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Olivetti Corp. v. Ames Business Systems, Inc.: Recovery of Lost Profits for a Violation of North Carolina General Statutes Section 75-1.1

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The North Carolina General Assembly has mandated that unfair and deceptive trade practices are unlawful.[1] For the past decade North Carolina's appellate courts have interpreted this mandate broadly by extending its application from transactions involving consumers to arm's-length business activities "in or affecting commerce."[2] In *Olivetti Corp. v. Ames Business Systems, Inc.*[3] the North Carolina Court of Appeals affirmed the trial court's application of the Unfair and Deceptive Trade Practices Act to a distributor-dealer relationship.[4] In so holding the court of appeals invoked the Act's treble damage provision, North Carolina General Statutes section 75-16,[5] to allow a large recovery for the dealer (Ames) in its counterclaim against the distributor (Olivetti).[6] In measuring the quantum of damages to be trebled, the court accepted a lost profit formula proposed by Ames[7] and concluded the alleged injury resulted from Olivetti's unfair trade practices.[8] Thus, the *Olivetti* court became the first North Carolina appellate court to base a treble damage recovery under the statute on an award of lost profits.[9]

This Note analyzes the *Olivetti* decision in light of the need both for the broad protection afforded by North Carolina General Statutes section 75-1.1 and for effective remedies to enforce the statute under North Carolina General Statutes section 75-16. The Note first concludes that the court of appeals properly applied section 75-1.1 to the distributor-dealer relationship. Further, the Note observes that the court in *Olivetti* applied a measure of lost profits which accomplished the dual statutory goals of section 75-16: to punish a defendant for its wrongful conduct, and to compensate a plaintiff for the business opportunities it

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1. N.C. GEN. STAT. § 75-1.1 (1985). For the full text of the statute, see *infra* note 73.

2. N.C. GEN. STAT. § 75-1.1(a) (1985). For discussion of the breadth of the statute's applicability, see *infra* notes 77-92 and accompanying text.

3. 81 N.C. App. 1, 344 S.E.2d 82 (1986), *aff'd in part and rev'd in part*, 319 N.C. 534, 356 S.E.2d 578 (1987). For a summary of the North Carolina Supreme Court decision, see the Addendum to this Note.

4. *See id.* at 21-23, 344 S.E.2d at 94-95.

5. The full text of North Carolina General Statutes § 75-16 reads:

> 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 (1985).

6. Ames was awarded $1,218,600 on its counterclaim. *Olivetti*, 81 N.C. App. at 13, 344 S.E.2d at 89. For the computation of this amount, see *infra* note 33.

7. *Olivetti*, 81 N.C. App. at 15, 344 S.E.2d at 90.

8. *Id.* at 18-19, 344 S.E.2d at 92-93.

9. *See infra* note 99 and accompanying text.

lost as a result of the defendant's unfair trade practices.[10] The Note ultimately concludes that the *Olivetti* court's measure of lost profits comports with the standard of reasonable certainty that has been established by North Carolina appellate courts.

The events leading to the litigation between Olivetti and Ames were complex.[11] Ames Business Systems, Inc. was formed in April 1978 for the purpose of becoming a dealer for Olivetti.[12] The trial court found that Olivetti had promised to provide service, programming, and marketing support for Ames out of Olivetti's Charlotte, North Carolina office, and Ames entered a dealership agreement that included an opening purchase of $80,000 of accounting equipment.[13] Olivetti, however, closed its Charlotte office in July 1978[14] and entered into a new dealership agreement with Ames the following month.[15] Under the new agreement Olivetti extended Ames' dealership to cover the Charlotte area, and added word processing equipment to the accounting equipment Ames had been selling under the initial agreement.[16]

In April 1979 Olivetti entered into a supply agreement with NBI, a Colorado company. Under this agreement Olivetti was to purchase from NBI a new, sophisticated word processing system, the TES-701.[17] In August 1979, at a time when Olivetti was becoming concerned that its sales of the 701 system were not keeping pace with its purchase commitments under the NBI agreement, Olivetti convinced Ames to sell the 701 system. Olivetti's product manager for the 701 represented to Ames that the term of the supply agreement with NBI was five years. He guaranteed that Olivetti would provide full software, technical, and marketing support for that period to Ames' customers who purchased the 701.[18] Based on Olivetti's representations, Ames purchased a demonstration 701 from

10. *See infra* text accompanying notes 98 & 188.

11. *See Olivetti*, 81 N.C. App. at 4-13, 344 S.E.2d at 84-89.

12. According to the trial court, "[t]he business of Olivetti was, among other things, the sale of office products including typewriters, word processors and related equipment and supplies, through numerous dealers . . . and directly to certain large customers." *Id.* at 4, 344 S.E.2d at 84. Ames was a closely-held corporation in Hickory, North Carolina. It eventually became a dealer for other automated office systems in addition to Olivetti's. *See infra* note 19.

13. Under the initial agreement, Ames was to be Olivetti's dealer for the Hickory area. *Olivetti*, 81 N.C. App. at 4, 344 S.E.2d at 84.

14. As a result, Olivetti thereafter did not provide the promised programming and marketing support. *Id.*

15. The service support Olivetti was to provide under the new August 1978 dealership agreement was for a two-year period, but Olivetti sold its service operation in Charlotte to Piedmont Business Systems, Inc. in February 1979. Olivetti assigned Ames' service contract to Piedmont, and the court found that Piedmont failed to provide Ames' customers adequate service. Even though this resulted in "some damage to Ames, including a lost sale for a new word processor," *id.* at 5, 344 S.E.2d at 85, the trial court disregarded any such damages in its calculations, presumably because such damages were not attributable to the misrepresentations alleged in Ames' counterclaim.

16. *Id.* at 4-5, 344 S.E.2d at 84-85.

17. Specifically, Olivetti agreed to purchase four hundred of the 701's in 1979, and seven hundred in 1980. The initial term of the contract ended in December 1980, with automatic annual renewals unless either party notified the other of its intention not to renew at least 180 days prior to the expiration of the term. *Id.* at 6, 344 S.E.2d at 85.

18. *Id.* at 5, 344 S.E.2d at 85. The court found this statement by Mr. Gallagher, Olivetti's 701 product manager, was false, because the NBI agreement was terminable by either corporation at the end of 1980. The court also found this representation to be material to Ames' efforts to sell the 701. *Id.* at 5-6, 344 S.E.2d at 85.

Olivetti and, the trial court found, spent considerable time over the next two years attempting to sell the system.[19] At the very time when Ames was preparing to market the 701, Olivetti breached the NBI agreement by refusing to accept further shipments of the TES-701 from NBI.[20] Neither Olivetti nor NBI made a public announcement about the breach and termination of their agreement.[21]

Despite the termination of the NBI agreement, the trial court found, Olivetti misrepresented to Ames not only the material terms of the agreement,[22] but also the status of Olivetti's supply agreement with NBI.[23] Olivetti's misrepresentations regarding the NBI agreement were crucial to Ames' decision in early 1981 not to become an NBI dealer for the NBI 3000, a product similar to the TES-701.[24] Moreover, Olivetti refused to sell supplies for the 701 to Ames unless the latter would sign notes for amounts it already owed Olivetti on prior sales of the 701.[25] Although Olivetti sold several more 701's to Ames at a substantial discount,[26] the trial court found that Ames would not have made this additional purchase had it known the truth about the NBI agreement.[27]

Near the time of this latter transaction between Olivetti and Ames, Olivetti, without informing Ames, sold approximately one hundred 701 systems to a consortium of NBI dealers, which included one dealer in Raleigh, North Carolina. Three of Ames' employees[28] concluded that Olivetti was destroying Ames' market for the 701, and decided to join IPC, the new North Carolina dealer for NBI products. The trial court found that if Ames would have become an NBI dealer,

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19. This concentration on the TES-701 came at the expense of other products for which Ames had signed distribution agreements. *Id.* at 6, 344 S.E.2d at 85. Subsequent to its revised agreement with Olivetti in August 1978, Ames attempted to establish distribution agreements with five other automated office equipment suppliers, and did establish arrangements with three of those. Plaintiff Appellant's Brief at 4 n.3, *Olivetti* (No. 8526SC1129).

20. Olivetti breached the NBI agreement by refusing to accept further shipments of the TES-701 in July 1980. Olivetti breached the agreement because it anticipated losses from the system's slow sales and Olivetti's increasing inventory. Olivetti and NBI reached agreement on a termination arrangement in September 1980. *Olivetti*, 81 N.C. App. at 6-7, 344 S.E.2d at 85-86.

21. *Id.* at 7, 344 S.E.2d at 86.

22. *See supra* notes 17-18 and accompanying text.

23. For example, in October or November 1980 Ames heard a rumor from one of its customers in Charlotte that Olivetti had breached the NBI agreement and that termination of the agreement was impending. Two different 701 product managers for Olivetti told one of Ames' salespeople the NBI agreement was sound and the rumors were false. Upon the customer's receipt of a letter to that effect from Olivetti's product manager, Ames purchased five more 701's and sold two systems to the customer. *Olivetti*, 81 N.C. App. at 7-8, 344 S.E.2d at 86. Thus Ames continued directing its resources toward selling the 701, "even though the market had been severely damaged by Olivetti's secret actions." *Id.* at 8, 344 S.E.2d at 86.

24. *Id.*; *see infra* notes 50-65 and accompanying text.

25. By this action in March 1981, Olivetti tried to eliminate Ames' defenses and make it easier for Olivetti to sue on the debt. *Olivetti*, 81 N.C. App. at 9, 344 S.E.2d at 87. During these negotiations Olivetti did not inform Ames, whose customers required supplies for the TES-701, of the termination of the NBI agreement. *Id.*

26. Ames purchased ten 701's and two Olivetti 351's in September 1981. *Id.* at 9-10, 344 S.E.2d at 87.

27. *Id.*

28. The employees were Jay Ozment, an Ames salesman who learned about this large sale by Olivetti, his wife Teresa Ozment, a marketing service representative for Ames, and David Harrison, Ames' serviceman. *Id.* at 10, 344 S.E.2d at 87-88.

then two of the employees, Jay Ozment and David Harrison, would not have left the company, and Ames would have realized the profits from sales and service of the TES-701 and the NBI 3000 that its two former employees generated when they went to work for IPC.[29]

In April 1982 Olivetti brought suit against Ames to collect on an unpaid debt for purchases Ames had made over the prior four years.[30] Ames denied it owed the amount claimed by Olivetti, and counterclaimed that Olivetti had committed intentional fraud and unfair and deceptive trade practices in violation of section 75-1.1. Ames sought actual, treble, and punitive damages, as well as attorney's fees.[31] A non-jury trial was conducted in May 1984 in the Mecklenburg County Superior Court and the court entered its judgment in January 1985. The trial court's findings of fact included specific findings that Olivetti intentionally made fraudulent misrepresentations to Ames throughout the course of their business relationship.[32] On the basis of those findings, the trial court rescinded a portion of the final sale from Olivetti to Ames and awarded to Olivetti nearly $60,000, a small portion of the debt it had sought. The court awarded Ames lost profits for having foregone the opportunity to become an NBI dealer. The court invoked section 75-16 and trebled its award of damages to Ames for lost profits, so that Ames recovered over 1.2 million dollars from

29. Based on the revenue generated by Ames' former employees, the trial court found that Ames lost $401,000 in profits from 1982 to 1984. *Id.* at 11, 344 S.E.2d at 88. In so finding, the court accepted the projections of Wade Perry, Ames' president and owner, who was also one of the two original backers who negotiated the Olivetti dealership in 1978. Perry based his predictions of Ames' lost profits on Ozment's sales with IPC and his own experience with Ames' operating costs. *See infra* text accompanying note 173.

30. The actual amount Olivetti sought was $148,990.68 plus interest, but the trial court computed a lower figure. *See infra* note 33.

31. *Olivetti*, 81 N.C. App. at 3, 344 S.E.2d at 84.

32. The specific instances of fraudulent misrepresentation enumerated in the court of appeals' opinion were:

(1) Olivetti falsely told Ames in 1979 that the NBI agreement governing the supply of the TES-701 would last for five years, when it knew the actual terms of the agreement raised the possibility of a shorter term. Olivetti made the false statements "with the intent to deceive Ames and to induce Ames to take on and promote the 701 product, and they did in fact deceive Ames." *Id.* at 11, 344 S.E.2d at 88.

(2) Olivetti falsely told Ames in November 1980 that its relationship with NBI was intact, that it was negotiating for a continuation of the agreement, and that the agreement provided certain support for five years. In reality Olivetti had breached its agreement with NBI, the two companies had agreed not to renew their agreement, and the agreement did not provide for the support represented by Olivetti. Olivetti made such representations "to conceal [its] earlier misrepresentations to Ames and to further deceive Ames and to induce Ames to continue its efforts to market the 701 product; and they did in fact deceive Ames." *Id.* at 11-12, 344 S.E.2d at 88.

(3) Because of these same misrepresentations by Olivetti in late 1980 and early 1981, Ames continued to expend its efforts to market the 701, borrowed $46,000 to purchase five additional 701's, and passed up the opportunity to become an NBI dealer in 1981. *Id.*

(4) Olivetti falsely told Ames in the fall of 1981 that it was selling Ames ten more 701's at a discount in order to lower its inventory so it could purchase additional 701's pursuant to the NBI agreement. In fact, Olivetti had breached and terminated its agreement with NBI months before, and this misrepresentation constituted "further willful and intentional fraud by Olivetti against Ames, especially when viewed in connection with the earlier Olivetti representations to Ames." *Id.* at 12, 344 S.E.2d at 89. Again, Olivetti made these misrepresentations "to deceive Ames and to cause Ames to purchase additional machines from Olivetti; and they did in fact deceive Ames and cause Ames to purchase the additional 701's and two [Olivetti] 351's from [Olivetti] . . . which Ames would not have purchased had it known the truth." *Id.*

Olivetti for the latter's unfair and deceptive trade practices.[33] Both parties appealed based on a variety of assignments of error.[34] The North Carolina Court of Appeals affirmed the trial court's decision both as to the applicability of the North Carolina Unfair and Deceptive Trade Practices Act and as to the computation of damages awarded each party.

The court of appeals first considered Olivetti's assignments of error with regard to the lower court's application of section 75-1.1. As an initial matter the court addressed Olivetti's argument that the trial court erred in finding Olivetti had made material misrepresentations and Ames had reasonably relied on those misrepresentations.[35] The court of appeals, however, reasoned that there was competent evidence to support the court's findings of fact that Olivetti made such representations, that the representations were false, that the representations were material, and that Ames' reliance on Olivetti's representations was reasonable.[36] "Moreover," according to the court of appeals, "the magnitude of the damage suffered by Ames as a result of its reliance on Olivetti's misrepresentations further shows the materiality of those misrepresentations."[37] With the basis thus laid for Ames' counterclaim against Olivetti for fraudulent misrepresentation, the court of appeals proceeded to consider whether the lower court erred by applying the statute to the distributor-dealer relationship between Olivetti and Ames.

Olivetti maintained that section 75-1.1 applied only to consumer transactions,[38] so that Ames—a dealer rather than a consumer or user of Olivetti equip-

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33. The trial court's computation of damages was as follows:

> The Court finds that the total amount of actual damages suffered by Ames as a result of Olivetti's pattern of willful and intentional fraud and unfair and deceptive business acts and practices is at least as follows:
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> $401,000.00 resulting from [lost profits]
>
> $5,200.00 resulting from [Ames' sale of two of the latter ten 701's at a loss]
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> . . . The Court further finds and concludes that Ames is entitled to a judgment, pursuant to G.S. 75-16, in the amount of treble its actual damages, $1,218,600.00, as a result of the unfair and deceptive acts and practices of Olivetti against Ames.
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> . . . The Court further finds and concludes that Ames owes Olivetti the following:
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> $41,000 on the March 26, 1981 notes;
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> $16,800 on the September 1981 purchases;
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> $57,800 total, plus return of two 351's and seven 701's to Olivetti. In addition, Ames owes Olivetti interest on each amount, at the lawful rate, from September 1, 1981 on the $41,000 amount and from January 1, 1982 on the $16,800 amount.

Id. at 13, 344 S.E.2d at 89 (quoting the findings of the trial court).

34. *Id.*

35. *Id.* at 14, 344 S.E.2d at 89.

36. *Id.* at 14-15, 344 S.E.2d at 90; *see also* Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974) (actionable fraud consists of (1) false representation or concealment of a material fact that is (2) reasonably calculated to deceive, (3) made with intent to deceive which (4) does in fact deceive (5) resulting in damage to injured party).

37. *Olivetti*, 81 N.C. App. at 14, 344 S.E.2d at 90.

38. Olivetti based its argument on the decision of the Federal District Court for the Eastern District of North Carolina in Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985). The *Bunting* court dismissed an independent poultry grower's action against an integrated poultry producer for termination of their contract on the basis that plaintiff grower was not a "consumer" and so was not afforded protection under § 75-1.1. *Id.* at 691. The North Carolina Court of Appeals in *Olivetti*, however, found the case "distinguishable and unpersuasive on this issue and . . . not controlling on this Court." *Olivetti*, 81 N.C. App. at 23, 344 S.E.2d at 95.

ment—lacked standing to sue under the statute.[39] Relying on amendment of the statute in 1977[40] and on prior appellate decisions construing the statute,[41] the court of appeals ruled the statute was applicable to the transactions between Olivetti and Ames.[42] Not only were the activities involved in commerce, as is required for the statute to be applicable,[43] but Olivetti had failed to prove it fell within any of the allowable statutory exemptions.[44] In applying the statute to the distributor-dealer relationship, the *Olivetti* court reiterated that Ames had laid an adequate basis for the trial court's finding that Olivetti had committed unfair and deceptive trade practices in violation of the statute because " '[p]roof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive practices.' "[45] Finally, Olivetti contended the statute was unconstitutionally vague and overbroad as applied in the case. The court of appeals held the language of the statute provided adequate notice that fraudulent conduct was prohibited, and thus the statute was not unconstitutional as applied to Olivetti.[46]

Although it reaffirmed the broad sweep of section 75-1.1, the *Olivetti* court

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39. *Olivetti*, 81 N.C. App. at 21, 344 S.E.2d at 94.

40. *See* Act of June 27, 1977, ch. 747, §§ 1-2, 1977 N.C. Sess. Laws 984, 984 (codified at N.C. GEN. STAT. § 75-1.1 (1985)).

41. *See, e.g.*, Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985) (allowing recovery under § 75-1.1 for plaintiff employer who hired bookkeeper with prior criminal record based on defendant's representations about her qualifications); Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 261-62, 266 S.E.2d 610, 620 (1980) (applying statute to mortgagor-mortgagee relationship); F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371 (allowing recovery to state because oil supplier misrepresented prices it required state to pay under a fuel oil supply contract), *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 139 (1986); Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755 (allowing recovery from one who misrepresented his financial position in order to obtain credit), *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986); Threatt v. Hiers, 76 N.C. App. 521, 333 S.E.2d 772 (1985) (reiterating that N.C. GEN. STAT. § 75-1.1 applies to rental of residential and commercial property), *disc. rev. denied*, 315 N.C. 397, 338 S.E.2d 887 (1986); Kim v. Professional Business Brokers, 74 N.C. App. 48, 53, 328 S.E.2d 296, 300 (1985) (court "had no choice but to treble plaintiff's damages" when he proved fraud by motel owner in selling motel to plaintiff). For discussion of the amendment of § 75-1.1 in 1977, see *infra* notes 73-77 and accompanying text.

42. *Olivetti*, 81 N.C. App. at 22-23, 344 S.E.2d at 94-95.

43. N.C. GEN. STAT. § 75-1.1(a) (1985).

44. *Olivetti*, 81 N.C. App. at 22-23, 344 S.E.2d at 95. The two major categories of business enterprise excluded from § 75-1.1 are "professional services rendered by members of a learned profession," N.C. GEN. STAT. § 75-1.1(b) (1985), and certain media advertising activities, *id.* § 75-1.1(c). The former exclusion has been interpreted as applicable to " 'physicians, attorneys, clergy and related professions,' but the exclusion [has been] applied only to the rendering of actual professional services and not to the rendering of other types of services not exclusively limited to these learned areas." E. HIGHTOWER, NORTH CAROLINA: LAW OF DAMAGES § 29-5, at 108 (Supp. 1985) (quoting 47 N.C. ATT'Y GEN. REPS. 118 (1977)). A party claiming either statutory exemption bears the burden of proof. N.C. GEN. STAT. § 75-1.1(d) (1985). For the text of § 75-1.1, see *infra* note 73.

45. *Olivetti*, 81 N.C. App. at 23, 344 S.E.2d at 95 (quoting Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 97, 331 S.E.2d 677, 681 (1985)).

46. *Id.* at 23-24, 344 S.E.2d at 95; *see infra* note 155. In reaching this conclusion, the court quoted the language of the North Carolina Supreme Court, which had stated that "impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges or juries to interpret and administer it uniformly, constitutional requirements are fully met." *Olivetti*, 81 N.C. App. at 24, 344 S.E.2d at 95 (quoting *In re* Burris, 275 N.C. 517, 531, 169 S.E.2d 879, 888, *aff'd*, 403 U.S. 528 (1971)).

directed most of its opinion to a consideration of how the trial court computed damages. Olivetti contended the trial court erred in its computation of Ames' lost profits, first, because Ames lacked a history of profits. In response, the court analyzed the "new business rule," under which a court will not allow recovery of lost profits for a new or unestablished business without a history of profits because evidence of expected profits would be too speculative.[47] The North Carolina Court of Appeals criticized the rule and noted the refusal of North Carolina courts to adopt it.[48] Instead, the *Olivetti* court reaffirmed the "better and more equitable" view that "recovery for lost profits is allowed for injury to a business, regardless of whether the business has a history of profits, as long as the loss of profits is shown with a reasonable degree of certainty."[49] Thus, the court rejected the rationale behind the "new business rule" that a plaintiff must demonstrate a history of profits in order to recover damages for prospective profits.

A second basis of Olivetti's challenge to the damage award was that Ames could not have become an NBI dealer in late 1980 or early 1981. This argument challenged the lower court's finding that Olivetti's misrepresentations were causally linked to Ames' failure to become an NBI dealer.[50] The court of appeals analyzed the evidence of the negotiations between Ames and NBI,[51] the potential cost of an NBI dealership,[52] and the motivation behind Ames' foregoing such an opportunity.[53] The court found that Ames based its decision on "the promises and assurances it had received from Olivetti" and "the purchase it had recently made of additional Olivetti equipment in reliance on Olivetti's misrepresentations."[54] Had Ames learned the truth about the NBI agreement, the court reasoned, it would not have passed up the opportunity to become an NBI dealer itself.[55] The court's reasoning thereby disposed of Olivetti's objections, which

47. *Olivetti*, 81 N.C. App. at 16, 344 S.E.2d at 90-91; *see also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.3, at 154-55 (1973) (discussing the new business rule); Comment, *Remedies—Lost Profits as Contract Damages for an Unestablished Business: The New Business Rule Becomes Outdated*, 56 N.C.L. REV. 693 (1978) (arguing that the new business rule should be abandoned).

48. *Olivetti*, 81 N.C. App. at 16-17, 344 S.E.2d at 91.

49. *Id.*

50. A plaintiff seeking recovery for lost profits must show: (1) but for the defendant's actions, the plaintiff would have been able to make a profit; (2) that plaintiff can demonstrate the amount of lost profits with a reasonable degree of certainty; and (3) that damages for lost profits are not too remote. D. DOBBS, *supra* note 47, § 3.3, at 148. Olivetti sought to undercut Ames' argument that its actions caused Ames' lost profits.

51. One meeting took place between NBI's eastern regional manager and representatives of Ames. Although NBI did not make a formal offer of a dealership, its representative testified that the company was impressed with Ames and thought that Ames could be successful as an NBI dealership. *Olivetti*, 81 N.C. App. at 19, 344 S.E.2d at 92.

52. The testimony of Ames' representatives showed that the dealership would come at a cost of approximately $25,000 to $30,000. According to the court of appeals, "sufficient evidence was presented to permit the court to find that Ames either had the financial capability in early 1981 to become an NBI dealer or that it would have had such financial capability had it not been for Olivetti's misrepresentation." *Id.* at 19, 344 S.E.2d at 92-93.

53. *Id.*; *see infra* note 159.

54. *Olivetti*, 81 N.C. App. at 19, 344 S.E.2d at 93. The latter was a reference to Ames' purchase of five 701's from Olivetti in late 1980. *See supra* note 23.

55. *Olivetti*, 81 N.C. App. at 19, 344 S.E.2d at 93.

were based on the lack of a causal link between its representations to Ames and Ames' failure to become an NBI dealer.

Olivetti nonetheless contended that the measure the trial court used to determine Ames' lost profits was improper, because a more definite measure (Ames' history of profits and losses) was available and because IPC, the new NBI dealership, was too different from Ames for its sales to provide an accurate "yardstick" for measuring Ames' losses.[56] The court of appeals denied that the lower court had based its findings on the sales records of IPC as a comparable business; rather, the basis of the determination was the sales and service business Ames lost to IPC because of Olivetti's misrepresentations.[57] The court stated that, because there is no single method of determining lost profits, each case must be determined on the basis of its specific facts.[58] The court found the measure of lost profits provided by Ames "reasonable and conservative and . . . adequately supported by the evidence in the record."[59]

The fourth basis of Olivetti's objections to the lost profit award to Ames—which ran as an underlying proposition through Olivetti's other arguments on damages—was that the evidence was simply insufficient to support the award.[60] Thus, Olivetti squarely raised the problem of what constitutes adequate proof of lost profits under North Carolina law. Bearing in mind that lost profits are to some extent "uncertain and problematical,"[61] the court held that a plaintiff could meet the reasonable certainty requirement[62] by presenting evidence "sufficiently specific to permit the fact finder to arrive at a reasoned conclusion."[63] The *Olivetti* court favored the view that " '[t]he more reprehensible a defendant's behavior, the more the law will feel justified in resolving doubts against him concerning the consequences of the behavior.' "[64] Thus, the wrongdoer should bear the risk of uncertainty created by the wrongdoing.[65]

Applying these principles to the case, the court of appeals ruled that Ames presented sufficient evidence to permit the lower court to find Ames could, and would, have become an NBI dealer in early 1981 had it not been for Olivetti's

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56. *Id.* For an explanation of a "yardstick" measure of damages, see *infra* notes 169-70 and accompanying text.

57. *Olivetti*, 81 N.C. App. at 19-20, 344 S.E.2d at 93. Specifically, the lower court based its computation of lost sales and service business on the business generated for IPC by Ames' former employees. *Id.* at 20, 344 S.E.2d at 93.

58. *Id.*

59. *Id.*

60. *Id.* at 15, 344 S.E.2d at 90.

61. *Id.* at 17, 344 S.E.2d at 91.

62. *See supra* text accompanying note 49.

63. *Olivetti*, 81 N.C. App. at 17, 344 S.E.2d at 91.

64. *Id.* at 18, 344 S.E.2d at 92 (quoting Comment, *Remedies—Lost Profits as Contract Damages for an Unestablished Business: The New Business Rule Becomes Outdated*, *supra* note 47, at 710).

65. *Id.*; *see also* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-66 (1946) (in antitrust suit by theater owners against motion picture distributors, tortious conduct of defendant that made damages for lost profits more difficult to ascertain was nonetheless actionable); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563-66 (1931) (in action to recover damages for conspiracy that attempted to monopolize interstate commerce in vegetable parchment, defendant's wrongful conduct meant defendant should bear risk of uncertainty in computation of damages).

false representations.[66] In addition, the court of appeals found the evidence of Ames' lost profits for 1982 through 1984—based on projections provided by Ames' representative, Wade Perry[67]—was a sufficient measure of the amount of lost profits, especially because "Olivetti's wrongful conduct made more definite projections difficult to ascertain."[68] The court then dismissed Olivetti's other assignments of error on damages,[69] as well as Ames' assignments of error that sought an alternative formula to compute damages over a longer period of time,[70] a punitive damage award in addition to the treble damage award,[71] and the recovery of attorney's fees.[72] The court affirmed the trial court's computation of damages in its entirety.

When the North Carolina General Assembly originally passed North Carolina General Statutes section 75-1.1,[73] it approved a statute comparable in

66. *Olivetti*, 81 N.C. App. at 18-19, 344 S.E.2d at 92; *see supra* notes 50-55 and accompanying text.

67. According to the court of appeals, Perry based his projections on Ozment's sales history and Perry's own experience with Ames. *Olivetti*, 81 N.C. App. at 20, 344 S.E.2d at 93. For the specific bases of Perry's projections, see *infra* text accompanying note 173. In addition, the testimony of Jay Ozment, Ames' former salesman, and documentary evidence substantiated Perry's projections, *Olivetti*, 81 N.C. App. at 21, 344 S.E.2d at 94, which the court found were "not mere guesswork, but . . . based on evidence in the record and therefore . . . a sufficient basis for the findings and award made." *Id.*; *cf.* Tillis v. Cotton Mills, 251 N.C. 359, 367, 111 S.E.2d 606, 613 (1959) (damages for lost profits not allowed if based on "mere guesswork").

68. *Olivetti*, 81 N.C. App. at 20, 344 S.E.2d at 93.

69. Of the ten TES-701's and two Olivetti 351's Ames purchased from Olivetti in September 1981, seven 701's and both 351's remained in Ames' possession at the time of trial. The court of appeals upheld the trial court's rescission of the sale of the remaining systems "as a matter of equity." *Id.* at 24, 344 S.E.2d at 95-96. The court also denied it was error for the trial court not to offset the amount Ames owed Olivetti prior to trebling Ames' damage award. To have done so "would amount to a triple recovery for Olivetti and would frustrate the punitive function of the treble damage provision." *Id.* at 24-25, 344 S.E.2d at 96.

70. Under its alternative formula, Ames sought recovery for expenses it wasted on the TES-701 from August 1979 through December 1981, minus profits and service revenues it made on sales of the system for that period. The court of appeals ruled, "insufficient evidence was presented at trial to permit the calculation of the damages under this formula with the requisite degree of certainty." *Id.* at 25, 344 S.E.2d at 96. In addition, Ames' proof of lost profits after 1984 "was simply too speculative to permit recovery." *Id.* at 26, 344 S.E.2d at 96. For a comparison of Ames' evidence regarding this period with the evidence Ames presented for the 1982 to 1984 period, for which recovery was allowed, see *infra* notes 179-81 and accompanying text.

71. The court found no abuse of discretion in the trial court's failure to award punitive damages: "It is clear that the court believed that the amount awarded was sufficient to compensate Ames for the injury suffered by it and to penalize Olivetti for its wrongful conduct. We are inclined to agree." *Olivetti*, 81 N.C. App. at 26, 344 S.E.2d at 96-97. *See generally* Note, *Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Are Both Treble and Punitive Damages Available for Violations of Section 75-1.1?*, 62 N.C.L. REV. 1139 (1984) (arguing that the two measures should be mutually exclusive); *see infra* notes 191-93 and accompanying text (discussing recovery of both punitive and treble damages).

72. The court ruled there was no abuse of discretion by the trial court in failing to allow recovery of attorney's fees under N.C. GEN. STAT. § 75-16.1 (1985). *Olivetti*, 81 N.C. App. at 26, 344 S.E.2d at 97.

73. Prior to its amendment in 1977, N.C. GEN. STAT. § 75-1.1 (1969) read:

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

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

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or

breadth to its counterpart in the Federal Trade Commission Act.[74] Initially, North Carolina courts held that the state statute was applicable primarily to consumer transactions.[75] After the North Carolina Supreme Court narrowly interpreted the statute in 1977 to deny a claim for harassing debt collection activities,[76] the general assembly expanded the scope of the statute so that it would prevent unfair and deceptive acts in commercial transactions.[77] Cases decided after the amendment of the statute have found that "commercial activities" include automobile sales,[78] aircraft sales,[79] tractor sales,[80] truck sales,[81] real estate

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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.

Act of June 12, 1969, ch. 833, § 1, 1969 N.C. Sess. Laws 930, 930 (codified as amended at N.C. GEN. STAT. § 75-1.1 (1985)).

The general assembly subsequently amended paragraphs (a) and (b), so that the statute currently reads:

(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 the 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.

Act of June 27, 1977, ch. 747, §§ 1-2, 1977 N.C. Sess. Laws 984, 984 (codified at N.C. GEN. STAT. § 75-1.1(a)-(b) (1985)). For an analysis of the statute and its purposes, see Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C.L. REV. 207, 210-23 (1982).

The general assembly amended the statute in response to the North Carolina Supreme Court's decision in State *ex rel.* Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977). In *J.C. Penney*, defendant made frequent threatening telephone calls to its customers at their homes and businesses. The court of appeals held that defendant's debt collection activities fell within the scope of § 75-1.1. State *ex rel.* Edmisten v. J.C. Penney Co., 30 N.C. App. 368, 372, 227 S.E.2d 141, 144 (1976), *rev'd*, 292 N.C. 311, 233 S.E.2d 895 (1977). The supreme court reversed the decision of the court of appeals by narrowing the scope of the language used in the statute, *J.C. Penney*, 292 N.C. at 315-17, 233 S.E.2d at 898-99, and holding that "debt collection activities are not within the purview of G.S. 75-1.1." *Id.* at 320, 233 S.E.2d at 901. In a lengthy dissent, Justice Huskins recounted the offending debt collection practices and concluded that the majority's "close and narrow construction of the term 'trade and commerce' . . . is erroneous." *Id.* at 323, 233 S.E.2d at 902-03 (Huskins, J., dissenting).

74. *See* 15 U.S.C. § 45(a)(1) (1982) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."). For a discussion of the origins of § 75-1.1, see Comment, *The Trouble with Trebles: What Violates G.S. § 75-1.1?*, 5 CAMPBELL L. REV. 119, 122-23 (1982).

75. *See, e.g.*, Hardy v. Toler, 24 N.C. App. 625, 211 S.E.2d 809 (recovery allowed against car salesman who misrepresented prior ownership and mileage to purchaser), *modified and aff'd*, 288 N.C. 303, 218 S.E.2d 342 (1975).

76. State *ex rel.* Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977); *see supra* note 73.

77. For discussion of the amendment of the statute, see *supra* note 73.

78. Bailey v. LeBeau, 79 N.C. App. 345, 339 S.E.2d 460, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 137, *modified and aff'd*, 318 N.C. 411, 348 S.E.2d 524 (1986); Lee v. Payton, 67 N.C. App. 480, 313 S.E.2d 247 (1984).

79. Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712 (4th Cir.) (dictum), *cert. denied*, 464 U.S. 848 (1983).

80. Bernard v. Central Carolina Truck Sales, Inc., 68 N.C. App. 228, 314 S.E.2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984).

81. Jackson v. Hollowell Chevrolet Co., 81 N.C. App. 150, 343 S.E.2d 577 (1986).

brokerage practices,[82] residential real estate developer practices,[83] rental activities,[84] banking industry practices,[85] insurance industry practices,[86] commercial loan brokerage activities,[87] fraudulently obtaining credit,[88] misbranding of goods,[89] sale of a business,[90] personnel agency activities,[91] and bidding practices of oil suppliers.[92]

Although it has been difficult for courts to define unfair and deceptive trade practices with precision, the North Carolina Supreme Court has held that practices offending public policy are unfair, as are those that are "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."[93] Similarly, commercial conduct that is "an inequitable assertion of [a party's] power or position" over another violates the statute.[94] According to the supreme court, "[p]roof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts."[95] Once a jury has determined the facts, the question whether there has been a violation of the statute is decided by the court as a matter of law.[96] Whether a defendant has acted in bad faith is not pertinent to a recovery under the statute.[97] Thus, the court must automatically apply the treble damages remedy provided for in section 75-16 when a defendant has violated section 75-1.1. The treble damage provision is a "hybrid" statute that serves both a punitive and a remedial function.[98]

Nonetheless, the court has never allowed a treble damages recovery for a violation of the Unfair and Deceptive Trade Practices Act based on a lost profit award.[99] A review of prior North Carolina decisions that have considered ade-

82. Starling v. Sproles, 66 N.C. App. 653, 311 S.E.2d 688 (1984); Stone v. Paradise Park Homes, Inc., 37 N.C. App. 97, 245 S.E.2d 801, *disc. rev. denied*, 295 N.C. 653, 248 S.E.2d 257 (1978).

83. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986).

84. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

85. Talbert v. First Union Nat'l Bank, 51 N.C. App. 236, 275 S.E.2d 565 (1981).

86. Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986); Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980).

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

88. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755 (1986).

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

90. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 891 (1986).

91. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985). *But cf.* Buie v. Daniel Int'l Corp., 56 N.C. App. 445, 289 S.E.2d 118 (employer-employee relationship not covered under the statute), *disc. rev. denied*, 305 N.C. 759, 292 S.E.2d 574 (1982).

92. F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371 (1986).

93. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 262-63, 266 S.E.2d 610, 621 (1980).

94. *Id.* at 264, 266 S.E.2d at 622. The *Johnson* court also defined an act as "deceptive" if it had the "capacity or tendency to deceive." *Id.* at 266, 266 S.E.2d at 622.

95. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 97, 331 S.E.2d 677, 681 (1985); Hardy v. Toler, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975).

96. *Hardy*, 288 N.C. at 310-11, 218 S.E.2d at 346-47.

97. Marshall v. Miller, 302 N.C. 539, 544-45, 276 S.E.2d 397, 400-01 (1981).

98. *Id.* at 546-47, 276 S.E.2d at 402.

99. In Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, *modified and aff'd*, 303 N.C. 675, 281 S.E.2d 43 (1981), the court allowed a treble damages recovery to a beauty salon owner who alleged damages for lost profits because of her allergic reaction to defendant landlord's nearby plas-

quate proof of lost profits provides a basis for evaluating the *Olivetti* court's measure of lost profits. Although the rules governing proof of lost profits are similar for both tort and contract actions,[100] this Note discusses proof of lost profits in the two situations separately.

Steffan v. Meiselman[101] illustrates the rules governing proof of lost profits in tort cases.[102] In *Steffan* the supreme court considered a restaurant owner's claim for profits lost as a result of the failure of his landlord, a theater owner, to repair a leaking toilet directly above plaintiff's leased premises. When unclean water from the toilet leaked through the ceiling of the restaurant onto the food preparation area, several of plaintiff's customers walked out, and his business declined sharply thereafter until he was forced to close the restaurant.[103] The court had to decide whether evidence of plaintiff's lost profits, based on plaintiff's own testimony and an audit comparing plaintiff's profits before and after the mishaps, was too speculative to allow damages. The court adopted the position that " 'a more liberal rule in regard to profits lost, should prevail in actions purely of tort . . . .' "[104] In a tort action the inquiry is not whether the consequences were within the contemplation of the parties.[105] Rather, the proper inquiry is whether the consequences were the natural and probable result of the wrongful act—especially "where the act that occasioned the loss is malicious"—and whether the lost profits are "ascertainable with a fair degree of certainty."[106] The court in this case had no difficulty in finding defendant's "gross negligence or willful or malicious conduct" caused the demise of plaintiff's business[107] and plaintiff offered sufficient evidence to allow recovery for prospective

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tics manufacturing company. Defendant had represented to plaintiff that he would not operate the business near hers, but did so anyway. Among damages claimed by plaintiff were her lost profits for work missed because of her allergy, *id.* at 582, 275 S.E.2d at 179, but neither the court of appeals nor the supreme court grounded her recovery on that basis.

100. *See infra* text accompanying notes 156-57.

101. 223 N.C. 154, 25 S.E.2d 626 (1943).

102. *See also* Smith v. Corsat, 260 N.C. 92, 131 S.E.2d 894 (1963) (stating the rules for lost profits in personal injury cases); Reliable Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951) (when plaintiff trucker's tractor-trailer was damaged by defendant's automobile in a collision, plaintiff could show lost profits from halt of business for two-and-a-half month period during which truck was being repaired); Phillips v. Integon Corp., 70 N.C. App. 440, 319 S.E.2d 673 (1984) (allowing plaintiff to seek lost profits in case alleging defendant unfairly fixed insurance rates in violation of N.C. GEN. STAT. § 75-5 (1985) (governing unfair competition)); Griffin v. Starlite Disco, Inc., 49 N.C. App. 77, 270 S.E.2d 613 (1980) (recovery of lost profits allowed for self-employed plaintiff who suffered assault by defendant's agent). *But cf.* Kitchen Lumber Co. v. Tallahassee Power Co., 206 N.C. 515, 174 S.E.2d 427 (1934) (profits lost as a result of defendant dam owner's tortious conduct in releasing water and washing out plaintiff's bridge for two weeks did not necessarily proximately flow from defendant's conduct, because plaintiff could have continued shipping out its lumber during time the bridge was being repaired); Thompson v. Seaboard Air Line Ry. Co., 165 N.C. 377, 81 S.E. 315 (1914) (although willful wrong committed with intent to disrupt contractual relations of another would be actionable, plaintiff may not recover lost profits when defendant negligently started fire that destroyed lumber plaintiff would have otherwise been able to sell at a profit).

103. *Steffan*, 223 N.C. at 155-57, 25 S.E.2d at 627-28.

104. *Id.* at 159, 25 S.E.2d at 629 (quoting Allison v. Chandler, 11 Mich. 542, 549 (1863)).

105. *Cf.* Perkins v. Langdon, 237 N.C. 159, 171, 74 S.E.2d 634, 644 (1953) (in a contract action, profits must be within contemplation of parties at the time contract is made); *see infra* note 119 and accompanying text.

106. *Steffan*, 223 N.C. at 159, 25 S.E.2d at 629.

107. *Id.* at 157-58, 25 S.E.2d at 628.

profits.[108]

The majority of North Carolina decisions on proof of lost profits have been contract cases. Earlier decisions provide useful discussion of the legal doctrine underlying lost profit awards, and more recent decisions illustrate a multiplicity of interesting fact patterns in which courts have applied the doctrine. In *Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co.*[109] plaintiff sought recovery of lost profits it allegedly would have made on the sale of cigarette machines had defendant honored its contract to exhibit plaintiff's machines at the 1904 St. Louis Exposition. The supreme court invoked the rule that there must be a "reliable standard" by which future profits may be ascertained.[110] The lost profits may not be "of such a remote and speculative character that they cannot be legally proved."[111] The court denied plaintiff's recovery of lost profits because the evidence did not establish with certainty the amount of business plaintiff may have lost as a result of defendant's breach.[112] In *Perry v. Kime*[113] the court also rejected plaintiff's claim of lost profits because of defendant's failure to provide a mule to cultivate plaintiff's 1914 crop. The court found evidence of the prior year's yield too speculative to estimate his lost profits on that basis.[114]

In *Wilkinson v. Dunbar*[115] the court found sufficient evidence to allow defendant's counterclaim against a plaintiff for whom he was cutting and hauling

108. *Id.* at 160, 25 S.E.2d at 630.

109. 141 N.C. 284, 53 S.E. 885 (1906).

110. *Id.* at 290, 53 S.E. at 887.

111. *Id.* at 295, 53 S.E. at 889. The court also cited with approval the related concept that "[t]he recovery of profits which might have been made in a new business cannot be sustained, because it cannot be proven that they would have been realized." *Id.* at 297, 53 S.E. at 890; *see* 1 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 183 (8th ed. 1891) (discussing lost profits for a new business). The *Olivetti* court disapproved of the "new business rule." *See supra* notes 47-49 and accompanying text.

112. Plaintiff was unable to demonstrate any specific sales it lost as a result of its failure to exhibit its machines. It was shown that plaintiff had another offer to exhibit, an offer it turned down because of its contract with defendant. *Machine Co.*, 141 N.C. at 287-88, 53 S.E. at 886.

In denying plaintiff's claim, the court relied on a similar fact situation presented in Jones v. Call, 96 N.C. 337, 2 S.E. 647 (1887), in which the court held the estimated profits were too speculative and remote to constitute a basis for computing damages. *Machine Co.*, 141 N.C. at 297, 53 S.E. at 890 (citing Jones v. Call, 96 N.C. 337, 2 S.E. 647 (1887)). Also the *Machine Co.* court determined that bad faith on the part of defendant could not overcome the well-settled rule that damages for lost profits must not be too remote or speculative. *Id.* at 298, 53 S.E. at 890. Although the court did not make the point entirely clear, it appears to have disallowed the Winston Cigarette Machine Company's claim on the basis of uncertainty as to the amount of damages rather than as to causation. *See id.* at 297-300, 53 S.E. at 889-90.

One commentator has suggested that the attempt to divide the problem of certainty into separate questions of "cause" and "amount" can lead to great difficulties. *See* Note, *The Requirement of Certainty in the Proof of Lost Profits*, 64 HARV. L. REV. 317 (1950). According to this author, "[t]he necessity of treating two difficult problems as more or less inextricable makes proof with sufficient certainty, in this already complex field, a serious difficulty." *Id.* at 318; *see also* Note, *Damages—Loss of Profits Caused by Breach of Contract—Proof of Certainty*, 17 MINN. L. REV. 194 (1933) (discussing the difficulty of dividing "cause" and "amount").

113. 169 N.C. 540, 86 S.E. 337 (1915).

114. *Id.* at 541, 86 S.E. at 337. The court noted all the variable circumstances in agricultural production that made it impossible to determine the cause of plaintiff's diminished yield for 1914. *Id.* at 541-42, 86 S.E. at 337-38.

115. 149 N.C. 20, 62 S.E. 748 (1908).

lumber. The court noted there may be circumstances in which a court must exclude from recovery "profits expected by reason of collateral engagements of the parties, or the profits of a going concern to arise from current sales and bargains which are yet to be made and dependent, to a great extent, on the uncertainty of trade and fluctuations of the market."[116] Notwithstanding the potential for speculative lost profit recoveries, the *Wilkinson* court accepted evidence defendant offered on the costs of cutting and hauling based on the testimony of his own lumbermen.[117] The court found such testimony probative on the issue of the amount of profits defendant lost because of plaintiff's breach of the contract.

In *Perkins v. Langdon*[118] the supreme court considered whether the lessee of a tobacco warehouse could recover lost profits for sales it allegedly would have made if defendant had not sold the warehouse to a third party after one year of a three-year lease. After reciting the applicable rules governing lost profits for a breach of contract,[119] the court addressed the issue "whether the challenged evidence comes within the bounds and limits of the approved general rule governing the allowance of prospective profits, or . . . whether it is conjectural, remote, or speculative, and therefore beyond the bounds of the rule."[120] The court found persuasive plaintiff's evidence that it directed a substantial effort to building up the tobacco market in Fayetteville and promoting the market to farmers and buyer-representatives of large tobacco companies.[121] By the end of the first year of the lease, plaintiff had established "a going concern" from which proof of profits was "reasonably ascertainable."[122] The court therefore allowed plaintiff's recovery of lost profits for the final two years of the lease.[123] In reaching its conclusion, the *Perkins* court relied on the opinion testimony both of

116. *Id.* at 22, 62 S.E. at 750.

117. According to the court,

> the witnesses who gave this testimony had personal observation and knowledge of the facts and conditions, and they were all said to be experienced lumbermen. Testimony of this kind, from such a source, is coming to be more and more allowed in investigations of this character, and the courts are disposed to admit "opinion evidence" when the witnesses have had personal observation of the facts and conditions, and from their practical training and experience are in a condition to aid the jury to a correct conclusion. While not expert testimony in the strict sense of the word, it is coming to have a recognized place in the law of evidence.

Id. at 27-28, 62 S.E. at 751-52.

118. 237 N.C. 159, 74 S.E.2d 634 (1953).

119. The *Perkins* court offered a clear expression of the lost profit rules in a contract case involving "an established mercantile business, prevented or interrupted by breach of contract." *Id.* at 171, 74 S.E.2d at 644. In such cases lost profits may be awarded when:

> (1) . . . it is reasonably certain that such profits would have been realized except for the breach of the contract, (2) . . . such profits can be ascertained and measured with reasonable certainty, and (3) . . . such profits may be reasonably supposed to have been within the contemplation of the parties, when the contract was made, as the probable result of a breach.

Id.

120. *Id.* at 173, 74 S.E.2d at 645.

121. *Id.* at 174, 74 S.E.2d at 646.

122. *Id.* The court based its conclusion on the successful sales of tobacco by plaintiff in the Fayetteville market. *Id.*

123. *Id.* at 178, 74 S.E.2d at 649.

plaintiff's witnesses and of disinterested witnesses who were conversant with the Fayetteville tobacco market.[124]

Several recent decisions of the North Carolina Court of Appeals have denied lost profit claims in breach of contract cases. The court of appeals in *Gouger & Veno, Inc. v. Diamondhead Corp.*[125] held that a contractor did not present sufficient evidence for the jury to determine its lost profits. There was no evidence on the wages plaintiff paid, its other costs, or the number of its employees on the job.[126] In *Gray v. Gray*[127] a plaintiff sought lost profits from a breach of contract to cultivate land for the 1971 crop year. The court of appeals, however, found the evidence of the 1970 crop year insufficient because plaintiff offered no evidence on whether market prices and expenses were the same as the prior year.[128] In *McBride v. Apache Camping Center, Inc.*[129] a couple who owned and operated a dog breeding business was unable to recover lost profits when, after the mobile home they used to transport dogs to shows was damaged, defendant breached his repair contract by failing to adequately repair the mobile home.[130] An accountant's evidence—consisting of the probable success of the schnauzers at dog shows, the increased hiring out of plaintiff's dogs for stud services owing to that success, and the ability of plaintiff's female dogs to bear litters of prize-winning puppies—was insufficient to support the lost profit award plaintiff sought.[131]

In *Rannbury-Kobee Corp. v. Miller Machine Co.*[132] the court considered a claim of lost profits allegedly resulting from design and manufacture defects in a universal wrapping machine, as well as from the late delivery of the machine. Plaintiff, however, had no regularly established pattern of business profits on which such a claim could be based.[133] The court denied plaintiff its alleged lost profits: the evidence showed that plaintiff had to withdraw bids because of the late delivery and the machine's defects, but not that it was unable to perform firm contracts without the machine.[134]

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124. *See id.* at 176-78, 74 S.E.2d at 647-49.

125. 29 N.C. App. 366, 224 S.E.2d 278 (1976).

126. *Id.* at 368-69, 224 S.E.2d at 280.

127. 30 N.C. App. 205, 226 S.E.2d 417 (1976).

128. *Id.* at 207, 226 S.E.2d at 418-19.

129. 36 N.C. App. 370, 243 S.E.2d 913 (1978).

130. *Id.* at 370-71, 243 S.E.2d at 914.

131. *Id.* at 372, 243 S.E.2d at 915; *see also* Weyerhaeuser Co. v. Godwin Bldg. Supply Co., 292 N.C. 557, 234 S.E.2d 605 (1977) (because plaintiff offered no evidence to support either the probability of profits or an estimate of their amount, it was error for jury to consider possible lost profits as an element of damages); Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959) (requiring that lost profit measurements be based on facts in the record, not on mere guesswork or inference).

132. 49 N.C. App. 413, 271 S.E.2d 554 (1980).

133. *Id.* at 416, 271 S.E.2d at 557.

134. The court of appeals reasoned:

> Plaintiff may base its claim for lost profits upon other factors [than an established pattern of profits], but these factors must be equally as reliable as a proven record of profits and may not involve conjecture or speculation. . . . One such method of establishing lost profits would appear to be to show contracts which the plaintiff had entered into, which it was unable to perform because of late delivery and defects in the wrapping machine. Plaintiff's evidence . . . was to the effect that it had to withdraw *bids* because the machine was

In *Danjee, Inc. v. Addressograph Multigraph Corp.*[135] the court of appeals did uphold a lost profit award to plaintiff, a small typesetting business, which lost an account with the Practicing Law Institute (PLI) because of defendant's failure to deliver a 797 Input Machine in a timely fashion.[136] The evidence showed that plaintiff received a commitment from PLI that it would supply plaintiff over $100,000 in future business. Defendant was so slow to deliver the 797 and the loaner machine provided in the contract that plaintiff was unable to maintain the specifications sought by PLI, which as a result had its work completed by someone else.[137] Defendant invoked the *Machine Co.* decision[138] in which there was insufficient evidence to enable a jury to estimate the potential loss of sales of the cigarette machines from defendant's refusal to allow plaintiff to exhibit them. The *Danjee* court, however, distinguished the speculative evidence offered in the earlier case from the "reasonably clear" evidence that PLI had committed itself to furnish business to plaintiff.[139]

In *Olivetti* the court of appeals considered a number of these prior decisions. The court held that sufficient evidence existed to find "with a reasonable degree of certainty" that Ames had lost profits of $401,000.[140] The factor distinguishing *Olivetti* from the great majority of prior lost profit cases was that the court further concluded "such loss was the direct and necessary result of Olivetti's wrongful conduct."[141] The questions still remained, however, whether Olivetti's wrongful conduct was properly subject to the proscriptions of section 75-1.1 and whether Ames offered ample evidence, in light of North Carolina precedent, to allow a trebling of its alleged lost profits under section 75-16.

The *Olivetti* court found that Olivetti made fraudulent misrepresentations of a material fact to Ames, and that Ames reasonably relied on the misrepresentations to its detriment.[142] Ames thus established the elements necessary for

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not operational. There was no evidence that any bid by plaintiff was ever accepted, although plaintiff's president testified that he believed the bids would have been accepted had plaintiff been capable of performing. By the time plaintiff finally entered into a firm contract with a customer, the wrapping machine was fully operational.

We do agree with the trial judge that the foregoing evidence failed to make out with sufficient certainty the plaintiff's loss of profits due to the delay in its commencement of operations.

Id. at 417, 271 S.E.2d at 557.

135. 44 N.C. App. 626, 262 S.E.2d 665, *disc. rev. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980).

136. Also at issue—but subject to a different damages calculation—was plaintiff's recovery for a 748 Phototypesetter, which defendant misrepresented as a new model when in fact it was a demonstrator model. *Id.* at 637, 262 S.E.2d at 672.

137. *See id.* at 634-35, 262 S.E.2d at 670-71. The lost PLI account was the basis for the jury's award to plaintiff of $40,000 in lost profits, which the court calculated by subtracting plaintiff's production costs from the PLI business it lost. *Id.* at 635, 262 S.E.2d at 670-71.

138. *Machine Co.*, 141 N.C. at 287-88, 53 S.E. at 886. For a discussion of *Machine Co.* see *supra* notes 109-112 and accompanying text.

139. *Danjee*, 44 N.C. App. at 636, 262 S.E.2d at 671. The court also noted that plaintiff's agents made several preparations for soliciting additional business based on the expected delivery of the 797. *Id.* The court did not find PLI's commitment speculative, even though the evidence showed that PLI would "most likely" supply Danjee with the additional $100,000 in future business if its current requirements were met. *Id.* at 629, 636, 262 S.E.2d at 667, 671.

140. *Olivetti*, 81 N.C. App. at 21, 344 S.E.2d at 94.

141. *Id.*

142. *Id.* at 14-15, 344 S.E.2d at 89-90.

proof of fraud,[143] and courts have held fraud actionable under section 75-1.1.[144] North Carolina courts have broadly interpreted the Unfair and Deceptive Trade Practices Act,[145] consistent with the avowed intent of the North Carolina General Assembly in its 1977 modification of the statute.[146] The nature of a distributorship or franchise arrangement is such that an unfair trade practice statute should be applicable to it.[147] Courts in other states have applied their unfair trade practice statutes to such arrangements between suppliers and distributors.[148] In addition, at least one North Carolina decision other than *Olivetti* has applied section 75-1.1 to a distributor.[149]

Given the direct bearing a distributor's activities may have not only on a dealer, but also on the consumer—witness the effect of Olivetti's misrepresentations on Ames' Charlotte customer[150]—there is no reason not to apply the admittedly broad North Carolina statute to such arrangements.[151] The statute

143. *See generally* Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 253-55, 266 S.E.2d 610, 615-16 (1980) (although the borrower-mortgage broker relationship is covered under § 75-1.1, plaintiff's cause of action failed because defendant's representations to plaintiff were true); Ragsdale v. Kennedy, 286 N.C. 130, 138-39, 209 S.E.2d 494, 500-01 (1974) (defendant proved elements of actionable fraud in counterclaim against plaintiff who had falsely represented a corporation was a "gold mine" and a "going concern").

144. Hardy v. Toler, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975).

145. *See supra* notes 77-92 and accompanying text.

146. *See supra* note 73.

147. One commentator has offered a useful definition of the distributor's arrangement with a supplier:

> Many corporations sell their products through agreements with local distributors, who handle not only that product but the products of others. Such agreements often require that the products sold bear the trademark of the party contracting with the distributor (hereinafter called the seller) and be sold in a specified manner. The distributor typically agrees to purchase a specified quantity of the seller's product, often within the first few months of the commencement of the relationship, upon the threat of early termination of the relationship. The agreement may specify that the distributor is not the seller's agent but rather an independent contractor acting for its own account for resale on its own terms. The seller's actual control over the manner in which the product is sold, however, may be substantial.

Black, *New Federal Trade Commission Franchise Disclosure Rule: Application to Distributorship Arrangements*, 35 BUS. LAW. 409, 417 (1980).

In *Olivetti* NBI was the supplier and Olivetti was the distributor. Ames was a regional dealer for Olivetti's distribution network.

148. *See, e.g.*, Morris v. Watsco, Inc., 385 Mass. 672, 433 N.E.2d 886 (1982) (termination of distributorship actionable; issue was computation of interest according to Florida law); Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 408 N.E.2d 1370 (1980) (applying sections of state statute regarding unfair or deceptive acts or practices to businesspeople engaging in "trade or commerce" with one another, in the case of a convenience store franchise); Dowling v. NADW Marketing, Inc., 631 S.W.2d 726 (Tex. 1982) (jury findings, which supported verdict that defendant violated Texas' Deceptive Trade Practices Act in offering plaintiff opportunity for distributorship, included proof of fraud); *see also* Watson v. Settlemeyer, 150 Colo. 326, 372 P.2d 453 (1962) (in unfair competition context, but in the absence of a statute, conduct of rival distributor was responsible for termination of plaintiff distributor's oral distributorship contract with oil company).

149. F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 139 (1986).

150. *See supra* note 23.

151. For a discussion of other state unfair trade practice statutes, see Faruki, *The Defense of Terminated Dealer Litigation: A Survey of Legal and Strategic Considerations*, 46 OHIO ST. L.J. 925 (1985); Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 531-36 (1980); Lovett, *State Deceptive Trade Practices Legislation*, 46 TUL. L. REV. 724 (1972); Note, *Toward*

applies to unfair and deceptive acts "in or affecting commerce,"[152] and " 'commerce' includes all business activities, however denominated . . . ."[153] North Carolina courts have seized on this broad language to apply the statute to a variety of commercial transactions.[154] Thus, the *Olivetti* decision fits easily within the mainstream of the North Carolina cases, which have allowed broad application of the statute. Although Olivetti charged that the statute was unconstitutionally vague and overbroad as applied, the court's denial of this argument is also in harmony with prior decisions construing the statute.[155]

What is not so clear is whether the evidence Ames presented was sufficient proof of lost profits. The rules governing proof of lost profits under tort and contract principles in North Carolina cases are similar. The greater number of cases have considered lost profits resulting from a breach of contract, in which a plaintiff must prove that profits would have been realized but for the breach, that the amount of profits is ascertainable with reasonable certainty, and that the profits were within the contemplation of the parties when the parties entered into the contract.[156] In a tort action a court will allow recovery of lost profits if a plaintiff's loss is the direct and necessary result of a defendant's wrongful conduct, and the plaintiff can then show the amount of profits with reasonable certainty.[157] Thus, under a tort law analysis, the *Olivetti* court first had to determine whether Ames would have become an NBI dealer in late 1980 or

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Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses, 96 HARV. L. REV. 1621 (1983).

152. N.C. GEN. STAT. § 75-1.1(a) (1985).

153. *Id.* § 75-1.1(b).

154. *See supra* notes 78-92 and accompanying text.

155. The *Olivetti* court relied on the vagueness standard applied in an earlier decision by the North Carolina Supreme Court. *In re* Burris, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd*, 403 U.S. 528 (1971); *see supra* note 46. The *Burris* court concluded, "When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met." 275 N.C. at 531, 169 S.E.2d at 888.

In another decision the North Carolina Court of Appeals stated in dictum that the language of § 75-1.1 was so "broad and vague" that the allowance of treble damages was "at least of questionable validity." Hammers v. Lowe's Cos., 48 N.C. App. 150, 154, 268 S.E.2d 257, 259-60 (1980). One year later, however, the North Carolina Supreme Court reaffirmed the broad applicability of § 75-1.1 and defended the levying of treble damages under § 75-16. Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981). When a superior court recently declared § 75-1.1 unconstitutional, the court of appeals struck that portion of the lower court's opinion as "surplusage and of no legal effect." United Virginia Bank v. Air-Lift Assocs., 79 N.C. App. 315, 323, 339 S.E.2d 90, 95 (1986).

One commentator has recently argued that § 75-1.1 is unconstitutionally vague and requires restrictive amendments. Farr, *Unfair and Deceptive Legislation: The Case for Finding North Carolina General Statutes Section 75-1.1 Unconstitutionally Vague as Applied to an Alleged Breach of a Commercial Contract*, 8 CAMPBELL L. REV. 421 (1986). The article compares the North Carolina statute with those of other states. *See id.* at 432-34. The author concluded:

> Treble damages may serve the interests of justice when a consumer would otherwise be unable to finance litigation against a corporation. However, treble damages are an injustice when they result in huge windfalls to commercial plaintiffs at the expense of commercial defendants who, despite having breached a contract, may have acted with the best of intentions and in good faith.

Id. at 436. Obviously, such a conclusion is not warranted when applied to the willful breach and fraudulent misrepresentations at issue in *Olivetti*.

156. *See, e.g.*, *Perkins*, 237 N.C. at 171, 74 S.E.2d at 644; *see supra* note 119.

157. *See* Reliable Trucking Co. v. Payne, 233 N.C. 637, 639, 65 S.E.2d 132, 133 (1951); Kitchen Lumber Co. v. Tallahassee Power Co., 206 N.C. 515, 522, 174 S.E. 427, 431 (1934).

early 1981 had it not been for Olivetti's misrepresentations concerning the status of the NBI agreement. Once the court found the misrepresentations caused Ames to forego the opportunity to become an NBI dealer, the inquiry then became whether Ames offered adequate proof to determine the amount of its lost profits with reasonable certainty.

The court's reasoning on the causation issue is persuasive when compared to other North Carolina cases that involved tortious conduct. After a close analysis of the evidence[158] the *Olivetti* court found that Ames would have become an NBI dealer had Olivetti not assured Ames that Olivetti would continue its supply and support of the TES-701 after Olivetti had privately terminated its supply agreement.[159] This evidence fits the standard stated in *Steffan* that the conse-

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158. *See supra* notes 51-53 and accompanying text.

159. *Olivetti*, 81 N.C. App. at 19, 344 S.E.2d at 92-93. Testimony offered by Perry and Ames' two former employees who went to IPC supported the finding that Ames otherwise would have pursued an NBI dealership. For example, Perry testified:

> Q. Did you then subsequently make a decision about whether or not to become an NBI dealer?
>
> A. Yes, after Mr. Downs [NBI representative] left, we stayed and we discussed everything, based on what Mr. Downs had said. We had the proper mix of people. We had the nice office space. But we decided that it wasn't feasible for us to go with NBI at that time because of a number of reasons, number one being that the 701 was basically identical to the NBI-3000. At that time I was paying at least $2,000.00 per unit less for my 701 than NBI was paying for their NBI-3000. We were also told that upcoming, we would be getting additional software features [through Olivetti]. A second video, which would have made us more successful in selling the product, and then thirdly, we just felt that we had just spent forty-some thousand dollars for Olivetti equipment, and we have five of them in there—well, less the two that we were delivering [to the Charlotte customer], and based on those factors, we decided to forego the opportunity to become an NBI dealer.
>
> . . .
>
> Q. If you or anyone at Ames had known in late 1980 or early 1981, the NBI-Olivetti agreement was not going to be renewed for 1981 or had not been renewed for 1981, would Ames have made a different decision about whether or not to become an NBI dealer?
>
> A. Yes. We would have become an NBI dealer in March of '81 or sooner.
>
> Q. Could you have become an NBI dealer?
>
> A. Yes, we could have. Initially, I could have taken the $46,000.00 that I borrowed. I could have invested that in NBI products, which was more than sufficient to fulfill their requirements for immediate floor inventory. Had my stockholders known at the same time, I would have approached them for any working capital that I may have needed, and based on the worth of the people that were in business with me, I feel that either one of them could have shown me from five hundred thousand to a million dollars on a financial statement.

Defendant Appellee's Brief at 27-28, *Olivetti*.

> Jay Ozment, Ames' salesman, was also at the same meeting and testified:
>
> Q. Did Ames become an NBI dealer at that time?
>
> A. No, we did not. Mr. Perry and I talked after Mr. Downs had left, and the conclusion we came to is if we were going to receive the things that we had been told we were going to receive, that there was really no sense in going with NBI at that time. We had the 701. If we were to get the additional software and the second video, which we were competing against Cavin's [the then-current NBI dealer], then we would have a very viable product at that point in time.

Id. at 29.

> David Harrison, Ames' serviceman, testified:
>
> Q. And did Ames subsequently decide not to become an NBI dealer?
>
> A. Yes. It was Mr. Perry and Jay's thoughts that, well, they told me that it would be senseless for us to go with NBI now to get these other features when we've got the same machine with the possibility of getting these features in the future that we can sell for less

quences be a natural and probable result of defendant's act, especially when a defendant has acted maliciously.[160]

Olivetti argued on appeal that Ames' inability to become an NBI dealer was similar to the situation of the plaintiff who had failed to enter into actual contracts in *Rannbury-Kobee*,[161] or the plaintiff who had been unable to show specific cigarette-machine sales in *Machine Co.*[162] The *Danjee* court, however, allowed recovery for the typesetting business based on a foregone business opportunity caused by the defendant's failure to deliver the proper equipment for the plaintiff to satisfy its client's needs. Similarly, Olivetti's fraudulent misrepresentation caused Ames to forego a business opportunity it otherwise would have taken had it been fully informed. The possibility of a direct NBI dealership was what motivated Ames' employees to become affiliated with IPC.[163]

Assuming Ames would have become an NBI dealer, the problem remains whether its proof of lost profits based on the sales and service revenue of its former employees was sufficient when compared to prior contract and tort cases involving proof of certainty in the measurement of lost profits. The *Olivetti* court's rejection of the "new business rule" as applicable to the case was well-founded. Although the court in *Machine Co.* had approved the principle,[164] the *Olivetti* court noted that North Carolina courts had rejected it and instead adopted the requirement that the amount of damages for lost profits be proven with a reasonable degree of certainty.[165] As the court noted, it is a misnomer to apply such an appellation to a case of an established business with no history of profits immediately preceding the period for which lost profits are being sought.[166] The agricultural cases have not allowed recovery when the only evidence of prior profits was the plaintiff's profits and expenses for the previous crop year.[167] The *Perkins* court, however, did allow recovery of lost profits for the lessee of the tobacco warehouse who, despite his having been in business

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> money [than] NBI was selling it for. So they figured why go with NBI now if we've got the same machine for less money? It would be senseless.

Id. at 31.

160. *Steffan*, 223 N.C. at 159, 25 S.E.2d at 629.

161. *Rannbury-Kobee*, 49 N.C. App. at 413, 271 S.E.2d at 554.

162. *See* Plaintiff Appellant's Brief at 21-25, *Olivetti*. The *Wilkinson* court also mentioned "collateral engagements of the parties." *Wilkinson*, 149 N.C. at 22, 62 S.E. at 750.

163. For example, Jay Ozment testified that

> I would have recommended that we go to NBI. Again, I am very knowledgeable on competition, and everything that I could read at that point in time listed NBI as number one or number two as far as the word-processing systems on the market. I guess my selling bears that out now, and I would have made that same choice as I made a year later to go with NBI. I would have recommended that Mr. Perry take on the NBI product.

Defendant Appellee's Brief at 30, *Olivetti*.

164. *Machine Co.*, 141 N.C. at 297, 53 S.E. at 890.

165. *Olivetti*, 81 N.C. App. at 16-17, 344 S.E.2d at 91. For a criticism of the "new business rule," see Comment, *supra* note 47. The author concluded that the objective of seeking a bright-line test "should not mandate a continuing adherence to [the rule] when its major premise—that past profits are necessarily the only reliable basis from which the existence of future profits may be inferred—is no longer acceptable." *Id.* at 733-34.

166. *Olivetti*, 81 N.C. App. at 16, 344 S.E.2d at 91.

167. *Perry*, 169 N.C. at 541, 86 S.E. at 337; *Gray*, 30 N.C. App. at 207, 226 S.E.2d at 418-19.

only for one year, had established a "going concern."[168] In the absence of any precedent that clearly espoused the "new business rule," the *Olivetti* court adopted the view that even though Ames had not had a history of profits by which it could measure prospective profits, Ames should nonetheless be able to recover lost profits it could demonstrate with reasonable certainty.

Ames opted for a "yardstick" measure in its proof of the amount of profits it lost because of Olivetti's misrepresentations.[169] The United States Supreme Court recognized this measure of lost profits in a case cited with approval by the *Olivetti* court.[170] As the court of appeals noted, Ames was not drawing a comparison between itself and IPC as automated office equipment dealers. Rather, Ames presented evidence of the specific NBI business it lost to IPC because of Olivetti's misrepresentations. Thus, the lost profit measure offered by Ames does not fit neatly into the traditional "yardstick" category. Did the court's measure of lost profits nonetheless comply with the requirement that such profits be proven with reasonable certainty?

There are several North Carolina cases in which the court has denied lost profits because there was no reasonable certainty as to the measure of such damages. In *Machine Co.* and *Rannbury-Kobee* plaintiffs were unable to demonstrate lost sales with specificity. In *Perry* and *Gray* the comparison of one year's crop with a prior year's crop did not afford reasonable certainty. Indefinite computation of profits and costs also precluded recovery in *Gouger & Veno* and *McBride*. According to the court of appeals in *Gouger & Veno*, the evidence "fell far short of providing the jury with information upon which they might determine loss of profits with reasonable certainty."[171] Other North Carolina decisions have turned on similar conclusions about the indeterminacy of the evidence of lost profits.[172]

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168. *Perkins*, 237 N.C. at 174, 74 S.E.2d at 646.

169. A court applying the "yardstick" measure of lost profits compares the income and expenses of the plaintiff's business with those of other businesses of a comparable nature, size, and location during the period in question. *See, e.g.*, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 257-59 (1946); *see also* 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1346A, at 249 (3d ed. 1968) ("Profits made by others . . . or by the plaintiff himself in a similar business or under a similar contract, where the facts were not greatly different, may also afford a reasonable inference of the plaintiff's loss."); Comment, *supra* note 47, at 713-17 (discussing the "yardstick" measure and its variations).

170. Bigelow v. RKO Pictures, Inc., 327 U.S. 251 (1946). The *Olivetti* court cited this and another Supreme Court case, Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931), in support of the proposition that a more liberal rule allowing lost profits should apply in tort actions. *Olivetti*, 81 N.C. App. at 18, 344 S.E.2d at 92.

171. *Gouger & Veno*, 29 N.C. App. at 369, 224 S.E.2d at 280.

172. *See, e.g.*, Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959) (evidence insufficient to allow recovery to truck driver alleging lost profits related to revenue he would have received had defendant shippers not breached contract for carriage of goods); Champion Fiber Co. v. Hardin, 172 N.C. 767, 90 S.E. 919 (1916) (denying defendant's counterclaim for lost profits, when lost profit amount was based on varying estimates of profits on wood); C.B. Coles & Sons Co. v. Standard Lumber Co., 150 N.C. 183, 63 S.E. 736 (1909) (denying defendant's counterclaim for lost profits for rental value of space after plaintiff failed to pick up pine lumber from defendant's property); Meares v. Nixon Constr. Co., 7 N.C. App. 614, 173 S.E.2d 593 (1970) (holding plaintiff's testimony that his anticipated profit was 20% of contract price did not provide adequate factual basis for jury to determine measure of damages with certainty required by prior North Carolina Supreme Court decisions).

Ames' measurement of lost profits in *Olivetti* must be judged against these standards. In arriving at the amount of Ames' lost profits, the trial court accepted the projections of Perry, the business' president and owner. Perry had based his own projections on Ozment's actual sales for IPC between October 1981 and March 1984; a projected gross profit margin on those sales based on the gross profit margin realized by Ames in prior years; projected service revenue generated by the sales based on Perry's knowledge and Ames' past record; and Ames' projected operating expenses based on those of prior years.[173] Ozment testified there was no substantial difference between the sales techniques he used while employed by IPC and techniques he used while employed with Ames.[174] Olivetti argued that even if it conceded the court's measure of damages to be proper, Perry's testimony was inadequate to support the lost profit award. The court of appeals, however, disagreed because the testimony of Ozment and certain documentary evidence supported Perry's projections.[175]

The *Wilkinson* court also had found persuasive the testimony of both defendant and his lumbermen in computing timber profits per thousand feet.[176] The *Perkins* court relied on the testimony of both plaintiff and disinterested witnesses in arriving at its measure of lost profits for defendant's breach of the tobacco warehouse lease.[177] Similarly, Olivetti was unsuccessful in objecting to the testimony of Perry, who had experience in the business of selling automated office equipment and offered figures on which Ames' lost profits could be based with reasonable certainty.[178]

A comparison of the lost profit recovery allowed by the *Olivetti* court and that disallowed is instructive. In its appeal Ames sought a broader measure of its damages to take into account the expenses it allegedly wasted on the TES-701 prior to 1982, and profits it allegedly lost subsequent to 1984.[179] The problem with Ames' proof for the period preceding 1982 was that it failed to present sufficient evidence for the court to determine what portion of Ames' expenses and losses were attributable to Olivetti's misconduct rather than to other factors.[180] For the post-1984 period Ames was unable to offer into evidence figures on profits based on actual sales by IPC: such losses for future profits were too

173. *Olivetti*, 81 N.C. App. at 20, 344 S.E.2d at 93.

174. From such evidence the court concluded,

> use of the sales made by Ozment for IPC, an NBI dealer, during the relevant time period and in the same or similar geographical area in which Ames operated and the service business generated from those sales to determine the profits which Ames would have made during the same time period as an NBI dealer seems particularly reliable.

Id. at 20-21, 344 S.E.2d at 93.

175. *Id.* at 27-28, 344 S.E.2d at 93-94.

176. *Wilkinson*, 149 N.C. at 21, 62 S.E. at 751-52.

177. *Perkins*, 237 N.C. at 176, 74 S.E.2d at 647.

178. *Olivetti*, 81 N.C. App. at 21, 344 S.E.2d at 94.

179. *Id.* at 25, 344 S.E.2d at 96; *see supra* note 70.

180. *Olivetti*, 81 N.C. App. at 25-26, 344 S.E.2d at 96. A large portion of what Ames sought by this measure, also based on Perry's projections, was 28 months of "wasted effort" at $9,000 per month, for a total of $252,000. Plaintiff-Appellant's Brief app. at 7, *Olivetti*. The court had difficulty with these figures because Ames presumably did reap some profits from the sale of 701's between 1979 and 1982, and so would have received a double recovery had the court allowed damages for that period. *Olivetti*, 81 N.C. App. at 26, 344 S.E.2d at 96.

speculative.[181] In contrast, the lost profit projections for 1982 through 1984 were probative of causation, because Olivetti's misrepresentations led to Ames' foregoing the opportunity to become an NBI dealer. Further, the projections for 1982 through 1984 were probative as a measure of the amount of profits lost, because they reflected actual IPC sales by Ames' former employees.

Based on prior cases in which courts have held plaintiffs' evidence of lost profits sufficient and the *Olivetti* court's close scrutiny of the evidence, the measure the court adopted was probative of lost profits within a reasonable degree of certainty. Even if the measure was only approximate, a wrongdoer who has displayed egregious conduct should "bear the risk of the uncertainty which his own wrong has created."[182] In *Olivetti* the distributor and its agents engaged in a pattern of deceptive conduct with respect to Ames. In reliance on Olivetti's misrepresentations Ames converted its demonstration documents for customers to the 701 system. Ames spent one to two months reformatting and upgrading its legal billing and legal documents packages for display to customers so that the packages might comport with the enhancements made possible by the 701.[183] Ames' employees attended a training school on the 701 in Tarrytown, New York.[184] Ames sent out mailers and booked hotel accommodations in Morganton, Salisbury, and other outlying areas in its sales territory to demonstrate the 701 system to attorneys, architects, and other businesspeople who might find the system useful.[185] While Ames spent substantial time and effort to promote and sell the 701 system, Olivetti misrepresented the nature of its plans for distribution, marketing, and other support of the system. Under such circumstances it is "enough if the evidence [shows] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."[186]

For a plaintiff to recover damages for a violation of North Carolina General Statutes section 75-1.1 it is not pertinent whether the wrongdoer demonstrated bad faith.[187] Once a violation has been shown the court must automatically apply a recovery of treble damages under North Carolina General Statutes section 75-16 in order to compensate the aggrieved party *and* to punish the wrongdoer.[188] Courts must give relief in cases, like *Olivetti*, in which unfair and deceptive trade practices have "broken up, destroyed or injured" the business of another.[189] If the *Olivetti* court had found the lost profit measure too uncertain as a basis for awarding damages, then Ames' recovery would have been inade-

181. *Olivetti*, 81 N.C. App. at 26, 344 S.E.2d at 96. Perry extrapolated from the 1982-1984 profit losses to arrive at a projected twenty-year loss to Ames of over $4.2 million. Plaintiff Appellant's Brief app. at 7, *Olivetti*.

182. *Olivetti*, 81 N.C. App. at 18, 344 S.E.2d at 92.

183. Defendant Cross-Appellant's Brief app. at 15-16, *Olivetti* (quoting testimony of Jay Ozment).

184. *Id.* app. at 16-17.

185. *Id.* app. at 17-18.

186. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

187. *See* Marshall v. Miller, 302 N.C. 539, 544, 276 S.E.2d 397, 400-01 (1981).

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

189. N.C. GEN. STAT. § 75-16 (1985).

quate considering the nature and magnitude of the harm done to its business.[190] Under such circumstances Ames could have argued the court should allow both a treble damages recovery under the statute as a matter of law and a punitive damages award at the factfinder's discretion.[191] A cause of action could allege both treble damages for a violation of section 75-1.1 and punitive damages on the theory that a defendant's willful wrongdoing merits such a recovery, but problems of mutual exclusivity of the two remedies may then arise.[192] The *Olivetti* court agreed with the trial court that punitive damages were inappropriate when the treble damages recovery proved adequate to compensate Ames for its losses.[193]

Ames' damages recovery for the injury done to its business was both adequate and justified. Section 75-1.1 has been applied to a vast array of circumstances and it should embrace unfair and deceptive trade practices in the distributor-dealer relationship. Courts must be wary not to adopt a universal view favoring the dealer who claims "long and faithful service and good performance" on behalf of the "heartless and greedy" distributor.[194] Courts should ensure, however, that a business does not "victimize another business by engaging in conduct that amounts to an inequitable assertion of its power or position."[195] The purpose of North Carolina's Unfair and Deceptive Trade Practices Act has been to punish such conduct and to offer small businesses and other private litigants an alternative to larger recoveries available under federal legislation.[196]

A business seeking relief for a violation of the statute should also be afforded a treble damages recovery under section 75-16 upon proving it lost profits as a result of the prohibited conduct. In *Olivetti* the fraudulent misrepresenta-

190. Had the court denied Ames' lost profits, Ames would have recovered $5,200, and only that amount would have been trebled under § 75-16.

191. In a dissenting opinion in Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712 (4th Cir. 1983), Judge Bryan argued that an award of punitive damages may not preclude a treble damages recovery for a violation of § 75-1.1. *Id.* at 718-21 (Bryan, J., dissenting).

192. *See* Note, *supra* note 71, at 1143-45.

193. *Olivetti*, 81 N.C. App. at 26, 344 S.E.2d at 96-97. The court of appeals also deferred to the discretion of the trial judge in not awarding attorney fees under § 75-16.1, *Olivetti*, 81 N.C. App. at 26, 344 S.E.2d at 97, a provision only applicable to violations of § 75-1.1. *See* N.C. GEN. STAT. § 75-16.1 (1985); Aycock, *supra* note 73, at 259-60. The allowance of treble damages under § 75-16 applies to all Chapter 75 violations.

In Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986), a real estate developer was able to recover only a nominal damages award from a defendant who violated § 75-1.1 by distributing to plaintiff's residents letters that alleged improper sewage facilities. The court of appeals overturned the trial court's punitive damages award, but allowed plaintiff to recover attorney's fees of $15,000 because of defendant's willful acts. *Id.* at 64, 338 S.E.2d at 925-26. In a separate opinion Judge Phillips argued that fairness and the legislative intent behind § 75-1.1 dictated that punitive damages should supplement the treble damages provision "where a violation of N.C. GEN. STAT. 75-1.1 is malicious, wilful and for an improper purpose and where trebling the actual damages suffered would neither punish the wrongdoer nor encourage victims to enforce the statutory policy." *Id.* at 66, 338 S.E.2d at 927 (Phillips, J., concurring in part and dissenting in part).

194. Faruki, *supra* note 151, at 926.

195. Aycock, *supra* note 73, at 223.

196. Marshall v. Miller, 302 N.C. 539, 549, 276 S.E.2d 397, 403-04 (1981). One commentator has noted the rationale behind the need to protect small businesses that, like consumers, are "unequal participants in many of their business transactions." Note, *supra* note 151, at 1629.

tions of the distributor caused its dealer to forego a promising business opportunity and to continue selling a product that the distributor had secretly decided it was no longer willing to supply and support. The goal of the damages remedy in *Olivetti*[197] was not only to punish Olivetti for its conduct, but also to compensate Ames for the business opportunities it lost because of Olivetti's misrepresentations. The treble damages award accomplished the dual statutory purposes of punishing the wrongdoer in order to deter future violations and providing a remedy for actual injury suffered by the aggrieved party.[198]

In *Olivetti* the North Carolina Court of Appeals properly noted that "the degree of acceptable uncertainty [of proof of lost profits] varies with the strength of the underlying substantive legal policy."[199] Even without taking into account Olivetti's wrongful conduct, Ames offered adequate proof of its lost profits under the peculiar circumstances of the case. The court applied the standard of reasonable certainty that has been well-established under prior North Carolina case law addressing sufficient evidence of lost profits.[200] As a result, the *Olivetti* decision is a useful, albeit narrowly-drawn, statement of what constitutes adequate proof of lost profits suffered by victims of unfair and deceptive trade practices in

197. According to the *Olivetti* court, "[e]ach case must be determined according to its own facts, keeping in mind the goal of the damage remedy for those facts. . . . We are unable to say that the method used by the court here to ascertain Ames' lost profits was improper given the circumstances of this case." *Olivetti*, 81 N.C. App. at 20, 344 S.E.2d at 93.

198. Marshall v. Miller, 302 N.C. 539, 546, 276 S.E.2d 397, 402 (1981).

199. *Olivetti*, 81 N.C. App. at 18, 344 S.E.2d at 92.

200. *See supra* notes 101-39 and accompanying text.

ADDENDUM

After this Note reached the final stages of publication, the North Carolina Supreme Court decided the case on appeal. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 356 S.E.2d 578 (1987). In an opinion written by Justice Meyer, the supreme court upheld the trial court's findings that Olivetti made material misrepresentations to Ames, *id.* at 542-43, 356 S.E.2d at 583, and that Ames' reliance on Olivetti's misrepresentations was reasonable, *id.* at 544, 356 S.E.2d at 584. The supreme court further held, "along with what appears to be a majority of jurisdictions reaching the issue," that the new business rule is not applicable in North Carolina. *Id.* at 546, 356 S.E.2d at 585. However, the court by a 4-3 margin reversed the decision of the court of appeals on the issue of damages. *Id.* at 544, 356 S.E.2d at 584.

First, the majority vacated the trial court's damage award of $5,200 to Ames for lost profits on its sale of the two TES-701's. *Id.* at 544-45 n.2, 356 S.E.2d at 584-85 n.2. The majority then reasoned that Ames failed to offer proof of lost future profits with reasonable certainty. *Id.* at 546-49, 356 S.E.2d at 585-87. The majority held there was insufficient evidence that Ames was deprived of an opportunity to become an NBI dealer. *Id.* at 546-47, 356 S.E.2d at 586. The majority held as a matter of law that the trial court's use of the profits generated for IPC by Ames' former employees was an erroneous measure of damages. *Id.* at 548-49, 356 S.E.2d at 586-87. Because it held Ames did not prove damages with reasonable certainty, the majority did not reach the issues of whether Chapter 75 of the North Carolina General Statutes applied to the case or whether punitive damages were available to Ames. *Id.* at 549, 356 S.E.2d at 587.

Contrary to the majority opinion, Justice Frye—who was joined in his separate opinion by Chief Justice Exum and Justice Martin—viewed proof of damages for lost profits as a question of fact. *Id.* at 552-54, 356 S.E.2d at 589-90 (Frye, J., concurring in part and dissenting in part). According to Justice Frye, Ames not only proved the *fact* of damages, *id.* at 553, 356 S.E.2d at 589 (Frye, J., concurring in part and dissenting in part), but as an innocent victim was not required to show the *amount* of damages with mathematical precision, *id.* at 559, 356 S.E.2d at 592 (Frye, J., concurring in part and dissenting in part). After detailing the evidence, the dissenting justices expressed the position that they would have upheld the trial court's finding that Ames proved its damages for lost profits with reasonable certainty. *Id.* at 562, 356 S.E.2d at 594 (Frye, J., concurring in part and dissenting in part).

North Carolina. The innovative decision offers hope for a business whose profits have diminished because of a violation of section 75-1.1. The decision also sounds a warning to future violators. It is a warning that undoubtedly will not go unnoticed.

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