions on appeals from the Federal Trade Commission, since the language of G.S. 75-1.1 closely parallels that of the Federal Trade Commission Act . . . ."<sup>20</sup> In 1977 the General Assembly rewrote G.S. 75-1.1 to conform exactly to section (5)(1)(a) of the FTC Act,<sup>21</sup> thereby overturning the decision of the North Carolina Supreme Court in *State ex rel. Edmisten v. J.C. Penney Co.*,<sup>22</sup> which had limited the scope of the section by distinguishing it from the FTC Act. Both acts now read as follows: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are declared unlawful."<sup>23</sup> Since the 1977 revision, it is apparent that in interpreting G.S. 75-1.1 the North Carolina Supreme Court will seek help from federal decisions construing section 5 of the FTC Act.<sup>24</sup>

Commenting on G.S. 75-1.1 in 1981, the North Carolina Supreme Court stated:

In an area of law such as this, we would be remiss if we failed to consider also the overall purpose for which this statute was enacted. The commentators agree that state statutes such as ours were enacted to supplement federal legislation, so that local business interests could not proceed with impunity, secure in the knowledge that the dimensions of their transgression would not merit federal action.<sup>25</sup>

Part II of this Article deals with G.S. 75-1.1 and several statutes that are closely related to it.

## II. UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES UNDER G.S. 75-1.1

G.S. 75-1.1, enacted in 1969<sup>26</sup> and amended in 1977,<sup>27</sup> is the centerpiece

17. Law of June 12, 1969, ch. 833, 1969 N.C. Sess. Laws 930.

18. For an interpretation of the public policy which led to the passage of G.S. 75-1.1, see Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 Wake Forest Intra. L. Rev. 1 (1969). See also Comment, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. Rev. 896 (1970).

19. 288 N.C. 303, 218 S.E.2d 342 (1975). For a discussion of *Hardy*, see Note, *Trade Regulation*, 12 Wake Forest L. Rev. 484 (1976).

20. 288 N.C. at 308, 218 S.E.2d at 345 (referring to 15 U.S.C. § 45(a)(1) (1976)).

21. 15 U.S.C. § 45(a)(1) (1976).

22. 292 N.C. 311, 233 S.E.2d 895 (1977). Discussed at notes 55-59 and accompanying text *infra*.

23. 15 U.S.C. § 45(a)(1) (1976); N.C. Gen. Stat. § 75-1.1 (1981).

24. See *Marshall v. Miller*, 302 N.C. 539, 542-43, 276 S.E.2d 397, 399-400 (1981); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 260-65, 266 S.E.2d 610, 619-22 (1980).

25. *Marshall v. Miller*, 302 N.C. at 549, 276 S.E.2d at 403.

26. Law of June 12, 1969, ch. 833, 1969 N.C. Sess. Laws 930.

27. Law of June 27, 1977, ch. 747, §§ 1-2, 1977 N.C. Sess. Laws, 1st Sess. 984.

in the law of unfair methods of competition and unfair and deceptive acts or practices in North Carolina. The first component, "[u]nfair methods of competition,"<sup>28</sup> appeared in section 5 of the FTC Act in 1914. The second component, "unfair or deceptive acts or practices," was added to the FTC Act by the Wheeler-Lea amendments of 1938.<sup>29</sup> Congress has not defined "unfair"<sup>30</sup> or "deceptive," and the North Carolina General Assembly in adopting both components in 1969 did not undertake to do so. The words "unfair" and "deceptive" are not subject to precise definition;<sup>31</sup> hence, a search must be made for whatever meaning each has acquired. However, the question of what is unfair or deceptive within the meaning of G.S. 75-1.1 does not arise until it is determined that the act or practice is within the *scope* of the statute.

Acts or practices within the scope of the statute, if proved to be unfair or deceptive, will invoke the automatic treble damage provision in G.S. 75-16,<sup>32</sup> and in many cases attorney's fees may be awarded. Enforcement by the Attorney General may be by injunction, and when the notice requirements of G.S. 75-15.2<sup>33</sup> are met, a civil penalty may be imposed.

### A. Scope

#### 1. Legislative Exclusions

There are two express exclusions contained in the statute. In 1977 the General Assembly rewrote subsection (b) and excluded professional *services* rendered by a member of a learned profession.<sup>34</sup> This is a limited exclusion. For example, advertising by a member of a learned profession is a commercial practice and not an actual performance of professional services; thus, deceptive advertising would be subject to G.S. 75-1.1.<sup>35</sup>

Subsection (c) excludes the advertising media when the owner, agent or employee who published material did not have knowledge of the false, misleading or deceptive character of the advertisement and did not have a direct

---

28. See text accompanying note 23 *supra*.

29. Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45 (1976)).

30. According to the House Managers of the Conference Committee:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.

H.R. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914).

31. *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

32. N.C. Gen. Stat. § 75-16 (1981).

33. *Id.* § 75-15.2.

34. Law of June 27, 1977, ch. 747, §§ 1-2, 1977 N.C. Sess. Laws, 1st Sess. 984 (codified at N.C. Gen. Stat. § 75-1.1(b) (1981)).

35. "The phrase 'learned profession' applies to physicians, attorneys, clergy and related professions." 47 N.C. Att'y Gen. Rep. 118 (1977). N.C. Gen. Stat. § 84-13 (1981) provides for double damages against an attorney for fraudulent practices.



financial interest in the sale or distribution of the advertised product or service.

Some conduct, although not expressly excluded from G.S. 75-1.1, is proscribed in more specific statutes. In 1973 the General Assembly passed the Vehicle Mileage Act.<sup>36</sup> Copied from the federal law, this statute is directed against odometer deception. An offender is liable for the greater of fifteen hundred dollars in damages or treble the amount of the actual damages. In 1979 six special statutes were enacted as a part of chapter 75 of the North Carolina General Statutes. G.S. 75-30 through 75-35 are sections directed against unfair and deceptive practices in connection with automatic dialing and recorded message players,<sup>37</sup> work-at-home solicitations,<sup>38</sup> representation of winning a prize,<sup>39</sup> representation of eligibility to win a prize,<sup>40</sup> representation of being specially selected<sup>41</sup> and simulation of checks and invoices.<sup>42</sup> A violation of any of these six statutes is subject to the same treble damage penalty as violations of G.S. 75-1.1, but unlike violations of G.S. 75-1.1, a violation of these statutes subjects one to criminal penalties.

In 1981 the General Assembly amended chapter 42 of the General Statutes to limit a tenant to actual damages in a suit against the landlord for unlawful ejection.<sup>43</sup> Further, the tenant is limited to actual damages should the landlord seize possession of or interfere with a tenant's access to a tenant's or household member's personal property in any manner not in accordance with G.S. 44A-2(e). This legislation in effect removes these specific activities from the treble damage remedy provided in G.S. 75-16 for violations of G.S. 75-1.1.

## 2. Legislative Inclusions

When the General Assembly adopted G.S. 75-1.1 in 1969, it did not identify any acts or practices that it deemed to be unfair or deceptive. But in 1971 it started a process of enacting legislation against specified business practices and declaring that a violation of the statute shall constitute an unfair act or practice under G.S. 75-1.1. The continuation of this process has created an impressive list of legislatively designated "unfair" or "deceptive acts or practices." To compile a complete list of these designations, one must search in various chapters of the General Statutes. Included are the following enactments:

1. In 1971 the Retail Installment Sales Act specified that the "knowing and willful violation of any provision of this Chapter shall

---

36. Law of May 22, 1973, ch. 679, 1973 N.C. Sess. Laws, 1st Sess. 1011 (codified as amended at N.C. Gen. Stat. §§ 20-340 to -350 (1978 & Supp. 1979)).

37. N.C. Gen. Stat. § 75-30 (1981).

38. *Id.* § 75-31.

39. *Id.* § 75-32.

40. *Id.* § 75-33.

41. *Id.* § 75-34.

42. *Id.* § 75-35.

43. Law of June 12, 1981, ch. 566, § 1, [1981] 6 N.C. Adv. Legis. Serv. 238 (to be codified at N.C. Gen. Stat. §§ 42-25.1 to -25.4).

constitute an unfair trade practice under G.S. 75-1.1."<sup>44</sup>

2. In 1974 legislation was enacted against the misuse of the term "wholesale."<sup>45</sup>

3. In 1977 the Business Opportunity Sales Act was added.<sup>46</sup>

4. In 1977 twenty-six debt collection practices by creditors were specified as unfair or deceptive by the General Assembly.<sup>47</sup>

5. In 1979 the statute regulating agencies engaged in collecting debts from consumers was rewritten<sup>48</sup> to conform to the 1977 legislation dealing with debt collect practices of creditors.<sup>49</sup>

Also enacted in 1979 were statutes directed at unfair practices of loan brokers<sup>50</sup> and of persons involved in prepaid entertainment contracts.<sup>51</sup>

6. In 1981 statutes dealing with rental referral agencies<sup>52</sup> and discount buying clubs<sup>53</sup> were added to the list by the General Assembly.

The common element in the foregoing list is that each of the statutes is deemed by the General Assembly to be within the scope of G.S. 75-1.1. Beyond that, there are important differences among the statutes. For example, the "knowing and willful" requirement of the Retail Installment Sales Act does not appear in the other statutes. Also, the statutes have different remedies. Some provide for lesser and some for greater remedies than are available for a violation of G.S. 75-1.1. In several of the more recent statutes, attorney's fees<sup>54</sup> may be awarded without meeting the requirements set forth in G.S. 75-16.1—the section that usually controls in G.S. 75-1.1 cases.

---

44. Law of July 8, 1971, ch. 796, § 1, 1971 N.C. Sess. Laws 1019 (codified at N.C. Gen. Stat. § 25A-44(4) (Cum. Supp. 1979)). Proof of knowing and willful violation is not required in G.S. 75-1.1 cases. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

45. Law of Apr. 13, 1974, ch. 1392, §§ 1, 2, 1973 N.C. Sess. Laws, 2d Sess. 771 (codified at N.C. Gen. Stat. § 75-29 (1981)). Farm products, fertilizers, insecticides, pesticides and petroleum are excluded.

46. Law of July 1, 1977, ch. 884, § 1, 1977 N.C. Sess. Laws, 1st Sess. 1210 (codified at N.C. Gen. Stat. §§ 66-94 to -100 (1981)).

47. Law of June 27, 1977, ch. 747, § 4, 1977 N.C. Sess. Laws, 1st Sess. 984 (codified at N.C. Gen. Stat. §§ 75-50 to -56 (1981)). These provisions were part of the prompt legislative response to *State ex rel. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 233 S.E.2d 895 (1977).

48. Law of June 7, 1979, ch. 835, 1979 N.C. Sess. Laws, 1st Sess. 1101 (codified at N.C. Gen. Stat. §§ 66-49.24 to -49.50 (1981)).

49. See note 47 and accompanying text *supra*.

50. Law of July 1, 1979, ch. 705, § 1, 1979 N.C. Sess. Laws, 1st Sess. 770 (codified at N.C. Gen. Stat. §§ 66-106 to -112 (1981)).

51. Law of June 7, 1979, ch. 833, § 1, 1979 N.C. Sess. Laws, 1st Sess. 1097 (codified at N.C. Gen. Stat. §§ 66-118 to -125 (1981)). This act pertains to health spas, dance studios and similar businesses.

52. Law of June 18, 1981, ch. 610, § 1, [1981] 7 N.C. Adv. Legis. Serv. 12 (to be codified at N.C. Gen. Stat. §§ 66-135 to -139).

53. Law of June 17, 1981, ch. 594, § 1, [1981] 6 N.C. Adv. Legis. Serv. 299 (to be codified at N.C. Gen. Stat. §§ 66-126 to -131).

54. N.C. Gen. Stat. § 66-111(a) (1981) (loan brokers), § 66-125(a) (prepaid entertainment contracts); § 66-139 (not yet codified; see note 35 *supra*) (rental referral); § 66-131 (not yet codified; see note 36 *supra*) (discount buying).

### 3. Judicial Exclusions

In 1977 the North Carolina Supreme Court gave a narrow scope to G.S. 75-1.1. In *State ex rel. Edmisten v. J.C. Penney Co.*<sup>55</sup> a seller's debt collection practices were attacked under G.S. 75-1.1. The supreme court noted that the word "trade" in the statute has a narrower meaning than the word "commerce."<sup>56</sup> The court concluded that the General Assembly inserted the word "trade" in order to limit the broad definition of "commerce" in the federal decisions.<sup>57</sup> Further, the court noted that G.S. 75-1.1(b), which had no counterpart in the FTC Act, referred to "buyers" and "sellers."<sup>58</sup> The court then concluded that debt collection practices did not come within G.S. 75-1.1 because the unfair and deceptive practices in that section must involve a "bargain, sale, barter, exchange or traffic."<sup>59</sup>

This narrow construction was short-lived. The General Assembly enacted the Consumer Protection Act of 1977,<sup>60</sup> which specifically provided that "commerce" includes all business activities.

The North Carolina Court of Appeals has excluded from G.S. 75-1.1 breach of warranties, express or implied, when no other factors are involved.<sup>61</sup> This court also construed the original G.S. 75-1.1 to exclude an owner who sells his own residence.<sup>62</sup> Although the scope of the statute was broadened by the 1977 amendments, the courts will likely continue to exclude isolated transactions of this sort. Further, according to the court of appeals,<sup>63</sup> Congress in enacting the Commodity Exchange Act<sup>64</sup> preempted the field. Thus, G.S. 75-

55. 292 N.C. 311, 233 S.E.2d 895 (1977).

56. *Id.* at 316, 233 S.E.2d at 899. G.S. 75-1, like the Sherman Act, uses the term "trade or commerce." It is highly likely that the drafter of G.S. 75-1.1 incorporated the word "trade" in order to conform to the language of G.S. 75-1.

57. See note 56 *supra*.

58. 292 N.C. at 317, 233 S.E.2d at 899. G.S. 75-1.1(b) read as follows:

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.

Law of June 12, 1969, ch. 883, 1969 N.C. Sess. Laws 930 (repealed 1977).

59. 292 N.C. at 316-17, 233 S.E.2d at 899.

60. Law of June 27, 1977, ch. 747, §§ 1-4, 1977 N.C. Sess. Laws, 1st Sess. 984 (codified at N.C. Gen. Stat. §§ 75-1.1(a), -1.1(b), -15.2, -50 to -56 (1981)).

For an excellent analysis of the four major changes made in the North Carolina Consumer Protection Act of 1977, see Comment, Trade Regulation—The North Carolina Consumer Protection Act of 1977, 56 N.C.L. Rev. 547 (1978). The four major changes made in 1977 were: (1) the text of the basic unfair trade practices provision, G.S. 75-1.1(a), was amended so that the language of that section is now precisely the same as section 5(a) of the FTC Act; (2) G.S. 75-1.1(b) was rewritten to preclude the application of the North Carolina unfair trade practices law to the rendering of professional services; (3) G.S. 75-15.2 was added to provide for the imposition of civil penalties in suits brought by the attorney general under the unfair trade practices law; and (4) G.S. 75-50 to 75-56 were added to prohibit certain debt collection practices and to provide limited remedies for that type of unfair trade practice.

61. *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 106, 245 S.E.2d 801, 807 (1978).

62. *Rosenthal v. Perkins*, 42 N.C. App. 449, 454, 257 S.E.2d 63, 67 (1979).

63. *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 420, 248 S.E.2d 567, 570 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 32 (1979).

64. Ch. 369, 42 Stat. 998 (1922) (codified, as amended, at 7 U.S.C. §§ 1-24 (1976)).

1.1 cannot be invoked against a commodities broker for conduct covered by the federal act.

The United States Court of Appeals for the Fourth Circuit is of the opinion that an ordinary breach of contract between two business organizations, although intentional, does not in itself constitute an unfair or deceptive act under the statute.<sup>65</sup> A federal district court has construed the statute to regulate conduct between businesses and between sellers or lenders and consumers but has decided that it has no application to contracts between employers and employees.<sup>66</sup> The ultimate decision of this important question will be made by the North Carolina courts.

#### 4. Judicial Inclusions

Several decisions of the North Carolina courts have shed some light on the scope of G.S. 75-1.1. *Johnson v. Phoenix Mutual Life Insurance Co.*<sup>67</sup> involved a broker selling his services by procuring a commercial loan for a borrower. The supreme court considered this to be business activity within the scope of the statute but concluded on the facts that defendant's conduct was not unfair or deceptive. This case did not involve a competitor or an ordinary consumer. The alleged unfair or deceptive practice involved two businesses not in a competitive relationship. If this case is followed, the scope of G.S. 75-1.1 will include business practices of competitors, business practices of those not in a competitive relationship and business practices that affect consumers.

Business activities of real estate brokers,<sup>68</sup> rental of housing units,<sup>69</sup> rental of commercial property<sup>70</sup> and rental of lots in a mobile home park<sup>71</sup> have been held to be within the scope of G.S. 75-1.1. Also, sales practices by sellers of automobiles,<sup>72</sup> antifreeze<sup>73</sup> and mobile homes<sup>74</sup> have been examined for alleged unfairness and deception under the statute. Further, according to the court of appeals, G.S. 75-1.1 would be violated if plaintiff purchaser could

---

65. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981). Although this interpretation of the statute is not binding on the North Carolina courts, it would not be surprising for this view to prevail when only businesspersons are involved. It does not follow, however, that a breach of contract involving a consumer will be excluded from G.S. 75-1.1. See *Pedwell v. First Union Nat'l Bank*, 51 N.C. App. 236, 275 S.E.2d 565 (1981) (vendor defendant conspired with lender defendant to prevent purchaser plaintiff from performing). The General Assembly has made certain types of contracts subject to G.S. 75-1.1, for example, prepaid entertainment contracts. N.C. Gen. Stat. §§ 66-118 to -125 (1981).

66. *Roberson v. Dale*, 464 F. Supp. 680 (M.D.N.C. 1979).

67. 300 N.C. 247, 266 S.E.2d 610 (1980).

68. *Vickery v. Olin Hill Constr. Co.*, 47 N.C. App. 98, 266 S.E.2d 711, cert. denied, 301 N.C. 106, 273 S.E.2d 312 (1980); *Kleinfelter v. Northwest Builders & Developers, Inc.*, 44 N.C. App. 561, 261 S.E.2d 498 (1980); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 245 S.E.2d 801, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

69. *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

70. *Kent v. Humphries*, 50 N.C. App. 580, 275 S.E.2d 176 (1981).

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

72. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975); *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

73. *State ex rel. Edmisten v. Zim Chem. Co.*, 45 N.C. App. 604, 263 S.E.2d 849 (1980).

prove there were a conspiracy between the vendor bank and a mortgage lender to prevent the plaintiff from performing his part of the purchase contract.<sup>75</sup>

Unfair and deceptive acts and practices in the insurance industry are not regulated exclusively by the insurance statutes; therefore, an alleged unfair business practice committed by one insurance agent against another may be examined under G.S. 75-1.1.<sup>76</sup>

The General Assembly and the courts have begun to establish the dimensions of G.S. 75-1.1. These legislative and judicial processes, of necessity, will continue. The landlord-tenant area is likely to be a fertile source for litigation and legislation. In *Love v. Pressley*<sup>77</sup> the court of appeals decided that G.S. 75-1.1 applied to the rental of residential housing. Treble damages were awarded to a tenant (who did not owe any rent) against the landlord for trespass and conversion of her personal property. Later, in *Spinks v. Taylor*,<sup>78</sup> the peaceful padlocking practices of a landlord against tenants who were in default in rent payments were held not to be within the scope of G.S. 75-1.1 because those procedures did not "offend 'established public policy' or constitute a practice which is 'immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.'"<sup>79</sup> A few days after the supreme court decided *Spinks v. Taylor*, the General Assembly added article 2A, "Ejectment of Residential Tenants," to chapter 42 of the General Statutes.<sup>80</sup> This legislation states that public policy forbids the eviction of a tenant other than by the procedures provided in article 3 of chapter 42. Further, distress and distraint were outlawed.<sup>81</sup> However, a violation of this new article is limited to actual damages. Although this new legislation may have been induced by the padlocking procedures described in *Spinks v. Taylor*, the language is not so limited. Thus, it may be that in a suit by a tenant against a landlord for damages for any unlawful eviction or for any unlawful seizure of the tenant's personal property, only actual damages can be assessed by the court.

After it is determined that an act or practice is within the scope of G.S. 75-1.1, whether the alleged act or practice is "unfair" or "deceptive" must be considered.

---

74. *Wachovia Bank & Trust Co. v. Smith*, 44 N.C. App. 685, 262 S.E.2d 646, cert. denied, 300 N.C. 379, 267 S.E.2d 685 (1980).

For another suggested application of G.S. 75-1.1, see Comment, *Attacking the "Forfeiture as Liquidated Damages" Clause in North Carolina Installment Land Sales Contracts as an Equitable Mortgage, Penalty, and Unfair and Deceptive Trade Practice*, 7 N.C. Cent. L.J. 370 (1976).

75. *Pedwell v. First Union Nat'l Bank*, 51 N.C. App. 236, 238, 275 S.E.2d 565, 567 (1981).

76. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

77. 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

78. 303 N.C. 256, 278 S.E.2d 501 (1981).

79. *Id.* at 265, 278 S.E.2d at 506 (quoting *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980)).

80. Law of June 12, 1981, ch. 566, § 1, [1981] 6 N.C. Adv. Legis. Serv. 238 (to be codified at N.C. Gen. Stat. §§ 42-25.1 to -25.4).

81. "Distress and distraint" refers to the seizure by a wronged party of personal property belonging to a wrongdoer in satisfaction of the wrong committed. See *Black's Law Dictionary* 561 (4th ed. 1957).

*B. The Meaning of "Unfair" or "Deceptive" in G.S. 75-1.1*

The General Assembly has specified that certain acts or practices violate G.S. 75-1.1.<sup>82</sup> Apart from this legislation, it is the duty of the court to determine as a matter of law, based on a jury's finding of fact, whether the defendants engaged in unfair or deceptive acts or practices within the scope of G.S. 75-1.1.<sup>83</sup> The unfair-methods-of-competition component should be examined separately from the unfair-or-deceptive-acts-or-practices component.

1. Unfair Methods of Competition

This component has been a part of section 5 of the Federal Trade Commission Act since 1914. In deciding what is "unfair," the North Carolina courts need not start with an empty vessel. Two important sources may be utilized: the North Carolina law of unfair competition and federal decisions interpreting this component of section 5 of the FTC Act.<sup>84</sup>

The common law of unfair competition was known to Congress when it passed the FTC Act in 1914.<sup>85</sup> Congress deliberately avoided the phrase "unfair competition" by writing "unfair *methods* of competition" in section 5 of the FTC Act. The purpose in adding the word *method* was not to exclude the common law of "unfair competition" but to make it possible to develop a body of law that might extend beyond the common law as it existed in 1914.<sup>86</sup> Thus, at a *minimum*, "unfair methods of competition" in G.S. 75-1.1 should include the North Carolina law of unfair competition.

The concept of unfair competition had its origin in the sense of justice of common law judges. The North Carolina Supreme Court has defined unfair competition as that "which a court of equity would consider unfair."<sup>87</sup> Thus, the court's role in determining what is an unfair *method* of competition is no different from its traditional role in developing the law of unfair competition.

Trademark and trade name infringement provided a fruitful setting for the early development of the law of unfair competition.<sup>88</sup> One engaged in business might "pass off" his goods as those of a competitor by using an identical or confusingly similar mark.<sup>89</sup> This practice came to be regarded as unfair competition. Other practices have been added to a growing list. A commenta-

---

82. See text accompanying note 44 *supra*.

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

84. See generally Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. Rev. 227 (1980).

85. See 51 Cong. Rec. 12,142-45 (1914).

86. See *id.* at 12,145.

87. *Charcoal Steak House, Inc. v. Staley*, 263 N.C. 199, 204, 139 S.E.2d 185, 189 (1964) (quoting *Carolina Aniline & Extract Co. v. Ray*, 221 N.C. 269, 273, 20 S.E.2d 59, 61 (1942)).

88. See S. Oppenheim and G. Weston, *supra* note 4, at 2-3. See generally R. Callmann, *The Law of Unfair Competition, Trademarks, and Monopolies* (3d ed. 1967 & Supp. 1971).

In a trademark infringement case, the Fourth Circuit Court of Appeals indicated that there might be a claim for unfair competition under North Carolina law. *AMP Inc. v. Foy*, 540 F.2d 1181, 1188 (4th Cir. 1976).

89. *D-E-W Foods Corp. v. Tuesday's of Wilmington, Inc.*, 29 N.C. App. 519, 225 S.E.2d 122 (passing off was not proved), cert. denied, 290 N.C. 660, 228 S.E.2d 451 (1976).

tor<sup>90</sup> on the law of unfair competition in North Carolina discussed the following topics as included within the prohibition against unfair competition: trademark and trade name infringement; imitation of a competitor's product and its appearance; interference with a competitor's contractual relations; disparagement of product, title or business methods; and misappropriation of a competitor's values. Thus, the common law of unfair competition in North Carolina extends beyond the traditional concept of "passing off."

In *Liberty/UA, Inc. v. Eastern Tape Corp.*<sup>91</sup> defendants were restrained from copying plaintiff's uncopyrighted records on tapes through an electronic device and then selling the tapes in competition with plaintiff's records. The North Carolina Court of Appeals followed the reasoning of *International News Service v. Associated Press*,<sup>92</sup> decided by the United States Supreme Court in 1918, in concluding that it is unfair competition for defendant "to reap where it has not sown."<sup>93</sup>

In *B.B. Walker Co. v. Ashland Chemical Co.*<sup>94</sup> plaintiff sued in a federal court, seeking, among other things, to recover for defendant's interference with plaintiff's contractual relations with its own customers.<sup>95</sup> Plaintiff relied on both the North Carolina common law of unfair competition and G.S. 75-1.1. According to the federal district judge, the one-year statute of limitations applicable to G.S. 75-1.1 had expired.<sup>96</sup> However, the three-year statute applicable to the unfair competition claims had not expired. Plaintiff was awarded nominal compensatory damages for the defendant's tortious conduct following the breach of contract in the sum of \$10.00 and punitive damages in the

---

90. Comment, Unfair Competition—Law of Unfair Competition in North Carolina, 46 N.C.L. Rev. 856 (1968).

91. 11 N.C. App. 20, 180 S.E.2d 414 (grant of temporary restraining order affirmed), cert. denied, 278 N.C. 702, 181 S.E.2d 600 (1971). In a second appeal, the court denied damages, court costs and attorney's fees to plaintiff, who had successfully pursued a contempt proceeding following a violation of the temporary restraining order. *United Artists Records, Inc. v. Eastern Tape Corp.*, 18 N.C. App. 183, 196 S.E.2d 598, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (1973). Later that year the court of appeals affirmed an order of permanent injunction against production of bootleg tapes and referred the issue of damages to the trial court. *United Artists Records, Inc. v. Eastern Tape Corp.*, 19 N.C. App. 207, 198 S.E.2d 452, cert. denied, 284 N.C. 255, 260 S.E.2d 653 (1973).

92. 248 U.S. 215 (1918).

93. 11 N.C. App. at 22, 180 S.E.2d at 416 (quoting *International News Serv. v. Associated Press*, 248 U.S. at 239).

94. 474 F. Supp. 651 (M.D.N.C. 1979).

95. In *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954), the court set forth the elements of the tort of interference with contractual relations:

First, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. . . . Second, that the outsider had knowledge of the plaintiff's contract with the third person. . . . Third, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. . . . Fourth, that in so doing the outsider acted without justification. . . . Fifth, that the outsider's act caused the plaintiff actual damages.

(footnotes omitted).

96. The one-year statute of limitations for causes of action accruing under chapter 75 has since been amended by G.S. 75-16.2, which provides for a four-year limitation period. N.C. Gen. Stat. § 75-16.2 (1981). Thus the statute of limitations currently is one year longer under G.S. 75-1.1 than it is for the common law tort of unfair competition.

amount of \$250,000.<sup>97</sup> In this particular case plaintiff fared better under the common law of unfair competition than it would have under G.S. 75-1.1 with its treble damage provision because the court deemed that defendant's conduct had the "character of outrage frequently associated with crime";<sup>98</sup> therefore, substantial punitive damages were assessed. In most cases, however, G.S. 75-1.1 will be preferable because treble damages are automatic, whereas it is infrequent that the facts will justify punitive damages in a common law unfair competition claim.

G.S. 75-1.1 was involved in *Harrington Manufacturing Co. v. Powell Manufacturing Co.*<sup>99</sup> The court of appeals in that case noted the absence of a precise definition of "unfair methods of competition."<sup>100</sup> Further, the court observed that it may not be desirable to have a precise definition because the acts to which the term should apply are ever-changing in character, as social and business conditions change.<sup>101</sup> Defendant in its second counterclaim alleged unfair methods of competition under G.S. 75-1.1, claiming that plaintiff demonstrated the "blade assembly" of defendant to potential customers representing the assembly to be the "blade assembly" of plaintiff. The court noted that the nature of the alleged deception differs from that found in the usual case of "passing off"; nevertheless, the underlying nature of the wrong was the same and therefore came within the purview of G.S. 75-1.1.<sup>102</sup>

The court dismissed defendant's counterclaims alleging false advertising in a violation of G.S. 75-1.1, but it gave a timely warning on false advertising:

The statements in Harrington's advertisements as to which Powell complains did not, in our opinion, go so far beyond tolerable limits of puffing as to constitute unfair acts proscribed by G.S. 75-1.1. Harrington's advertisements, as was the case with Powell's which were the subject of Harrington's complaint, were directed to knowledgeable buyers who could not easily have been misled by exaggerated claims. We caution, however, that all advertisers would be well advised to exercise care not to step over the necessarily vague but nonetheless real boundary line dividing fair conduct from foul which the court from time to time may be called upon to draw. This is particularly true in view of the possibility that treble damages might be imposed under G.S. 75-16. We hold only that, under the circumstances of this case, the advertisements which were the subject of defendant's first and third counterclaims, like those which were the subject of plaintiff's complaint, did not pass over that line. There was no error in the trial court's order dismissing defendant's first and third counterclaims.<sup>103</sup>

---

97. 474 F. Supp. at 666.

98. *Id.* at 665.

99. 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

100. *Id.* at 404, 248 S.E.2d at 746.

101. *Id.*

102. *Id.* at 405, 248 S.E.2d at 746.

103. *Id.* at 403, 248 S.E.2d at 745.



In *Ellis v. Smith-Broadhurst, Inc.*<sup>104</sup> the court of appeals decided that an allegation by one insurance agent against another insurance agent for misrepresentations concerning plaintiff's proposed policy to a client was within the scope of G.S. 75-1.1. Further, the court held that genuine issues of fact existed "both as to the alleged misrepresentations and as to causal relationship between the alleged misrepresentations and plaintiff's loss of commissions from the sale."<sup>105</sup> Consequently, summary judgment in favor of defendants was reversed.

In *Burke Transit Co. v. Queen City Coach Co.*,<sup>106</sup> decided in 1948, plaintiff was permitted to sue competitors under G.S. 75-1 and 75-5(b) for circulating false statements about the business of plaintiff. This type of case is now covered by the first component of G.S. 75-1.1.

## 2. Unfair or Deceptive Acts or Practices

This component of G.S. 75-1.1 protects consumers and businesspersons not in a competitive relationship against unfair or deceptive acts or practices in or affecting commerce. The courts, in determining what is "unfair" or "deceptive," may find assistance from several sources, such as the common law of fraud and deceit, federal decisions interpreting section 5 of the FTC Act and related North Carolina statutes wherein the General Assembly has defined "unfair" and "deceptive" practices.

According to the North Carolina Supreme Court, the essential elements in proof of actionable fraud at common law are:

- (1) false representation or concealment of a material fact,
- (2) reasonably calculated to deceive,
- (3) made with intent to deceive,
- (4) which does in fact deceive,
- (5) resulting in damage to the injured party.<sup>107</sup>

*Hardy v. Toler*<sup>108</sup> is the first case in which the supreme court interpreted G.S. 75-1.1. Plaintiff alleged that defendant, an automobile dealer, made false representations concerning the condition of a car at the time of purchase. The stipulated facts admitted false representations. Based on this, the court held as a matter of law that G.S. 75-1.1 had been violated and that plaintiff was entitled to treble damages.<sup>109</sup> The court declared that proof of fraud necessarily constitutes an unfair or deceptive act within the statute. Thus, if the transaction is within the scope of G.S. 75-1.1, a plaintiff is entitled to treble damages upon proof of common law fraud.

In *Johnson v. Phoenix Mutual Life Insurance Co.*<sup>110</sup> a broker engaged to

---

104. 48 N.C. App. 180, 268 S.E.2d 271 (1980).

105. Id. at 184, 268 S.E.2d at 274.

106. 228 N.C. 768, 47 S.E.2d 297 (1948).

107. *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974).

108. 288 N.C. 303, 218 S.E.2d 342 (1975).

109. Id. at 311, 218 S.E.2d at 347.

110. 300 N.C. 247, 266 S.E.2d 610 (1980).

procure a loan was alleged to have violated G.S. 75-1.1. The supreme court turned to federal decisions interpreting section 5 of the FTC Act for guidance in defining "deceptive" and "unfair." As to deception, the court discerned that an act or practice is deceptive under section 5 if it has the capacity or tendency to deceive.<sup>111</sup> Further, though words and sentences may be framed so that they are literally true, they still may be deceptive. In determining whether a representation is deceptive, its effect on the average consumer is considered.<sup>112</sup>

The court further found that "unfairness" is broader than and includes the concept of deception. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."<sup>113</sup> The court measured the defendant's conduct by these guidelines and concluded that it was neither unfair nor deceptive.<sup>114</sup>

*Marshall v. Miller*<sup>115</sup> is the third case in which the supreme court has dealt with the meaning of "unfair" or "deceptive." In this consumer suit the only issue before the court was whether bad faith was an essential element in a cause of action under G.S. 75-1.1.<sup>116</sup> The court examined the federal decisions and found that the FTC may issue a cease and desist order to enforce section 5 when an act or practice has a capacity to deceive, regardless of the presence or absence of good faith on the part of the offending party. The supreme court adopted this view:

If unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public. Consequently, good faith is not a defense to an alleged violation of G.S. 75-

---

111. Id. at 265, 266 S.E.2d at 622.

112. Id. at 265-66, 266 S.E.2d at 622.

113. Id. at 263, 266 S.E.2d at 621. The Supreme Court of the United States in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) stated:

Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

114. 300 N.C. at 265, 266 S.E.2d at 622. In *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981), the defendant landlord's padlocking practices against defaulting tenants did not offend established public policy or constitute a practice which is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. But the General Assembly, in 1981, amended G.S. § 42 to outlaw padlocking practices. Law of June 12, 1981, ch. 566, § 1, [1981] 6 N.C. Adv. Legis. Serv. 238 (to be codified at N.C. Gen. Stat. § 42-25.2). However, damages for a violation are limited to actual damages as in an action for trespass or conversion.

115. 302 N.C. 539, 276 S.E.2d 397 (1981).

116. The North Carolina Court of Appeals deemed the following issue submitted to the jury erroneous because defendants could be adjudged to have committed unfair or deceptive acts without a showing that they acted in bad faith: "Did the defendant, after October 7, 1974, without the intent and/or the ability to perform lead the plaintiffs or any of them to believe that he would provide the following equipped facilities for their use, reasonable wear and tear accepted [*sic*]?" Id. at 541, 276 S.E.2d at 399, discussed in *Survey of Developments in North Carolina Law, 1980—Commercial Law*, 59 N.C.L. Rev. 1070, 1070 (1981).

1.1.<sup>117</sup>

The court of appeals had decided that the intent of the actor should be disregarded only in suits brought by the attorney general.<sup>118</sup> The supreme court disagreed and held that consumers suing under G.S. 75-1.1 do not have to prove intent.<sup>119</sup>

An earlier decision by the court of appeals might be decided differently now. In *Wachovia Bank & Trust Co. v. Smith*<sup>120</sup> the court of appeals stated:

We need not decide now what specific actions, if any, which do not constitute fraud, would nonetheless be a violation of G.S. 75-1.1. Nevertheless, under the evidence presented in this case, *absent evidence of willful deception or bad faith*, we cannot conclude that the existence of defects in the mobile home or Tunstall's failure to perform the above stated services constitutes a violation of G.S. 75-1.1 to warrant the award of treble damages under G.S. 75-16.<sup>121</sup>

In *Stone v. Paradise Park Homes, Inc.*<sup>122</sup> the jury found that the home purchased from defendant was built on land filled with vegetable debris, which caused damages of \$3,500 because the house settled. The court of appeals decided that plaintiff was entitled to treble damages under G.S. 75-1.1, inasmuch as his claim was based on fraud.<sup>123</sup>

### C. Conclusions Concerning G.S. 75-1.1

G.S. 75-1.1 apparently does not apply to every transaction that might be unfair or deceptive. The alleged violator must be engaged in commerce.<sup>124</sup> Commerce is defined in the statute to include all business activities. The statute is not directed against unfair or deceptive acts of a person, not engaged in the business of selling real estate, who sells his own home. Presumably, the same applies to one, not an automobile dealer, who sells his own car, or to one who rents out an apartment in his home. These isolated transactions are not likely to have an impact on the marketplace. An injured party in these situations must rely on whatever relief may be provided by the common law.

Under the first component, "unfair *methods* of competition," the victim can be a person engaged in business. In private suits relying on this component, it may be required that the parties be competitors. Under the second component, "unfair or deceptive acts or practices," the supreme court has indicated that one business may be protected from the unfair or deceptive acts of

---

117. 302 N.C. at 548, 276 S.E.2d at 403.

118. *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97 (1980).

119. There is evidence in the statutes to support the view of the supreme court. For example, G.S. 75-1.1(c) specifically requires knowledge on the part of publishers of false advertising. The omission of any reference to intent or knowledge in G.S. 75-1.1(a) suggests that the legislature did not choose to include them as elements of "unfair" or "deceptive" acts.

120. 44 N.C. App. 685, 262 S.E.2d 646, cert. denied, 300 N.C. 379, 267 S.E.2d 685 (1980).

121. *Id.* at 691, 262 S.E.2d at 650 (emphasis added).

122. 37 N.C. App. 97, 245 S.E.2d 801, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

123. *Id.* at 105, 245 S.E.2d at 807.

124. *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979).

another business without a competitive relationship.<sup>125</sup> A business might victimize another business by engaging in conduct that amounts to an inequitable assertion of its power or position. If it is clearly established that one business may sue another business for unfair or deceptive acts even though there is no competitive relationship between the parties, the standard of unfairness or deception need not be the same as applied when the victim is an ordinary consumer. In determining as a matter of law what is unfair or deceptive, a court may take into account the nature of the parties involved in the challenged transaction.

Helpful illustrations of unfairness or deception, particularly in consumer transactions, may be found in legislation dealing with debt collection practices<sup>126</sup> and regulation of the diamond industry.<sup>127</sup> Federal court decisions dealing with section 5 of the FTC Act will continue to be instructive.<sup>128</sup> As more cases are decided, a better understanding of what a court of equity considers unfair or deceptive will emerge. Still, there always will be a gray area. Hence, a careful counselor will advise a client to operate within a margin of safety rather than risk tumbling over the cliff of unfairness and deception into a judgment that will be automatically trebled. On the other hand, a plaintiff's attorney should be mindful that in the gray area the treble damage provision might be a double-edged sword. A trial judge in a close case might choose to find that G.S. 75-1.1 has not been violated rather than subject the defendant to treble damages.<sup>129</sup>

---

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

126. N.C. Gen. Stat. §§ 75-50 to -56, 66-49.42 to -49.47 (1981).

127. *Id.* §§ 66-73 to -75.

128. For a helpful article, see Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 Wis. L. Rev. 107. The author makes the following statement:

In particular, this article will identify the circumstances under which the FTC has ruled it to be unfair for a seller to (a) withhold material information, (b) make unsubstantiated advertising claims, (c) deprive consumers of various post-purchase rights, and (d) use various high-pressure sales techniques. These four categories cover the majority of practices that have ever been prohibited under the ban on unfair acts or practices, and virtually all of the practices addressed under that language in the last fifteen or twenty years. In most of these categories, there are now a sufficient number of decisions to constitute a body of precedent capable of being analyzed in a traditional common law manner. However, in the confusion of the debate over how to define "unfairness" in the abstract, this developing body of case law has received surprisingly little attention. There has not yet been any systematic, "empirical" effort to identify the more specific predictive principles that may be emerging from these applications of the statute.

*Id.* at 108-09.

In 1980, the FTC set forth, in response to a letter from the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, the view of the FTC on the concept of "unfairness" as it has been applied to consumer transactions. Letter from FTC to Senators Wendell H. Ford and John C. Danforth (Dec. 17, 1980).

129. Is the treble damage provision of G.S. 75-16 as applied to G.S. 75-1.1 constitutional? The court of appeals in *Hammers v. Lowe's Cos.* noted that it was of "questionable validity." 48 N.C. App. 150, 154, 268 S.E.2d 257, 260 (1980). The rationale of the opinion of the supreme court in *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), suggests that the treble damage provision would pass constitutional muster. See notes 115-18 and accompanying text *supra*.

## III. DIRECT RESTRAINTS OF TRADE

A. *Pricing Practices*

Price-fixing arrangements appear in a variety of settings. Sellers or buyers may band together and exert joint power (a horizontal arrangement) over prices rather than compete with each other, or suppliers may agree to "rig" bids. A producer or distributor may enter into vertical agreements or pursue some other course to control resale prices. An individual or firm may adopt pricing policies that involve price discriminations among customers, or prices may be unreasonably lowered for the purpose of injuring a competitor. A price-fixing arrangement may be subject to one or more of the following: common law, G.S. 75-1 and G.S. 75-5(b) subsections (1), (3), (4), (5) and (7).

## 1. Horizontal Price Fixing

(a) *Common law*

In *Smith v. Greenlee*,<sup>130</sup> decided in 1829, the North Carolina Supreme Court was confronted with one of the many forms of bid rigging. "A sale at auction is a sale to the best bidder, its object a fair price, its means competition."<sup>131</sup> According to the court:

Puffing or by-bidding is a fraud on the vendee. So, on the other hand, an agreement not to bid, for the purpose of paralyzing competition, is a fraud upon the vendor, and vitiates the sale—at least so far that no party to such agreement can claim any benefit from it.<sup>132</sup>

Numerous cases have involved various types of agreements to reduce or eliminate competition in auction sales.<sup>133</sup> The courts have adhered to the view that such agreements are void as against public policy.

In *State v. Craft*,<sup>134</sup> decided in 1914, milk dealers who controlled sixty percent of the milk supply in Wilmington colluded to raise the price of milk and published their agreement in a newspaper. They were convicted of the common law offense of price fixing and were fined. Chief Justice Clark, in commenting on the nature of the offense, said:

A conspiracy to raise the prices of the necessities of life being a crime at common law, it could be no defense to show that another

---

130. 13 N.C. (2 Dev.) 126 (1829).

131. *Id.* at 128.

132. *Id.*

133. E.g., *Lamm v. Crumpler*, 233 N.C. 717, 65 S.E.2d 336 (1951). In *King v. Winants*, 71 N.C. 469 (1874), the court denied one member of a partnership an accounting for profits on the grounds that the partnership had illegally jacked up the bidding on government contracts for the care of the sick. In explaining his rationale, Justice Reade used the following analogy:

Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveller the other rifles his pocket of \$1000 and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a Court of justice hear them? No case can be found where a Court has allowed itself to be so abused.

*Id.* at 473.

134. 168 N.C. 208, 83 S.E. 772 (1914).

person than one of the conspirators sold the same commodity at as high a price as these defendants had agreed upon, or that the witness might think the price agreed on a reasonable one, or that the article could not be produced profitably at less than the price agreed on, in view of the conditions under which the defendants were carrying on the business. The indictment is not for raising the price, but for the *combination and agreement* to do so.<sup>135</sup>

This case, had it arisen today, could have been prosecuted under G.S. 75-1, which makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina."<sup>136</sup> However, neither the solicitor nor the trial judge was aware that the General Assembly had enacted this section the previous year and had modeled it after the Sherman Act.<sup>137</sup>

These common law cases have vitality due to G.S. 75-2, which provides, "Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of G.S. 75-1."<sup>138</sup>

### (b) Statutes

In 1981 in response to widespread bid rigging on state contracts, the General Assembly enacted legislation that relies on the principles of the common law.<sup>139</sup> G.S. 133-21, when codified, will provide:

#### *Government contracts; violation of G.S. 75-1 and G.S. 72-2.—*

Every person who shall engage in any conspiracy, combination, or any other act in restraint of trade or commerce declared to be unlawful by the provisions of G.S. 75-1 and G.S. 75-2 shall be guilty of a felony under this section where the combination, conspiracy, or other unlawful act in restraint of trade involves:

(a) a contract for the purchase of equipment, goods, services or materials or for construction or repair let or to be let by a governmental agency;

(b) a subcontract for the purchase of equipment, goods, services or materials or for construction or repair with a prime contractor or proposed prime contractor for a governmental agency.<sup>140</sup>

Similar concerns had prompted the legislature to act twenty years earlier when the Division of Purchase and Contract realized that it was receiving identical bids for various commodities such as bread.<sup>141</sup> State officials were unsure of the applicability of G.S. 75-1, inasmuch as it had lain dormant since

135. Id. at 211, 83 S.E. at 773 (emphasis in original).

136. N.C. Gen. Stat. § 75-1 (1981).

137. 15 U.S.C. § 1 (1976).

138. N.C. Gen. Stat. § 75-2 (1981).

139. Law of July 2, 1981, ch. 764, § 1, [1981] 7 N.C. Adv. Legis. Serv. 545 (to be codified at N.C. Gen. Stat. §§ 133-20 to -30).

140. Id. (to be codified at N.C. Gen. Stat. § 133-21).

141. Raleigh News and Observer, Mar. 24, 1961, at 1, col. 3.

its enactment in 1913.<sup>142</sup> Furthermore, G.S. 75-3<sup>143</sup> was an impediment. This section had been included in the 1913 legislation to make it easier to prove a violation of the antitrust laws by establishing a *prima facie* case, but there was a hitch. G.S. 75-3 also provided a defense when it was shown that no competitor had been injured. Obviously, an agreement by all suppliers to submit identical bids could constitute a good defense because there was no injury to a competitor. In 1961 G.S. 75-3 was repealed.<sup>144</sup> The General Assembly then proceeded to enact a new price-fixing statute that currently is G.S. 75-5(b)(7). The following conduct is made unlawful:

[W]hile engaged in buying or selling any goods in this State to make, enter into, execute or carry out any contract, obligation or agreement of any kind by which the parties thereto or any two or more of them bind themselves not to sell or dispose of any goods or any article of trade, use or consumption, below a common standard figure, or fixed value, or establish or settle the price of such goods between them, or between themselves and others, at a fixed or graduated figure, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale of such goods.<sup>145</sup>

The language of this statute is remarkably similar to a provision in the 1901 antitrust statute that was deleted in 1905.<sup>146</sup> Although triggered by the practice of sellers making identical bids for state contracts, G.S. 75-5(b)(7) is a comprehensive price-fixing statute. It is not confined to situations in which the State is the buyer or seller. Further, its language is specific enough to apply to both horizontal and vertical price-fixing agreements. Although the General

---

142. *Id.*, Apr. 22, 1961, at 5, col. 4.

143. All contracts, combinations in the form of trust, and conspiracies in restraint of trade or commerce prohibited in §§ 75-1 and 75-2, are hereby declared to be unreasonable and illegal, unless the persons entering into such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce can show affirmatively upon an indictment or civil action for violation of §§ 75-1 and 75-2 that such contract, combination in the form of trust, conspiracy in restraint of trade or commerce does not injure the business of any competitor, or prevent any one from becoming a competitor because his or its business will be unfairly injured by reason of such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce.

Law of Mar. 3, 1913, ch. 41, § 3, 1913 N.C. Pub. Laws 66 (repealed 1961).

144. Law of June 22, 1961, ch. 1153, § 1, 1961 N.C. Sess. Laws 1582.

145. N.C. Gen. Stat. § 75-5(b)(7) (1981).

146. To make or enter into, or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or articles of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity of transportation between them, or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interests they may have in connection with the sale or transportation of any such article or commodity that its price might be in any manner affected.

Law of Mar. 11, 1901, ch. 586, § 1, 1901 N.C. Sess. Laws 820.

North Carolina was without an antitrust statute during the years 1905-1907. See note 5 *supra*.

Assembly in 1981 did not make the violation of this statute a felony, a private litigant may sue for treble damages under G.S. 75-5(b)(7) or 75-1.

G.S. 75-1 and 75-5(b)(7), compared to federal law, are undeveloped statutes. However, G.S. 133-21 will contribute to a better understanding of G.S. 75-1 by making it clear that bid rigging in contracts with the government includes "services" as well as goods. G.S. 75-5(a)(2) defines "goods" to include "goods, wares, merchandise, articles or other things of value."<sup>147</sup> The supreme court has held that the "service" of transporting gasoline is a *thing of value*,<sup>148</sup> thus indicating that price fixing in the service industries is covered by G.S. 75-5(b)(7).

To ascertain the courts' view of price fixing as a per se violation under G.S. 75-1 to 75-5(b)(7), resort first must be made to a decision under the common law. In *State v. Craft*<sup>149</sup> the court made it clear that the reasonableness of a price fixed by competitors for a necessity was not a defense. In another case, *Patterson v. Southern Railway*,<sup>150</sup> the court in construing G.S. 75-5(b)(3) rejected a defense that the effect of the rate agreement had been to lower the price of gasoline to the consumer. Justice Seawell, writing for the court in *Patterson*, eliminated the rule of reason approach in the following language:

Generalizations respecting monopoly statutes, their purpose and effect, cannot be expected equally to fit them all, but it may be laid down as a principle common to our own laws that where an act has been directly condemned by the statute, no power resides in the court to balance the advantages of continuing the situation produced by defendants' violation of law against the advantages of granting the relief sought in the action, thereby making such a violator of the law a sort of economic Robin Hood who may, with judicial approval, plunder the individual in the interest of the needy public.

. . . .

. . . The law looks at the transaction "in the long run," adopting the philosophy that the public is more interested in continuing competition than in reaping the temporary rewards of a fight in which it is extinguished.<sup>151</sup>

The State of North Carolina, along with several other states, has been victimized for a long time in its paving contracts due to various forms of bid rigging among competitors. In 1980 this fact came to light in suits brought by the Attorney General of the United States under the Sherman Act. Indications are that the Attorney General of North Carolina will become more active in enforcing G.S. 75-1, especially when the State is a victim.<sup>152</sup> If so, the

---

147. N.C. Gen. Stat. § 75-5(a)(2) (1981).

148. *Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937).

149. 168 N.C. 208, 83 S.E. 772 (1914).

150. 214 N.C. 38, 198 S.E. 364 (1938).

151. *Id.* at 44, 198 S.E. at 367-68.

152. The antitrust section of the N.C. Department of Justice has pursued a number of the violators in the federal suits, for the purpose of obtaining reimbursement for money lost through rigged bids. As of September 23, 1981, more than \$11 million had been recovered in settlements



courts will be given more opportunity to develop the law of horizontal price fixing under the North Carolina statutes.

A private person injured as a result of price fixing is likely to have a choice between state law and the Sherman Act. The jurisdictional sweep of the Sherman Act is broad enough to include many price fixing practices in a local area.<sup>153</sup> In this event, the federal route is preferable because there is more certainty to be found in federal law on horizontal price fixing than in state law.<sup>154</sup> The North Carolina courts should resort to federal law for guidance in applying state statutes.

The United States Supreme Court summarized the federal law on horizontal price fixing as follows:

[P]rice fixing is contrary to the policy of competition underlying the Sherman Act. . . . [I]ts illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.<sup>155</sup>

In *United States v. Socony-Vacuum Oil Co.*<sup>156</sup> the per se rule was established for "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce."<sup>157</sup> Subsequently, agreements to fix maximum prices were held to be within the ban of the per se rule set forth in *Socony*.<sup>158</sup> Further, the rule itself has been modified in *civil* actions to the extent that it is not necessary to prove both purpose and effect; proof of either is sufficient to invoke the rule in civil actions.<sup>159</sup> In criminal proceedings, proof of purpose is an essential element.<sup>160</sup> The Sherman Act applies to service industries<sup>161</sup> and to professions<sup>162</sup> in the price-fixing area. In *Catalano, Inc. v. Target Sales, Inc.*<sup>163</sup> an agreement had been made among beer wholesalers in Fresno, California, to eliminate the short-term trade credit formerly granted on beer purchases by

---

with offending construction or contracting companies. Communication from H. Al Cole, Jr., Special Deputy Attorney General (Sept. 23, 1981).

153. *McLain v. Real Estate Bd.*, 444 U.S. 232 (1980).

154. See Annot., 64 L. Ed. 2d 997, 1007-28 (1981).

155. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10 (1956) (footnotes omitted).

156. 310 U.S. 150 (1940).

157. *Id.* at 223.

158. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum resale price fixing); *Kiefer-Steward Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

159. *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969) (majority found effect, with no discussion of purpose).

160. *United States v. United States Gypsum Co.*, 438 U.S. 422, 435 (1978).

161. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976).

162. *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

163. 446 U.S. 643 (1980).

retailers. Was this price fixing under the Sherman Act? The court had this to say:

It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price. An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing. While it may be that the elimination of a practice of giving variable discounts will ultimately lead in a competitive market to corresponding decreases in the invoice price, that is surely not necessarily to be anticipated. It is more realistic to view an agreement to eliminate credit sales as extinguishing one form of competition among the sellers. In any event, when a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*.<sup>164</sup>

Exceptions to the *per se* rule in arrangements involving price under the Sherman Act are rare.<sup>165</sup>

## 2. Resale-Price Maintenance

Vertical agreements to control resale prices in the chain of distribution, for the most part, were exempt from the North Carolina antitrust law after 1937, as in that year the General Assembly enacted a "Fair Trade" law designed to legalize resale-price maintenance agreements involving commodities bearing the brand, mark or name of sellers that were in free and open competition with like commodities produced by others.<sup>166</sup> In 1939 the North Carolina Supreme Court ruled in *Ely Lilly & Co. v. Saunders*<sup>167</sup> that the "Fair Trade" law did not contravene the antimonopoly provisions of the State constitution. In 1974, in *Bulova Watch Co. v. Brand Distributors, Inc.*,<sup>168</sup> a unanimous court overruled the *Saunders* decision. The "non-signer" provision of the "Fair Trade" law, which bound all persons with notice of a resale price agreement to honor the contract, was held unconstitutional for two reasons: (1) it delegated legislative power to a private corporation in violation of article II, section 1 of the State constitution, and (2) article I, section 19 of the State constitution was violated because the non-signer was deprived of liberty con-

164. *Id.* at 648-49.

165. See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), no violation of the Sherman Act found on remand sub nom. *CBS v. American Soc'y of Composers*, 620 F.2d 930 (2d Cir. 1980); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Board of Trade v. United States*, 246 U.S. 231 (1918).

166. Law of Mar. 22, 1937, ch. 350, 1937 N.C. Pub. Laws 683 (repealed 1975) (see note 170 *infra*).

167. 216 N.C. 163, 4 S.E.2d 528 (1939). Justice Barnhill wrote a vigorous dissent. See *id.* at 182, 4 S.E.2d at 541 (Barnhill, J., dissenting).

168. 285 N.C. 467, 206 S.E.2d 141 (1974).

trary to the law of the land.<sup>169</sup> The General Assembly repealed the "Fair Trade" law, effective July 1, 1975.<sup>170</sup> Since that date vertical price fixing should be subject to G.S. 75-1 and to G.S. 75-5(b)(7) because, as the supreme court stated in *Bulova*, "Apart from the Fair Trade Act, the producer of a trademarked article has no right to control the price for which it may be resold by his customer, nothing else appearing."<sup>171</sup>

The federal law on resale-price maintenance is more highly developed than the state law. In 1911, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,<sup>172</sup> the United States Supreme Court held that resale-price maintenance agreements violated both the common law and section 1 of the Sherman Act. These arrangements, like horizontal price fixing, came to be regarded as per se unreasonable.<sup>173</sup>

In 1937 Congress passed the Miller-Tydings Amendment<sup>174</sup> to section 1 of the Sherman Act, and in 1952 Congress passed the McGuire Amendment<sup>175</sup> to the FTC Act. Each of these amendments applied to both the Sherman Act and the FTC Act, and both were designed to exempt from federal law certain resale-price maintenance agreements that were permissible under state law by virtue of operative "Fair Trade" laws. Because the states, with few exceptions, had enacted "Fair Trade" laws, most resale-price maintenance agreements were for many years exempt from state and federal law. In 1975 Congress enacted the Consumer Goods Pricing Act that repealed both the Miller-Tydings and McGuire Amendments.<sup>176</sup> *Dr. Miles* was born again. The per se rule of section 1 of the Sherman Act now applies to agreements by which a seller restricts resale prices of the buyer, whether the restriction involves minimum, fixed or maximum prices.<sup>177</sup>

---

169. *Id.* at 474-75, 206 S.E.2d at 146.

170. Law of Apr. 24, 1975, ch. 172, 1975 N.C. Sess. Laws, 1st Sess. 125.

171. 285 N.C. at 480, 206 S.E.2d at 150. Although the state courts are divided on the question of whether resale-price maintenance agreements violated the common law, the North Carolina Supreme Court acknowledged that the United States Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), represented the prevailing view in stating that the common law was violated. *Ely Lilly & Co. v. Saunders*, 216 N.C. 163, 168, 4 S.E.2d 528, 532 (1939). G.S. 75-1 could be invoked either on the ground that G.S. 75-2 applies, or that G.S. 75-1, like section 1 of the Sherman Act, proscribes resale-price maintenance agreements.

172. 220 U.S. 373 (1911).

173. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

174. District of Columbia Revenue Act of 1937, ch. 690, tit. VIII, 50 Stat. 693 (repealed 1975).

175. Act of July 14, 1952, ch. 745, 66 Stat. 631 (repealed 1975).

176. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. §§ 1, 45(a) (1976)).

177. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The California statute involved in this case did not provide for sufficient supervision of the resale-price maintenance system by the state to establish the antitrust immunity permitted by *Parker v. Brown*, 317 U.S. 341 (1943). See also *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.18 (1977), where the Court stated: "As in *Schwinn*, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy."

Since 1958, Congress has required each automobile manufacturer to set a suggested retail list price. Disclosure of Automobile Information Act, 15 U.S.C. §§ 1221-1225 (1976).

### 3. Pricing Policies Designed to Injure or Destroy Competitors

G.S. 75-5(b)(3), (4) and (5) have the obvious purpose of protecting a weak business from certain pricing practices of a powerful rival.<sup>178</sup> G.S. 75-5(b)(4) makes the following conduct unlawful:

While engaged in buying or selling any goods within the State, through himself or together with or through any allied, subsidiary or dependent person, to injure or destroy or undertake to injure or destroy the business of any rival or competitor, by unreasonably raising the price of any goods bought or by unreasonably lowering the price of any goods sold with the purpose of increasing the profit on the business when such rival or competitor is driven out of business, or his business is injured.<sup>179</sup>

In the trial court version of *State v. Atlantic Ice & Coal Co.*,<sup>180</sup> the trial judge had ruled that this section was so indefinite that its enforcement would violate the due process clause of the federal and state constitutions. On appeal, the North Carolina Supreme Court upheld the conviction under G.S. 75-5(b)(3), which makes it illegal to injure a competitor in order to fix prices, and thus did not review the ruling on G.S. 75-5(b)(4).<sup>181</sup> Because the state and federal courts have considerable experience in deciding what is an unreasonable restraint of trade, determining what is an unreasonable lowering or raising of prices should not pose insurmountable difficulty for North Carolina courts.

In 1936 Congress enacted section 3 of the Robinson-Patman Antidiscrimination Act.<sup>182</sup> Its provisions concerning pricing practices of sellers are broader than G.S. 75-5(b)(4), but unlike the North Carolina law, it does not apply to buyers.<sup>183</sup> A clause in section 3 of the Robinson-Patman Act makes it a crime "to sell . . . goods at unreasonably low prices for the purpose of de-

---

178. N.C. Gen. Stat. § 75-5(b)(3)-(5) (1981). These sections were, in substance, first enacted in 1907. Law of Mar. 11, 1907, ch. 218, § 1(c)-(d), 1907 N.C. Pub. Laws 254.

179. N.C. Gen. Stat. § 75-5(b)(4) (1981).

180. 210 N.C. 742, 188 S.E. 412 (1936).

181. *Id.* at 756, 188 S.E.2d at 421.

182. Robinson-Patman Antidiscrimination Act, ch. 592, § 3, 49 Stat. 1528 (1936) (codified at 15 U.S.C. § 13a (1976)).

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both. 15 U.S.C. § 13a (1976).

183. A buyer might be reached under section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), under the attempt-to-monopolize clause, or under section 5 of the Federal Trade Commission Act, *id.* § 45(a)(1), under the unfair-method-of-competition clause.

stroying competition or eliminating a competitor."<sup>184</sup> In *United States v. National Dairy Products Corp.*<sup>185</sup> the Supreme Court held this clause to be constitutional. However, the Court made it clear that all sales below cost do not violate section 3 of the Robinson-Patman Antidiscrimination Act. Only those sales made below cost without legitimate commercial objective, such as meeting the price of a competitor, and with specific intent to destroy competition, would be covered. Only a few cases have been prosecuted under this federal statute.

Unlike provisions in the Sherman and Clayton Acts, treble damage relief is not available under section 3 of the Robinson-Patman Act.<sup>186</sup> On the other hand, G.S. 75-5(b)(4) subjects a violator to criminal prosecution and to a suit for treble damages.

#### 4. Price Discrimination

G.S. 75-5(b)(5) is a price discrimination statute. It makes unlawful the following conduct:

While engaged in dealing in goods within this state, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another place, when there is not good and sufficient reason on account of transportation or the expense of doing business for charging less at the one place than at the other, or to give away such goods, with a view to injuring the business of another.<sup>187</sup>

In *State v. Atlantic Ice & Coal Co.*<sup>188</sup> a jury found an individual defendant guilty of violating this section. On appeal the conviction was upheld under G.S. 75-5(b)(3).<sup>189</sup> Thus, the supreme court did not consider the count involving G.S. 75-5(b)(5). In the following year, the supreme court upheld a ruling of a trial court that had sustained charges in the complaint against several defendants for violations of both G.S. 75-5(b)(3) and 75-5(b)(5).<sup>190</sup> In 1973, in *Rose v. Vulcan Materials Co.*,<sup>191</sup> the supreme court for the first time discussed price discrimination. The facts in this case were unusual in that the favored buyer sought damages from the seller because of the seller's failure to perform the contract that created the discrimination. Ordinarily, in private suits involving price discrimination, the victim of the discrimination sues. The court interpreted G.S. 75-5(b)(5) as follows:

We think this statute is aimed at *predatory area discrimination in the primary line*. It was not intended to outlaw price discrimination

---

184. Id. § 13(a).

185. 372 U.S. 29 (1963).

186. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958).

187. N.C. Gen. Stat. § 75-5(b)(5) (1981).

188. See notes 180-81 and accompanying text *supra*.

189. 210 N.C. at 749-56, 188 S.E. at 417-21.

190. *Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937).

191. 282 N.C. 643, 194 S.E.2d 521 (1973). See Note, Antitrust Law—A Rocky Road for Price Discrimination in North Carolina, 53 N.C.L. Rev. 136 (1974).

in the secondary line, and no *reasonable* construction of the statute produces that result. Apparently, the purpose of G.S. 75-5(b)(5) is to prevent a seller with several distribution points from predatorily lowering his prices in one locality where he has competition, while maintaining his prices at another locality in order to continue to generate an acceptable overall profit margin, thereby destroying his competitor in the low priced locality. Such practices would be area discrimination in the primary line and are illegal under G.S. 75-5(b)(5). Beyond such practices G.S. 75-5(b)(5) does not reach. The statute simply has no applicability to price discrimination in the secondary line. Since defendant, having at best made out an inferential case of price discrimination in the secondary line, has not shown the contract in question to be predatory area discrimination in the primary line, his defense based on G.S. 75-5(b)(5) was improperly sustained by the Court of Appeals.<sup>192</sup>

The court then proceeded to examine price discrimination as a restraint of trade under G.S. 75-1. The court stated that a *contract* establishing a price discrimination was not illegal per se; therefore, the party who alleges that the contract is in restraint of trade must prove that it is *unreasonably* in restraint of trade.<sup>193</sup> In this case, the defendant who alleged the illegality did not produce evidence to prove that the contract was unreasonable. The court indicated that the portion of the contract purporting to fix a higher price for *other* buyers might be illegal price fixing under G.S. 75-1 and 75-5(b)(7), but this issue was considered severable and was not decided. The court has yet to reveal how it would apply G.S. 75-5(b)(5) to a primary line discrimination case.

The Robinson-Patman Antidiscrimination Act amended section 2 of the Clayton Act.<sup>194</sup> Summarized, the Robinson-Patman Act prohibits a seller from discriminating in prices charged for goods of like grade and quality if such discrimination causes the requisite probable competitive injury, unless the discrimination is permissible under one of the several defenses found in various parts of section 2, subsections (a) and (b). Payments of brokerage and similar allowances to buyers are regulated by section 2, subsection (c), which makes such payments in violation of the section illegal per se. Subsections (d) and (e) of section 2 prohibit promotional allowances and services not made available or accorded to all competing customers or purchasers on proportionately equal terms. The only defense in these two subsections is a good faith meeting of competition. Buyers are covered under subsection (c) in the brokerage clause and in subsection (f), which prohibits buyers from knowingly inducing or receiving a discriminatory price that the seller is forbidden to grant under subsection (a). There is no provision in the Robinson-Patman Act to prohibit buyers from inducing or receiving discriminatory allowances or

192. 282 N.C. at 654-55, 194 S.E.2d at 529. The court explained that the "line of competition between the seller (Vulcan) and its competitors is called the 'primary line'; that between the buyer (Rose) and his competitors, the 'secondary line.'" Id. at 653, 194 S.E.2d at 529.

193. Id. at 657-58, 194 S.E.2d at 531.

194. Ch. 592, § 2(a)-(f), 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13(a)-(f) (1976)). The 1936 enactment also added three sections (codified at 15 U.S.C. §§ 13a, 13b, 21a (1976)).

services. However, the Federal Trade Commission may issue cease and desist orders against such practices under section 5 of the FTC Act.<sup>195</sup>

Most cases involving the Robinson-Patman Act are private suits for treble damages under section 4 of the Clayton Act. In *J. Truett Payne Co. v. Chrysler Motors Corp.*<sup>196</sup> the Court rejected the concept of automatic damages upon proof of violation of the Robinson-Patman Act. The plaintiff must prove actual injury attributable to the price discrimination and damages before he is entitled to recover.<sup>197</sup>

In *Rose v. Vulcan Materials Co.*<sup>198</sup> the North Carolina Supreme Court correctly rejected a defense to a contract action based on the Robinson-Patman Act because all the sales were intrastate and thus did not meet the jurisdictional requirements of the federal act. The Robinson-Patman Act is an "in commerce" statute and requires a crossing of a state line.<sup>199</sup>

### B. Territorial Arrangements

Territorial arrangements may be horizontal or vertical. In a horizontal arrangement, actual or potential competitors may agree not to compete by dividing markets. The division may relate solely to a geographic market, or there may be a product division, a division of customers or a combination of these. A vertical division may be between a seller and a buyer or between a supplier who retains title to the goods and a distributor who is an agent or consignee of the supplier. Vertical arrangements fall into three categories in which: (1) the seller or supplier agrees not to sell or supply another in a territory assigned to a buyer or agent; (2) the buyer or agent agrees not to promote or make sales in the territory assigned to another; and (3) the buyer or agent agrees not to sell to anyone who resides outside his assigned territory.

#### (1) Horizontal Division of Markets

Prior to 1907 there was no statutory provision in North Carolina concerning horizontal division of markets. The legality of such arrangements was determined under the common law. In *Culp v. Love*,<sup>200</sup> decided in 1900, the North Carolina Supreme Court refused to enforce a contract in which the parties had agreed not to compete with each other for a specified number of months in the sale of flour and other commodities in several counties. The

---

195. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). See Note, Trade Regulations—Robinson-Patman Act Section 2(d)—Promotional Allowances, 47 N.C.L. Rev. 243 (1968).

196. 101 S. Ct. 1923 (1981) (proof of damages in federal antitrust suits).

197. An article by Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975), has been very influential in subsequent Robinson-Patman section 2(a), first-line injury cases. The judicial adoption of the marginal cost rule as the touchstone for distinguishing between predatory and competitive pricing is discussed in *La Rue*, Recent Judicial Efforts to Reconcile the Robinson-Patman Act with the Sherman Act, 36 Wash. & Lee L. Rev. 325 (1979). Cf. *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299 (4th Cir. 1979) (damage under section 4 of Clayton Act recoverable only if injury is proved).

198. 282 N.C. 643, 194 S.E.2d 521 (1973).

199. *Moore v. Meads Fine Bread Co.*, 348 U.S. 115 (1954).

200. 127 N.C. 457, 37 S.E. 476 (1900).

court stated that the intent of the parties was immaterial and that the contract was against public policy.<sup>201</sup> This case has continuing vitality inasmuch as G.S. 75-2, enacted in 1913, provides that any contract in restraint of trade which violates the principles of the common law is a violation of G.S. 75-1.

When *Shute v. Shute*<sup>202</sup> was decided in 1918, there was a specific statutory provision dealing with division of territories. G.S. 75-5(b)(6), first enacted in 1907,<sup>203</sup> makes the following unlawful:

While engaged in buying or selling any goods in this State, to have any agreement or understanding, express or implied, with any other person not to buy or sell such goods within certain territorial limits within the State, with the intention of preventing competition in selling or to fix the price or prevent competition in buying such goods within these limits.<sup>204</sup>

In *Shute* plaintiff sold defendant a cotton gin and agreed that for ten years he would not compete with defendant *south* of Bear Skin Creek in the business of ginning or buying cotton seed and seed cotton. The contract further provided that defendant, the buyer, would not compete with plaintiff, the seller, *north* of Bear Skin Creek during a like period. Plaintiff sought to enjoin defendant from erecting a gin *north* of Bear Skin Creek in violation of the contract. The North Carolina Supreme Court quickly discerned that the agreement was not the usual ancillary restraint of trade designed to protect the goodwill purchased by the vendee. This contract involved a division of territory, and the court dismissed the suit on the ground that the contract violated G.S. 75-5(b)(6), the common law and G.S. 75-1.<sup>205</sup>

In *Maola Ice Cream Co. v. Maola Milk & Ice Cream Co.*<sup>206</sup> the North Carolina Supreme Court reached the high water mark in expressing its disdain for division of territories. Plaintiff owned the trademark "Maola" and sold ice cream manufactured in two plants, one in Washington, North Carolina, the other in New Bern, North Carolina. There was a well-defined division of territory as between the two plants. When plaintiff sold the New Bern plant to defendant, an agreement was made that the trademark "Maola," partially assigned to defendant, should be used by defendant in a territory to the *south* of

---

201. Id. at 461-62, 37 S.E. at 477-78. The court also concluded that the contract was a fraud on a third party. The manufacturer of "Sweetwater" flour shifted its agency from defendant to plaintiff at defendant's request. Defendant, however, did not inform the manufacturer of the agreement to not compete. Id. at 461, 37 S.E. at 477.

202. 176 N.C. 462, 97 S.E. 392 (1918). N.C. Gen. Stat. § 75-5(b)(6) (1981) does not apply to ancillary restraints of trade unless they are employed to "monopolize any given business, or the sale of any article, within the territory named." *Wooten v. Harris*, 153 N.C. 43, 46, 68 S.E. 898, 899 (1910). An agreement by a grantor at the time of sale that he will not permit the sale or advertising of petroleum products on a four-acre tract of retained land for a period of twenty-five years does not violate this statute. *Quadro Stations, Inc. v. Gilley*, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

203. Law of Mar. 11, 1907, ch. 218, § 1(e), 1907 N.C. Pub. Laws 254. This section was enacted, in its present form, in 1913. Law of Mar. 3, 1913, ch. 41, § 5(f), 1913 N.C. Pub. Laws 66.

204. N.C. Gen. Stat. § 75-5(b)(6) (1981).

205. 176 N.C. at 465-66, 97 S.E. at 393-94.

206. 238 N.C. 317, 77 S.E.2d 910 (1953). See also Steed & Hunter, Trade-Mark Assignments and Restraints of Trade: The *Maola Ice Cream* Case, 33 N.C.L. Rev. 399 (1955).



Vanceboro, the territory theretofore served by the New Bern plant. When defendant began to distribute dairy products under the name "Maola" from a dairy north of Vanceboro, plaintiff alleged unfair competition and sought a restraining order. The court decided that the restriction on the defendant's mark, "Maola," was invalid as a division of territory.<sup>207</sup> The court emphasized that it was not shown that plaintiff had sold ice cream products in all of eastern North Carolina north of Vanceboro before the sale of the New Bern plant, and thus the agreement would suppress and stifle competition.<sup>208</sup>

Market splitting among competitors, whether keyed to geography, products or customers, completely eliminates competition among the parties; thus, it is more anticompetitive than a price-fixing agreement. In *United States v. Topco Associates, Inc.*,<sup>209</sup> the leading federal case on horizontal market divisions, the Supreme Court of the United States made it clear that a horizontal market division, even in the absence of price fixing, was illegal per se.<sup>210</sup> The fact that a market division is confined to the boundaries of a single state does not insulate the transaction from the Sherman Act. In *Burke v. Ford*<sup>211</sup> the lower federal court held that a state-wide division of markets, into either territories or brands, by wholesalers of liquor in Oklahoma did not affect interstate commerce sufficiently to come within the scope of the Sherman Act. The Supreme Court of the United States reversed, adding the following:

Horizontal territorial divisions almost invariably reduce competition among the participants. . . . When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers [there were no liquor distilleries in Oklahoma]—than would have occurred had free competition prevailed among the wholesalers. In addition the wholesalers' division of brands meant fewer wholesale outlets available to any one out-of-state distiller. Thus the state-wide wholesalers' market division inevitably affected interstate commerce.<sup>212</sup>

As the foregoing cases illustrate, both the state and federal laws are applied with rigor to market-splitting arrangements.

---

207. 238 N.C. at 322-23, 77 S.E.2d at 915.

208. Id. at 322, 77 S.E.2d at 915.

209. 405 U.S. 596 (1972).

210. Later, the Supreme Court summarily affirmed a final judgment permitting Topco to utilize areas of primary responsibility, designate warehouse locations, determine the location of places of business for trademark licenses, terminate the membership of businesses not adequately promoting Topco Products, and formulate and implement profit pass-overs, unless the practices directly or indirectly achieved or maintained territorial exclusivity. *United States v. Topco Assocs., Inc.*, 414 U.S. 801 (1973), aff'g without opinion 319 F. Supp. 1031 (N.D. Ill. 1970), on remand from 405 U.S. 596 (1972).

211. 246 F. Supp. 403 (N.D. Okla. 1965), aff'd, 377 F.2d 901 (10th Cir.), rev'd per curiam, 389 U.S. 320 (1967).

212. 389 U.S. at 321-22 (footnotes omitted).

## (2) Vertical Division of Markets

(a) *Exclusive selling*

Ordinarily a seller is free to select his customers and to refuse to deal with others. Therefore, a seller may establish an exclusive dealership in a specified territory. G.S. 75-4 requires a writing in order for such an agreement to be enforceable by the buyer.<sup>213</sup> The seller usually is free to shift from one dealer to another at the end of the contract period.<sup>214</sup> At first blush G.S. 75-5(b)(6) appears to outlaw an exclusive selling arrangement. However, in *Mar-Hof Co. v. Rosenbacker*,<sup>215</sup> the court resorted to the rule of reason<sup>216</sup> and upheld a seller's agreement to deal only with the defendant buyer in Winston-Salem.<sup>217</sup>

On exclusive selling, the United States Supreme Court stated:

[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. Cf. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). If the restraint stops at that point—if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.<sup>218</sup>

It appears that in the absence of evidence of monopolization, an attempt to monopolize or other illegal purpose such as price fixing, an exclusive selling arrangement will be upheld as a reasonable restraint of trade under North Carolina and federal antitrust laws.

(b) *Closed territories and customer limitations*

An exclusive-selling arrangement binds the seller (manufacturer) not to sell to another buyer (dealer) in a specified territory. The buyer (dealer) is not prevented by an exclusive-selling arrangement from making sales outside his

---

213. *Radio Elecs. Co. v. RCA*, 244 N.C. 114, 92 S.E.2d 664 (1956).

214. Under the Automobile Dealer Franchise Act of 1956, an automobile manufacturer may be liable if there is a lack of good faith in refusing to renew a franchise contract. 15 U.S.C. §§ 1221-1225 (1976).

215. 176 N.C. 330, 97 S.E. 169 (1918).

216. The rule of reason used to determine whether an action or agreement is an illegal restraint of trade was presented in a 1917 United States Supreme Court case:

To determine that question [whether restraint is illegal] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effects, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

*Board of Trade v. United States*, 246 U.S. 231, 238 (1917). On the other hand, some restraints are per se unreasonable, in which case the rule of reason cannot be exercised.

217. An automobile franchise agreement providing for an exclusive dealership in a specified territory was upheld in *Waldron Buick Co. v. General Motors Corp.*, 254 N.C. 117, 118 S.E.2d 559 (1961).

218. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967). This statement was not involved in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

territory. To try to prevent a buyer (dealer) from selling in the territory of another buyer (dealer), the seller (manufacturer) may extract from each of his buyers (dealers) a promise to sell only in his assigned territory. Intrabrand competition can be further reduced if the seller (manufacturer) can impose on the buyer (dealer) a limitation to sell only to customers who reside in his territory.

In *Waldron Buick Co. v. General Motors Corp.*<sup>219</sup> plaintiff, a "franchised" Buick dealer in Concord, sought treble damages against the named defendant and a "franchised" Buick dealer in Charlotte. Plaintiff alleged that he had been forced by defendants to cease sales activities in the Charlotte area. General Motors had exclusive-selling arrangements with both plaintiff in Concord and defendant dealer in Charlotte. However, neither dealer had entered into a "closed-territory" agreement, which would have bound the dealer to sell only in his assigned territory. The court, in affirming a judgment of involuntary nonsuit, in effect upheld a "closed-territory" agreement that was *not* actually there. The court reasoned that the agreement of General Motors to sell only to the Charlotte dealer in the Charlotte area meant that the Charlotte dealer and General Motors had a right to keep the Concord dealer from selling in the Charlotte area.<sup>220</sup>

The court emphasized the absence of a customer limitation on plaintiff, thus leaving Charlotte customers free to buy from him in Concord.<sup>221</sup> It appears that if General Motors expressly had limited sales within territorial limits, it would have been upheld. In the absence of such a restriction imposed vertically, can the franchisees agree among themselves to territorial limitations? If so, a significant exception will have been made to the rigorous rule in this state against horizontal division of territories.

The United States Supreme Court considered its first case involving vertical closed-territory and customer-limitation arrangements two years after *Waldron Buick Co.* was decided. In *White Motor Co. v. United States*<sup>222</sup> the lower court had held these vertical restrictions to be per se violations of the Sherman Act and granted summary judgment. The Supreme Court sent the case back for trial because it concluded from a summary judgment record that it did not "know enough of the economic and business stuff out of which these arrangements emerge to be certain."<sup>223</sup> *United States v. Arnold, Schwinn & Co.*,<sup>224</sup> decided four years later, involved a variety of territorial and customer restrictions on both goods sold and goods on consignment. Regarding goods sold, the Supreme Court of the United States decided that:

Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—

---

219. 254 N.C. 117, 118 S.E.2d 559 (1961).

220. *Id.* at 128, 118 S.E.2d at 567-68.

221. *Id.* at 125, 118 S.E.2d at 565.

222. 372 U.S. 253 (1963).

223. *Id.* at 263.

224. 388 U.S. 365 (1967).

whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act.<sup>225</sup>

The Court indicated that a possible exception to the *per se* rule on goods sold might be made for newcomers and for failing companies.<sup>226</sup> After a decade of varied interpretations of the *Schwinn* *per se* rule by the lower federal courts, the Supreme Court in 1977 decided *Continental T.V., Inc. v. GTE Sylvania, Inc.*,<sup>227</sup> a case involving a dealer location clause. The Court overruled the broadly stated *per se* rule of *Schwinn*.<sup>228</sup> The Court returned to the rule of reason in *nonprice* vertical restraints but also reserved the possibility of reinstating a *per se* rule in particular cases in the future.

Congress has intervened to allow licensors in specific industries to divide territories among licensees. For example, trademark owners of soft drink products were authorized by Congress in 1980 to limit their licensees to a specific geographic territory, provided that effective interbrand competition exists in the area.<sup>229</sup>

### C. Exclusive Arrangements

Bargains to deal exclusively with another are almost universally upheld at common law unless they effect, or form part of a plan to effect, a monopoly.<sup>230</sup> The common law view still prevails in North Carolina and under federal law in respect to exclusive-selling arrangements.<sup>231</sup> A seller may bind himself to sell to a particular buyer or to a particular class of buyers. As previously discussed, this includes an agreement by a seller to sell to only one buyer in a specified locality.<sup>232</sup> Such a limitation on the seller often appears in franchise agreements. On the other hand, serious antitrust problems arise when a buyer gets involved in an arrangement in which he is bound to deal only with the seller. Statutes that specifically treat exclusive dealing restrictions on buyers are G.S. 75-5(b)(2) and section 3 of the Clayton Act. Further, G.S. 75-1 and 75-1.1, section 1 of the Sherman Act and section 5 of the FTC Act also apply.

---

225. Id. at 382.

226. Id. at 374. Territorial and customer restrictions imposed by an owner on his agent or consignee were subject to the rule of reason.

227. 433 U.S. 36 (1977).

228. Id. at 58.

229. Soft Drink Interbrand Competition Act of 1980, Pub. L. No. 96-308, 94 Stat. 939 (to be codified at 15 U.S.C. §§ 3501-3503).

230. Restatement (First) of Contracts § 516(e) (1932).

231. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Waldron Buick Co. v. General Motors Corp.*, 254 N.C. 117, 118 S.E.2d 559 (1961); *Mar-Hof Co. v. Rosenbacker*, 176 N.C. 330, 97 S.E. 169 (1918).

232. See text accompanying notes 214-19 *supra*.

## (1) Restrictions on Buyer

(a) *Exclusive buying*

G.S. 75-5(b)(2) provides that it is unlawful for any person directly or indirectly or by express or implied contract "[t]o sell any goods in this State upon condition that the purchaser thereof shall not deal in the goods of a competitor or rival in the business of the person making such sales."<sup>233</sup>

Unlike G.S. 75-5(b)(6), there is no requirement of intent or other qualifying feature in G.S. 75-5(b)(2); therefore, the rule of reason that applies to the former has no application to the latter.<sup>234</sup> *Standard Fashion Co. v. Grant*,<sup>235</sup> decided in 1914, was the first case involving the validity of an exclusive-buying contract under G.S. 75-5(b)(2). The seller sought to recover for patterns delivered to the buyer. Defendant contended that the contract of sale was invalid inasmuch as it contained a provision that bound him not to sell any other make of patterns. The court agreed with defendant and held the contract unenforceable as a direct violation of the statute that is now G.S. 75-5(b)(2).<sup>236</sup> Because it was not raised in the record, the court declined to pass on the possibility of the seller collecting for the patterns on the theory of *quantum valebat*.<sup>237</sup>

The rigor with which the court applies G.S. 75-5(b)(2) is demonstrated in *Florsheim Shoe Co. v. Leader Department Store, Inc.*<sup>238</sup> In that case the seller sued the buyer to recover on an open account for shoes and an electric sign. The buyer counterclaimed, alleging that the seller had breached its agreement to sell exclusively to the buyer in Asheville. The buyer ordinarily would have been entitled to prevail on the counterclaim;<sup>239</sup> however, the evidence disclosed that the buyer had agreed not to sell other shoes within a competitive price range of those of the seller. Because the buyer's agreement violated G.S. 75-5(b)(2), the court held the entire contract illegal.<sup>240</sup> The result was that an otherwise legal, exclusive, selling provision was unenforceable by the buyer because of an illegal buying provision in the agreement.

In *Arey v. Lemons*<sup>241</sup> the landowners leased their premises rent-free to an

233. N.C. Gen. Stat. § 75-5(b)(2) (1981). This provision was originally enacted in 1907. Law of Mar. 11, 1907, ch. 218, § 1(a), 1907 N.C. Pub. Laws 254. It was reenacted in 1911. Law of Mar. 8, 1911, ch. 167, § 1(a), 1911 N.C. Pub. Laws 321. In 1913 it was reenacted in its present form. Law of Mar. 3, 1913, ch. 41, § 5(b), 1913 N.C. Pub. Laws 66.

234. In *Mar-Hof Co. v. Rosenbacker*, 176 N.C. 330, 97 S.E. 169 (1918), the court observed that G.S. 75-5(b)(6) permits a standard of reasonableness because it requires a finding of intent. In *Florsheim Shoe Co. v. Leader Dep't Store, Inc.*, 212 N.C. 75, 193 S.E. 9 (1937), the court distinguished G.S. 75-5(b)(6) from G.S. 75-5(b)(2).

235. 165 N.C. 453, 81 S.E. 606 (1914).

236. *Id.* at 456, 81 S.E. at 607.

237. *Id.* at 457, 81 S.E. at 608.

238. 212 N.C. 75, 193 S.E. 9 (1937).

239. See *Mar-Hof Co. v. Rosenbacker*, 176 N.C. 330, 97 S.E. 169 (1918).

240. 212 N.C. at 79, 193 S.E. at 11.

241. 232 N.C. 531, 61 S.E.2d 596 (1950). In *Grubb Oil Co. v. Garner*, 230 N.C. 499, 53 S.E.2d 441 (1949), the pleadings did not allege any agreement that the buyer was not to deal in competitors' products. The court indicated that if the hearing revealed a sublease with such a restriction

oil company for ten years, and the oil company, as lessee, subleased the same property rent-free to the owners of the land. The only possible consideration for this "startling document" was the promise of the oil company to sell to the owners of the fee its petroleum products and an agreement by the owners of the fee to handle such products to the exclusion of similar products of other sellers. The entire agreement was decreed to be void as a clear violation of G.S. 75-5(b)(2).<sup>242</sup>

In *Lewis v. Archbell*,<sup>243</sup> unlike previous cases, plaintiff was a competitor of the seller. Plaintiff alleged that he had been forced out of business by an exclusive buying contract for cross-ties entered into by plaintiff's competitor and the Norfolk and Southern Railroad. The North Carolina Supreme Court concluded that under the facts a jury would have to decide whether the railroad had agreed to refrain from dealing with defendant seller's competitors.<sup>244</sup> Subsequently, plaintiff proved that the exclusive arrangement actually existed and that he was injured as a result; he was awarded *treble* damages.<sup>245</sup>

The foregoing cases reveal that a promise by a buyer not to deal in the goods of a competitor of the seller is per se illegal under G.S. 75-5(b)(2).<sup>246</sup> Under the federal antitrust laws, exclusive-buying arrangements are usually tested under section 3 of the Clayton Act.<sup>247</sup> This section reaches only those exclusive-buying arrangements that are reasonably likely "to substantially lessen competition or tend to create a monopoly in any line of commerce."<sup>248</sup> Exclusive contracts, whether involving "commodities" or a service, may also violate the Sherman Act and section 5 of the FTC Act.<sup>249</sup>

---

as part of a single transaction, a different situation might arise. *Id.* at 501, 53 S.E.2d at 443. As presented by the pleadings, the case involved a permissible restriction in a lease; that is, the lessor agreed not to sell, from the demised premises or other premises within a radius of two thousand feet, any petroleum products other than those of the lessee.

242. 232 N.C. at 536-37, 61 S.E.2d at 600.

243. 199 N.C. 205, 154 S.E. 11 (1930).

244. *Id.* at 206-07, 154 S.E. at 12.

245. See *Lewis v. Frye*, 207 N.C. 852, 175 S.E. 717 (1934).

246. In *State v. Standard Oil Co.*, 205 N.C. 123, 170 S.E. 134 (1933), a civil action was dismissed because the complaint failed to allege facts sufficient to constitute a cause of action. If the complaint had alleged that the exclusive arrangements in the leases violated G.S. 75-5(b)(2), it might have survived a demurrer.

247. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14 (1976).

248. *Id.*

249. *FTC v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392 (1953).

*(b) Requirements contracts*

It is not uncommon for a buyer to agree to purchase all of his requirements from a particular seller. This arrangement will foreclose a market to the competitors of a seller as effectively as will a covenant by a buyer not to deal with a competitor of the seller. A seller should not be permitted to escape the sanctions of G.S. 75-5(b)(2) by imposing a requirements contract on the buyer. On the other hand, a buyer may desire a requirements contract to assure a source of supply in times of scarcity. In such a situation the per se rule of G.S. 75-5(b)(2) should not apply. Instead, all requirements contracts not designed to circumvent G.S. 75-5(b)(2) should be examined under G.S. 75-1 and 75-1.1 and tested for legality under the rule of reason.

Section 3 of the Clayton Act makes illegal only those requirements contracts that are reasonably likely "to substantially lessen competition or tend to create a monopoly in any line of commerce."<sup>250</sup> The meaning of this clause is often the subject of litigation. A comparison of two cases decided with different results by the United States Supreme Court provides some guidance for understanding the qualifying clause as it is applied to requirement contracts. In *Standard Oil Co. v. United States*<sup>251</sup> the Court held that the requirements contracts of defendant with sixteen percent of the independent service stations in a several-state area that foreclosed 6.7 percent of the gasoline market in that area were enough to "substantially lessen competition or tend to create a monopoly" in violation of section three of the Clayton Act. In *Tampa Electric Co. v. Nashville Coal Co.*<sup>252</sup> plaintiff, a public utility, entered into a contract with defendant, a coal supplier, in which defendant agreed to furnish the total requirements of plaintiff in certain plants for twenty years. Before the first delivery was made, defendant advised plaintiff that it considered the contract illegal under the antitrust laws and refused to make delivery. In upholding the contract, the United States Supreme Court followed the technique that it had used in *Standard Oil* to ascertain the percentage of market foreclosed to the seller's competitors. After determining that the line of commerce was coal, the Court found that the relevant market was the area in which the seven hundred producers of coal in the Appalachians competed with the defendant. This contract, although involving \$128,000,000 over a twenty-year period, nevertheless, foreclosed less than one percent of the market. This percentage of foreclosure by a contract that offered a public utility the assurance of a steady and ample supply of fuel was held not enough to "tend to foreclose a substantial volume of competition."<sup>253</sup>

---

250. 15 U.S.C. § 14 (1976).

251. 337 U.S. 293 (1949) (defendant's major competitors had similar contracts with other outlets).

252. 365 U.S. 320 (1961).

253. *Id.* at 335. The Court stressed the public interest in ensuring a steady fuel supply to the utility. *Id.* at 334.

*(c) Tying arrangements*

The usual tying contract forces the customer to take a product or service that he does not necessarily want in order to secure one that he does desire. The result of a tying arrangement is to foreclose to competitors a market in the tied product as well as to coerce the buyer. In *Hall v. City of Morganton*<sup>254</sup> the city undertook to secure a tying arrangement. Plaintiff, who lived outside the city, had paid for a connection with the city water system, but the city threatened to cut off plaintiff's water supply unless he switched from Duke Power to city power. The court approved the restraining order issued by the trial judge.<sup>255</sup> This case could have been brought under G.S. 75-5(b)(2) inasmuch as it is directed at foreclosing markets.

Many tying arrangements may be in restraint of trade under G.S. 75-1 and unfair methods of competition under G.S. 75-1.1. Nevertheless, in one application of North Carolina law to a tying arrangement, the court of appeals upheld the right to produce and sell long-playing records without offering each musical performance in single-record form.<sup>256</sup>

In 1969 the General Assembly dealt specifically with the tie-in concept in one narrow area. G.S. 75-16 makes it a criminal offense for a lender of money to require a borrower to insure property that is offered as security with a particular insurer.<sup>257</sup>

The federal courts have taken a harsh attitude toward tying clauses, and the jurisdictional reach of the federal statutes is broad enough to cover most of these clauses. Whether in a sale, lease or license, the present rule under both the Clayton and Sherman Acts is that a tying arrangement is per se illegal when the tying item, by virtue of either uniqueness or customer appeal, gives enough power in the tying product to accomplish the tie-in<sup>258</sup> and there is not an insubstantial amount of commerce in the tied product.<sup>259</sup> Unlike requirements contracts, the dollar volume is the test in tying clauses.<sup>260</sup> In a treble damage suit to determine whether the amount of commerce foreclosed is sufficient to warrant prohibition of the practice, the relevant figure is the total volume of sales tied by the sales policy under challenge and not the portion of this total accounted for by the plaintiff who brings the treble damage suit.<sup>261</sup> Thus, if the tied sales to all purchasers made by the defendant is not insubstantial, an individual purchaser may sue for treble damages even though his purchases amount to only a "fraction" of the tied sales.<sup>262</sup>

---

254. 268 N.C. 599, 151 S.E.2d 201 (1966). Cities are not automatically immune from the federal antitrust laws. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

255. 268 N.C. at 601, 151 S.E.2d at 202.

256. *United Artists Records, Inc. v. Eastern Tape Corp.*, 19 N.C. App. 207, 213, 198 S.E.2d 452, 454 (1973).

257. N.C. Gen. Stat. § 75-17 (1981). See also *id.* §§ 75-18, -19.

258. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

259. *International Salt Co. v. United States*, 332 U.S. 396 (1947).

260. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

261. *Id.* at 502.

262. *Id.*



Occasionally, the federal courts have accepted a special justification for a particular tying arrangement. For example, in *United States v. Jerrold Electronics Corp.*,<sup>263</sup> a tie-in of various items of equipment needed for a community television antenna to the servicing of the equipment by the seller was upheld. The court concluded that the seller had a legitimate interest in assuring the proper functioning of this complex equipment in a new industry.<sup>264</sup>

A tie-in involving commodities may be illegal under section 3 of the Clayton Act,<sup>265</sup> section 1 of the Sherman Act<sup>266</sup> or section 5 of the Federal Trade Commission Act.<sup>267</sup> Tying arrangements not involving commodities, and therefore not within the coverage of section 3 of the Clayton Act, have been attacked successfully under section 1 of the Sherman Act. These arrangements have included tying railway services to leases of land<sup>268</sup> and block-booking of motion pictures for television exhibition.<sup>269</sup>

The tie-in concept has been expanded to cover arrangements in which a seller requires a buyer to purchase products of a third party. In two cases gasoline suppliers were found to have violated section 5 of the FTC Act by coercing their "dealers" to handle a particular brand of tires, batteries and accessories of a third party.<sup>270</sup> The gasoline supplier in each instance had received a commission from the supplier of the tires, batteries and accessories.

## (2) Restrictions on Lessees, Licensees and Franchisees

G.S. 75-5(b)(2) applies only to buyers. But suppose restrictions are imposed on lessees, licensees and franchisees. In *Knutton v. Cofield*,<sup>271</sup> plaintiff and defendant executed a contract for the installation of an electric phonograph in defendant's place of business. Defendant agreed that during the term of the five-year contract he would not permit the installation of any competing device. After defendant breached this agreement, plaintiff sued for damages. Defendant demurred on the ground that the contract violated the laws of the state as a restraint on trade and thus was void. The court held that this "joint undertaking" did not violate the antitrust laws.<sup>272</sup> Clearly, the specific provisions of G.S. 75-5(b)(2) did not apply because there was no sale, but the court

263. 187 F. Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961). Other examples are *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), petition for cert. dismissed, 381 U.S. 125 (1965); *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir.), cert. denied, 368 U.S. 931 (1961). But see *Siegel v. Chicken Delight, Inc.*, 311 F. Supp. 847 (N.D. Cal. 1970), aff'd in part, rev'd in part, 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972).

264. 187 F. Supp. at 557.

265. *IBM Corp. v. United States*, 298 U.S. 131 (1936).

266. *International Salt Co. v. United States*, 332 U.S. 392 (1947) (involving section 3 of the Clayton Act and section 1 of the Sherman Act).

267. The Federal Trade Commission may bring proceedings under section 5 of the FTC Act, 15 U.S.C. § 41 (1976), for conduct which violates section 3 of the Clayton Act, id. § 14, or section 1 of the Sherman Act, id. § 1.

268. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

269. *United States v. Loew's Inc.*, 371 U.S. 38 (1962).

270. *FTC v. Texaco Inc.*, 393 U.S. 223 (1968); *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965).

271. 273 N.C. 355, 160 S.E.2d 29 (1968).

272. Id. at 360, 160 S.E.2d at 33.

also indicated that the general coverage of Chapter 75 of the General Statutes extended only to "the sale and movement in commerce of goods, wares, merchandise and other things of value."<sup>273</sup> Contracts in restraint of trade may involve parties other than a buyer and seller; therefore, it would have been preferable had the court concluded that the restraint on the defendant was a reasonable one and did not violate G.S. 75-1.

G.S. 75-1.1 also should provide a source of redress for lessees, licensees and franchisees who are injured by unreasonable exclusive-dealing arrangements.<sup>274</sup>

In *FTC v. Motion Picture Advertising Service, Inc.*<sup>275</sup> a producer of motion picture advertising films had exclusive contracts with forty percent of the theater owners in the area in which it operated. Although section 3 of the Clayton Act did not apply because no commodity was involved, the United States Supreme Court held that these exclusive contracts fell within the prohibitions of the Sherman Act and represented, therefore, an unfair method of competition under section 5 of the FTC Act.<sup>276</sup>

#### D. Refusals to Deal

##### (1) Individual Refusals to Deal

One engaged in business may have a variety of commercial and personal reasons not to deal with another person or firm. Ordinarily, a single trader may choose not to deal with another without violating the antitrust statutes of North Carolina or of the United States.<sup>277</sup> Nonetheless, an individual refusal to deal, when coupled with other conduct, may fall into a forbidden category. If done with the intent to "destroy or injure . . . the business of any competitor" and "with the purpose of attempting to fix the price of any goods when the competition is removed," the refusal to deal is a violation of G.S. 75-5(b)(3).<sup>278</sup> The refusal of the only newspaper in a city to deal with advertisers who patronized the local radio station has been held an attempt to monopolize under section 2 of the Sherman Act.<sup>279</sup>

When a trader agrees to deal only with certain traders, the effect is to refuse to deal with all others. Exclusive dealerships whereby the seller agrees to deal only with a particular distributor in a given locality have been upheld

---

273. *Id.*

274. In 1977, G.S. 75-1(b) was rewritten to eliminate the words "buyers and sellers." Law of June 27, 1977, ch. 747, § 2, 1977 N.C. Sess. Laws, 1st Sess. 984.

275. 334 U.S. 392 (1953).

276. *Id.* at 395.

277. *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

278. It is unlawful

for any person directly or indirectly to do, or have any contract express or knowingly implied . . . [t]o willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed.

N.C. Gen. Stat. § 75-5(b)(3) (1981).

279. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

under both North Carolina law<sup>280</sup> and federal law.<sup>281</sup> On the other hand, a seller cannot extract from a buyer a promise not to deal with a competitor of the seller without running afoul of an express provision of the North Carolina antitrust law.<sup>282</sup> Likewise, such an arrangement is proscribed by federal law when a seller makes a sale on the condition that the buyer will not deal in the goods of a competitor and when the effect of the arrangement may be "to substantially lessen competition or tend to create a monopoly in any line of commerce."<sup>283</sup>

## (2) Concerted Refusals to Deal

Federal and state statutes do not offer specific guidance as to whether concerted refusals to deal are illegal. With the exception of the recent state and federal statutes triggered by the Arab boycott of Israel,<sup>284</sup> there is no specific legislation on concerted refusals to deal. Concerted refusals to deal may violate section 1 of the Sherman Act and section 5 of the FTC Act. The North Carolina Supreme Court has not followed federal precedents in this area.

In *Rice v. Asheville Ice Co.*<sup>285</sup> plaintiff sued for damages under the anti-trust laws, alleging that defendants refused to sell ice to him and thus prevented him from engaging in the business of retailing ice in the Asheville area. In a per curiam opinion, the North Carolina Supreme Court affirmed a dismissal of the action, apparently on the ground that plaintiff could not show any damages.<sup>286</sup> The court did not consider whether there was a concert of action by defendants and, if so, whether it would constitute a restraint of trade under G.S. 75-1.

In 1941 two cases involving concerted refusals to deal were decided by the North Carolina Supreme Court. In *McNeill v. Hall*<sup>287</sup> plaintiff, a cafe opera-

---

280. An exclusive-dealing arrangement in which the seller agrees to deal only with a buyer in a specified locality appears to be proscribed by N.C. Gen. Stat. § 75-5(b)(6) (1981), but, by applying the rule of reason, the court upheld such an arrangement in *Mar-Hof Co. v. Rosenbaker*, 176 N.C. 330, 97 S.E. 169 (1918). See text accompanying note 215 *supra*. The legality of this type of exclusive-dealing arrangement was reaffirmed in *Waldron Buick Co. v. General Motors Corp.*, 254 N.C. 117, 118 S.E.2d 559 (1961).

281. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). In *United States v. Arnold, Schwinn & Co.*, the Court by way of dictum stated: "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods." 388 U.S. at 376.

282. N.C. Gen. Stat. § 75-5(b)(2) (1981).

283. 15 U.S.C. § 14 (1976). This Act extends to leases, contracts to sell and to sales, whereas G.S. 75-5(b)(2) is confined to sales.

284. There is special legislation, both federal and state, dealing with situations such as the so-called "Arab boycott." E.g., id. § 2407 (Supp. III 1979); N.C. Gen. Stat. § 75B (1981).

285. 204 N.C. 768, 169 S.E. 707 (1933) (per curiam). The court relied on *Lewis v. Archbell*, 199 N.C. 205, 154 S.E. 11 (1930). Further, G.S. 75-5(b)(3) was held inapplicable on the ground that plaintiff was not a competitor of defendants. 204 N.C. at 769, 169 S.E. at 707. Plaintiff, of course, was trying to buy from defendants in order to compete with them at the retail level, inasmuch as they were also retailers. G.S. § 75-1.1 has a provision which does not require the defendant to be in competition with the plaintiff.

286. 204 N.C. at 769, 169 S.E. at 707.

287. 220 N.C. 73, 16 S.E.2d 456 (1941).

tor, was forced to go out of business because he was unable to secure supplies from salesmen representing baking houses and packing houses that served the village of Micaville. The salesmen ceased selling to plaintiff because a combination of retail businessmen threatened to withhold patronage from the salesmen if they continued to sell to plaintiff. Plaintiff suffered a nonsuit in the trial court, and the North Carolina Supreme Court, in affirming, stated:

The gravamen of the action alleged is a boycott of the plaintiffs' business. A requisite of any boycott is a conspiracy. Boycott is defined by Black's Law Dictionary (Second Edition) as "a conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business . . . ." A "conspiracy" is "an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." The determination of the defendants to decline to buy from the salesmen if they continued to sell to the plaintiffs was not an unlawful act. It was simply the exercise of the right they had to buy from or to refrain from buying from whomsoever they pleased. *"If these acts are not wrongful or illegal, no agreement to commit them can properly be called an illegal and wrongful conspiracy."* *State v. Martin*, 191 N.C. 404, 132 S.E. 16, 17.

In the absence of intimidation and coercion, and in a peaceable manner, a person has a right to endeavor to prevent other firms procuring certain articles to be sold in competition with the sale of the same articles by them in a given territory.<sup>288</sup>

The most troublesome part of the foregoing statement is "[i]f these acts are not wrongful or illegal, no agreement to commit them can properly be called an illegal and wrongful conspiracy." This statement obliterates the distinction between individual refusal to deal and concerted refusal to deal. To pursue this reasoning in other areas of antitrust would discard most of the existing law. It is not wrongful for one to fix his own price, but it is quite a different matter to agree with competitors on a price. In 1914 Chief Justice Clark in *State v. Craft*<sup>289</sup> understood the difference. He observed, "The indictment is not for raising the price, but for the combination and agreement to do so."<sup>290</sup>

In *Lineberger v. Colonial Ice Co.*<sup>291</sup> a retailer of ice alleged violations of G.S. 75-1 and 75-5(b)(6). He contended that by concerted action all six manufacturers of ice in the area refused to sell to him. Paragraph 8 of the complaint stated:

[I]mmediately after refusing to sell ice to the plaintiff, as a part of said conspiracy and in furtherance thereof, and to procure for themselves the unlawful gain from the plaintiff's established business, the said conspirators employed the plaintiff's drivers and helpers to point out to them all of the plaintiff's customers and the various routes

288. Id. at 74, 16 S.E.2d at 457 (emphasis supplied). See *State v. Dalton*, 168 N.C. 204, 83 S.E. 693 (1914), for a case in which the court approved an indictment alleging a common law conspiracy to break up a rival company.

289. 168 N.C. 208, 83 S.E. 772 (1914).

290. Id. at 211, 83 S.E. at 773.

291. 220 N.C. 444, 17 S.E.2d 502 (1941) (per curiam).

upon which said customers resided, and did thereafter and now continue to sell to said customers to the loss of the said plaintiff and the unlawful enrichment of said defendants.<sup>292</sup>

The complaint survived a demurrer in the trial court, but the North Carolina Supreme Court in a per curiam opinion reversed, declaring that the suit involved a controversy of a private nature and hence no public interest was involved.<sup>293</sup>

Conceding that a number of suppliers may individually refuse to deal with the plaintiff, it is quite a different matter for a group of suppliers to agree among themselves not to do business with him. There should be a public interest in protecting a business from the concerted action of others. Today, the plaintiff should prevail under G.S. 75-1.1 by alleging that the boycott was an unfair trade practice.

A brief summary of selected federal cases will reveal a sharp contrast to these decisions of the North Carolina Supreme Court. As early as 1904, the United States Supreme Court ruled that a concerted refusal by traders to deal with other traders violated section 1 of the Sherman Act.<sup>294</sup> In 1914 in *Eastern States Retail Lumber Dealers' Association v. United States*,<sup>295</sup> an agreement by a group of retailers not to deal with wholesalers who sold directly to consumers was held to be unlawful as an unreasonable restraint on trade.<sup>296</sup> The Supreme Court repeated the following from a decision in which it had upheld the Supreme Court of Mississippi in a similar interpretation of the Mississippi antitrust statute:

An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to *the individual against whom the concerted action is directed*.<sup>297</sup>

Later, the Supreme Court declared that group boycotts (concerted refusal by traders to deal with other traders) were unreasonable per se.<sup>298</sup> In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*<sup>299</sup> plaintiff, a small retailer, sued for treble damages and for an injunction under the federal antitrust laws. He alleged that a chain store outlet located next door to him had induced several suppliers to boycott him or to sell to him only on unfavorable terms. The lower federal courts dismissed the complaint on the ground that the controversy was a private quarrel between Klor's and Broadway-Hale that did not amount to a

---

292. Record at 5.

293. 220 N.C. at 445, 17 S.E.2d at 502.

294. *Montague & Co. v. Lowry*, 193 U.S. 38 (1904).

295. 234 U.S. 600 (1914).

296. *Id.* at 611-12.

297. *Id.* at 614 (quoting *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 440-41 (1909)) (emphasis added).

298. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (citing *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941)).

299. 359 U.S. 207 (1959).

public wrong proscribed by the Sherman Act.<sup>300</sup> The Supreme Court, in rejecting this view, stated:

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. Cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213, "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Cf. *United States v. Patten*, 226 U.S. 525, 542.

Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its "nature" and "character," a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.<sup>301</sup>

In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*<sup>302</sup> the United States Supreme Court, relying on its decision in *Klor's*, held in a per curiam opinion that it was error for the district court to dismiss for failure to state a claim a complaint alleging that defendant trade association and its members had violated section 1 of the Sherman Act by establishing and enforcing "capricious and arbitrary" standards for gas burners that plaintiff's burners could not meet, effectively excluding plaintiff as a competitor.<sup>303</sup>

A combination of businesspersons that exerts economic power to injure or destroy another businessperson wields the same kind of power as the "trusts"

---

300. Id. at 210.

301. Id. at 212-13 (footnotes omitted).

302. 364 U.S. 656 (1961) (per curiam).

303. Id. at 659-60.

that brought about the enactment of antitrust laws. The public interest is served when a competitor is protected from the evils of monopoly power, whether the power be exercised by a "trust" or a group. There is no more effective way to victimize a business than to make it the object of a commercial boycott. Economic coercion through combinations and conspiracies is what section 1 of the Sherman Act is about. North Carolina can make its counterpart, G.S. 75-1, a viable statute by eliminating the obstacles erected in *McNeill v. Hall*<sup>304</sup> and *Lineberger v. Colonial Ice Co.*<sup>305</sup> To cope effectively with commercial group boycotts does not require the adoption of a per se rule: each case can be considered on its merits under the rule of reason.<sup>306</sup>

Commercial boycotts may violate section 5 of the FTC Act.<sup>307</sup> G.S. 75-1.1 offers a fresh approach to dealing with this type of concerted action. The courts have no difficulty in protecting a single person under the common law of unfair competition from the acts of another business. Surely the public interest is no less involved when an equal or more serious injury occurs to a business as a result of an agreement by its competitors or an agreement by its suppliers that was induced by a competitor.

#### *E. Monopolization, Attempt to Monopolize, Combination or Conspiracy to Monopolize, and Mergers*

The North Carolina antitrust statute has no provision with language similar to section 2 of the Sherman Act: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

304. 220 N.C. 73, 16 S.E.2d 456 (1941). The court quoted the following from 15 C.J.S. Conspiracy § 12g (1939): "It has been held that a combination of retail dealers in merchandise, which for a legitimate purpose interferes with another's right to buy goods by persuasion or other peaceful means exerted against the sellers, does not amount to an actionable conspiracy, there being no intimidation or coercion." 200 N.C. at 74-75, 16 S.E.2d at 457. This statement is supported in *Corpus Juris Secundum* by a single lower federal court case decided in 1907: *Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Ass'n*, 150 F. Supp. 413 (C.C.S.D. 1907). A later edition of *Corpus Juris Secundum* gives a broader meaning to boycott by allowing the required intimidation to be passive. 15A C.J.S. Conspiracy § 12a (1967).

305. 220 N.C. 444, 17 S.E.2d 502 (1941) (no public interest involved). But see *Lewis v. Frye*, 207 N.C. 852, 175 S.E. 717 (1934) (treble damages awarded when plaintiff injured by an exclusive buying contract between plaintiff's former customer and a competitor); *Lewis v. Archbell*, 199 N.C. 205, 154 S.E. 11 (1930).

306. The per se rule is not uniformly applied in the federal courts. In *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970), two suppliers dealing with distributor A agreed with B to shift to B. This arrangement was found to be reasonable under the circumstances. In *Instant Delivery Corp. v. City Stores Co.*, 284 F. Supp. 941 (E.D. Pa. 1968), four retailers had been using a single delivery service. They changed to two different services and then returned to a single service. The complaining carrier who lost out in the bidding was found to be "a disappointed competitor, not the object of an illegal boycott." 284 F. Supp. at 947. In *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, 308 F. Supp. 988 (D.D.C. 1970), the per se rule was rejected in considering a provision in a long-term lease that gave certain lessees the right to select and approve tenants who in the judgment of these lessees would contribute to the success of the enterprise.

The rule of reason is particularly appropriate in dealing with protest boycotts. *Missouri v. National Org. for Women*, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980). See also Comment, *Protest Boycotts Under the Sherman Act*, 128 U. Pa. L. Rev. 1131 (1980).

307. *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941).

States, or with foreign nations, shall be deemed guilty of a felony . . . ."<sup>308</sup> However, G.S. 75-5(b)(3) covers some of the same ground. This section makes it unlawful for any person, directly or indirectly, to have an "express or knowingly implied" contract to "willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed."<sup>309</sup> One similarity to be noted at the outset is that both statutes are directed at individual misconduct as well as at concerted action.

### (1) Individual Misconduct

Two North Carolina cases illustrate the application of G.S. 75-5(b)(3) to an individual. In *Smith v. Morganton Ice Co.*<sup>310</sup> defendant, the owner of an ice plant in Morganton, secured a monopoly of the ice business in Morganton by a series of acts that froze out plaintiff, a competitor at the retail level. Defendant first procured an agreement with the Deaf and Dumb School in Morganton, a manufacturer of ice, not to sell ice to anyone. Defendant then procured agreements with ice plants in neighboring towns not to sell ice to plaintiff unless he would agree to resell at a minimum price in Morganton of fifty cents per one hundred pounds. Plaintiff was buying ice from a plant in Newton for 17.5 cents per hundred pounds and reselling it for a profit at 35 cents. Defendant threatened the Newton supplier with a trade war. As a result, the Newton supplier ceased dealing with plaintiff. Defendant was successful in securing a monopoly and thereafter sold its ice for fifty cents per one hundred pounds in Morganton. Plaintiff recovered damages under the common law doctrine preventing unlawful combination or, alternatively, under a 1907 antitrust statutory provision that is now codified at G.S. 75-5(b)(3).<sup>311</sup> Jurisdictional considerations aside, defendant in this case would be guilty of "monopolizing" under section 2 of the Sherman Act.

In *State v. Atlantic Ice & Coal Co.* defendant, a Georgia corporation, was convicted of and fined one thousand dollars for violating G.S. 75-5(b)(3). Defendant, the largest of approximately twenty-five coal dealers in Winston-Salem, had drastically cut the price of coal. The justification offered for this action by the president of defendant corporation was that he wanted sales and that there already were too many coal dealers in Winston-Salem. There was no evidence that any of defendant's competitors had been driven out of business; nevertheless, the court stated:

It goes without saying that reducing the price of coal to the con-

---

308. 15 U.S.C. § 2 (1976). Article I, section 34 of the North Carolina Constitution provides: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

309. N.C. Gen. Stat. § 75-5(b)(3) (1981). This section was enacted in Law of Mar. 11, 1907, ch. 218, § 1(b), 1907 N.C. Pub. Laws 254. In 1911 it was restricted to "circulating false reports" and thus severely narrowed in scope. Law of Mar. 8, 1911, ch. 167, § 1(b), 1911 N.C. Pub. Laws 321. In 1913 the language of the 1907 Act was restored. Law of Feb. 7, 1913, ch. 41, § 5(c), 1913 N.C. Pub. Laws 66. The present version was held to be constitutional in *State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 188 S.E. 412 (1936).

310. 159 N.C. 151, 74 S.E. 961 (1912).

311. *Id.* at 154, 74 S.E. at 963.



sumer below what the defendant paid for same, with the other evidence above set forth, is sufficient evidence to be submitted to the jury that defendant formed a purpose to monopolize, and willfully undertook to injure its competitors.<sup>312</sup>

Defendant, in effect, was convicted of an attempt to monopolize. This offense is specifically set forth in section 2 of the Sherman Act.

## (2) Concerted Action

Three cases have come before the North Carolina Supreme Court involving an alleged conspiracy in violation of G.S. 75-5(b)(3).<sup>313</sup> In each case the plaintiff was a truck carrier that was suing several railroads for combining to lower rates to injure truck carriers with the intent to restore the rates at a later time. The lowering of rates by railroads is now within the jurisdiction of the Utilities Commission,<sup>314</sup> but at the time these three cases were litigated, the Utilities Commissioner had jurisdiction over the raising of, but not the lowering of, such rates.<sup>315</sup> Two important points in these cases have continuing vitality in the antitrust laws. First, the fixing of rates is within the definition of "goods" under G.S. 75-5.<sup>316</sup> Second, the rate agreement's lowering of the price of gasoline to consumers did not constitute a defense under G.S. 75-5(b)(3) because this section is not subject to the rule of reason.<sup>317</sup> In Sherman Act terms, the defendants in each of these cases would have been charged with a combination or a conspiracy to monopolize.

Because the language of G.S. 75-5(b)(3) and that of section 2 of the Sherman Act differ so widely, a summary of the cases under the federal act will not be undertaken. Nevertheless, the jurisdictional sweep of section 2 of the Sherman Act to reach local attempts to monopolize should be emphasized. In *Lorain Journal Co. v. United States*<sup>318</sup> a newspaper publisher was enjoined from attempting to monopolize the advertising business in Lorain, Ohio, by refusing to accept local advertising from any business that patronized the local radio station. The defendant operated the only newspaper in the city. This decision made it clear that a business practice designed to destroy a competitor in a single locality that would, if successful, achieve a monopoly and that, though falling short, nevertheless creates a dangerous probability of achieving a monopoly, is an attempt to monopolize under section 2 of the Sherman Act.<sup>319</sup>

312. 210 N.C. at 753, 188 S.E. at 419.

313. *Patterson v. Southern Ry.*, 214 N.C. 38, 198 S.E. 364 (1938); *Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937); *Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R.*, 210 N.C. 36, 185 S.E. 479 (1936). A statement in *Carolina Motor Service, Inc. v. Atlantic Coast Line Railroad* foreclosing injunctive relief for violation of G.S. 75-5 because it was a criminal statute, *id.* at 39, 185 S.E. at 481, was corrected by the court in *Burke Transit Co. v. Queen City Coach Co.*, 228 N.C. 768, 772-73, 47 S.E.2d 297, 300 (1948).

314. N.C. Gen. Stat. § 62-32 (1975).

315. Law of Mar. 9, 1933, ch. 134, § 16, 1933 N.C. Pub. Laws 106.

316. See *Bennett v. Southern Ry.*, 211 N.C. 474, 482, 191 S.E. 240, 246 (1937) (suit for damages).

317. *Patterson v. Southern Ry.*, 214 N.C. 38, 43-44, 198 S.E. 364, 367 (1938).

318. 342 U.S. 143 (1951). See also Annot., 52 A.L.R. Fed. 728 (1981).

319. 342 U.S. at 153.

## (3) Mergers

From 1950 to 1977, the federal Department of Justice and the Federal Trade Commission filed 437 merger cases challenging 1,406 acquisitions.<sup>320</sup> The Sherman Act and section seven of the Clayton Act have been utilized to scrutinize various types of mergers, including horizontal, vertical and conglomerate.

There is no indication that mergers have been examined under North Carolina antitrust law. However, there are several special statutes directed at mergers of banks,<sup>321</sup> insurance companies<sup>322</sup> and savings and loan associations.<sup>323</sup> Proposed mergers in these areas must be approved by the appropriate state supervising authority.

## IV. ANCILLARY RESTRAINTS OF TRADE

An ancillary restraint is an agreement that is subordinate to the lawful purpose of a larger transaction that it is designed to effectuate.<sup>324</sup> Typical examples are covenants not to compete in connection with the sale of a business or professional practice and in partnership agreements and employment contracts. G.S. 75-4 requires these contracts to be in writing.

Mutual promises provide the consideration for a covenant not to compete.<sup>325</sup> An initial offer of employment constitutes sufficient consideration for a covenant not to compete,<sup>326</sup> whereas covenants extracted from an employee subsequent to employment must be supported by additional consideration, such as a promotion or a raise in salary.<sup>327</sup> In North Carolina, a promise of continued employment is not sufficient consideration.<sup>328</sup> In several cases the

---

320. S. Oppenheim, G. Weston & J. McCarthy, *supra* note 4, at 415 (citing H. Mueller, *The Celler-Kefauver Act: The First 27 Years*, H.R. Doc. No. 96-243, 96th Cong., 1st Sess. 7 (1979)).

321. N.C. Gen. Stat. §§ 53-12 to -17 (1975 & Cum. Supp. 1979).

322. *Id.* §§ 58-155.1 to -155.10.

323. *Id.* § 54-159.

324. See generally Breckenridge, *Restraint of Trade in North Carolina*, 7 N.C.L. Rev. 249, 252 (1929); Note, *Covenants Not To Compete*, 38 N.C.L. Rev. 395 (1960); Note, *Injunction—Employee's Agreement Not to Compete*, 26 N.C.L. Rev. 402 (1948); Note, *Restraints on Trade—Covenants in Employment Contracts Not to Compete Within the Entire United States*, 49 N.C.L. Rev. 393 (1971). Land use restrictions imposed in connection with the conveyance of land reflect a type of ancillary restraint. For example, in *Quadro Stations, Inc. v. Gilley*, 7 N.C. App. 227, 172 S.E.2d 237 (1970), the court of appeals upheld a promise of a grantor made at the time of sale that he would not permit the sale or advertising of petroleum products on a four-acre tract of retained land for a period of twenty-five years.

325. *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 120 S.E.2d 739 (1961); *Scott v. Gillis*, 197 N.C. 223, 148 S.E. 315 (1929). See also *Hudson v. North Carolina Farm Bureau Mut. Ins. Co.*, 23 N.C. App. 501, 209 S.E.2d 416 (1974), cert. denied, 286 N.C. 414, 211 S.E.2d 802 (1975). In *Hudson* a retired employee was required to forfeit benefits of an employer-funded pension plan when he returned to work in competition with the employer who established the plan.

326. *Wilmar, Inc. v. Corsillo*, 24 N.C. App. 271, 273, 210 S.E.2d 427, 430 (1974), cert. denied, 286 N.C. 421, 211 S.E.2d 802 (1975).

327. *Forrest Paschal Mach. Co. v. Milholen*, 27 N.C. App. 678, 685, 220 S.E.2d 190, 196 (1975) (promotion from acting general manager to general manager found to be sufficient consideration); *James C. Greene Co. v. Arnold*, 266 N.C. 85, 145 S.E.2d 304 (1965) (employee became a manager, a change which the jury found to be sufficient consideration).

328. *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944). But see *Amdar, Inc. v. Satterwhite*, 37

covenants of employees not to compete were unenforceable because the court found a lack of consideration.<sup>329</sup>

In determining the validity of a covenant not to compete, the North Carolina courts apply the rule of reason.<sup>330</sup> An agreement found to be unreasonable is void.<sup>331</sup> Writing for the court in *Beam v. Rutledge*, Chief Justice Stacy stated:

The test to be applied in determining the reasonableness of a restrictive covenant is to consider whether the restraint affords only a fair protection to the interest of the party in whose favor it is given, and is not so broad as to interfere with the rights of the public.<sup>332</sup>

Whether an ancillary restraint is reasonable is a question of law.<sup>333</sup> The court will examine the circumstances of each case. Thus, the decided cases at most provide guidelines and should not be relied upon as precedents. In each case the court will examine the reasonableness of the time and the territorial aspects of the restraint.

#### A. Time

In earlier cases involving sales of a medical practice<sup>334</sup> and a milling business,<sup>335</sup> the court upheld promises not to compete for the lifetime of the covenantor. However, in *Jewel Box Stores Corp. v. Morrow*<sup>336</sup> Justice Sharp, writing for the court, carefully analyzed the facts, which involved the sale of a jewelry business, before deciding that a promise not to engage in a competing business for ten years in the city of Morganton or within ten miles thereof was reasonable. Today, it is probable that a ten-year restriction on the practice of medicine in a specified locality would be found to be against the public interest and thus unreasonable.

The time element is scrutinized more carefully in employment contracts than in contracts involving the sale of a business or professional practice or in

---

N.C. App. 410, 246 S.E.2d 165 (holding annual renewal of original employment contract containing covenant not to compete as adequate consideration for continuation of covenant), cert. denied, 295 N.C. 645, 248 S.E.2d 249 (1978).

329. *Worth Chem. Corp. v. Freeman*, 261 N.C. 780, 136 S.E.2d 118 (1964); *James C. Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E.2d 166 (1964); *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944); *Mastrom, Inc. v. Warren*, 18 N.C. App. 199, 196 S.E.2d 528 (1973); *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 185 S.E.2d 278 (1971), cert. denied, 280 N.C. 305, 186 S.E.2d 178 (1972).

330. For discussion of the rule, see note 216 *supra*.

331. 224 N.C. 154, 29 S.E.2d 543 (1944).

332. 217 N.C. 670, 673, 9 S.E.2d 476, 478 (1940) (partnership agreement among doctors). The court in considering the validity of a covenant not to compete in an employment contract in another case stated that it would enforce such a covenant if it is "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions[,] (5) fair to the parties, and (6) not against public policy." *Orkin Exterm. Co. v. Griffin*, 258 N.C. 179, 181, 128 S.E.2d 139, 140-41 (1962) (quoting *Asheville Assocs., Inc. v. Miller*, 255 N.C. 400, 121 S.E.2d 593 (1961)).

333. *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 663, 158 S.E.2d 840, 843 (1968).

334. *Hauser v. Harding*, 126 N.C. 295, 35 S.E. 586 (1900).

335. *Kramer v. Old*, 119 N.C. 1, 25 S.E. 813 (1896).

336. 272 N.C. 659, 158 S.E.2d 840 (1968).

partnership agreements. In *Welcome Wagon International, Inc. v. Pender*<sup>337</sup> the court in a four-to-three decision upheld a five-year restriction. The dissent considered three years or less to be ample time to protect the interest of the employer in that case.<sup>338</sup> Subsequently, in upholding a four-year restriction, the court commented that four years approached the maximum that it was inclined to approve in employment contracts.<sup>339</sup>

### B. Territory

A covenant may be invalidated either because the territory is not accurately defined<sup>340</sup> or because it is too broad in scope.<sup>341</sup> In an early case, the court permitted to pass unnoticed a covenant that the vendors "will not continue [the] business of milling in the vicinity of Elizabeth City."<sup>342</sup> Later, the court held that the "territory surrounding Yadkinville" was too indefinite; nevertheless, the restraint was enforced within the corporate limits.<sup>343</sup> More recently, the court stated that it "cannot by splitting up the territory make a new contract for the parties—it must stand or fall integrally."<sup>344</sup>

Suppose, however, that the territorial restriction is expressed in divisible terms. Will the court enforce as many units as are reasonable and "blue pencil"<sup>345</sup> the remainder? In *Welcome Wagon* the defendant had been employed as a "hostess" in "Fayetteville and the surrounding trade territory."<sup>346</sup> She resigned and began to compete with her former employer in Fayetteville. Suit was instituted by her former employer to enjoin the violation of the following provision in the employment contract:

Now, therefore, for and in consideration of this employment, and the compensation to be earned and paid to the Hostess hereunder, said Hostess covenants and agrees that she will not during the term

---

337. 255 N.C. 244, 120 S.E.2d 739 (1961).

338. *Id.* at 255, 120 S.E.2d at 747 (Bobbitt, J., dissenting).

339. *James C. Greene Co. v. Arnold*, 266 N.C. 85, 145 S.E.2d 304 (1965); see also *Forrest Paschal Mach. Co. v. Milholen*, 27 N.C. App. 678, 220 S.E.2d 190 (1975) (two-year restraint upheld); *Safety Equip. Sales & Serv., Inc. v. Wilhaus*, 22 N.C. App. 410, 206 S.E.2d 745 (1974) (two-year restraint upheld).

340. *Shute v. Heath*, 131 N.C. 281, 42 S.E. 704 (1902) (sale of lumber and cotton-ginning business).

341. *Maola Ice Cream Co. v. Maola Milk & Ice Cream Co.*, 238 N.C. 317, 77 S.E.2d 910 (1953) (division of territory in connection with partial assignment of a trademark); *Comfort Springs Corp. v. Burroughs*, 217 N.C. 658, 9 S.E.2d 473 (1940) (employment contract).

342. *Kramer v. Old*, 119 N.C. 1, 9, 25 S.E. 813, 814 (1896) (quoting the covenant). Later the court cast some doubt on the validity of such a provision. *Shute v. Heath*, 131 N.C. 281, 42 S.E. 704 (1902).

343. *Hauser v. Harding*, 126 N.C. 295, 299-300, 35 S.E. 586, 588 (1900) (sale of medical practice).

344. *Noe v. McDevitt*, 228 N.C. 242, 245, 45 S.E.2d 121, 123 (1947) (employment contract), noted in 26 N.C.L. Rev. 402 (1948); see also *Manpower of Guilford County, Inc. v. Hedgecock*, 42 N.C. App. 515, 257 S.E.2d 109 (1979), wherein a covenant not to compete in an employment contract was held unenforceable because of the "absence of clearly severable territorial divisions." *Id.* at 523, 257 S.E.2d at 115.

345. The "blue pencil" rule is applied, when restrictions on trade are stated as separate and distinct covenants, to strike an unreasonable restriction, leaving the remainder of the agreement enforceable. See 5 S. Williston, *Law of Contracts* § 1659 (1937).

346. 255 N.C. 244, 120 S.E.2d 739.

of this employment, and for a period of five whole years thereafter, engage directly or indirectly for herself or as agent, representative or employee of others, in the same kind or similar business as that engaged in by the Company (1) in Fayetteville, North Carolina, or (2) in any other city, town, borough, township, village or other place in the State of North Carolina, in which the Company is then engaged in rendering its said service, or (3) in any city, town, borough, township, village or other place in the United States in which the Company is then engaged in rendering its said service, or (4) in any city, town, borough, township or village in the United States in which the Company has been or has signified its intentions to be, engaged in rendering its said service.<sup>347</sup>

In a four-to-three decision the court applied the "blue pencil" rule and held that it was patent that the contract provision (1) was not unreasonable; (2) was for the chancellor to decide; and (3) and (4) were unreasonable.<sup>348</sup> Justice Bobbitt, writing for the dissent, considered the "blue pencil" rule unsound and argued that under it the agreement's legality depended on form rather than substance.<sup>349</sup> He stated further:

In testing the reasonableness of a covenant restricting competition after termination of employment, the impact upon the employee so restricted should receive due consideration. The covenant, in its entirety, hangs over him. He cannot foresee whether a court, at the end of protracted litigation, will enforce the covenant as written or only within a segment of the territory therein explicitly described.<sup>350</sup>

Since the *Welcome Wagon* case, the court of appeals in *Howard Schultz & Associates of the Southeast, Inc. v. Ingram*<sup>351</sup> has utilized the "blue pencil" technique to separate a reasonable territorial restriction in the covenant from another restriction which may have been overbroad.

Although the "blue pencil" rule has been applied in respect to territories, the supreme court has refused to apply it when the prohibited *activities* of the covenantor were stated in the alternative. Instead, the entire covenant was struck down as overinclusive.<sup>352</sup>

In applying the rule of reason, the court does not adhere to the old notion that a restraint throughout the "kingdom" is a general restraint and therefore void. In an early case the court upheld a state-wide restraint in connection with the sale of a newspaper.<sup>353</sup> In *Harwell Enterprises v. Heim*<sup>354</sup> a nationwide restraint was upheld in an employment contract. Justice Moore, writing for the court, said:

---

347. Id. at 246, 120 S.E.2d at 740.

348. Id. at 248, 120 S.E.2d at 742.

349. Id. at 255-56, 120 S.E.2d at 747 (Bobbitt, J., dissenting).

350. Id. at 256-57, 120 S.E.2d at 748 (Bobbitt, J., dissenting).

351. 38 N.C. App. 422, 248 S.E.2d 345 (1978).

352. *Henley Paper Co. v. McAllister*, 253 N.C. 529, 117 S.E.2d 431 (1960) ("manufacture, sale or distribution").

353. *Cowan v. Fairbrother*, 118 N.C. 406, 24 S.E. 212 (1896).

354. 276 N.C. 475, 173 S.E.2d 316 (1970), noted in 49 N.C.L. Rev. 393 (1971).

Because of the increased technical and scientific knowledge used in business today, the emphasis placed upon research and development, the new products and techniques constantly being developed, the nation-wide activities (even world-wide in some instances) of many business enterprises, and the resulting competition on a very broad front, the need for such restrictive covenants to protect the interests of the employer becomes increasingly important. If during the time of employment new products are developed and new activities are undertaken, reason would require their protection, as well as those in existence at the date of the contract, and to a company actually engaged in nation-wide activities, nation-wide protection would appear to be reasonable and proper.<sup>355</sup>

### C. Conclusion

The reasonableness of time and territory restrictions will be considered in relation to each other,<sup>356</sup> but a finding that they are reasonable is not conclusive of the validity of the covenant. Public policy also must be considered, and, as Chief Justice Clark pointed out in an early case, G.S. 75-4 does not authorize ancillary restraints of trade to be used as a device to establish a trust or otherwise to violate the antitrust laws.<sup>357</sup>

The Code of Professional Responsibility of the North Carolina Bar Association prohibits ancillary agreements that restrict the practice of law: "A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement except as a condition to payment of retirement benefits."<sup>358</sup>

## V. ENFORCEMENT AND REMEDIES

### A. Private Enforcement

#### (1) Statute of Limitations

The federal district courts in the State concluded that a one-year statute of limitations applied to private trade regulation suits, but the North Carolina Court of Appeals disagreed and applied a three-year period.<sup>359</sup> In 1979 the General Assembly enacted G.S. 75-16.2,<sup>360</sup> which tracks the federal law<sup>361</sup> by

355. 276 N.C. at 480-81, 173 S.E.2d at 320.

356. *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 665, 158 S.E.2d 840, 844 (1968).

357. *Moorehead Sea Food Co. v. Way*, 169 N.C. 679, 688-89, 86 S.E. 603, 607-08 (1915) (dissenting opinion). See Note, *Antitrust Significance of Covenants Not to Compete*, 64 Mich. L. Rev. 503, 505 n.14 (1966).

358. N.C. Code of Professional Responsibility DR 2-108(A) (1975). The same rule is applied by the American Bar Association. ABA Code of Professional Responsibility DR 2-108(A) (1975).

359. For a discussion of these cases, see *Survey of Developments in North Carolina Law, 1979—Commercial Law*, 58 N.C.L. Rev. 1290, 1303-05 (1980).

360. Law of Mar. 21, 1979, ch. 169, 1979 N.C. Sess. Laws, 1st Sess. 112.

361. 15 U.S.C. § 15(b) (1976).

adopting a four-year statute of limitations.<sup>362</sup> The statute of limitations is suspended upon the filing of a civil or criminal proceeding by the State. The effect of the suspension, in some cases, may be to extend the time for instituting a private suit beyond the four-year period.

## (2) Damages

G.S. 75-16,<sup>363</sup> enacted in 1913,<sup>364</sup> provides that any person who is injured because of violations of chapter 75 may sue for damages, and, if damages are assessed, the judgment *shall* be treble the amount fixed by the verdict.<sup>365</sup> G.S. 75-56 specifically excludes treble damages for violation of statutes regulating debt collection practices.<sup>366</sup> Presumably, all other substantive provisions in chapter 75 are subject to treble damages.<sup>367</sup>

In *Marshall v. Miller* the supreme court defined the nature of G.S. 75-16 as follows:

To begin with, it is an oversimplification to characterize G.S. 75-16 as punitive. The statute is partially punitive in nature in that it clearly serves as a deterrent to future violations. But it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties. It is, in effect, a hybrid.<sup>368</sup>

The court then cautioned that analogies to other rules of common law governing the imposition of punitive damages should not control. For instance, whereas common law actions grounded in tort or contract allow both actual and multiple damages, G.S. 75-16 provides that actual damages shall be trebled. The court of appeals has cautioned against the awarding of quadruple damages. This occurred when a jury was permitted first to assess damages for breach of contract and then to assess damages because the defendant failed to

---

362. G.S. 75-8, which makes continuous violations separate offenses, may serve to extend the time to more than four years from the date of the first violation. N.C. Gen. Stat. § 75-8 (1981). For an application of G.S. 75-8 under the prior statute of limitations, see *Thomas v. Petro-Wash, Inc.*, 429 F. Supp. 808 (M.D.N.C. 1977).

363. 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. N.C. Gen. Stat. § 75-16 (1981). Class actions may be brought in accordance with *id.* § 1A-1, Rule 23 (1969).

364. Law of Mar. 3, 1913, ch. 41, § 14, 1913 N.C. Pub. Laws 66.

365. In 1977, the requirement that damages be assessed by a jury was deleted. Law of June 23, 1977, ch. 707, § 1, 1977 N.C. Sess. Laws, 1st Sess. 852.

366. N.C. Gen. Stat. §§ 70-50 to -56 (1981). In 1979, the General Assembly enacted G.S. 66-49.42 to -49.47 to equalize treatment of debt collection agencies with the treatment of debt-collecting creditors under Chapter 75. Law of June 7, 1979, ch. 835, § 1, 1979 N.C. Sess. Laws, 1st Sess. 1108.

367. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975) (violation of G.S. 75-1.1); *Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937) (violation of G.S. 75-5(b)(3), (5)); *Lewis v. Frye*, 207 N.C. 852, 175 S.E. 717 (1934) (per curiam) (violation of G.S. 75-5(b)(2)).

368. 302 N.C. 539, 546, 276 S.E.2d 397, 402 (1981).

provide promised facilities.<sup>369</sup> In this case, the two wrongs were interrelated, thus damages were assessed twice for the same default. The trial judge decided that the failure to provide the promised facilities under the facts of the case violated G.S. 75-1.1. The judge then trebled those damages and added the single damages for breach of contract. This was error because it resulted in quadruple damages.<sup>370</sup>

Finally, if a plaintiff chooses to rescind a sales contract and to recover the sales price, he is precluded from recovering treble damages.<sup>371</sup>

### (3) Injunction

Chapter 75 does not specifically authorize injunctions in suits instituted by private parties except for ones against lenders who require a borrower to deal with a particular insurer.<sup>372</sup> In 1936 the supreme court ruled out private injunctions in the enforcement of G.S. 75-1 and 75-5(b) on the ground that "there is no equitable jurisdiction to enjoin the commission of a crime."<sup>373</sup> Twelve years later in *Burke Transit Co. v. Queen City Coach Co.*,<sup>374</sup> the court abandoned its earlier sweeping prohibition and sanctioned private injunctive relief in G.S. 75-1 and 75-5(b).

What about injunctive relief in private suits to enforce G.S. 75-1.1? Such relief should be possible. Traditionally, injunctive relief has been available in cases involving unfair competition at common law. Since the enactment of G.S. 75-1.1, the court of appeals has approved an injunction in such a case.<sup>375</sup> The enactment of G.S. 75-1.1 was designed to strengthen private enforcement. Thus, the equitable powers of the courts already existing at common law should not be diminished because the General Assembly failed to specify that G.S. 75-1.1 could be enforced by an injunction.

### (4) Attorney's fees

G.S. 75-16.1, enacted in 1973,<sup>376</sup> is limited to violations of G.S. 75-1.1. Before the presiding judge can allow reasonable attorney's fees to the claimant, there must be findings that the defendant "willfully" engaged in the act or practice and that "there was an unwarranted refusal by such party to pay the

---

369. *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97 (1980).

370. *Id.* at 542, 268 S.E.2d at 103. This part of the court of appeals' opinion was not reviewed by the supreme court.

371. *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976). The court relied on *Bruton v. Bland*, 260 N.C. 429, 132 S.E.2d 910 (1963) (election of remedies).

372. N.C. Gen. Stat. § 75-17 (1981) (enacted in Law of June 25, 1969, ch. 1032, § 1, 1969 N.C. Sess. Laws 1185).

373. *Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R.*, 210 N.C. 36, 39, 185 S.E. 479, 481 (1936).

374. 228 N.C. 768, 47 S.E.2d 297 (1948).

375. *United Artists Records, Inc. v. Eastern Tape Corp.*, 19 N.C. App. 207, 198 S.E.2d 452, cert. denied sub nom. *CBS v. Eastern Tape Corp.*, 284 N.C. 252, 200 S.E.2d 653 (1973).

376. Law of May 18, 1973, ch. 614, § 1, 1973 N.C. Sess. Laws, 1st Sess. 919.



claim which constitutes the basis of such suit.”<sup>377</sup> There are, however, some situations in which the legislature has declared specifically that a plaintiff can recover attorneys’ fees without proving that the defendant acted “willfully” and refused to pay the original claim.<sup>378</sup>

In order for the plaintiff to be the “prevailing” party within the meaning of G.S. 75-16.1, he not only must prove a violation of G.S. 75-1.1 by the defendant, but also must show that he has suffered actual injury as a result of the violation.<sup>379</sup> G.S. 75-16.1 further provides that an unsuccessful plaintiff may be charged with defendant’s attorneys’ fees should the court find that “[t]he party instituting the action knew, or should have known, the act was frivolous and malicious.”<sup>380</sup> The supreme court observed that “this is an important counterweight designed to inhibit the bringing of spurious lawsuits which the liberal damage provisions of G.S. 75-16 might otherwise encourage.”<sup>381</sup>

The standard provision for attorney’s fees in North Carolina is severely limited when compared to federal law. A private plaintiff who prevails in a suit for an injunction<sup>382</sup> or for treble damages<sup>383</sup> under the federal antitrust laws *must* be awarded reasonable attorney’s fees. Attorney’s fees *may* be awarded to a prevailing defendant in a Sherman Act case in which a state attorney general has brought a *parens patriae* antitrust suit in “bad faith, vexatiously, wantonly or for oppressive reasons.”<sup>384</sup>

## *B. Public enforcement*

### (1) Civil

#### *(a) Statute of limitations*

G.S. 75-16.2, which provides a four-year statute of limitations in civil suits, applies to public enforcement. However, an exception was made in 1981 with passage of a statute that provides that in conspiracies against a government agency prohibited by G.S. 75-1 or 75-2 (such as bid rigging), the cause of action shall accrue at the time of discovery of the conspiracy by the government agency that entered into the contract, and the action shall be brought within *three* years of the date of accrual of the cause of action.<sup>385</sup>

---

377. *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 106, 245 S.E.2d 801, 807-08 (1978) (judge did not abuse his discretion in denying attorney’s fees).

378. N.C. Gen. Stat. § 66-111(a) (1981) (loan brokers); id. § 66-125(a) (prepaid entertainment contracts); Law of June 18, 1981, ch. 610, [1981] 7 N.C. Adv. Legis. Serv. 12 (to be codified at N.C. Gen. Stat. § 66-139) (rental referral); Law of June 17, 1981, ch. 594, [1981] 6 N.C. Adv. Legis. Serv. 299 (to be codified at N.C. Gen. Stat. § 66-131) (discount buying).

379. *Mayton v. Hiatt’s Used Cars, Inc.*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864 (1980).

380. N.C. Gen. Stat. § 75-16.1 (1981), quoted in *Marshall v. Miller*, 302 N.C. at 550, 276 S.E.2d at 404.

381. 302 N.C. at 550, 276 S.E.2d at 404.

382. Clayton Act § 16, 15 U.S.C. § 26 (1976).

383. Id. § 4, 15 U.S.C. § 15.

384. Id. § 4C(d)(2), 15 U.S.C. § 15c.

385. Law of July 2, 1981, ch. 764, [1981] 7 N.C. Adv. Legis. Serv. 545 (to be codified at N.C. Gen. Stat. § 133-25).

(b) *Damages*

G.S. 133-25,<sup>386</sup> enacted in 1981, was triggered by the discovery of extensive bid rigging in paving contracts with the state.<sup>387</sup> That section authorizes any governmental agency entering into a contract that is or has been the subject of a conspiracy prohibited by G.S. 75-1 or 75-2 to sue for damages. At the election of the agency, the measure of damages shall be either the actual damages or ten percent of the contract price, damages to be trebled as provided in G.S. 75-16.

(c) *Injunction*

G.S. 75-14 authorizes the attorney general to prosecute civil actions in the name of the state and to obtain mandatory orders including, but not limited to, permanent or temporary injunctions and temporary restraining orders.<sup>388</sup>

(d) *Restitution*

G.S. 75-15.1 provides that in any suit instituted by the attorney general to enjoin a practice alleged to violate G.S. 75-1.1, the presiding judge may, upon a final determination of the cause, order the restoration of any moneys or property and the cancellation of any contract obtained by any defendant as a result of such violation. In *State ex rel. Edmisten v. Zim Chemical Co.* the court of appeals held that misbranding of antifreeze is a deceptive practice as a matter of law.<sup>389</sup> The court approved restitution not only to the direct purchasers from the defendant but also to four subsequent buyers (indirect purchasers) who were stuck with worthless antifreeze.<sup>390</sup> The application of the indirect purchaser doctrine may be of considerable importance, especially in suits by the attorney general on behalf of consumers.

(e) *Parens patriae*

In 1976 Congress authorized state attorneys general to sue on behalf of consumers for violations of the Sherman Act and to recover treble damages to be allocated to consumer-citizen beneficiaries.<sup>391</sup> The following year, the Supreme Court of the United States decided in *Illinois Brick Co. v. Illinois* to deny damages to indirect purchasers in most situations.<sup>392</sup> Consumers often are indirect purchasers, thus Sherman Act "parens patriae" suits will be limited until the indirect purchaser doctrine is discarded either by Congress or by the Supreme Court. In the meantime, the North Carolina Attorney General

---

386. See *id.*

387. See note 152 *supra*.

388. N.C. Gen. Stat. § 75-14 (1981).

389. 45 N.C. App. 604, 608, 263 S.E.2d 849, 852 (1980).

390. *Id.* at 608-09, 263 S.E.2d at 852.

391. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, tit. III, 90 Stat. 1394 (current version at 15 U.S.C. §§ 15c-15h (1976)).

392. 431 U.S. 720 (1977).

may secure some relief to indirect-purchaser consumers by requesting the courts to invoke the restitution provisions in G.S. 75-15.1.

(f) *Civil penalty*

G.S. 75-15.2, enacted in 1977,<sup>393</sup> provides that in any suit instituted by the attorney general in which the defendant is found to have violated G.S. 75-1.1 and in which the acts or practices that constituted the violation were, when committed, "specifically prohibited by a court order or knowingly violative of a statute," the court may, in its discretion, impose a civil penalty against the defendant of up to five thousand dollars for each violation.<sup>394</sup> This section is concerned with the harm against the public welfare, whereas G.S. 75-16 provides a treble damage remedy for individual grievances.<sup>395</sup>

(g) *Res judicata*

In *Nash County Board of Education v. Biltmore Co.*,<sup>396</sup> a school board sued for damages under the Sherman Act, alleging that it was the victim of a price-fixing conspiracy for milk purchased from the defendants. The defendants pleaded *res judicata* because the Attorney General of North Carolina had instituted suit against the defendants under the state antitrust statute in the state superior court for an injunction and treble damages for the same alleged price fixing. The state suit had resulted in injunctive relief in a consent judgment that purported to represent "all matters in controversy arising out of this action."<sup>397</sup> The decree, however, did not provide for any monetary damages. The United States Court of Appeals for the Fourth Circuit stated, "Having brought the suit originally in the state court through its privy [the Attorney General] the plaintiff cannot, after judgment in the state court, seek another 'bite at the cherry' by filing a like action in the federal court."<sup>398</sup> The federal court of appeals concluded that there was sufficient identity of causes of action between the state and federal actions to support a finding of *res judicata*.<sup>399</sup>

(2) Criminal penalties

G.S. 75-26 specifies that a violation of G.S. 75-1.1 is not a criminal offense. Presumably then, G.S. 75-29, which deals with the term "wholesale" in advertising, is not a criminal statute inasmuch as it is declared to be an unfair trade practice under G.S. 75-1.1. Also, G.S. 75-50 through 75-56, which regulate debt-collection practices, may not be criminal in nature because the General Assembly declared that these sections "shall exclusively constitute the

393. Law of June 27, 1977, ch. 747, § 3, 1977 N.C. Sess. Laws, 1st Sess. 984.

394. N.C. Gen. Stat. § 75-15.2 (1981).

395. *Holly v. Coggin Pontiac*, 43 N.C. App. 229, 238, 259 S.E.2d 1, 7, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

396. 464 F. Supp. 1027 (E.D.N.C. 1980), aff'd, 640 F.2d 484 (4th Cir. 1981).

397. *Id.* at 1028.

398. *Id.* at 493.

399. *Id.*

unfair and deceptive acts or practices proscribed by G.S. 75-1.1.”<sup>400</sup> Further evidence of the legislative intent not to make debt collection practices criminal are the less severe civil penalties for violation of the debt collection practices than for violation of G.S. 75-1.1. The remainder of the sections in Chapter 75 appear to be subject to criminal penalties. Some are made criminal by virtue of the “catch all” provision of G.S. 75-6 that makes a violation of Chapter 75 other than G.S. 75-1.1 a misdemeanor. Several sections are specifically designated as criminal in nature, the most notable being G.S. 75-1 and 75-2.

In 1981 in response to widespread bid rigging by paving contractors,<sup>401</sup> the General Assembly provided for harsh penalties for violations of G.S. 75-1 and 75-2. The penalty for violating G.S. 75-1 was changed from a misdemeanor to a Class H felony.<sup>402</sup> Hence, a person convicted under this section, or G.S. 75-2, may receive a sentence of up to ten years in prison or a fine of up to \$5,000, or both.<sup>403</sup> Should the state or any government agency be the victim of a conspiracy in violation of G.S. 75-1 or 75-2 a court is authorized to impose additional penalties, including a fine of up to \$100,000 for an individual and up to \$1,000,000 for a corporation.<sup>404</sup>

The other criminal sections in Chapter 75, including G.S. 75-5(b) with its seven subsections, were not changed and are punishable as misdemeanors.<sup>405</sup> G.S. 75-8 provides that if a violation is continuous, each week that the violation continues is a separate offense.

## VI. CONCLUSION

Since 1889 North Carolina has accumulated a complicated patchwork of antitrust and consumer protection law. This Article has undertaken to make that law easier to comprehend. Nevertheless, it is evident that a need exists for legislative clarification in many areas of this body of law. Illustrative of this need is the matter of criminal penalties. In 1981 the General Assembly responded to widespread bid rigging against the state, which had been discovered by federal officials, by increasing the criminal penalties for restraints of trade under G.S. 75-1 and 75-2. A violation of these sections henceforth may be punished as a felony rather than a misdemeanor. Conceding that bid rigging is a highly anticompetitive restraint of trade and deserves harsh treatment, it does not follow that all violations of G.S. 75-1 or 75-2 should be treated as felonies or even as criminal offenses. The law on restraints of trade might more effectively be enforced if the General Assembly specified the particular restraints of trade that it deems to be criminal in nature. Clearly, hori-

---

400. N.C. Gen. Stat. § 75-56 (1981).

401. See note 152 *supra*.

402. Law of July 2, 1981, ch. 764, [1981] 7 N.C. Adv. Legis. Serv. 545 (amending N.C. Gen. Stat. § 75-1) (to be codified at N.C. Gen. Stat. § 133-30). A Class H felony is a felony “punishable by imprisonment up to 10 years, or a fine or both . . .” N.C. Gen. Stat. § 14-1.1(a)(8) (1981).

403. Law of July 2, 1981, ch. 764, [1981] 7 N.C. Adv. Legis. Serv. 545 (amending N.C. Gen. Stat. § 75-1) (to be codified at N.C. Gen. Stat. § 133-30).

404. *Id.* (to be codified at N.C. Gen. Stat. § 133-22).

405. N.C. Gen. Stat. § 75-6 (1981).

zontal price fixing and horizontal division of territories should be designated as felony offenses. On the other hand, unreasonable vertical restraints, including resale price maintenance, should be examined to determine whether they should be felonies, misdemeanors or subject only to civil penalties. Further, a study should be made to determine the appropriate manner to deal with tying clauses. In 1969 the General Assembly was concerned with lenders who required borrowers to deal with a particular insurer. Special legislation was enacted that authorizes fines up to \$2,000. But what about other tying clauses? Such clauses are possible violations of G.S. 75-1 and thus Class H felonies. Is there any justification for this disparity? Also, there is need for legislation dealing with commercial boycotts. Should they be illegal? If so, should criminal penalties apply?

Although G.S. 75-1.1 is not a criminal statute, there are a growing number of special statutes dealing with consumer protection. Some of these special statutes include criminal penalties. Other special statutes in Chapter 75 do not include criminal penalties but, nevertheless, may be criminal by virtue of the "catch all" criminal provision in G.S. 75-6. This "catch all" should be modified to apply only to G.S. 75-5(b). The General Assembly should make clear which consumer protection statutes are criminal.

Most antitrust and consumer protection provisions are subject to mandatory treble damages. Consideration should be given to providing discretion to judges to award or not to award treble damages in a limited area: when there is no specific legislation or prior judicial decision to give notice to the defendant that his conduct is either an illegal restraint of trade or an unfair or deceptive act or practice, a trial judge should be authorized to waive the mandatory treble damage provision.

## APPENDIX—CHAPTER 75 OF THE NORTH CAROLINA GENERAL STATUTES

### Monopolies, Trusts and Consumer Protection.

#### ARTICLE 1.

##### *General Provisions.*

#### **§ 75-1. Combinations in restraint of trade illegal.**

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy shall be guilty of a Class H felony.

#### **§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.**

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(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.

#### **§ 75-2. Any restraint in violation of common law included.**

Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of G.S. 75-1.

§ 75-3: Repealed by Session Laws 1961, c. 1153.

**§ 75-4. Contracts to be in writing.**

No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the State of North Carolina, or at any point in the State of North Carolina, which contract is now illegal, or which contract is made illegal by any other section of this Chapter.

**§ 75-5. Particular acts prohibited.**

(a) As used in this section:

- (1) "Person" includes any person, partnership, association or corporation;
- (2) "Goods" include goods, wares, merchandise, articles or other things of value.

(b) In addition to the other acts declared unlawful by this Chapter, it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:

- (1) To agree or conspire with any other person to put down or keep down the price of any goods produced in this State by the labor of others which goods the person intends, plans or desires to buy.
- (2) To sell any goods in this State upon condition that the purchaser thereof shall not deal in the goods of a competitor or rival in the business of the person making such sales.
- (3) to willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed.
- (4) While engaged in buying or selling any goods within the State, through himself or together with or through any allied, subsidiary or dependent person, to injure or destroy or undertake to injure or destroy the business of any rival or competitor, by unreasonably raising the price of any goods bought or by unreasonably lowering the price of any goods sold with the purpose of increasing the profit on the business when such rival or competitor is driven out of business, or his business is injured.
- (5) While engaged in dealing in goods within this State, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another

place, when there is not good and sufficient reason on account of transportation or the expense of doing business for charging less at the one place than at the other, or to give away such goods, with a view to injuring the business of another.

- (6) While engaged in buying or selling any goods in this State, to have any agreement or understanding, express or implied, with any other person not to buy or sell such goods within certain territorial limits within the State, with the intention of preventing competition in selling or to fix the price or prevent competition in buying such goods within these limits.
- (7) Except as may be otherwise provided by Article 10 of Chapter 66, entitled "Fair Trade," while engaged in buying or selling any goods in this State to make, enter into, execute or carry out any contract, obligation or agreement of any kind by which the parties thereto or any two or more of them bind themselves not to sell or dispose of any goods or any article of trade, use or consumption, below a common standard figure, or fixed value, or establish or settle the price of such goods between them, or between themselves and others, at a fixed or graduated figure, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale of such goods.

(c) Nothing herein shall be construed to make it illegal for an agent to represent more than one principal, but this provision shall not be deemed to authorize two or more principals to employ a common agent for the purpose of suppressing competition or preventing the lowering of prices.

(d) This section does not make it illegal for a person to sell his business and goodwill to a competitor, and agree in writing not to enter business in competition with the purchaser in a limited territory if such agreement does not violate the principles of the common law against trusts and does not otherwise violate the provisions of this Chapter.

#### **§ 75-6. Violation a misdemeanor; punishment.**

Any corporation, either as agent or principal, violating any of the provisions of G.S. 75-5 shall be guilty of a misdemeanor, and such corporation shall upon conviction be fined not less than one thousand dollars (\$1,000) for each and every offense, and any person, whether acting for himself or as officer of any corporation or as agent of any corporation or persons violating any of the provisions of this Chapter, with the exception of G.S. 75-1.1 (the violation of which does not constitute a crime), shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

#### **§ 75-7. Persons encouraging violation guilty.**

Any person, being either within or without the State, who encourages or willfully allows or permits any agent or associates in business in this State, to



violate any of the provisions of this Chapter, with the exception of G.S. 75-1.1 (the violation of which does not constitute a crime), shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in G.S. 75-6.

**§ 75-8. Continuous violations separate offenses.**

Where the things prohibited in this Chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense.

**§ 75-9. Duty of Attorney General to investigate.**

The Attorney General of the State of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations or persons doing business in this State, which are or may be embraced within the meaning of the statutes of this State defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations or persons in North Carolina doing business in violation of law; and all other corporations of every character engaged in this State in the business of transporting property or passengers, or transmitting messages, and all other public service corporations of any kind or nature whatever which are doing business in the State for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the Utilities Commission or Commission of Banks [Commissioner of Banks] is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted.

**§ 75-10. Power to compel examination.**

In performing the duty required in G.S. 75-9, the Attorney General shall have power, at any and all times, to require the officers, agents or employees of any such corporation or business, and all other persons having knowledge with respect to the matters and affairs of such corporations or businesses, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such corporations or businesses, or which are in any way connected with the business thereof; and the Attorney General is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any justice or judge of the appellate or superior court divisions, after five days' notice of such application, for an order on any such person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge.

**§ 75-11. Person examined exempt from prosecution.**

No natural person examined, as provided in G.S. 75-10, shall be subject to indictment, criminal prosecution, criminal punishment or criminal penalty by reason of or on account of anything disclosed by him upon examination, and full immunity from criminal prosecution and criminal punishment by reason of or on account of anything so disclosed is hereby extended to all natural persons so examined. The immunity herein granted shall not apply to civil actions instituted pursuant to this Chapter.

**§ 75-12. Refusal to furnish information; false swearing.**

Any corporation or person unlawfully refusing or willfully neglecting to furnish the information required by this Chapter, when it is demanded as herein provided, shall be guilty of a misdemeanor and fined not less than one thousand dollars (\$1,000): Provided, that if any corporation or person shall in writing notify the Attorney General that it objects to the time or place designated by him for the examination or inspection provided for in this Chapter, it shall be his duty to apply to a justice or judge of the appellate or superior court division, who shall fix an appropriate time and place for such examination or inspection, and such corporation or person shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this Chapter. False swearing by any person examined under the provisions of this Chapter shall constitute perjury, and the person guilty of it shall be punishable as in other cases of perjury.

**§ 75-13. Criminal prosecution; district attorneys to assist; expenses.**

The Attorney General in carrying out the provisions of this Chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this Chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this Chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of the district attorneys in the State, who shall, upon being required to do so by the Attorney General, send bills of indictment and assist him in the performance of the duties of his office.

**§ 75-14. Action to obtain mandatory order.**

If it shall become necessary to do so, the Attorney General may prosecute civil actions in the name of the State on relation of the Attorney General to obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders, to carry out the provisions of this Chapter, and the venue shall be in any county as selected by the Attorney General.

**§ 75-15. Actions prosecuted by Attorney General.**

It shall be the duty of the Attorney General, upon his ascertaining that the laws have been violated by any trust or public service corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the State, or any officer or department thereof, as provided by law, or in the name of the State on relation of the Attorney General, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it.

**§ 75-15.1. Restoration of property and cancellation of contract.**

In any suit instituted by the Attorney General to enjoin a practice alleged to violate G.S. 75-1.1, the presiding judge may, upon a final determination of the cause, order the restoration of any moneys or property and the cancellation of any contract obtained by any defendant as a result of such violation.

**§ 75-15.2. Civil penalty.**

In any suit instituted by the Attorney General, in which the defendant is found to have violated G.S. 75-1.1 and the acts or practices which constituted the violation were, when committed, specifically prohibited by a court order or knowingly violative of a statute, the court may, in its discretion, impose a civil penalty against the defendant of up to five thousand dollars (\$5,000) for each violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant. Any penalty so assessed shall be paid to the General Fund of the State of North Carolina.

**§ 75-16.1. Attorney fee.**

In any suit instituted by a person who alleges that the defendant violated G.S. 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, upon a finding by the presiding judge that:

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to pay the claim which constitutes the basis of such suit; or
- (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

**§ 75-16.2. Limitation of actions.**

Any civil action brought under this Chapter to enforce the provisions

thereof shall be barred unless commenced within four years after the cause of action accrues.

When any civil or criminal proceeding shall be commenced by the Attorney General or by any of the district attorneys of the State to prevent, restrain or punish a violation of Chapter 75, the running of the period of limitation with respect to every private right of action arising under Chapter 75 and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; provided that when the running of the period of limitation with respect to a cause of action arising under Chapter 75 shall be suspended hereunder, any action to enforce such cause of action shall be barred unless commenced either within the period of suspension or within four years after the cause of action accrued, whichever is later.

**§ 75-17. Lender may not require borrower to deal with particular insurer.**

No person, firm, or corporation engaged in lending money on the security of real or personal property, and no trustee, director, officer, agent, employee, affiliate, or associate, of any such person, firm, or corporation, shall either directly or indirectly require or impose as a condition precedent

- (1) To financing the purchase of such property, or
- (2) to lending money upon the security of a mortgage, deed of trust, or other security instrument, or
- (3) For the renewal or extension of any such loan, mortgage, or deed of trust, or
- (4) For the performance of any other act in connection therewith,

that such person, firm or corporation

- a. For whom such purchase is to be financed, or
- b. To whom the money is to be loaned, or
- c. For whom such extension, renewal, or other act is to be granted, negotiate, procure, or otherwise obtain any policy of insurance or renewal, or extension thereof, covering such property, or a security interest therein, by or through a particular insurance company, agent, broker, or other person so specified or otherwise designated in any manner by the lenders, or their agents or employees or affiliated or related companies.

**§ 75-18. Lender may require nondiscriminatory approval of insurer.**

Although the lender and other persons enumerated in G.S. 75-17 may not specify or designate as a condition precedent a particular insurance company or agent, those persons, firms, or corporations engaged in lending money may approve the insurer selected by the borrower on a reasonable, nondiscriminatory basis, related to the solvency of the company and the type and provisions of policy coverage.

**§ 75-19. Violators subject to fine and injunction.**

The superior court, on complaint by any person that G.S. 75-17 or 75-18 is being violated, may issue an injunction against such violation and may fine all persons, firms, corporations, and officers, directors, trustees, agents, employees, or affiliates of such up to two thousand dollars (\$2,000) per person for such violation. In event of a disregard of such injunction or other court order, the superior court shall hold such parties in contempt and prescribe such further penalties as the court in its discretion shall so determine.

**§§ 75-20 to 75-26:** Reserved for future codification purposes.

**§ 75-27. Unsolicited merchandise.**

Unless otherwise agreed, where unsolicited goods are delivered to a person, he has a right to refuse to accept delivery of the goods and is not bound to return such goods to the sender. If such unsolicited goods are addressed to and intended for the recipient, they shall be deemed a gift to the recipient, who may use them or dispose of them in any manner without any obligation to the sender.

**§ 75-28. Unauthorized disclosure of tax information; violation a misdemeanor.**

Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for any person, firm or corporation employed or engaged to prepare, or who or which prepares or undertakes to prepare, for any other person or taxpayer any tax form, report or return, to disclose, divulge or make known in any manner or use for any purpose or in any manner other than in the preparation of such form, report or return, without the express consent of the taxpayer or person for whom the form or return is prepared, the name or address of the taxpayer or such other person, the amount of income, income tax or other taxes, or any other information shown on or included in such form, report or return, or any information which may be or may have been furnished by the taxpayer or such other person to the preparer of such form, report or return or to the person, firm or corporation so employed or engaged.

Nothing in this section shall be construed to amend or modify the authority specified in G.S. 105-276(6) or any statute enacted in substitution therefor.

Nothing in this section shall be construed to prohibit the inspection of such forms, reports or returns required under Subchapter I of Chapter 105 of the General Statutes in accordance with the authority provided in G.S. 105-259, or the examination of any person, books, papers, records or other data in accordance with the authority provided in G.S. 105-258.

Any person, firm or corporation, or any officer, agent, clerk, employee, or former officer or employee, of any firm or corporation engaged or formerly engaged in the preparation of tax forms, reports or returns for others, whether

acting for himself or as agent for such corporation, who or which shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court.

**§ 75-29. Unfair and deceptive trade names; use of term "wholesale" in advertising, etc.**

(a) No person, firm or corporation shall advertise the sale of its merchandise using the term "wholesale" with regard to its sale prices, except as such word may appear in the company or firm name, unless such advertised sale or sales is, or are, to a customer or customers having a certificate of resale issued pursuant to G.S. 105-164.28 and recorded as required by G.S. 105-164.25 or unless the wholesale price is established by an independent agency not engaged in the manufacture, distribution or sale of such merchandise.

No person, firm or corporation shall utilize in any commercial transaction a company or firm name which contains the word "wholesale" unless such person, firm or corporation is engaged principally in sales at wholesale as defined in G.S. 105-164.3. For the purposes of determining whether sales are made principally at wholesale or retail, all sales to employees of any such person, firm or corporation, all sales to organizations subject to refunds pursuant to G.S. 105-164.14, and all exempt sales pursuant to G.S. 105-164.13 shall be considered sales at wholesale. Sales of merchandise for delivery by the seller to the purchaser at a location other than the seller's place of business shall be considered sales at wholesale for the purposes of this section.

(b) The violation of any provision of this section shall be considered an unfair trade practice, as prohibited by G.S. 75-1.1.

(c) This section shall not apply to the sales of farm products, fertilizers, insecticides, pesticides or petroleum.

**§ 75-30. Automatic dialing and recorded message players; restriction on use of.**

(a) No person may make an unsolicited telephone call by the use of an automatic dialing and recorded message player unless:

- (1) Such calling person is a charitable, civic, political or opinion polling organization or a radio station, television station or broadcast rating service conducting a public opinion poll required by law; and
- (2) Such calling person clearly identifies the nature of the call and the name and address of the calling organization.

(b) As an exception to subsection (a) an unsolicited telephone call may be made by the use of an automatic dialing and recorded message player if the recorded message is preceded by an announcement made by a human operator who:

- (1) States the nature and length in minutes of the recorded message; and

- (2) Identifies the individual, business, group, or organization calling; and
- (3) Asks the called party whether he is willing to listen to the recorded message; and
- (4) Disconnects from the called party's line if the called party is unwilling to listen to the recorded message.

(c) For the purpose of this section an automatic dialing and recorded message player shall be defined as any automatic equipment which incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called and the capability, working alone or in conjunction with other equipment, of disseminating prerecorded message to the telephone number called.

(d) For the purpose of this section, a telephone call shall be deemed to be unsolicited unless pursuant to a prior agreement between the parties the person called has agreed to accept such calls from the person calling.

(e) Violation of this section shall be a misdemeanor, punishable by a fine of one hundred dollars (\$100.00), for each occurrence.

#### **§ 75-31. Work-at-home solicitations.**

No person, firm, association, or corporation shall advertise, represent, or imply that any person can earn money by stuffing envelopes, addressing envelopes, mailing circulars, clipping newspaper and magazine articles, or performing similar work, unless the person, firm, association or corporation making the advertisement or representation:

- (1) Actually pays a wage, salary, set fee, or commission to others for performing the represented tasks; and
- (2) At no time requires the person who will perform the represented tasks to purchase from or make a deposit to the solicitor on any instructional booklets, brochures, kits, programs or similar information materials, mailing lists, directories, memberships in cooperative associations, or other items or services.

#### **§ 75-32. Representation of winning a prize.**

No person, firm or corporation engaged in commerce shall, in connection with the sale or lease or solicitation for the sale or lease of any goods, property, or service, represent that any other person, firm or corporation has won anything of value or is the winner of any contest, unless all of the following conditions are met:

- (1) The recipient of the prize must have been selected by a method in which no more than ten percent (10%) of the names considered are selected as winners of any prize;
- (2) The recipient of the prize must be given the prize without any obligation; and

- (3) The prize must be delivered to the recipient at no expense to him, within 10 days of the representation.

The use of any language that has a tendency to lead a reasonable person to believe he has won a contest or anything of value, including but not limited to "congratulations," and "you are entitled to receive," shall be considered a representation of the type governed by this section.

#### § 75-33. Representation of eligibility to win a prize.

No person, firm or corporation engaged in commerce shall in connection with the sale or lease or solicitation for sale or lease of any goods, property or service represent that any other person, firm or corporation may win or is eligible to win anything of value, unless all of the following information is clearly and prominently conveyed at the time of the representation:

- (1) The actual retail value of each prize (the price at which substantial sales of the item which constitutes the prize were made in the area within the last 90 days, or if no substantial sales were made, the actual cost of the prize to the conductor of the contest);
- (2) The actual number of each prize to be awarded;
- (3) The odds of winning each prize.

#### § 75-34. Representation of being specially selected.

No person, firm or corporation engaged in commerce shall represent that any other person, firm or corporation has been specially selected in connection with the sale or lease or solicitation for sale or lease of any goods, property, or service, unless all of the following conditions are met:

- (1) The selection process is designed to reach a particular type or particular types of person, firm or corporation;
- (2) The selection process uses a source other than telephone directories, city directories, tax listings, voter registration records, purchased mailing lists, or similar common sources of names;
- (3) No more than ten percent (10%) of those considered are selected.

The use of any language that has a tendency to lead a reasonable person to believe he has been specially selected, including but not limited to "carefully selected" and "you have been chosen," shall be considered a representation of the type governed by this selection [section].

#### § 75-35. Simulation of checks and invoices.

No person engaged in commerce shall in any manner issue any writing which simulates or resembles: (i) a negotiable instrument; or (ii) an invoice, unless the intended recipient has actually contracted for goods, property, or services for which the issuer seeks proper payment.



§§ 75-36 to 75-49: Reserved for future codification purposes

## ARTICLE 2.

### *Prohibited Acts by Debt Collectors.*

#### § 75-50. Definitions.

The following words and terms as used in this Article shall be construed as follows:

- (1) "Consumer" means any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes.
- (2) "Debt" means any obligation owed or due or alleged to be owed or due from a consumer.
- (3) "Debt collector" means any person engaging, directly or indirectly, in debt collection from a consumer except those persons subject to the provisions of Article 9, Chapter 66 of the General Statutes.

#### § 75-51. Threats and coercion.

No debt collector shall collect or attempt to collect any debt alleged to be due and owing from a consumer by means of any unfair threat, coercion, or attempt to coerce. Such unfair acts include, but are not limited to, the following:

- (1) Using or threatening to use violence or any illegal means to cause harm to the person, reputation or property of any person.
- (2) Falsely accusing or threatening to accuse any person of fraud or any crime, or of any conduct that would tend to cause disgrace, contempt or ridicule.
- (3) Making or threatening to make false accusations to another person, including any credit reporting agency, that a consumer has not paid, or has willfully refused to pay a just debt.
- (4) Threatening to sell or assign, or to refer to another for collection, the debt of the consumer with an attending representation that the result of such sale, assignment or reference would be that the consumer would lose any defense to the debt or would be subjected to harsh, vindictive, or abusive collection attempts.
- (5) Representing that nonpayment of an alleged debt may result in the arrest of any person.
- (6) Representing that nonpayment of an alleged debt may result in the seizure, garnishment, attachment, or sale of any property or

wages unless such action is in fact contemplated by the debt collector and permitted by law.

- (7) Threatening to take any action not in fact taken in the usual course of business, unless it can be shown that such threatened action was actually intended to be taken in the particular case in which the threat was made.
- (8) Threatening to take any action not permitted by law.

#### § 75-52. Harassment.

No debt collector shall use any conduct, the natural consequence of which is to oppress, harass, or abuse any person in connection with the attempt to collect any debt. Such unfair acts include, but are not limited to, the following:

- (1) Using profane or obscene language, or language that would ordinarily abuse the typical hearer or reader.
- (2) Placing collect telephone calls or sending collect telegrams unless the caller fully identifies himself and the company he represents.
- (3) Causing a telephone to ring or engaging any person in telephone conversation with such frequency as to be unreasonable or to constitute a harassment to the person under the circumstances or at times known to be times other than normal waking hours of the person.
- (4) Placing telephone calls or attempting to communicate with any person, contrary to his instructions, at his place of employment, unless the debt collector does not have a telephone number where the consumer can be reached during the consumer's non-working hours.

#### § 75-53. Unreasonable publication.

No debt collector shall unreasonably publicize information regarding a consumer's debt. Such unreasonable publication includes, but is not limited to, the following:

- (1) Any communication with any person other than the debtor or his attorney, except:
  - a. With the written permission of the debtor or his attorney given after default;
  - b. To persons employed by the debt collector, to a credit reporting agency, to a person or business employed to collect the debt on behalf of the creditor, or to a person who makes a legitimate request for the information;
  - c. To the spouse (or one who stands in place of the spouse) of the debtor, or to the parent or guardian of the debtor if the

- debtor is a minor and lives in the same household with such parent;
- d. For the sole purpose of locating the debtor, if no indication of indebtedness is made;
  - e. Through legal process.
- (2) Using any form of communication which ordinarily would be seen or heard by any person other than the consumer that displays or conveys any information about the alleged debt other than the name, address and phone number of the debt collector except as otherwise provided in this Article.
  - (3) Disclosing any information relating to a consumer's debt by publishing or posting any list of consumers, except for credit reporting purposes and the publication and distribution of otherwise permissible "stop lists" to the point-of-sale locations where credit is extended, or by advertising for sale any claim to enforce payment thereof or in any other manner other than through legal process.

#### § 75-54. Deceptive representation.

No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. Such representations include, but are not limited to, the following:

- (1) Communicating with the consumer other than in the name (or unique pseudonym) of the debt collector and the person or business on whose behalf the debt collector is acting or to whom the debt is owed.
- (2) Failing to disclose in all communications attempting to collect a debt that the purpose of such communication is to collect a debt.
- (3) Falsely representing that the debt collector has in his possession information or something of value for the consumer.
- (4) Falsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding; falsely representing that the collector is in any way connected with any agency of the federal, State or local government; or falsely representing the creditor's rights or intentions.
- (5) Using or distributing or selling any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by a court, an official, or any other legally constituted or authorized authority, or which creates a false impression about its source.
- (6) Falsely representing that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges.

- (7) Falsely representing the status or true nature of the services rendered by the debt collector or his business.

**§ 75-55. Unconscionable means.**

No debt collector shall collect or attempt to collect any debt by use of any unconscionable means. Such means include, but are not limited to, the following:

- (1) Seeking or obtaining any written statement or acknowledgment in any form containing an affirmation of any debt by a consumer who has been declared bankrupt, an acknowledgment of any debt barred by the statute of limitations, or a waiver of any legal rights of the debtor without disclosing the nature and consequences of such affirmation or waiver and the fact that the consumer is not legally obligated to make such affirmation or waiver.
- (2) Collecting or attempting to collect from the consumer all or any part of the debt collector's fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge.
- (3) Communicating with a consumer (other than a statement of account used in the normal course of business) whenever the debt collector has been notified by the consumer's attorney that he represents said consumer.
- (4) Bringing suit against the debtor in a county other than that in which the debt was incurred or in which the debtor resides if the distances and amounts involved would make it impractical for the debtor to defend the claim.

**§ 75-56. Application.**

The specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article. Notwithstanding the provisions of G.S. 75-15.2, 75-16, and 75-16.1, civil penalties in excess of one thousand dollars (\$1,000) shall not be imposed, nor shall damages be trebled or attorney's fees assessed for any violation under this Article nor shall the provisions of this Article be construed to confer any right of private action not already available at common law or by means of other specific statutory authorization.

