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MISREPRESENTATION IN NORTH CAROLINA

ROBERT G. BYRD*

In the field of misrepresentation, tort law has evolved from the simple maxim "let the buyer beware" to a much more comprehensive response to representations that are false or misleading. North Carolina's courts and its legislature have each contributed to this development, imposing liability for representations made with knowledge of falsity, those made negligently, and even those made innocently, but which have a capacity to deceive.

In this Article Professor Robert Byrd explores the scope of liability for fraud, negligent misrepresentation, and representations amounting to an unfair or deceptive trade practice. In the field of fraud, Professor Byrd finds that the courts have confused their analyses by importing language that improperly emphasizes a recipient's duty to determine the accuracy of the representation. In addition, Professor Byrd argues that the North Carolina Supreme Court has held incorrectly that reckless disregard of the falsity of a representation is insufficient to establish fraud.

In the area of negligent misrepresentation, the most significant development has been the supreme court's recent recognition of the tort and its adoption of the Restatement (Second) of Torts, which allows recovery for economic loss even by a person not in privity of contract with the party making the representation. Professor Byrd also examines the statutory protection afforded to those who might not be able to rely on the traditional theories of misrepresentation and concludes that the courts will continue to construe expansively the unfair or deceptive trade practices statute.

In North Carolina significant changes in the law of misrepresentation have occurred over time. Major new theories have been recognized and less obvious changes have been made in traditional law. These developments entail both judicial and legislative initiatives and clearly reflect greater willingness to impose liability for misrepresentation. Liability has been extended beyond the traditional action for deceit to include neg-

* Burton Craige Professor of Law, University of North Carolina at Chapel Hill. B.S. 1953, J.D. 1956, University of North Carolina at Chapel Hill. Research for this Article was supported in part by the Albert Coates Law Center. The author wishes to express his appreciation to Joseph Lingle and Matthew Osborne for their valuable research assistance in the preparation of this Article.

ligent misrepresentation¹ and, when it constitutes an unfair or deceptive trade practice,² even innocent misrepresentation.³ The cause of action in negligent misrepresentation opens the door to recovery in situations in which the absence of either scienter or privity of contract once would have barred relief. Broad recognition of misrepresentation as an unfair or deceptive trade practice has lowered requirements and expanded damage recoveries in some misrepresentation cases. Consequently, an unfair or deceptive trade practice cause of action is likely to be a standard part of the claim for relief in many misrepresentation cases. These developments are still underway and the rule structure governing these two new causes of action has not evolved completely.

Changes in the law of fraud, or intentional misrepresentation, in North Carolina have been, for the most part, more subtle. The shift here is more in attitude than in formal rule structure. *Caveat emptor*, to the extent it ever was, is no longer a major influence. In fact, close study of the cases discloses that the *caveat emptor* philosophy never exerted the dominant impact lawyers and judges often have attributed to it. Nevertheless, some change has taken place. Today, the thrust of the North Carolina decisions is that reliance upon a representation of fact seriously made is justified unless reason to suspect its accuracy exists. Accordingly, a cause of action may lie notwithstanding the traditional applicability of *caveat emptor*.

Several factors create the potential for substantial confusion in the area of fraud. Much of the terminology used by the North Carolina Supreme Court is misleading. Language such as "reasonable reliance,"⁴ "duty to investigate,"⁵ and "duty to read"⁶ seems to place major responsibility upon the recipient of a representation to determine its accuracy. These ideas appear more compatible with *caveat emptor* than the view that the recipient may justifiably rely on representations of fact intended by the maker to be taken seriously. Moreover, if actual reliance upon a representation of fact intended to be taken seriously is enough, any fur-

1. For a discussion of the cause of action for negligent misrepresentation, see *infra* notes 232-75 and accompanying text.

2. For a discussion of the cause of action for unfair or deceptive trade practices, see *infra* notes 276-352 and accompanying text.

3. The *Restatement (Second) of Torts* recognizes a damage cause of action for innocent misrepresentation in connection with sale, rental, or exchange transactions. RESTATEMENT (SECOND) OF TORTS § 552C (1977). North Carolina has not recognized this cause of action except in the context of the statutory cause of action for unfair or deceptive trade practices.

4. For a discussion of reasonable reliance, see *infra* notes 47-73 and accompanying text.

5. For a discussion of the duty to investigate, see *infra* notes 109-33 and accompanying text.

6. For a discussion of the duty to read, see *infra* notes 134-64 and accompanying text.

ther inquiry about the reasonableness of that reliance is simply a redundancy that invites error.

In addition, the importance of the duties to investigate and to read in fraud claims may be exaggerated unless one reads the cases carefully. If the fraud claim is unsuccessful and the claimant has no other substantive grounds for recovery, the supreme court, in denying relief, frequently has emphasized the claimant's duty to investigate or duty to read. The court apparently uses the duty rationale in these cases to convey its view that disappointed expectations and unilateral mistake provide no basis for relief.⁷ The court's reliance on the duty rationale clearly is unrelated to the rejection of the fraud claim.

Furthermore, in an unexpected recent development the North Carolina Supreme Court held that reckless disregard of the falsity of a representation is insufficient to establish fraud.⁸ This development not only runs counter to the trend enlarging liability for misrepresentation but also lacks support in both judicial precedent and sound policy.⁹

Viewing these changes in the law of misrepresentation separately fails to reflect their major impact on North Carolina law. A misrepresentation claim no longer can be evaluated solely in terms of fraud. Lawyers must also take into account an expanding body of law that may enlarge both the substantive right of recovery and the remedies available for enforcement of that right. This Article explores the law of misrepresentation in North Carolina in light of these developments.

I. THE ELEMENTS OF FRAUD

Actionable fraud consists of (1) a false representation or concealment of a material fact that (2) is intended to and (3) does in fact (4) reasonably induce reliance and (5) results in injury or damage.¹⁰ Fault or scienter is also required.¹¹

7. See *infra* notes 116-19, 140-51 and accompanying text.

8. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568-69, 374 S.E.2d 385, 391-92 (1988).

9. For a discussion of *Myers & Chapman*, see *infra* notes 18-38 and accompanying text.

10. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468, 343 S.E.2d 174, 178 (1986) (citing *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)).

11. See *Zager v. Setzer*, 242 N.C. 493, 495, 88 S.E.2d 94, 95 (1955). Traditionally, North Carolina courts defined scienter as a state of mind in which one makes a representation with knowledge that it was false or in reckless disregard of its falsity. *Id.*; *Calloway v. Wyatt*, 246 N.C. 129, 133, 97 S.E.2d 881, 884 (1957). Recently, the North Carolina Supreme Court redefined scienter, predicating it exclusively on proof of knowing falsity. See *Myers & Chapman*, 323 N.C. at 568-69, 374 S.E.2d at 391-92 (1988). For a discussion of North Carolina's scienter requirement, see *infra* notes 18-38.

A. Materiality

To sustain a fraud action, a misrepresentation must relate to a material fact.¹² The *Restatement (Second) of Torts* adopts an objective standard to determine materiality.¹³ Under this standard a matter is material if a reasonable person making a decision about the transaction would attach importance to it.¹⁴ A fact is also material when the person representing it knows that the recipient, because of her ignorance or gullibility, or for other reasons, will attach importance to it even though a reasonable person would not.¹⁵ In contrast with the *Restatement*, the North Carolina Supreme Court apparently has adopted a subjective standard to determine the materiality of a misrepresentation:¹⁶ "A false representation is material when it deceives a person and induces him to act."¹⁷ The court, however, has never examined the issue in depth.

B. *Scienter*

Myers & Chapman, Inc. v. Thomas G. Evans, Inc.,¹⁸ a case decided in 1988, drastically changed the law of fraud. Before *Myers & Chapman*, plaintiffs could show the required element of sufficient awareness of the falsity of a representation—*scienter*—by proof that the defendant made the representation with knowledge of or in reckless disregard of its falsity.¹⁹ *Myers & Chapman* held that a representation made with reckless disregard for its falsity is insufficient to establish fraud.²⁰ The court reasoned:

While the concept of a statement "made with reckless indifference as to its truth," or one "recklessly made without knowledge as a positive assertion" . . . have been held to satisfy the element of "false representation," those concepts do not satisfy

12. *White Sewing Mach. Co. v. Bullock*, 161 N.C. 1, 6-7, 76 S.E. 634, 636-37 (1912).

13. See *RESTATEMENT (SECOND) OF TORTS* § 538 (1977).

14. *Id.* § 538(2)(a).

15. *Id.* § 538(2)(b).

16. *Keith v. Wilder*, 241 N.C. 672, 675, 86 S.E.2d 444, 446 (1955); *Cofield v. Griffin*, 238 N.C. 377, 379, 78 S.E.2d 131, 133 (1953); *White Sewing*, 161 N.C. at 7, 76 S.E. at 637. Federal courts have interpreted the North Carolina cases to apply a subjective standard. See, e.g., *Homelite v. Trywilk Realty Co.*, 272 F.2d 688, 691 (4th Cir. 1959).

17. *Cofield*, 238 N.C. at 379, 78 S.E.2d at 133. In *White Sewing* the court stated: "The false representation is material . . . if the fact untruly asserted or wrongfully suppressed, if it had been known to the party, would have influenced his judgment or decision in making the contract at all." *White Sewing*, 161 N.C. at 6, 76 S.E.2d at 636 (citation omitted).

18. 323 N.C. 559, 374 S.E.2d 385 (1988).

19. *Zager v. Setzer*, 242 N.C. 493, 495, 88 S.E.2d 94, 95 (1955); *Atkinson v. Charlotte Builders, Inc.*, 232 N.C. 67, 68, 59 S.E.2d 1, 1-2 (1950); *Palomino Mills, Inc. v. Davidson Mills Corp.*, 230 N.C. 286, 293, 52 S.E.2d 915, 920 (1949).

20. *Myers & Chapman*, 323 N.C. at 568-69, 374 S.E.2d at 391-92.

the element of a statement "made with intent to deceive." Without the element of intent to deceive, the required scienter for *fraud* is not present. The term "scienter" embraces both knowledge *and* an intent to deceive, manipulate or defraud.²¹

This case is remarkable for several reasons. First, it makes little sense to say that reckless disregard of falsity is sufficient to establish the maker's knowledge of the falsity of the representation but is insufficient to establish the maker's intent to deceive the recipient. Proof of knowing falsity, which *Myers & Chapman* required to show an intent to deceive, will always establish a "false representation" as well.²² Under these circumstances, it is of no practical significance that one can also show "false representation" by reckless disregard. Second, the court's suggestion that cases holding reckless disregard of falsity sufficient to establish scienter are of recent origin²³ ignores the court's own early and frequent reliance on this principle.²⁴ Third, the court surprisingly ignored the fact that an overwhelming majority of jurisdictions hold knowing or reckless falsity sufficient to show scienter.²⁵ Finally, for authority the court relied upon dicta in earlier cases that, when examined in their full context, seem to provide little support for the court's holding.²⁶ In light of these cir-

21. *Id.* at 568, 374 S.E.2d at 391.

22. See RESTATEMENT (SECOND) OF TORTS § 526(a) cmt. on cl. (a) (1977). The court apparently uses "false representation" to refer to the defendant's knowledge; the reckless disregard concept, however, is wholly irrelevant to determining whether the representation was false.

23. *Myers & Chapman*, 323 N.C. at 567, 374 S.E.2d at 391.

24. *E.g.*, *Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 91-92, 261 S.E.2d 99, 103 (1980), *overruled by Myers & Chapman*, 323 N.C. at 569, 374 S.E.2d at 391-92; *Zager v. Setzer*, 242 N.C. 493, 495, 88 S.E.2d 94, 95 (1955); *Atkinson v. Charlotte Builders, Inc.*, 232 N.C. 67, 68, 59 S.E.2d 1, 1-2 (1950); *Dunbar v. Tobacco Growers' Coop. Ass'n*, 190 N.C. 608, 609-10, 130 S.E. 505, 506 (1925); *Ferebee v. Gordon*, 35 N.C. (13 Ired.) 350, 351-52 (1852). Additional cases relying on the reckless disregard concept are cited *infra* notes 27, 35.

25. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 107, at 741-42 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

26. Neither "knowing or reckless falsity" nor "intent to deceive" was at issue in any case on which the *Myers & Chapman* court relied. The cases the court cited provide nothing more than a listing of the elements of fraud. Even in this limited context, the cases provide little support for the court's position. One case lists both "reckless indifference as to . . . truth" and "an intent to deceive." *Myrtle Apartments, Inc. v. Lumbermen's Mut. Casualty Co.*, 258 N.C. 49, 52, 127 S.E.2d 759, 761 (1962). Another identifies both "knowledge of [the representation's] falsity or . . . culpable ignorance of its truth" and "fraudulent intent." *Foster v. Snead*, 235 N.C. 338, 340, 69 S.E.2d 604, 606 (1952). The other three cases list "intent to deceive" but do not include knowing or reckless falsity as an element. *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974); *Vail v. Vail*, 233 N.C. 109, 113, 63 S.E.2d 202, 205 (1951); *Ward v. Heath*, 222 N.C. 470, 472, 24 S.E.2d 5, 7 (1943). An examination of the full opinion in *Ward* clearly shows that the phrase "intent to deceive," as the court used it, expressed the idea that the representation had to be made both with knowing or reckless falsity and for the purpose of inducing reliance by the recipient. *Ward*, 222 N.C. at 472-73, 24 S.E.2d

cumstances, it is surprising that the decision in *Myers & Chapman* was by a unanimous court and that the court gave so little attention to the impact of its decision.

After *Myers & Chapman*, fraud can be established only by proof of knowing falsity. Yet, it is difficult to identify any compelling reason for denying recovery when a false representation is made recklessly for the purpose of inducing the recipient's reliance. If an intent beyond the intent to induce reliance and action is required and proof of reckless disregard is insufficient to establish it, the result is that only by proof of knowing falsity can fraud be established. The rule in *Myers & Chapman* clearly needs to be reexamined. A better understanding of prior North Carolina case law may explain why the court reached this unusual decision but, more importantly, also discloses why the decision is wrong.

At least four versions of the elements of fraud are set out in the North Carolina cases. Each version requires (1) actual and (2) reasonable reliance (3) upon a material misrepresentation of fact (4) that results in harm. One group of cases adds knowing or reckless falsity and an intent to induce the recipient's reliance.²⁷ A second group includes an intent to deceive or, in the alternative, knowing or reckless falsity and an intent to induce the recipient's reliance.²⁸ A third set of cases lists an intent to deceive, but includes neither knowing or reckless falsity nor an intent to induce the recipient's reliance.²⁹ Finally, a fourth version incorporates knowing or reckless falsity and an intent to deceive, but does not list an intent to influence the recipient's reliance.³⁰

It is difficult to believe that these different statements of the elements of fraud have any substantive importance. The court has repeated each

at 8. This usage reconciles for the most part the various lists of the elements of fraud given in many North Carolina Supreme Court decisions. See *infra* text accompanying notes 27-34.

27. *E.g.*, *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 253, 266 S.E.2d 610, 615 (1980); *Odom*, 299 N.C. at 91-92, 261 S.E.2d at 103; *Lamm v. Crumple*, 240 N.C. 35, 44, 81 S.E.2d 138, 145 (1954); *Cofield v. Griffin*, 238 N.C. 377, 379, 78 S.E.2d 131, 133 (1953); *Bell v. Harrison*, 179 N.C. 190, 195-96, 102 S.E. 200, 203 (1920); *Robertson v. Halton*, 156 N.C. 215, 221, 72 S.E. 316, 318-19 (1911).

28. *E.g.*, *Dorsey v. Dorsey*, 306 N.C. 545, 548, 293 S.E.2d 777, 779 (1982); *Ward*, 222 N.C. at 472-73, 24 S.E.2d at 8; *Bolich v. Prudential Ins. Co.*, 206 N.C. 144, 155, 173 S.E. 320, 326 (1934); *Pritchard v. Dailey*, 168 N.C. 330, 332, 84 S.E. 392, 393 (1915).

29. *E.g.*, *Watts v. Cumberland County Hosp. Sys.*, 317 N.C. 110, 116-17, 343 S.E.2d 879, 884 (1986); *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468, 343 S.E.2d 174, 178 (1986); *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981); *Ragsdale*, 286 N.C. at 138-39, 209 S.E.2d at 500; *Early v. Eley*, 243 N.C. 695, 697-98, 91 S.E.2d 919, 921 (1956); *Hardy v. Southern Loan & Ins. Co.*, 218 N.C. 129, 134, 10 S.E.2d 599, 601 (1940).

30. *E.g.*, *Davis v. Davis*, 256 N.C. 468, 471, 124 S.E.2d 130, 133 (1962); *New Bern v. White*, 251 N.C. 65, 68, 110 S.E.2d 446, 448 (1959); *Leggett Elec. Co. v. Morrison*, 194 N.C. 316, 317, 139 S.E. 455, 455 (1927).

of them many times.³¹ Nothing suggests that the selection of one over another was for the purpose of affecting the outcome of a case or in fact did affect the outcome in any case. Before *Myers & Chapman* the court never gave the slightest indication that any conflict existed between these superficially different statements of the elements of fraud.

These circumstances strongly suggest the difference in the statements is one of language rather than substance. Moreover, a sensible way to reconcile the statements exists. Under two versions, the first and second, fraud exists when knowing or reckless falsity and an intent to induce the recipient's reliance are present. The second version merely equates "intent to deceive" with these two factors. At a minimum, the "intent to deceive" language in the third version must be interpreted to include both knowing or reckless falsity and intent to induce reliance, because these factors clearly are essential for fraud and are not included otherwise. In this overall context, it is entirely reasonable under the fourth version to interpret "intent to deceive" to convey the representor's purpose to induce the recipient's reliance. Rejecting this suggested reconciliation leaves only the implausible explanation that the court has, whether purposely or not, maintained parallel and conflicting lines of authority over most of this century.

The court's own opinions support this interpretation. *Ward v. Heath*,³² a case relied on in *Myers & Chapman* because it listed "intent to deceive" as an element of fraud, is illustrative. The court in that case recognized that proof of knowing or reckless falsity and an intent to induce the recipient's action is sufficient to establish fraud. After approving a textbook statement to this effect,³³ the court went on to say:

It is not always necessary in order to establish actionable fraud that a false representation should be knowingly made. It is well recognized with us that under certain conditions and circumstances if a party to a bargain avers the existence of a material fact recklessly or affirms its existence positively when he is consciously ignorant whether it be true or false he must be held responsible for a falsehood.³⁴

Thus, the *Myers & Chapman* court's suggestion forty-five years after *Ward* that the reckless disregard concept is "based on language in recent cases" is inconsistent with the facts. Over a long period of time the court, in setting forth the elements of fraud, has routinely incorporated

31. See *supra* cases cited notes 27-30.

32. 222 N.C. 470, 24 S.E.2d 5 (1943).

33. *Id.* at 472-73, 24 S.E.2d at 7-8.

34. *Id.* at 473, 24 S.E.2d at 8.

into its opinions statements endorsing the reckless disregard concept.³⁵ Reckless disregard is clearly the basis for the decisions in a number of older cases.³⁶ For example, *Zager v. Setzer*³⁷ stated:

And in this sense the evidence fails to disclose affirmatively that the plaintiff had knowledge of the alleged falsity of his representation However, the evidence is sufficient to support the inference that the plaintiff's representation . . . was recklessly made, or positively averred when he was consciously ignorant whether it was true or false The evidence tending to show this state of mind is an adequate substitute for proof of *scienter*.³⁸

The supreme court should overrule *Myers & Chapman*. The decision is questionable on several grounds. Prior case law, including those cases the court cited in support of its decision, is inconsistent with the court's holding that proof of reckless disregard is insufficient to establish *scienter*. The court's position that reckless disregard is sufficient to establish knowing falsity but insufficient to establish *scienter* introduces a distinction that has no meaningful application. The decision does not reflect sound policy. Finally, there is no indication in the *Myers & Chapman* opinion that the court was aware of or considered any of these matters.

C. Actual Reliance

A fraud cause of action requires that the claimant in fact relies on the defendant's misrepresentation.³⁹ When the plaintiff knows the true facts,⁴⁰ is aware that the representations are false,⁴¹ or would enter into

35. See *Haywood v. Morton*, 209 N.C. 235, 238, 183 S.E. 280, 281 (1955); *Dunbar v. Tobacco Growers Coop. Ass'n*, 190 N.C. 608, 609-10, 130 S.E. 505, 506 (1925); *Currie v. Malloy*, 185 N.C. 206, 214, 116 S.E. 564, 568 (1923); *Whitehurst v. Life Ins. Co.*, 149 N.C. 273, 277, 62 S.E. 1067, 1068 (1908); *Modlin v. Roanoke R.R. & Navigation Co.*, 145 N.C. 218, 226, 58 S.E. 1075, 1078 (1907); *Ferebee v. Gordon*, 35 N.C. (13 Ired.) 350, 351-52 (1852). For additional cases relying on the reckless disregard concept, see *supra* note 27.

36. See, e.g., *Zager v. Setzer*, 242 N.C. 493, 495, 88 S.E.2d 94, 95 (1955); *Atkinson v. Charlotte Builders, Inc.*, 232 N.C. 67, 68, 59 S.E.2d 1, 1-2 (1950); *Palomino Mills, Inc. v. Davidson Mills Corp.*, 230 N.C. 286, 293, 52 S.E.2d 915, 925 (1949).

37. 242 N.C. 493, 88 S.E.2d 94 (1955).

38. *Id.* at 495, 88 S.E.2d at 95.

39. *Eastern Steel Prods. Corp. v. Chestnutt*, 252 N.C. 269, 276, 113 S.E.2d 587, 593 (1960); *Simpson v. Tobacco Growers Coop. Ass'n*, 190 N.C. 603, 604, 130 S.E. 507, 507 (1925); *Von Hagel v. Blue Cross & Blue Shield*, 91 N.C. App. 58, 63, 370 S.E.2d 695, 699 (1988).

40. *Fishplate v. Fidelity Co.*, 140 N.C. 589, 594, 53 S.E. 354, 356 (1906); *Conley v. Coffin*, 115 N.C. 563, 566, 20 S.E. 207, 208 (1894); *Brown v. Lumbermens Mut. Casualty Co.*, 90 N.C. App. 464, 468-89, 369 S.E.2d 367, 369-70 (1988), *aff'd*, 326 N.C. 387, 390 S.E.2d 150 (1990).

the transaction regardless of their truth or falsity,⁴² no actual reliance exists and a cause of action in fraud cannot be sustained. A claim of actual reliance obviously must fail when the claimant acts on the basis of the claimant's own determination of the facts.⁴³ The fact that a claimant undertook independent inquiry or investigation of the facts is some evidence that the claimant relied upon his own determination rather than the defendant's representation. Such an inquiry or investigation does not, however, necessarily preclude reliance upon the representation. When a claimant enters into a transaction after an investigation in which he did not or could not discover the true facts, it is likely that the claimant ultimately relied upon the representation. In fact, an investigation which tends to confirm that the defendant's representations are reliable logically suggests that actual reliance probably occurred. Although language in an occasional case suggests that undertaking such an investigation precludes a finding of actual reliance,⁴⁴ the North Carolina case law is generally in accord with these principles.⁴⁵ In essence, the reliance must induce the transaction that underlies the claim for relief and a claim cannot be based upon representations made after the transaction is completed.⁴⁶

D. Reasonable Reliance

Actual reliance upon another person's representation is not suffi-

41. *Cox v. Johnson*, 227 N.C. 69, 70, 40 S.E.2d 418, 418-19 (1946); *Follette v. Mutual Accident Ass'n*, 110 N.C. 377, 379, 14 S.E. 923, 924 (1891).

42. *Patton v. Champion Fiber Co.*, 194 N.C. 765, 768, 140 S.E. 734, 736 (1927).

43. *Gilmer v. Hanks*, 84 N.C. 317, 320 (1881); *Daniel Boone Complex, Inc. v. Furst*, 57 N.C. App. 282, 286, 291 S.E.2d 296, 299, *disc. rev. denied*, 306 N.C. 555, 294 S.E.2d 369 (1982).

44. *Cash Register Co. v. Townsend*, 137 N.C. 652, 657, 50 S.E. 306, 307 (1905); *Crowder v. Langdon*, 38 N.C. (3 Ired. Eq.) 476, 484 (1845).

45. See, e.g., *Pridgen v. Long*, 177 N.C. 189, 197, 98 S.E. 451, 454 (1919); *Harback v. Lain & Keonig, Inc.*, 73 N.C. App. 374, 380-81, 326 S.E.2d 115, 119, *disc. rev. denied*, 313 N.C. 600, 332 S.E.2d 179 (1985). In *State v. Howley*, 220 N.C. 113, 16 S.E.2d 705 (1941), a criminal prosecution for false pretense, the court said:

Moreover, it is well settled in the law pertaining to fraud and deceit that a party is not entitled to relief on the grounds of false representations where, instead of relying upon them, he relies on his own knowledge, or resorts to other means of knowledge Yet, it is not always determinable merely from the fact that outside sources are consulted that there is no reliance on the representations. If under the circumstances the party be unable to learn the truth from his examination or investigation, or, without fault on his part, does not learn it and in fact relies on the representations, he is entitled to relief

Id. at 119, 16 S.E.2d at 709 (citation omitted).

46. *Clark v. East Lake Lumber Co.*, 158 N.C. 139, 146, 73 S.E. 793, 796 (1912); *Northwestern Bank v. Rash*, 74 N.C. App. 101, 105, 327 S.E.2d 302, 305 (1985).

cient to establish a claim for fraud. In North Carolina, the reliance must also be reasonable.⁴⁷ This requirement is one of the most perplexing aspects of the fraud cause of action. When one has used a deliberate lie to injure another and often, as a result, to benefit oneself, the purpose of the reasonable reliance requirement is not at once obvious. When a transaction rests in fraud, neither contract stability nor the defrauder's expectancy interest merits protection. If these were the only interests involved, actual reliance, even when the recipient acts imprudently or is easily taken in, should be sufficient to sustain a claim for fraud.

If the purpose of the reasonable reliance requirement is to weed out trumped-up claims, its continued use for this purpose is questionable. The asserted need for an artificial threshold to separate fraudulent claims from genuine ones has always rested upon untested assumptions about the number of unwarranted claims and the difficulty of dealing with them on an individual basis.⁴⁸ In other areas of the law, rules that once denied or limited a cause of action because of fear of false claims have been overturned without untoward consequences.⁴⁹ If reasonable reliance is determined under an objective standard that requires the recipient to act as a prudent person, that standard conflicts with the basic principle that contributory negligence is not a defense to intentional tort claims.⁵⁰

Many authorities now hold that a less exacting standard of care—justifiable reliance—is sufficient to establish fraud.⁵¹ Under this view, the recipient of a misrepresentation is justified in believing it to be true unless its falsity is obvious or unless he knows facts that make reliance unreasonable.⁵² Justifiable reliance is not negated because a reasonable person would have made inquiry or investigation to determine the truth of the representation.⁵³ Reliance is justified, however, only when the fact represented, if true, would be important to a reasonable person's decision to enter into the transaction.⁵⁴

The language in many North Carolina cases seems to place greater

47. *Sanders v. Mayo*, 186 N.C. 108, 110, 118 S.E. 910, 911 (1923).

48. *See Orlo v. Connecticut Co.*, 128 Conn. 231, 238, 21 A.2d 402, 405 (1941).

49. *See id.* at 240, 21 A.2d at 405 (permitting recovery for negligent infliction of mental distress when no contemporaneous physical injury was caused by the negligence).

50. RESTATEMENT (SECOND) OF TORTS § 545A (1977).

51. PROSSER AND KEETON, *supra* note 25, § 108, at 749-53; RESTATEMENT (SECOND) OF TORTS § 537.

52. PROSSER AND KEETON, *supra* note 25, § 108, at 750; RESTATEMENT (SECOND) OF TORTS § 541.

53. PROSSER AND KEETON, *supra* note 25, § 108, at 752; RESTATEMENT (SECOND) OF TORTS § 540.

54. PROSSER AND KEETON, *supra* note 25, § 108, at 753; RESTATEMENT (SECOND) OF TORTS § 538.

demands upon the recipient before reliance on the truth of a representation can be found to be reasonable. This impression arises because in fraud cases the court frequently invokes the concepts of (1) *caveat emptor*, (2) the claimant's duty to read any writing she accepts or signs, and (3) the claimant's duty to investigate the facts represented. In so doing, the court often characterizes as negligence the recipient's failure to ascertain the facts important to her decision to enter into the transaction.⁵⁵ The importance of these ideas in determining the reasonable reliance issue may be exaggerated if one considers only their frequent repetition in the opinions. Except for the duty-to-read rationale,⁵⁶ these ideas usually appear when the facts of the case are otherwise insufficient to establish fraud or any other substantive basis for relief. For example, the court has relied on *caveat emptor* primarily when the fraud claim failed;⁵⁷ the court also has declared that the doctrine does not apply when fraud exists.⁵⁸ Some qualification of these statements is necessary in relation to the duty-to-read cases. Those cases hold reliance unreasonable as a matter of law when the falsity of the representation appears on the face of a writing that the recipient fails to read. If the recipient is prevented from reading the writing by the maker of the representation, the jury determines whether her reliance is reasonable.⁵⁹

Many decisions strongly support the view that accepting and relying on a definite and positive representation, without attempting to verify it, is reasonable unless the recipient has reason to doubt its accuracy.⁶⁰ The supreme court has set forth the rationale underlying this view in unmistakable language. In *Walsh v. Hall*,⁶¹ the court said:

[T]he law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. There

55. For a full discussion of these cases, see *infra* text accompanying notes 109-64.

56. For a discussion of the duty-to-read rationale, see *infra* text accompanying notes 134-64.

57. See *Guy v. First Carolinas Joint Stock Land Bank*, 205 N.C. 357, 358, 171 S.E. 341, 342 (1933); *Woodridge v. Brown*, 149 N.C. 299, 303, 62 S.E. 1076, 1077 (1908); *Etheridge v. Vernoy*, 70 N.C. 713, 724 (1874).

58. *Hill v. Brower*, 76 N.C. 124, 125-26 (1877); *Biggs & Co. v. Perkins*, 75 N.C. 397, 400 (1876).

59. See *infra* text accompanying notes 146-64 for a discussion of the cases applying these principles.

60. See *Keith v. Wilder*, 241 N.C. 672, 676, 86 S.E.2d 444, 447 (1955); *Gray v. Edmonds*, 232 N.C. 681, 683, 62 S.E.2d 77, 79 (1950); *Currie v. Malloy*, 185 N.C. 206, 213, 116 S.E. 564, 567-68 (1923); *Bell v. Harrison*, 179 N.C. 190, 196-97, 102 S.E. 200, 203 (1920); *White Sewing Mach. Co. v. Bullock*, 161 N.C. 1, 10-11, 76 S.E. 634, 639 (1912).

61. 66 N.C. 233 (1872).

must be a reasonable reliance upon the integrity of men or the transactions of business, trade and commerce could not [prosper]⁶²

In another case the court addressed the recipient's obligation to investigate with the same clarity: "We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word and for that reason did not pursue inquiries that would have disclosed the falsehood."⁶³

On the other hand, reliance is not reasonable when the falsity of the representation is either known or patent.⁶⁴ The recipient cannot close his eyes to the obvious and later seek damages or rescission for fraud,⁶⁵ unless his failure to observe is caused by trick or artifice of the person making the representation.⁶⁶

In holding reliance unreasonable, the supreme court at times has emphasized that the recipient and maker of the representation had an equal opportunity to know about the matter represented.⁶⁷ In most of these cases, the fraud claim was unsuccessful for some other reason. In some of them, the recipient knew that the maker either had no personal knowledge of the relevant facts⁶⁸ or relied upon information supplied by a third party.⁶⁹ Because of the recipient's knowledge, the court treated the representation as one of opinion rather than fact. In other cases, proof of scienter or some other vital element was missing and the task of the court was essentially to allocate the risk of loss between innocent parties.⁷⁰

Reliance also will not be reasonable if the representation amounts to

62. *Id.* at 238. This language is often quoted in later cases. See, e.g., *Roberson v. Williams*, 240 N.C. 696, 702, 83 S.E.2d 811, 815 (1954); *Currie*, 185 N.C. at 214, 116 S.E. at 568.

63. *White Sewing*, 161 N.C. at 9, 76 S.E. at 637 (quoting *Hale v. Philbrick*, 42 Iowa 81, 83-84 (1875)). Later cases frequently quote this language. See, e.g., *Coffield v. Griffin*, 238 N.C. 377, 381-82, 78 S.E.2d 131, 134 (1953); *Massey v. Alston*, 173 N.C. 215, 221, 91 S.E. 964, 967 (1917).

64. *Pridgen v. Long*, 177 N.C. 189, 197-98, 98 S.E. 451, 454-55 (1919); *Lawson v. Baer*, 52 N.C. (7 Jones) 461, 462-63 (1860); *Simmons v. Horton*, 51 N.C. (6 Jones) 278, 280 (1859).

65. *Williamson v. Holt*, 147 N.C. 515, 520, 61 S.E. 384, 386 (1908).

66. *May v. Loomis*, 140 N.C. 350, 357, 52 S.E. 728, 730 (1905); *Stout v. Harper*, 51 N.C. (6 Jones) 347, 349-50 (1859); *Simmons*, 51 N.C. (6 Jones) at 280.

67. See *McLain v. Shenandoah Life Ins. Co.*, 224 N.C. 837, 840, 32 S.E.2d 592, 594 (1945); *Bennett v. Whippett-Knight Co.*, 198 N.C. 98, 99, 150 S.E. 676, 676 (1929); *Smathers v. Gilmer*, 126 N.C. 757, 759-60, 36 S.E. 153, 154 (1900).

68. See, e.g., *Harding v. Southern Loan & Ins. Co.*, 218 N.C. 129, 135, 10 S.E.2d 599, 602 (1940); *Peyton v. Griffin*, 195 N.C. 685, 688, 143 S.E. 525, 527 (1928).

69. See, e.g., *Crowder v. Langdon*, 38 N.C. (3 Ired. Eq.) 476, 486 (1845); *Spencer v. McLean*, 24 N.C. (2 Ired.) 93, 94 (1841).

70. See, e.g., *Saunders v. Hatterman*, 24 N.C. (2 Ired.) 32, 34 (1841).

nothing more than an expression of an adversary's opinion, prediction, or product commendation.⁷¹ A knowing misrepresentation of the opinion or intention actually held, however, is a misrepresentation of fact and may support a recovery in fraud.⁷² Distinguishing fact and opinion in the law of misrepresentation is more intricate than simply determining whether the matter represented is on its face one of existing fact.⁷³

Several matters related to reasonable reliance require further consideration. One is opinion. Representations of opinion constitute by far the most significant group of cases in which relief for fraud is denied on the ground that claimant's reliance was not reasonable. In addition, the extent to which a party will be bound by the contents of a writing she signs or by facts she could have ascertained by reasonable investigation and the general development of the duty-to-read merit in-depth consideration.

1. Opinion

Generally, to be actionable as fraud a representation must be a statement of fact and must be specific and definite in nature.⁷⁴ The court rejects the fraud claim when a representation consists only of an expression of the maker's opinion or judgment,⁷⁵ a prediction or prophecy about the future,⁷⁶ or a promise of future performance.⁷⁷ The court has recognized, however, that the defendant's knowing misrepresentation of the opinion or intention he actually holds constitutes an actionable misrepresentation of fact.⁷⁸

A statement in the form of an opinion may imply the existence of facts and, for this reason, may amount to a fraudulent misrepresentation.

71. *E.g.*, *Berwer v. Union Cent. Life Ins. Co.*, 214 N.C. 554, 557, 200 S.E. 1, 3 (1938).

72. *Outcault Advertising Co. v. Fain*, 171 N.C. 714, 716, 89 S.E. 35, 36 (1916); *Whitehurst v. Life Ins. Co.*, 149 N.C. 273, 276, 62 S.E. 1067, 1068 (1908); *Frey v. Middle Creek Lumber Co.*, 144 N.C. 759, 760-61, 57 S.E. 464, 464 (1907).

73. *See infra* text accompanying notes 88-95.

74. *Warfield v. Hicks*, 91 N.C. App. 1, 8, 370 S.E.2d 689, 692-93, *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988).

75. *See, e.g.*, *Myrtle Apartments, Inc. v. Lumbermen's Mut. Casualty Co.*, 258 N.C. 49, 52, 127 S.E.2d 759, 761 (1962) (recommendation for installation of new boiler); *Massey v. North Carolina Pub. Serv. Co.*, 196 N.C. 299, 301, 145 S.E. 561, 562 (1928) (representation of law); *Outcault Advertising*, 171 N.C. at 716, 89 S.E. at 36 (cost of advertising).

76. *See, e.g.*, *Mills v. Carolina Cemetery Park Corp.*, 242 N.C. 20, 29-30, 86 S.E.2d 893, 899-900 (1955) (future improvements would be made); *Straus Co. v. Economys*, 230 N.C. 316, 318, 52 S.E.2d 802, 803 (1949) (time that a truck would arrive); *McCormick v. Jackson*, 209 N.C. 359, 360, 183 S.E. 369, 370 (1936) (land could be sold for a higher price).

77. *See, e.g.*, *Davis v. Davis*, 236 N.C. 208, 211, 72 S.E.2d 414, 415-16 (1952) (support for life); *Clark v. Laurel Park Estates*, 196 N.C. 624, 635-36, 146 S.E. 584, 589 (1929) (future improvements to land).

78. *Lee v. Keck*, 68 N.C. App. 320, 328, 315 S.E.2d 323, 329, *disc. rev. denied*, 311 N.C. 401, 319 S.E.2d 271 (1984).

For example, when a seller who knew his horse was diseased represented that the horse was "a little thin but mending fast," the court held that the representation implied that the horse was otherwise sound.⁷⁹ In *Unitype Co. v. Ashcraft Bros.*,⁸⁰ the court, in finding the seller's representations about the performance of a typesetting machine to be actionable, explained: "Where facts are not equally known by both sides, a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he, impliedly, states that he knows facts which justify his opinion."⁸¹

At the very least, a statement of opinion may imply that the maker knows of no facts inconsistent with the opinion expressed. On this basis, the court upheld a cause of action when the seller of stock in a corporation confronting major financial difficulties represented it as a "gold mine" and a "going concern."⁸² The court stated: "When [the seller] undertook to describe the business as a 'gold mine' and a 'going concern' he incurred a concomitant duty to make a full disclosure of any extenuating financial circumstances which counteracted his positive assertions concerning the condition of the corporation."⁸³

A promise to be performed in the future is characterized as a promissory representation, and a failure to perform the promise alone does not constitute fraud.⁸⁴ The making of the promise, however, implies an intention to perform and, when none exists, constitutes a misrepresentation of fact—the promisor's intention or state of mind.⁸⁵ Obtaining another person's goods, services, or property by means of a promise to pay or to render other performance when the promisor intends to do neither is fraudulent.⁸⁶ The intention not to perform usually must be shown by circumstantial evidence. Proof of nonperformance, without more, is insufficient to establish fraudulent intent.⁸⁷

No clear line separates representations of fact and opinion. Neither

79. *Whitmire v. Heath*, 155 N.C. 304, 306-07, 71 S.E. 313, 314 (1911).

80. 155 N.C. 63, 71 S.E. 61 (1911).

81. *Id.* at 67, 71 S.E. at 62.

82. *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 500 (1974).

83. *Id.* at 139, 209 S.E.2d at 501.

84. *Mills v. Carolina Cemetery Park Corp.*, 242 N.C. 20, 30, 86 S.E.2d 893, 900 (1955); *J.B. Colt & Co. v. Norwood*, 202 N.C. 819, 820, 161 S.E. 706, 707 (1932); *Elizabeth City Hotel Corp. v. Overman*, 201 N.C. 337, 341, 160 S.E. 289, 291 (1931).

85. *Lamm v. Crumpler*, 240 N.C. 35, 44, 81 S.E.2d 138, 145 (1954); *Roberson v. Swain*, 235 N.C. 50, 55, 69 S.E.2d 15, 19 (1952); *Littlejohn v. Johnson*, 214 N.C. 221, 221, 198 S.E. 639, 639 (1938).

86. *Williams v. Hedgepeth*, 184 N.C. 114, 116, 113 S.E. 602, 602-03 (1922).

87. *See Britt v. Britt*, 320 N.C. 573, 580, 359 S.E.2d 467, 471 (1987); *Williams v. Williams*, 220 N.C. 806, 810, 18 S.E.2d 364, 366 (1941).

the form nor the language of the representation necessarily controls its classification.⁸⁸ The usual formulation of the rule—that reliance is unreasonable if the representation is opinion—is somewhat misleading. Some cases fall into this pattern.⁸⁹ In other cases, however, the court's classification of a representation as fact or opinion seems to depend on its determination whether the representation invited reasonable reliance.⁹⁰ The cases suggest that when the maker offers representations seriously and in a manner calculated to induce reliance, even though "clothed in the form of an opinion or estimate,"⁹¹ a fraud action can be maintained.⁹² On the other hand, a representation that appears on its face to be fact may be regarded as opinion when the recipient knows that the maker has no personal knowledge or is only offering an estimate.⁹³ Moreover, "when there is doubt as to whether [the representations] were intended and received as mere expressions of opinion or as statements of fact to be regarded as material, the question must be submitted to the jury."⁹⁴ In such cases, the fact that knowledge of the matters represented is readily available to the recipient by inquiry or investigation is relevant to the jury's determination.⁹⁵

Courts view sales talk, puffing, commendation, and other representations by which a seller promotes her product as opinions that usually provide no basis for a fraud action.⁹⁶ "One who relies on such affirmations made by a person whose interest might prompt him to invest the property with exaggerated value does so at his peril, and must take the

88. See *Shell v. Roseman*, 155 N.C. 90, 94, 71 S.E. 86, 87 (1911); *J.I. Case Threshing Mach. Co. v. Feezor*, 152 N.C. 516, 518-20, 67 S.E. 1004, 1006-07 (1910); *Williamson v. Holt*, 147 N.C. 515, 523-24, 61 S.E. 384, 386-87 (1908).

89. See, e.g., *Horton v. Humble Oil & Ref. Co.*, 255 N.C. 675, 680, 122 S.E.2d 716, 720 (1961); *Pritchard v. Dailey*, 168 N.C. 330, 332, 84 S.E. 392, 393 (1915).

90. For example, whether representations about the capacity and performance of machinery constitute fact or opinion may depend on the maker's perception of how the recipient is likely to receive them. See *American Laundry Mach. Co. v. Skinner*, 225 N.C. 285, 290, 34 S.E.2d 190, 193 (1945) (opinion); *J.B. Colt Co. v. Conner*, 194 N.C. 344, 346, 139 S.E. 694, 695 (1927) (opinion); *Unitype Co. v. Ashcraft Bros.*, 155 N.C. 63, 68, 71 S.E. 61, 62-63 (1911) (fact); *J.I. Case*, 152 N.C. at 519-20, 67 S.E. at 1006-07 (fact).

91. *Whitehurst v. Life Ins. Co.*, 149 N.C. 273, 276, 62 S.E. 1067, 1068 (1908).

92. See *Bolich v. Prudential Ins. Co.*, 206 N.C. 144, 155, 173 S.E. 320, 326 (1934); *Pate v. Blades*, 163 N.C. 267, 272, 79 S.E. 608, 610 (1913); *Whitehurst*, 149 N.C. at 276, 62 S.E. at 1068.

93. See *Galloway v. Goolsby*, 176 N.C. 635, 638, 97 S.E. 617, 618 (1918); *Parker v. Raleigh Sav. Bank*, 152 N.C. 253, 255, 67 S.E. 492, 493 (1910).

94. *Whitehurst*, 149 N.C. at 276, 62 S.E. at 1068.

95. See *Outcault Advertising Co. v. Fain*, 171 N.C. 714, 716, 89 S.E. 35, 36 (1916); *Frey v. Middle Creek Lumber Co.*, 144 N.C. 759, 760-61, 57 S.E. 464, 464 (1907).

96. See *Early v. Eley*, 243 N.C. 695, 698, 91 S.E.2d 919, 921 (1956); *Oltman v. Williams*, 167 N.C. 312, 313, 83 S.E. 348, 349 (1914); *National Cash Register Co. v. Townsend Grocery Store*, 137 N.C. 652, 655-57, 50 S.E. 306, 307 (1905).

consequences of his imprudence.' ”⁹⁷ General statements about the future performance and potential profitability of property or a business fall into this category.⁹⁸ Similar statements about the work capacity of machinery, the quality of its performance, and the efficiency of its operation also provide no basis for a fraud action.⁹⁹

The cases frequently declare that promises, predictions, prophecies, and similar promissory representations that relate to events in the future are opinions and thus provide no basis for fraud claims.¹⁰⁰ Promissory representations, even when tailored for particular occasions, amount to little more than projections of future success and will be viewed as sales talk.¹⁰¹ A fraud claim can arise, however, when the representation consists of a promise to perform in the future and the defendant has no intention to do so.¹⁰²

By their very nature, some matters such as quality and value are so much the product of judgment that they clearly represent opinion.¹⁰³ Quantity, on the other hand, is objectively determinable and usually constitutes fact.¹⁰⁴ Although this distinction is important in determining whether a misrepresentation of fact exists or reliance is justified, other circumstances surrounding the representation may be more important. A statement of quantity may represent fact, judgment, or guess.¹⁰⁵ Similarly, surrounding circumstances may show that a representation of value was intended and received as more than an expression of the maker's judgment, or was purposely made with the knowledge that it

97. *Horton v. Humble Oil & Ref. Co.*, 255 N.C. 675, 680, 122 S.E.2d 716, 720 (1961) (quoting *Pritchard v. Dailey*, 168 N.C. 330, 332, 84 S.E. 392, 393 (1915)).

98. *See id.*; *Pritchard*, 168 N.C. at 332, 84 S.E. at 393.

99. *See American Laundry Mach. Co. v. Skinner*, 225 N.C. 285, 290, 34 S.E.2d 190, 193 (1945); *J.B. Colt Co. v. Conner*, 194 N.C. 344, 346, 139 S.E. 694, 695 (1927). Yet such representations, when intended and understood as factual, may support a fraud action. *See Unitype Co. v. Ashcraft Bros.*, 155 N.C. 63, 67-68, 71 S.E. 61, 62 (1911); *J.I. Case Threshing Mach. Co. v. Feezor*, 152 N.C. 516, 519-20, 67 S.E. 1004, 1006 (1910).

100. *See cases cited supra* notes 76-77.

101. *See McCormick v. Jackson*, 209 N.C. 359, 360, 183 S.E. 369, 370 (1936) (real estate broker's representation that land could be sold for more); *Outcault Advertising Co. v. Fain*, 171 N.C. 714, 716, 89 S.E. 35, 36 (1916) (representation that means of advertising offered for sale would cost no more than advertising in newspaper); *National Cash Register Co. v. Townsend Grocery Store*, 137 N.C. 652, 655, 50 S.E. 306, 308 (1905) (representation of savings in time and money from use of cash register offered for sale).

102. *See Lamm v. Crumpler*, 240 N.C. 35, 44, 81 S.E.2d 138, 145 (1954); *Small v. Dorsett*, 223 N.C. 754, 761, 28 S.E.2d 514, 518 (1944).

103. *See Lester v. McLean*, 242 N.C. 390, 396-97, 87 S.E.2d 886, 891 (1955); *Oltman v. Williams*, 167 N.C. 312, 313, 83 S.E. 348, 349 (1914); *Conly v. Coffin*, 115 N.C. 563, 565, 20 S.E. 207, 207 (1894).

104. *Shell v. Roseman*, 155 N.C. 90, 94, 71 S.E. 86, 87 (1911).

105. *See Galloway v. Goolsby*, 176 N.C. 635, 639-40, 97 S.E. 617, 619 (1918); *Frey v. Middle Creek Lumber Co.*, 144 N.C. 759, 762, 57 S.E. 464, 465 (1907).

would induce the recipient's reliance.¹⁰⁶

These observations apply equally in other areas in which the opinion rule is invoked. Two North Carolina cases involving the sale of stock vividly illustrate their application. In one, the seller represented that "the stock is gilt edged" and "nothing better could be bought";¹⁰⁷ in the other, the seller represented that the corporation was "a gold mine" and "a going concern."¹⁰⁸ In the abstract these representations seem very similar. Based on the circumstances present in each case, however, a fraud claim was upheld in the second case but denied in the first.

2. Duty of Investigation and Inquiry

A few early cases seemed to place major responsibility upon the parties to an arm's length transaction to determine all facts relevant to the transaction for themselves.¹⁰⁹ When the facts, although misrepresented, could have been ascertained by inquiry or investigation, reliance was not reasonable as a matter of law.¹¹⁰ Thus, when the facts could have been determined by survey,¹¹¹ examination of court records,¹¹² or inquiry of third parties,¹¹³ the court held reliance upon another's misrepresentation of them unreasonable. In large part these cases seem to reflect an expansive view by the court of what a seller could do and what a buyer should expect in the promotion of the land or chattels offered for sale. On this basis, the court treated the representations as if they were opinions. In any event, such cases were few in number and were first limited¹¹⁴ and then rejected¹¹⁵ by later cases.

The duty of investigation and inquiry is stated in general terms by the court in cases clearly decided on other grounds.¹¹⁶ In cases in which the fraud claim is rejected because the representation is held to be opin-

106. See *Bell v. Harrison*, 179 N.C. 190, 195, 102 S.E. 200, 204 (1920); *Morrison v. Hartley*, 178 N.C. 618, 621, 101 S.E. 375, 376 (1919); *Miller v. Mateer*, 172 N.C. 401, 405-06, 90 S.E. 435, 438 (1916).

107. *Early v. Eley*, 243 N.C. 695, 698, 91 S.E.2d 919, 921 (1956).

108. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974).

109. See *Credle v. Swindell*, 63 N.C. 305, 307 (1869); *Lytle v. Bird*, 48 N.C. (3 Jones) 222, 224-25 (1855); *Fields v. Rouse*, 48 N.C. (3 Jones) 72, 73-74 (1855). *Credle* and *Lytle* were later expressly rejected by the supreme court. *May v. Loomis*, 140 N.C. 350, 358, 52 S.E. 728, 730-31 (1905).

110. *Credle*, 63 N.C. at 306; *Lytle*, 48 N.C. (3 Jones) at 224-25.

111. *Credle*, 63 N.C. at 306; *Lytle*, 48 N.C. (3 Jones) at 224-25.

112. *Fields*, 48 N.C. (3 Jones) at 73-74.

113. *Saunders v. Hatterman*, 24 N.C. (2 Ired.) 32, 34-35 (1841).

114. *Walsh v. Hall*, 66 N.C. 233, 239 (1872).

115. *May v. Loomis*, 140 N.C. 350, 358, 52 S.E. 728, 730-31 (1905).

116. See *Harding v. Southern Loan & Ins. Co.*, 218 N.C. 129, 135, 10 S.E.2d 599, 602 (1940); *Berwer v. Union Cent. Life Ins. Co.*, 214 N.C. 554, 558, 200 S.E. 1, 3 (1938).

ion, commendation, or a promise looking to the future, the court often has stated that the recipient of such a representation must investigate before relying on it.¹¹⁷ Reliance is unreasonable here because the representation is opinion rather than fact; the court's admonition about the duty to investigate adds nothing. In other cases, the matter represented is fact but the fraud claim is denied because allegation or proof of falsity, scienter, or some other essential factor is missing.¹¹⁸ These cases, although fewer in number than the opinion cases, are more difficult to dismiss. Even though other grounds for these decisions were present, the court apparently believed that characterizing the recipient's failure to investigate as negligent provided additional support for the decision to deny relief.

Cases in which the failure to investigate formed the basis for the decision are rare.¹¹⁹ On the other hand, cases finding reasonable reliance despite the claimant's failure to investigate are numerous and cover a wide range of transactions.¹²⁰ They include cases involving misrepresentations of title,¹²¹ acreage,¹²² and boundaries¹²³ of land—situations in which the earlier cases had found reliance unreasonable. Reasonable reliance is not negated simply because the facts are available in public records¹²⁴ or could readily be ascertained from a third person.¹²⁵ Thus, a jury has been permitted to find reasonable reliance upon representations that a third party no longer would be a selling agent in the territory the

117. *Horton v. Humble Oil & Ref. Co.*, 255 N.C. 675, 680, 122 S.E.2d 716, 720 (1961); *Peyton v. Griffin*, 195 N.C. 685, 688, 143 S.E. 525, 527 (1928); *National Cash Register Co. v. Townsend Grocery Store*, 137 N.C. 652, 655-56, 50 S.E. 306, 308 (1905); *Conly v. Coffin*, 115 N.C. 563, 566-67, 20 S.E. 207, 207 (1894).

118. See *Tarault v. Seip*, 158 N.C. 363, 367-68, 74 S.E. 3, 6 (1912); *Williamson v. Holt*, 147 N.C. 515, 523-24, 61 S.E. 384, 387 (1908).

119. See *Calloway v. Wyatt*, 246 N.C. 129, 134-35, 97 S.E.2d 881, 886 (1957) (representation that water supply was adequate); *Williams v. Jennette*, 77 N.C. App. 283, 285, 292, 335 S.E.2d 191, 193, 197 (1985) (representation that timber could be removed and land developed, which was impossible due to great depth of peat found on land; vendor of undeveloped land could not be liable for misrepresentation unless he induced the purchaser to forgo an investigation of the land).

120. See cases cited *infra* notes 121-32.

121. *Currie v. Malloy*, 185 N.C. 206, 215-17, 116 S.E. 564, 566-67 (1923). *Contra* *Shimer v. Traub*, 244 N.C. 466, 468, 94 S.E.2d 363, 364-65 (1956) (regarding representations prior to execution of deed merely as vendor's expression of confidence in his title).

122. *Norburn v. Mackie*, 262 N.C. 16, 24, 136 S.E.2d 279, 285 (1964); *Haywood v. Morton*, 209 N.C. 235, 237, 183 S.E. 280, 281 (1935).

123. *Keith v. Wilder*, 241 N.C. 672, 676, 86 S.E.2d 444, 447 (1955); *Walsh v. Hall*, 66 N.C. 233, 238 (1872).

124. *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 270-71, 141 S.E.2d 522, 525-26 (1965).

125. See *Olivetti Corp. v. Ames Business Sys., Inc.*, 319 N.C. 534, 543-44, 356 S.E.2d 578, 584 (1987); *Cofield v. Griffin*, 238 N.C. 377, 381-82, 78 S.E.2d 131, 134 (1953).

claimant was assigned;¹²⁶ that the army would pay the expenses of moving a mobile home incident to a change of station even though the claimant was an experienced member of the military and the facts were available through the post transportation officer;¹²⁷ that a tobacco allotment would be transferred with a conveyance of the land when its truth could have been determined from a local governmental office;¹²⁸ and other representations.¹²⁹ Similarly, reliance has been found reasonable when the representation related to the condition of machinery—a fact capable of independent determination¹³⁰—and even when the representation related to a court's disposition of the claimant's own lawsuit¹³¹ or the number of feet of timber in the claimant's own tract of land.¹³² The court itself has observed that "the rule is also well established that one to whom a positive and definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence."¹³³ This statement, despite some ambiguity in its expression, is clearly intended to declare that reliance upon a positive and definite representation is reasonable unless grounds to suspect its falsity exist.

The idea that the recipient of a fraudulent representation has a duty to investigate and will be charged with knowledge of facts that reasonable investigation would have disclosed is not, and probably never has been, a part of North Carolina's law of misrepresentation. Its repetition in the cases serves no useful purpose and invites confusion.

The court should discard the duty-to-investigate language and its associated baggage. In cases involving opinion, obvious falsity, or other facts insufficient to establish fraud, the duty to investigate contributes nothing to the analysis or outcome. In cases in which reasonable reliance is a genuine issue, the recipient's failure to investigate may be one circumstance, just as numerous other factors may be, used to determine whether the recipient of the representation reasonably relied on it. Stating the relevance of a failure to investigate in terms of a recipient's

126. *White Sewing Mach. Co. v. Bullock*, 161 N.C. 1, 10, 76 S.E. 634, 637 (1912).

127. *Strickland v. A & C Mobile Homes*, 70 N.C. App. 768, 769, 321 S.E.2d 16, 18-19 (1984), *disc. rev. denied*, 313 N.C. 336, 327 S.E.2d 899 (1985).

128. *Whitaker v. Wood*, 258 N.C. 524, 526, 128 S.E.2d 753, 754 (1963).

129. *See, e.g., Johnson v. Owens*, 263 N.C. 754, 759, 140 S.E.2d 311, 314 (1965) (condition of heating system); *Gray v. Edmonds*, 232 N.C. 681, 682-83, 62 S.E.2d 77, 79 (1950) (occupancy of apartments and rentals collected).

130. *J.I. Case Threshing Mach. Co. v. Feezor*, 152 N.C. 516, 519-20, 67 S.E. 1004, 1006 (1910).

131. *Stewart v. Hubbard*, 56 N.C. (3 Jones Eq.) 186, 190-91 (1857).

132. *Roberson v. Williams*, 240 N.C. 696, 702, 83 S.E.2d 811, 815 (1954).

133. *Gray*, 232 N.C. at 683, 62 S.E.2d at 79.

"duty" only distorts the reasonable reliance issue for the trial judge, the jury, and the appellate courts.

3. Duty To Read

The idea that one is bound by a writing one signs or accepts, whether or not one knows or understands its contents, is encountered frequently in the North Carolina cases. In reality, this notion is a part of the larger concept that the recipient of a representation must use reasonable care to ascertain the truth of representations for his reliance to be reasonable. Both the analysis used and the situations in which it is invoked parallel substantially those cases involved under the duty-to-investigate rule. The cases speak of the claimant's duty to read the writing¹³⁴ and characterize a failure to do so as negligence which precludes relief from its terms.¹³⁵ The court invokes the duty-to-read rationale in a number of different contexts. Although the court itself does not always distinguish these situations, doing so is essential to assess the significance of the duty to read.

A duty-to-read analysis may be based upon either tort¹³⁶ or contract¹³⁷ principles; the cases, however, often focus on the claimant's failure to read rather than on the substantive theory.¹³⁸ Further, in some of

134. *Harrison v. Southern Ry.*, 229 N.C. 92, 95, 47 S.E.2d 698, 700 (1946); *Watkins v. Grier*, 224 N.C. 339, 343, 30 S.E.2d 223, 225 (1944); *Cromwell v. Logan*, 196 N.C. 588, 593, 146 S.E. 233, 236 (1929).

135. *Isley v. Brown*, 253 N.C. 791, 794, 117 S.E.2d 821, 824 (1961) (negligence); *Harris v. Bingham*, 246 N.C. 77, 79, 97 S.E.2d 453, 455 (1957) (utter heedlessness); *J.B. Colt Co. v. Kimball*, 190 N.C. 169, 172, 129 S.E. 406, 408 (1925) (negligence); *Clements v. Life Ins. Co.*, 155 N.C. 57, 62, 70 S.E. 1076, 1078 (1911) (gross neglect).

136. The tort theory of course is fraud. The duty to read may be invoked when a party seeking to enforce a writing as a contract misrepresents: (1) that the writing reflects a prior agreement between the parties, (2) the character or essential terms of the writing, or (3) material facts that induced the other's assent to the agreement evidenced by the writing. For a discussion of each area, respectively, see *infra* text accompanying notes 152-54, 155-59, and 160-62.

137. Mutual assent is the primary contract principle to which the duty to read relates. One party claims that an agreement evidenced by a writing was induced by fraud. If fraud is not established, the agreement is enforced and the parol evidence rule or provisions in the writing disclaiming an agent's authority to vary the agreement are relied on to exclude evidence of prior nonfraudulent representations. The duty-to-read rationale is often used to explain this result. For a fuller discussion, see cases cited *infra* notes 140-42 and accompanying text. In other instances, however, the court relies on the parol evidence rule or a contractual disclaimer without any apparent inquiry into whether the prior representations were fraudulent. The duty-to-read rule is employed again to support this result. A possible explanation for these cases is that the court implicitly holds that a failure to read precludes a finding of reasonable reliance as a matter of law. For a fuller discussion, see cases cited *infra* notes 143-44 and accompanying text.

138. See *Setzer v. Old Republic Life Ins. Co.*, 257 N.C. 396, 401, 126 S.E.2d 135, 138-39 (1962); *Watkins*, 224 N.C. at 343, 30 S.E.2d at 225; *Plotkin v. Realty Bond Co.*, 204 N.C. 508,

these cases the fact that the claimant failed to read, while relevant, may not have been essential to the application of the substantive principle.¹³⁹ As a result, the cases initially suggest a much greater significance for the duty-to-read rationale than appears from a careful study of them.

In one large group of cases, the claimant's allegation or proof of fraud is insufficient. Because no other basis for relief exists, the claimant's ignorance of the terms of the writing, disappointed expectations or, at best, unilateral mistake becomes the only ground to support the claim.¹⁴⁰ Denying relief in these cases is consistent with the objective theory of contract formation,¹⁴¹ but the language in the cases usually emphasizes the claimant's negligent failure to read rather than the protection of the other party's expectations.¹⁴² Another group of cases decided under contract law involves allegations that the defendant's misrepresentation induced the claimant's assent to the contract. These cases deny relief on the basis of the parol evidence rule¹⁴³ or the presence of a merger or disclaimer clause¹⁴⁴ in the contract. For reasons that are not always apparent, the court did not consider the misrepresentation in these cases. Contract principles also govern in still other fraud-in-the-

512, 168 S.E. 820, 822 (1933); *Wilson v. Life Ins. Co.*, 155 N.C. 173, 176, 71 S.E. 79, 80 (1911). *Harris* demonstrates the appeal of this rationale. The owner of real property sued the realtor for his losses incident to a lost sale as a result of the realtor's negligent failure to subject the sale to an existing easement. *Harris*, 246 N.C. at 78, 97 S.E.2d at 454. Although insufficient proof of damages provided a completely adequate basis for denial of relief, the court strongly asserted the failure-to-read rationale and concluded that the seller was "guilty of utter heedlessness." *Id.* at 79, 97 S.E.2d at 455. Because the suit did not attack the transaction implemented by the writing, the usual reason for applying the rationale did not arise under these facts.

139. See *Setzer*, 257 N.C. at 399-401, 126 S.E.2d at 137-38; *Isley*, 253 N.C. at 793, 117 S.E.2d at 823; *Harris*, 246 N.C. at 79, 97 S.E.2d at 455; *Plotkin*, 204 N.C. at 511-12, 168 S.E. at 821-22.

140. See *Isley*, 253 N.C. at 793, 117 S.E.2d at 823 (holding "[i]f there was mistake, it was unilateral"); *Barnes v. House*, 253 N.C. 444, 450, 117 S.E.2d 265, 269 (1960) (finding no fraud); *Harrison v. Southern Ry.*, 229 N.C. 92, 94, 47 S.E.2d 698, 700 (1948) (finding claimant fully understood contents of writing); *Williams v. Williams*, 220 N.C. 806, 811, 18 S.E.2d 364, 367 (1942) (finding no fraud; pleadings insufficient for relief for mistake or failure of consideration); *Griggs v. Griggs*, 213 N.C. 624, 627, 197 S.E. 165, 167 (1938) (finding no fraud or mistake).

141. Under the objective theory of contract formation, intent to contract will be found when assent is reasonably indicated by a party's objective manifestations. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 2-2, at 26-27 (2d ed. 1977).

142. See *Barnes*, 253 N.C. at 451, 117 S.E.2d at 270; *Harris*, 246 N.C. at 78-79, 97 S.E.2d at 454.

143. *E.g.*, *Clements v. Life Ins. Co.*, 155 N.C. 57, 60, 70 S.E. 1076, 1077 (1911); *Dr. Shoop Medicine Co. v. J.A. Mizell & Co.*, 148 N.C. 384, 386, 62 S.E. 511, 512 (1908); *Dellinger v. Gillespie*, 118 N.C. 737, 739, 24 S.E. 538, 539 (1896).

144. *E.g.*, *J.B. Colt Co. v. Kimball*, 190 N.C. 169, 170, 129 S.E. 406, 407 (1925); *International Harvester Co. v. Carter*, 173 N.C. 229, 230-31, 91 S.E. 840, 841 (1917).

inducement cases in which the claimant unsuccessfully seeks to reform a contract.¹⁴⁵ The authority of all of these groups of cases is limited not only by their reliance on contract principles but also by the fact that in most of them the court could have reached the same result without using the duty-to-read rationale.

The court, however, has applied the duty-to-read doctrine specifically to fraud cases. The cases, although not free of ambiguity, seem to establish the following rule structure. Failure to read is related to the determination whether reliance upon a misrepresentation is reasonable.¹⁴⁶ If the maker of the representation in no way prevents the recipient from reading the document, reliance upon a representation is unreasonable as a matter of law if the recipient could have discerned the falsity of the representation by reading the document.¹⁴⁷ If the maker misrepresents the character or essential terms of the writing,¹⁴⁸ misreads the writing to the claimant,¹⁴⁹ or prevents the claimant from reading it,¹⁵⁰ the claimant's failure to learn the truth by reading the document is a circumstance that bears on whether she reasonably relied upon the representation. A jury then determines whether the claimant acted prudently by failing to read the document.¹⁵¹

Applying the duty-to-read rule to misrepresentation cases is questionable. Use of the rule is objectionable both in principle and because it does not provide an effective tool to resolve the issues arising in particular situations in which the court has employed it.

145. *Industrial Loan & Inv. Bank v. Dardine*, 207 N.C. 509, 510, 177 S.E. 635, 635 (1935); *J.B. Colt*, 190 N.C. at 170, 129 S.E. at 407; *Dr. Shoop Medicine*, 148 N.C. at 386, 62 S.E. at 512; *Floars v. Aetna Life Ins. Co.*, 144 N.C. 232, 236-37, 56 S.E. 915, 917 (1907).

146. *See* *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962); *Pittman v. Tobacco Growers Coop. Ass'n*, 187 N.C. 340, 342, 121 S.E. 634, 635 (1924).

147. *See* *Breece v. Standard Oil Co.*, 211 N.C. 211, 212, 189 S.E. 498, 499 (1937); *Industrial Loan*, 207 N.C. at 510, 177 S.E. at 635; *W.R. Grace & Co. v. Strickland*, 188 N.C. 369, 373, 124 S.E. 856, 858 (1924); *School Comm. v. Kesler*, 67 N.C. 443, 448 (1872).

148. *See, e.g.,* *Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963); *Butler v. Armour Fertilizer Works*, 193 N.C. 632, 640, 137 S.E. 813, 816 (1927); *Dunbar v. Tobacco Growers Coop. Ass'n*, 190 N.C. 608, 610, 130 S.E. 505, 506 (1925); *Modlin v. Roanoke R.R. & Navigation Co.*, 145 N.C. 218, 225, 58 S.E. 1075, 1077-78 (1907).

149. *See, e.g.,* *Leonard v. Southern Power Co.*, 155 N.C. 10, 17, 70 S.E. 1061, 1064 (1911); *Hayes v. Atlanta & C. Air Line Ry.*, 143 N.C. 125, 128-29, 55 S.E. 437, 438 (1906); *Dorsett v. Clement-Ross Mfg. Co.*, 131 N.C. 254, 259, 42 S.E. 612, 613 (1902).

150. *See, e.g.,* *Taylor v. Edmunds*, 176 N.C. 325, 327, 97 S.E. 42, 43 (1918) (deed "sandwiched in with other deeds"); *Gwaltney v. Provident Sav. Life Assurance Soc'y*, 132 N.C. 925, 928, 44 S.E. 659, 661 (1903) (no opportunity to examine because writing was handed to claimant in the street).

151. *See, e.g.,* *Mills*, 259 N.C. at 263, 130 S.E.2d at 544; *Whitfield v. Carolina Hous. & Mortgage Corp.*, 243 N.C. 658, 663, 92 S.E.2d 78, 81 (1956); *Butler*, 193 N.C. at 640, 137 S.E. at 816; *W.R. Grace & Co.*, 188 N.C. at 373-74, 124 S.E. at 858; *Griffin v. Roanoke R.R. & Lumber Co.*, 140 N.C. 514, 522, 53 S.E. 307, 309-10 (1906).

The rule has been used when the parties enter into an agreement before executing a writing that the defendant falsely represents as reflecting their prior agreement.¹⁵² The claimant seeks to reform the writing to show the true agreement. Although the duty-to-read rule is often invoked in these cases, it does not preclude relief because the character or essential terms of the writing were misrepresented. Under these circumstances, the jury must determine whether the claimant reasonably relied upon the false representation of the contents of the writing. Applying the duty-to-read analysis to these facts unduly restricts the remedy of reformation. For example, writings are often reformed for mutual mistake.¹⁵³ Reformation would not be possible if the duty-to-read rationale were applied, because deception about the character or essential terms of the writing seldom would be present on these facts. If failure to read does not preclude relief for mutual mistake, it clearly should not do so when the defendant falsely represents that the writing incorporates the prior agreement between the parties. In addition, the concern that the reformation claim itself may be fraudulently made is already answered in the requirement that the claim be established by clear, cogent, and convincing evidence.¹⁵⁴ The fact that the terms of the writing are readily available and that they conflict with the alleged prior agreement, of course, is relevant in assessing the claimant's credibility and the sufficiency of the evidence to meet this stringent burden of proof. Therefore, no added requirement of a duty to read is necessary to guard against unwarranted claims.

A slightly different situation occurs when no agreement exists between the parties apart from a writing, assent to which is gained by false representation of its character or essential terms.¹⁵⁵ Once again, failure to read does not necessarily preclude relief in these cases; its availability hinges on a jury determining that reliance on the representation was reasonable. The claimant is usually successful in these cases. Thus, damages or rescission has been granted when the defendant fraudulently

152. See *Manufacturers' Oil & Grease Co. v. Averett*, 192 N.C. 465, 468-69, 135 S.E. 298, 299-300 (1926); *Bell v. McJones*, 151 N.C. 85, 87-88, 65 S.E. 646, 646-47 (1909); *Modlin*, 145 N.C. at 225, 58 S.E. at 1077-78; *Cutler v. Roanoke R.R. & Lumber Co.*, 128 N.C. 477, 483, 39 S.E. 30, 32 (1901).

153. *E.g.*, *Ollis v. Board of Educ.*, 210 N.C. 489, 491, 187 S.E. 772, 773-74 (1936).

154. See, *e.g.*, *M.P. Hubbard & Co. v. Horne*, 203 N.C. 205, 209, 165 S.E. 347, 349 (1932); *Manufacturers' Oil*, 192 N.C. at 468, 135 S.E. at 299.

155. See *Whitfield*, 243 N.C. at 660, 92 S.E.2d at 79; *Edney v. Motor Serv. & Sales, Inc.*, 210 N.C. 569, 569-70, 187 S.E. 758, 759 (1936); *Dunbar v. Tobacco Growers Coop. Ass'n*, 190 N.C. 608, 610, 130 S.E. 505, 506 (1925); *Leonard v. Southern Power Co.*, 155 N.C. 10, 17, 70 S.E. 1061, 1064 (1911).

represented that a guaranty was only a letter of recommendation,¹⁵⁶ or that a release was a paper to gain admittance to the hospital,¹⁵⁷ to permit payment of medical expenses,¹⁵⁸ or to pay the expenses of the injured person's spouse.¹⁵⁹ Although the claimant usually succeeds on these facts, it still seems unacceptable to make the availability of relief contingent upon a finding that the claimant's failure to read was not negligent. Permitting the defrauder to enforce an agreement when the other party never intended to contract or instead meant to make an entirely different agreement promotes no legitimate interest in the particular transaction or in transactional stability generally. The parties assert two different versions of the transaction between them. A jury in determining which version to accept certainly should be free to consider that the writing was signed by the claimant and that the terms of the writing could have been readily ascertained. The duty-to-read rule, however, clutters the submission of this issue to the jury. If the jury finds that the defendant did not prevent the claimant from reading the document, the duty-to-read rule completely forecloses using this sensible approach.

The other major fact pattern in which the duty-to-read rule may be asserted occurs when a contract between the parties is evidenced by a writing and the provisions of the writing contradict facts the defendant misrepresented in order to induce the claimant's assent to the contract.¹⁶⁰ The defendant, however, did not misrepresent the character or contents of the writing. Most cases involving these facts have denied relief as a matter of law because the claimant failed to read the writing.¹⁶¹ Today, when an intentionally false representation is made for the pur-

156. *Furst & Thomas v. Merritt*, 190 N.C. 397, 399, 130 S.E. 40, 42 (1925).

157. *Harrison v. Southern Ry.*, 229 N.C. 92, 93, 47 S.E.2d 698, 699 (1948).

158. *Davis v. Davis*, 256 N.C. 468, 471, 124 S.E.2d 130, 132 (1962); *Dorsett v. Clement-Ross Mfg. Co.*, 131 N.C. 254, 258, 42 S.E. 612, 613 (1902).

159. *Cowart v. Honeycutt*, 257 N.C. 136, 140-41, 125 S.E.2d 382, 385 (1962).

160. See, e.g., *Industrial Loan & Inv. Bank v. Dardine*, 207 N.C. 509, 510-11, 177 S.E. 635, 635 (1935); *J.B. Colt Co. v. Kimball*, 190 N.C. 169, 171, 129 S.E. 406, 408 (1925); *International Harvester Co. v. Carter*, 173 N.C. 229, 230, 91 S.E. 840, 841 (1917).

161. E.g., *Breece v. Standard Oil Co.*, 211 N.C. 211, 212, 189 S.E. 498, 499 (1937); *Dorrity v. Greater Durham Bldg. & Loan Ass'n*, 204 N.C. 698, 700, 169 S.E. 640, 641 (1933). All of the cases in this group seem to be based on the premise that evidence of the representation is inadmissible under the parol evidence rule. See *Dardine*, 207 N.C. at 511, 177 S.E. at 635; *Dellinger v. Gillespie*, 118 N.C. 737, 739, 24 S.E. 538, 539 (1896). Because the parol evidence rule does not preclude proof of fraud in the inducement, however, its application depends on a prior determination that the representation is insufficient to establish fraud. See *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 270-71, 141 S.E.2d 522, 525-26 (1965); *Lamm v. Crumpler*, 240 N.C. 35, 44, 81 S.E.2d 138, 145 (1954). In these cases, that determination usually is based on the recipient's failure to read the writing. See cases cited *supra* note 147. Although the failure to read is the only reason given for denial of relief in some cases, the above analysis seems implicit. See *Crowell v. Logan*, 196 N.C. 588, 593, 146 S.E. 233, 235-36 (1929).

pose of deceiving the recipient, it is no longer sensible to charge the recipient with knowledge of the contents of the writing and, on this basis, to hold reliance unreasonable as a matter of law.¹⁶² Giving conclusive effect to a failure to read also seems out of step with the developments curtailing the recipient's duty of investigation.¹⁶³ Furthermore, a convincing argument can be made that the defrauder who presents the writing for signature or acceptance, as is usually the case, impliedly gives assurances that the writing reflects the parties' prior negotiations, thereby preventing the claimant from reading it.

Continued adherence to the duty-to-read rationale in its present form is difficult to support in principle. First, the distinction between assurances that are implicit in holding out the writing and assurances received from verbal representation of its contents is too thin to determine the outcome of cases. Second, reasonable reliance does not provide a good vehicle for resolving the parties' factual dispute about what agreement, if any, existed. Third, when the defendant does not misrepresent the character or content of the writing, this factual dispute is taken from the jury and decided as a matter of law. Finally, courts are increasingly unwilling to rely on the recipient's negligence in denying recovery for intentional wrongdoing and, as a result, are unwilling to judge reliance in terms of reasonable prudence.¹⁶⁴

E. Damages

Like materiality, scienter, and actual, reasonable reliance, actual damage is an essential element of a cause of action in fraud.¹⁶⁵ For example, merely showing that credit was obtained by fraudulently overstating the value of assets will not establish actual damages if there is no proof of a loss in the transaction.¹⁶⁶ The courts have found actual damages when fraud induced a claimant to enter into a transaction with a

162. The written contract has become the standard method for transacting business and must be signed before much of life's commercial activity can occur. Commercial contracts are often long, complex, and highly technical. Reading them is often difficult; understanding them may be nearly impossible. Because of the enormous time and effort required to read and understand the contents of such writings, many individuals routinely sign them without so doing. As a practical matter, they have little choice.

163. See *supra* notes 109-33 and accompanying text.

164. Many fraud-in-the-inducement cases do not invoke the duty-to-read rationale at all. The representation is not inconsistent with the writing; therefore, the opportunity to discover its falsity from the writing is not present. See, e.g., *J.I. Case Threshing Mach. Co. v. McKay*, 161 N.C. 584, 591, 77 S.E. 848, 850-51 (1913).

165. *Northwestern Bank v. Rash*, 74 N.C. App. 101, 104, 327 S.E.2d 302, 304 (1985) (citing *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 253, 266 S.E.2d 610, 615 (1980)).

166. *Lillian Knitting Mills Co. v. Earle*, 237 N.C. 97, 105-06, 74 S.E.2d 351, 357 (1953).

party with whom he did not wish to deal¹⁶⁷ or convinced him to surrender a note that was uncollectible because of the maker's insolvency.¹⁶⁸ In contrast, the possibility that the claimant will incur future liability because of the fraud may not constitute actual damage. On this basis, recovery was denied when a defendant's liability insurer fraudulently underpaid a medical bill that the insurer had agreed to pay, thereby exhausting the benefits available that year, in the absence of proof that the victim had to pay for medical expenses later incurred.¹⁶⁹ Similarly, proof of liability that may arise because another's assumption of the claimant's liability for debt is omitted fraudulently from a deed does not establish actual damages.¹⁷⁰

No cause of action exists when the claimed loss would have occurred even though the misrepresentation had not been made. For example, losses arising from the collapse of an underground corrugated metal pipe, represented as cement, could not be recovered when a cement pipe also would have collapsed and caused the same damage.¹⁷¹ This damages issue at times may be complex. In one case, despite the fact that coverage providing double-indemnity benefits for accidental death in air flight was unavailable from any insurer, the court upheld an action based on an insurer's representation that its policy provided such coverage.¹⁷² The claimant could show actual damage by proof that the same amount of total coverage could have been obtained by increasing the amount of the basic insurance coverage.¹⁷³

North Carolina,¹⁷⁴ consistent with a majority of jurisdictions,¹⁷⁵ allows benefit-of-bargain damages in fraud cases. This measure allows a successful claimant to recover the difference between the value he would have received had the representations been true and the value of what he actually received.¹⁷⁶ A minority of jurisdictions limit recovery in fraud

167. *Daniel Boone Complex, Inc. v. Furst*, 43 N.C. App. 95, 104, 258 S.E.2d 379, 386 (1979), *disc. rev. denied*, 299 N.C. 120, 261 S.E.2d 923 (1980).

168. *Ledbetter v. Morris*, 48 N.C. (3 Jones) 543, 545 (1856).

169. *Parker v. Hensel*, 242 N.C. 211, 214, 87 S.E.2d 201, 203 (1955).

170. *Speller v. Speller*, 273 N.C. 340, 343, 159 S.E.2d 894, 896 (1968) (*dictum*).

171. *Feibus & Co. v. Godley Constr. Co.*, 44 N.C. App. 133, 139, 260 S.E.2d 665, 669 (1979), *rev'd on other grounds*, 301 N.C. 294, 271 S.E.2d 385 (1980).

172. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470-72, 343 S.E.2d 174, 180-81 (1986).

173. *Id.* at 471-72, 343 S.E.2d at 180-81.

174. *Horne v. Cloninger*, 256 N.C. 102, 104, 123 S.E.2d 112, 113 (1961); *Kennedy v. High Point Sav. & Trust Co.*, 213 N.C. 620, 622-23, 197 S.E. 130, 131 (1938); *Morrison v. Hartley*, 178 N.C. 618, 621, 101 S.E. 375, 376 (1919); *Hoke v. Whisnant*, 174 N.C. 658, 660, 94 S.E. 446, 447 (1917); *Van Gilder v. Bullen*, 159 N.C. 291, 296, 74 S.E. 1059, 1061 (1912).

175. See PROSSER AND KEETON, *supra* note 25, § 110, at 768.

176. *Id.*

to out-of-pocket damages¹⁷⁷—the difference between the price paid and the value of what the claimant received. In light of the large number of cases applying the benefit-of-bargain rule¹⁷⁸ and the supreme court's own observation that the rule "is established by the uniform decisions of this Court,"¹⁷⁹ the court's recent comment that "[w]e do not have to choose in this case between the majority and minority rules"¹⁸⁰ is, to say the least, surprising.

Good reason exists for allowing benefit-of-bargain damages in fraud. The usual tort rule permits recovery of the difference between the price paid and the value received. Applying the tort rule in fraud places the defrauder in a no-lose position. If the fraud succeeds, she reaps its benefits. If it fails, she must surrender the benefits gained but is left in a position no worse than she occupied before her unsuccessful attempt.

Nevertheless, the benefit-of-bargain rule should not be applied inflexibly. If the fraud victim has not or cannot prove benefit-of-bargain damages, recovery under the out-of-pocket rule should be allowed if supported by adequate proof. As a number of jurisdictions have recognized, recovery should be allowed under the measure of damages the claimant's proof supports.¹⁸¹ The question whether to adopt this sensible approach apparently has never arisen in North Carolina.

In this connection, however, one case requires brief consideration. In *Horne v. Cloninger*¹⁸² the plaintiff bought property that had to be repaired to make it correspond to the defendant's representations.¹⁸³ The supreme court held erroneous a jury instruction fixing damages in the amount of repair costs at the time of discovery of the fraud.¹⁸⁴ The rationale for the decision is unclear. The instruction may have been defective because it identified repair costs as the measure of recovery, because it allowed recovery of costs prevailing at the time of discovery of the fraud rather than at the time of its commission, or for both reasons. Evidence of repair costs is probative of either benefit-of-bargain or out-of-

177. See *id.* at 767.

178. See, e.g., *Norburn v. Mackie*, 264 N.C. 479, 481, 141 S.E.2d 877, 880 (1965) (per curiam); *Garland v. Penegar*, 235 N.C. 517, 519, 70 S.E.2d 486, 487-88 (1952); *Hutchins v. Davis*, 230 N.C. 67, 73, 52 S.E.2d 210, 214 (1949); *Helms v. Holton*, 152 N.C. 587, 593, 67 S.E. 1061, 1063-64 (1910); *Small v. Pool*, 30 N.C. (8 Ired.) 47, 47 (1847). For additional cases applying the benefit-of-bargain rule, see *supra* note 174.

179. *Kennedy v. High Point Sav. & Trust Co.*, 213 N.C. 620, 623, 197 S.E. 130, 131 (1938).

180. *Britt v. Britt*, 320 N.C. 573, 580-81, 359 S.E.2d 467, 471-72 (1987).

181. See, e.g., *Hinkle v. Rockville Motor Co.*, 262 Md. 502, 511-13, 278 A.2d 42, 47-48 (1971); *Selman v. Shirley*, 161 Or. 613, 638-39, 91 P.2d 312, 322 (1939) (on rehearing).

182. 256 N.C. 102, 123 S.E.2d 112 (1961).

183. *Id.* at 102-03, 123 S.E.2d at 112-13.

184. *Id.* at 104, 123 S.E.2d at 113.

pocket losses and, in the absence of contrary proof, probably should be sufficient for the jury to determine either. This view is consistent with decisions holding that evidence of repair costs is sufficient to establish diminution in market value in cases involving injury to property.¹⁸⁵ Thus, logic and authority suggest that *Horne* should not be interpreted to hold repair costs insufficient proof of damages. Using repair costs as the measure of recovery may still be erroneous, particularly when such costs are inconsistent with other evidence of actual and represented values.¹⁸⁶ When conflicting evidence is not present, however, it is questionable whether the jury instruction, even if erroneous, is prejudicial.

To the extent that *Horne* suggests that only proof directly establishing the difference between represented and actual value permits recovery in fraud, the case demonstrates the pitfalls of strict adherence to an inflexible benefit-of-bargain formula. When the victim's proof establishes actual loss caused by the defendant's fraud, denying recovery because the evidence is insufficient to show benefit-of-bargain damages is simply unacceptable.

In *Wolf Co. v. Smith Mercantile Co.*¹⁸⁷ the court upheld recovery of benefit-of-bargain damages and "such additional damages as would be reasonably foreseen . . . at the time the contract was entered into."¹⁸⁸ The court apparently permitted the buyer of a defective machine to recover for lost profits and the cost of installing the machine. Similarly, when a buyer purchased land on which to erect a building and the seller's fraudulent representation of the title delayed the buyer in obtaining construction funds, the court allowed recovery of increased construction costs resulting from the delay.¹⁸⁹ Consequential losses arising from reliance upon a misrepresentation may be the only damage suffered when the fraudulent transaction does not involve the transfer of property. For example, when a car dealership founders because of the distributor's fraud, recovery of expenditures for advertising, space, and labor may be appropriate.¹⁹⁰

185. *Farrall v. Universal Garage Co.*, 179 N.C. 389, 392-93, 102 S.E. 617, 619 (1920) (holding instruction stating measure of damages as repair costs rather than diminution in value erroneous, but basing reversal on cumulative errors); *Plow v. Bug Man Exterminators, Inc.*, 57 N.C. App. 159, 162-63, 290 S.E.2d 787, 789 (holding that cost of repair as a damage formula is "equally acceptable" as diminution in market value), *disc. rev. denied*, 306 N.C. 558, 294 S.E.2d 224 (1982).

186. *Farrall*, 179 N.C. at 393, 102 S.E. at 619.

187. 189 N.C. 322, 127 S.E. 208 (1925).

188. *Id.* at 326, 127 S.E. at 210.

189. *Shreve v. Combs*, 54 N.C. App. 18, 23-24, 282 S.E.2d 568, 572 (1981).

190. *Erskine v. Chevrolet Motors Co.*, 185 N.C. 479, 485, 494, 117 S.E. 706, 708-09, 713 (1923).

Recovering punitive damages poses a greater challenge for fraud victims. As the supreme court itself has observed, the law in North Carolina related to the recovery of punitive damages in fraud cases has been "singularly confused."¹⁹¹ *Swinton v. Savoy Realty Co.*,¹⁹² decided in 1953, held that merely because a plaintiff proves fraud does not necessarily entitle him to submit to the jury a claim for punitive damages.¹⁹³ An "element of aggravation" must be present before punitive damages are awarded,¹⁹⁴ and this finding must be made on "the facts in each case."¹⁹⁵ Subsequent court of appeals cases dealing with the issue are inconsistent. One group of cases follows the *Swinton* analysis and usually denies recovery.¹⁹⁶ Another group adopts the view that fraud, without more, permits the award of punitive damages.¹⁹⁷ In 1975 *Swinton's* ad hoc approach, while not abandoned, was skewed somewhat when the supreme court embraced the idea that "it is the general rule that ordinarily punitive damages are not recoverable in an action for fraud."¹⁹⁸

Observing that "fraud by its very nature involves intentional wrongdoing," *Newton v. Standard Fire Insurance Co.*,¹⁹⁹ decided in 1976, overruled *Swinton* and discarded the notion that some additional element of aggravation is necessary.²⁰⁰ This apparently is the court's final word on the subject.²⁰¹

191. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976).

192. 236 N.C. 723, 73 S.E.2d 785 (1953), *overruled in part by Newton*, 291 N.C. at 113, 229 S.E.2d at 302.

193. *Id.* at 725, 73 S.E.2d at 787.

194. *Id.*

195. *Id.* at 726, 73 S.E.2d at 787.

196. *See, e.g., Tuggle v. Haines*, 26 N.C. App. 365, 369, 216 S.E.2d 460, 463, *disc. rev. denied*, 288 N.C. 253, 217 S.E.2d 681 (1975); *Clouse v. Chairtown Motors, Inc.*, 17 N.C. App. 669, 671, 195 S.E.2d 327, 328-29 (1973); *Poplin v. Ledbetter*, 6 N.C. App. 170, 173-74, 169 S.E.2d 527, 529-30 (1969).

197. *See, e.g., Stone v. Martin*, 85 N.C. App. 410, 418, 355 S.E.2d 255, 260, *disc. rev. denied*, 320 N.C. 638, 360 S.E.2d 105 (1987); *Payne v. North Carolina Farm Bureau Mut. Ins. Co.*, 67 N.C. App. 692, 696, 313 S.E.2d 912, 914 (1984); *Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 616, 306 S.E.2d 519, 526 (1983), *disc. rev. denied*, 310 N.C. 154, 311 S.E.2d 294 (1984).

198. *Hardy v. Toler*, 288 N.C. 303, 306, 218 S.E.2d 342, 344 (1975). This idea had been introduced in dicta in two earlier cases. *See Davis v. North Carolina State Highway Comm'n*, 271 N.C. 405, 408-09, 156 S.E.2d 685, 688 (1967); *Wilkins v. Commercial Fin. Co.*, 237 N.C. 396, 404, 75 S.E.2d 118, 124 (1953).

199. 291 N.C. 105, 229 S.E.2d 297 (1976).

200. *Id.* at 113, 229 S.E.2d at 302.

201. *Terry v. Terry*, 302 N.C. 77, 273 S.E.2d 674 (1981), followed the *Newton* holding. *Id.* at 88, 273 S.E.2d at 680. Surprisingly, *Terry* relied on *Hardy* for the proposition that "[o]rdinarily punitive damages are not recoverable," presumably purposely dropping the words "in an action for fraud" from the statement as it appeared in *Hardy*. *Id.* (citing *Hardy*, 288 N.C. at 305, 218 S.E.2d at 344).

II. NONDISCLOSURE

The generalization that in arm's length dealings one party owes the other no duty to disclose material facts relating to the transaction has no more validity than the claim that *caveat emptor* applies under such circumstances.²⁰² Circumstances arise in which no duty of disclosure is imposed even though one party knows that the other is unaware of the facts and that those facts would be important to her decision to enter into the transaction. No reason exists to question the rejection of a duty of disclosure, for example, in cases like *Sparks v. Union Trust Co.*²⁰³ and *Setzer v. Old Republic Life Insurance Co.*²⁰⁴ These cases, however, provide no basis for a general denial of a duty of disclosure.

In *Sparks*, a bank knew that the borrower would use the loan proceeds to fund a transaction with another depositor who was insolvent.²⁰⁵ The court held that the bank owed no duty to the borrower to disclose the insolvency.²⁰⁶ The facts come within the rule that, in the absence of a special relationship or unusual circumstances, tort law does not impose on an individual a duty to take affirmative action to prevent loss to another.²⁰⁷ In *Setzer*, an insurer that issued a series of credit life insurance policies, each containing an indemnity provision covering loss of certain body parts, later issued a new policy which omitted that provision.²⁰⁸ The court correctly held that the insurer owed no duty to inform the insured of the omitted coverage because the indemnity provision was not a significant factor in prompting the insured to buy either policy.²⁰⁹

Liability often has been imposed when the nondisclosure related to a material fact affecting the transaction between the parties.²¹⁰ When a duty of disclosure exists, nondisclosure constitutes fraud. Accordingly,

202. This generalization lacks vitality in five important situations: when nondisclosure of a material fact affects a transaction between the parties; when a disclosure, although technically true, is misleading in light of other facts that the representing party knows but does not disclose; when a party to a transaction actively conceals facts material to the transaction; when the nondisclosing party has knowledge superior to the other and knows the other cannot reasonably be expected to learn of the material facts; and when the nondisclosing party stands in a confidential or fiduciary relationship to the other. See *infra* notes 210-31 and accompanying text for a discussion of these principles.

203. 256 N.C. 478, 124 S.E.2d 365 (1962).

204. 257 N.C. 396, 126 S.E.2d 135 (1962).

205. *Sparks*, 256 N.C. at 479, 124 S.E.2d at 366.

206. *Id.* at 482-83, 124 S.E.2d at 368.

207. See PROSSER AND KEETON, *supra* note 25, § 56, at 374. An additional reason to find no duty in this case is that the information relating to the other customer's account was confidential. *Sparks*, 256 N.C. at 481, 124 S.E.2d at 367-68.

208. *Setzer*, 257 N.C. at 397, 126 S.E.2d at 136.

209. *Id.* at 399-400, 126 S.E.2d at 137-38.

210. See cases cited *infra* notes 216-20.

both the determination of liability and the measure of damages are controlled by the rule structure governing intentional misrepresentation.²¹¹

When a disclosure, although true in a technical sense, is misleading in light of other known but undisclosed facts, liability is imposed.²¹² An opinion, even when expressed in general terms, may constitute a fraudulent misrepresentation when the defendant possesses undisclosed facts inconsistent with the opinion stated.²¹³

In some instances the line between active misrepresentation and nondisclosure may not be distinct and a particular fact situation may be placed in either category.²¹⁴ The way in which the circumstances are characterized matters little, however, because liability is usually imposed on one theory or the other.²¹⁵ Liability arises when facts material to the transaction are actively concealed.²¹⁶

A duty of disclosure has been imposed in other cases in which active misrepresentation was not present. In *Brooks v. Ervin Construction Co.*²¹⁷ the court held that the vendor owed a duty to the purchaser to disclose that the house was built on filled land; nondisclosure made the vendor liable for damages incurred when the house settled.²¹⁸ The duty was defined as follows: "Where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation, and judgment of the purchaser, the vendor is bound to disclose such facts, and make them known to the purchaser."²¹⁹

The duty of the seller to disclose to the buyer is now clearly established.²²⁰ The duty, however, is limited in several ways. First, it exists

211. See *Brooks v. Ervin Constr. Co.*, 253 N.C. 214, 217-19, 116 S.E.2d 454, 457-59 (1960); *Brooks Equip. & Mfg. Co. v. Taylor*, 230 N.C. 680, 686-87, 55 S.E.2d 311, 315 (1949).

212. See *Ragsdale v. Kennedy*, 286 N.C. 130, 137-38, 209 S.E.2d 494, 499-500 (1974); *Alston v. Maxwell*, 16 N.C. (1 Dev. Eq.) 18, 19-20 (1826). In *Childress v. Nordman*, 238 N.C. 708, 78 S.E.2d 757 (1953), the court imposed no duty upon a seller whose agent represented that a building was free of termites when the seller later discovered the presence of termites. *Id.* at 713, 78 S.E.2d at 761. The court stated that the representation related to conditions existing when it was made and was not intended to extend to later conditions even if they arose before the transaction was closed. *Id.* at 712-13, 78 S.E.2d at 760-61. The case is extremely narrow in its approach and seems to reach an incorrect result.

213. *Ragsdale*, 286 N.C. at 138-40, 209 S.E.2d at 500-01.

214. See *id.* at 137-38, 209 S.E.2d at 500; *Isler v. Brown*, 196 N.C. 685, 686, 146 S.E. 803, 804 (1929); *Alston*, 16 N.C. (1 Dev. Eq.) at 19-20.

215. *Isler*, 196 N.C. at 686, 146 S.E. at 804.

216. *Horne v. Cloninger*, 256 N.C. 102, 103, 123 S.E.2d 112, 113 (1961).

217. 253 N.C. 214, 116 S.E.2d 454 (1960).

218. *Id.* at 219, 116 S.E.2d at 458.

219. *Id.* at 217, 116 S.E.2d at 457.

220. See *Ragsdale v. Kennedy*, 286 N.C. 130, 139-40, 209 S.E.2d 494, 501 (1974); *Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 120-21, 123 S.E.2d 590, 598 (1962); *Brooks*, 253 N.C. at 217-19, 116 S.E.2d at 457-59; *Brooks Equip. & Mfg. Co. v. Taylor*, 230

only for facts known by the seller.²²¹ Furthermore, disclosure is required only if the seller knows that the buyer is unaware of the facts and would be unlikely to discover them in the exercise of due diligence.²²²

Apparently, no corresponding duty of disclosure is imposed on the buyer.²²³ The clearest case for denying a buyer's duty to disclose is when the seller's knowledge is equal to or greater than the buyer's.²²⁴ This situation usually exists when the information relates to the quantity or quality of the seller's property. In *Harrell v. Powell*²²⁵ the government leased and erected buildings on land owned by the seller.²²⁶ The party who managed the property for the government learned of the government's plans to give the buildings to the owner of the land.²²⁷ This fact substantially increased the value of the land and prompted the manager to buy the property.²²⁸ The court held that the buyer owed no duty of disclosure and denied the seller any relief.²²⁹

When a confidential or fiduciary relationship exists between parties to a transaction, a duty of full disclosure is owed by the fiduciary or any other person in whom confidence is reposed.²³⁰ Although a fiduciary's liability may be predicated on fraud, including nondisclosure, the law provides even greater protection for beneficiaries.²³¹

III. NEGLIGENT MISREPRESENTATION

North Carolina, together with an increasing number of other jurisdictions,²³² now recognizes a cause of action for negligent misrepresenta-

N.C. 680, 686, 55 S.E.2d 311, 315 (1949); *Isler*, 196 N.C. at 686, 146 S.E. at 804; *Brown v. Gray*, 51 N.C. (6 Jones) 103, 104-06 (1858); *Case v. Edney*, 26 N.C. (4 Ired.) 93, 95 (1843).

221. See *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 199, 225 S.E.2d 557, 566 (1976).

222. *Brown*, 51 N.C. (6 Jones) at 104.

223. See *Harrell v. Powell*, 249 N.C. 244, 249-50, 106 S.E.2d 160, 163-64 (1958); *Smith v. Beatty*, 37 N.C. (2 Ired. Eq.) 456, 458 (1843).

224. *Smith*, 37 N.C. (2 Ired. Eq.) at 458 (holding that purchaser has no duty to disclose presence of gold on land).

225. 249 N.C. 244, 106 S.E.2d 160 (1958).

226. *Id.* at 246, S.E.2d at 161.

227. *Id.* at 247, 106 S.E.2d at 162.

228. *Id.*

229. *Id.* at 249-50, 106 S.E.2d at 163-64.

230. *Abbitt v. Gregory*, 201 N.C. 577, 597-99, 160 S.E. 896, 906-07 (1931).

231. *McNeil v. McNeil*, 223 N.C. 178, 181, 25 S.E.2d 615, 616-17 (1943) (holding that transaction is void when conducted without beneficiary's consent); *Lockridge v. Smith*, 206 N.C. 174, 178-79, 173 S.E. 36, 39 (1934) (holding that fraud is presumed when beneficiary consents; fiduciary must show the transaction was fair and open); see also GEORGE T. BOGERT, TRUSTS § 96 (6th ed. 1987) (stating the rule that a transaction between a fiduciary and a beneficiary fails unless the fiduciary proves the transaction was open and fair).

232. See PROSSER AND KEETON, *supra* note 25, § 107, at 745-47.

tion.²³³ Like fraud, negligent misrepresentation requires the misrepresentation of a material fact, actual reliance, justified reliance, and damages.²³⁴ The representation must be made for the purpose of inducing the recipient's reliance.²³⁵ The requisite fault consists of negligence in obtaining or communicating the information contained in the representation;²³⁶ a showing of knowing or reckless falsity is not required.

The negligent misrepresentation cause of action evolved in the North Carolina Court of Appeals in a series of cases over a ten-year period.²³⁷ In the early cases the court of appeals simply viewed the claim as one based on negligence and, in upholding a cause of action, rejected arguments that recovery could not be had for economic loss standing alone²³⁸ or by one not in privity of contract.²³⁹ Later cases adopted the negligent misrepresentation description of the cause of action.²⁴⁰

A wide range of relationships and transactions have been involved in cases upholding the cause of action for negligent misrepresentation: a purchaser of realty relying on representations of the seller's real estate broker²⁴¹ or engineer;²⁴² a purchaser of corporate stock relying on representations of a geologist hired by the corporation;²⁴³ an insured relying on the insurer's representation that a substitute vehicle would be covered

233. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 207-16, 367 S.E.2d 609, 613-18 (1988).

234. The North Carolina appellate courts have given little consideration to these issues, but they occasionally address them. See *Raritan River*, 322 N.C. at 207-16, 367 S.E.2d at 613-18 (finding justified reliance); *Alva v. Cloninger*, 51 N.C. App. 602, 610-12, 277 S.E.2d 535, 540-41 (1981) (finding actual and justified reliance); *Stanford v. Owens*, 46 N.C. App. 388, 394-95, 265 S.E.2d 617, 622 (finding actual and justified reliance), *disc. rev. denied*, 301 N.C. 95, 273 S.E.2d 300 (1980).

235. See *Stanford*, 46 N.C. App. at 395, 265 S.E.2d at 622.

236. See *Raritan River*, 322 N.C. at 209, 214, 367 S.E.2d at 614, 617 (adopting RESTATEMENT (SECOND) OF TORTS § 522 (1977)).

237. See cases cited *infra* notes 238-48.

238. See *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 667, 255 S.E.2d 580, 584, *disc. rev. denied*, 298 N.C. 295, 259 S.E.2d 911 (1979).

239. See *Bradley Freight Lines v. Pope, Flynn & Co.*, 42 N.C. App. 285, 290-91, 256 S.E.2d 522, 525, *disc. rev. denied*, 298 N.C. 295, 259 S.E.2d 299 (1979).

240. See *Stanford v. Owens*, 46 N.C. App. 388, 394-95, 265 S.E.2d 617, 621-22, *disc. rev. denied*, 301 N.C. 95, 273 S.E.2d 300 (1980).

241. *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 595, 394 S.E.2d 643, 647 (1990); *Powell v. Ward*, 88 N.C. App. 61, 67-68, 362 S.E.2d 796, 799 (1987).

242. *Stanford v. Owens*, 76 N.C. App. 284, 286-87, 332 S.E.2d 730, 731-32 (appeal after remand), *disc. rev. denied*, 314 N.C. 670, 336 S.E.2d 402 (1985).

243. *Howell v. Fisher*, 49 N.C. App. 488, 494-98, 272 S.E.2d 19, 24-26 (1980), *disc. rev. denied*, 302 N.C. 218, 277 S.E.2d 69 (1981).

by the policy without a special endorsement;²⁴⁴ a general contractor relying on the representation of the owner's architect²⁴⁵ or soil engineer;²⁴⁶ a home buyer relying on the representation of the lending bank's appraiser;²⁴⁷ and the holder of a security interest in equipment relying on a title search conducted by an attorney hired by the person giving the security interest.²⁴⁸

Many of these cases have relied extensively on section 552 of the *Restatement (Second) of Torts*.²⁴⁹ The *Restatement* recognizes a cause of action for negligent misrepresentation only when the representation is made in connection with a commercial transaction in which the supplier of the information has a pecuniary interest.²⁵⁰ Both a commercial transaction and a pecuniary interest in the supplier were present in the North Carolina cases recognizing the negligent misrepresentation cause of action; none of the cases, however, expressly considered whether these facts were essential to the cause of action.²⁵¹ The *Restatement* extends liability only to specific uses and users of the information that the supplier intended to influence.²⁵² These restrictions apparently are intended to limit the supplier's liability to specific risks of which the supplier was aware when supplying the information. Recently, in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*,²⁵³ the North Carolina Supreme Court confronted this issue and adopted the *Restatement* position.²⁵⁴ In doing so, it expressly rejected foreseeability, privity of contract, and a California balancing test²⁵⁵ as appropriate standards for determining the extent-

244. *Bradley Freight Lines v. Pope, Flynn & Co.*, 42 N.C. App. 285, 290-91, 256 S.E.2d 522, 525-26, *disc. rev. denied*, 298 N.C. 295, 259 S.E.2d 299 (1979).

245. *Shoffner Indus. v. W.B. Lloyd Constr. Co.*, 42 N.C. App. 259, 264-67, 257 S.E.2d 50, 54-56, *disc. rev. denied*, 298 N.C. 296, 259 S.E.2d 301 (1979).

246. *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 668-69, 255 S.E.2d 580, 585, *disc. rev. denied*, 298 N.C. 295, 259 S.E.2d 911 (1979).

247. *Alva v. Cloninger*, 51 N.C. App. 602, 610-12, 277 S.E.2d 535, 540-41 (1981).

248. *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 406-08, 263 S.E.2d 313, 317-19, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). Other situations also exist. *See, e.g.*, *Ness v. Jones*, 89 N.C. App. 504, 507, 366 S.E.2d 570, 572 (1988) (upholding a claim for relief based on real estate broker's misrepresentation that seller's wife would qualify for additional VA financing).

249. *RESTATEMENT (SECOND) OF TORTS* § 552(1) (1977).

250. *Id.* § 552(2)(a).

251. Some cases, however, note the presence of these factors. *See, e.g.*, *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 595, 394 S.E.2d 643, 648 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

252. *RESTATEMENT (SECOND) OF TORTS* § 552.

253. 322 N.C. 200, 367 S.E.2d 609 (1988).

254. *Id.* at 207-16, 367 S.E.2d at 613-18.

255. In *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958) (en banc), the California Supreme Court announced a variable-factor balancing test to determine whether a third person

of-liability issue.²⁵⁶ Chief Justice Exum's opinion reflects the same concerns as those expressed in the *Restatement*:

We believe that in fairness accountants should not be liable in circumstances where they are unaware of the use to which their opinions will be put. Instead, their liability should be commensurate with those persons or classes of persons whom they know will rely on their work. With such knowledge the auditor can, through purchase of liability insurance, setting fees, and adopting other protective measures appropriate to the risk, prepare accordingly.²⁵⁷

Determining the significance of *Raritan River* is not easy. In holding that the complaint stated a cause of action, the court noted that the complaint alleged

that when defendants [an accounting firm and its individual partners] prepared the audited financial statements for [the client] they knew: (1) the statements would be used by [the client] to represent its financial condition to creditors who would extend credit on the basis of them; and (2) plaintiff [Sidbec-Dosco] and other creditors would rely upon these statements.²⁵⁸

These allegations, even when considered in the light most favorable to the pleader, are ambiguous. One reasonable interpretation is that they allege nothing more than knowledge that in the usual course of business a variety of persons could rely on the financial statements in connection with a variety of transactions. Another interpretation is that the accounting firm knew that the statements would be provided specifically to plaintiff, Sidbec-Dosco, and other creditors incident to obtaining credit.

not in privity with the plaintiff should be liable for negligent misrepresentation. Among the factors a court should consider are

the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

Id. at 650, 320 P.2d at 19.

256. *Raritan River*, 322 N.C. at 211-14, 367 S.E.2d at 615-17. The court rejected the privity approach "because it provides inadequately for the central role independent accountants play in the financial world." *Id.* at 211, 367 S.E.2d at 615. The court rejected the "reasonably foreseeable" test "because it would result in liability more expansive than an accountant should be expected to bear." *Id.* As for the California balancing test, the *Raritan River* court found that its factors, such as the defendant's moral blame and the policy of preventing future harm, would be "difficult to apply" and that the test unacceptably "approximate[d] a 'reasonable foreseeability' test." *Id.* at 214, 367 S.E.2d at 617.

257. *Id.* at 213, 367 S.E.2d at 616.

258. *Id.* at 216, 367 S.E.2d at 618.

The *Restatement* rule denies liability under the first interpretation and imposes liability under the second.²⁵⁹

Nothing in *Raritan River* suggests which interpretation the court gave to the allegations in finding them sufficient. The sensible conclusion is that the court's decision, following the rule that pleadings are to be construed liberally, is based on the second interpretation. The court's endorsement of the *Restatement* and its assumption that its decision was consistent with the *Restatement* provide further support for this position.

Nevertheless, some uncertainty surrounds *Raritan River* because of the unusual way in which the court dealt with Illustration 10, set out in section 552 of the *Restatement*.²⁶⁰ In Illustration 10, a creditor suffers loss in relying on an accountant's negligently prepared financial statements; liability is denied because the accountant had no knowledge other than that such statements are used customarily in a wide variety of financial transactions and are relied on by a variety of users in connection with these transactions. Although Illustration 10 parallels the fact situation under the first interpretation of the complaint suggested above, nowhere in its opinion does the court recognize this. Instead, the court directed its inquiry to whether Illustration 10 requires the accountant's knowledge of intended uses and users to come from the client rather than another person.²⁶¹ In making this inquiry, the court did not recognize that, under the facts in Illustration 10, the *Restatement* rule denies liability whether the information comes from the client, a third person, or general knowledge of commercial practices.²⁶² Finally, in rejecting any requirement that the client be the source of the accounting firm's knowledge, the court never inquired whether this view was a product of a misreading of Illustration 10, but instead based its decision on the text of the *Restatement*.²⁶³ Perhaps the most that can be said is that these circumstances create some doubt about the scope of the court's decision.

259. Comment (h) to the *Restatement* provides:

It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it.

RESTATEMENT (SECOND) OF TORTS § 552 cmt. h (1977). Illustration 10 to this section apparently was intended to illustrate a fact situation involving "a larger class who might reasonably be expected" to rely. *Id.* § 552 cmt. h, illus. 10.

260. See *id.* § 552 cmt. h, illus. 10.

261. *Raritan River*, 322 N.C. at 215, 367 S.E.2d at 617-18.

262. RESTATEMENT (SECOND) OF TORTS § 552 cmt. h, illus. 10.

263. *Raritan River*, 322 N.C. at 215, 367 S.E.2d at 618.

In a second case decided in the same appeal,²⁶⁴ the court held inadequate to state a cause of action allegations that the creditor (Raritan) relied upon a Dun & Bradstreet report which specifically referred to the accounting firm's audit report as the source of its information.²⁶⁵ Here the pleadings, unlike those in the first case, were not susceptible of being read to include an allegation that the accounting firm knew that Raritan would rely on the reports. The greatest knowledge attributable to the accounting firm, under the view of the pleadings most favorable to the plaintiff, would be that in the ordinary course of business people customarily rely on financial statements prepared by accountants. If this view of the facts were taken, the facts would parallel those in Illustration 10. The court, however, did not employ this analysis. Instead, it reasoned "that a party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information."²⁶⁶

This holding in *Raritan River* is based upon the idea that information taken out of the context of the full financial statements and audit report may be incomplete and misleading.²⁶⁷ This proposition is appealing in the abstract. When the information in fact is incomplete and misleading, the conclusion is almost inescapable; reliance upon it is unreasonable. Nothing in *Raritan River*, however, suggests that the information in the Dun & Bradstreet report was incomplete and misleading. It may well have given an accurate picture of the company's financial condition.

The judgment denying Raritan's claim was clearly correct. The requirement of reliance on the financial statements themselves is not an unreasonable way to achieve the goal of limiting liability for negligent misrepresentation. However, if the purpose of the rule which the court adopted is to prevent indefinite and burdensome liability and to define liability in terms of the risk undertaken, the rule is not particularly effective. If, on the one hand, an accountant knows that the financial statements are intended for the use of a particular person and that person

264. Two creditors brought actions against the defendant accounting firm and its individual partners, and the court consolidated the two actions. *Id.* at 203, 367 S.E.2d at 611.

265. *Id.* at 205, 367 S.E.2d at 612.

266. *Id.* at 206, 367 S.E.2d at 612.

267. The court stated:

Isolated statements in the report, particularly the net worth figure, do not meaningfully stand alone; rather, they are interdependent and can be fully understood and justifiably relied on only when considered in the context of the entire report, including any qualifications of the auditor's opinion and any explanatory footnotes included in the statements.

Id. at 207, 367 S.E.2d at 613.

then relies on accurate and complete information obtained from a Dun & Bradstreet report based upon the statements rather than from the statements themselves, that fact does not enlarge the risk so as to make it incommensurate with the accountant's undertaking. On the other hand, if the accountant does not know that the statements are intended for the use of any particular person, imposing liability because someone relies on the statements themselves would result in a disproportionate burden. It is again puzzling that the court did not mention that the accountant had no reason to know that this particular claimant would rely.

The question of the appropriate measure of recovery for negligent misrepresentation has not been presented to the North Carolina appellate courts. Some jurisdictions apply the usual tort measure of recovery, while others allow benefit-of-bargain damages.²⁶⁸ Under the former the recipient recovers the difference in value between what he surrendered and what he received in the transaction and thereby is restored to the position he held before acting on the representation.²⁶⁹ No recovery is allowed for the additional benefits that would have been present in the bargain had the representations been true.²⁷⁰ The policy considerations supporting a benefit-of-bargain recovery apply with less force when the basis of liability is negligence rather than intentional wrongdoing.²⁷¹

Consequential damages resulting from reliance on negligent misrepresentation can be recovered. For example, when a soil tester negligently failed to discover that a building was built on filled soil, the purchaser recovered from him damages caused by the fill, including the costs of repairing the building and the building's decrease in value.²⁷² In some instances, consequential damages may constitute the claimant's only loss. North Carolina courts have allowed building contractors to recover for increased construction costs²⁷³ or liability to a third party²⁷⁴ incurred as

268. PROSSER AND KEETON, *supra* note 25, § 110, at 767-68. The benefit-of-bargain rule usually is not applied when a person other than a party to the transaction makes the representation. *Id.* The third party in these cases will not benefit even if the transaction is induced by the misrepresentation. Further, in many of these cases the formulary approach of the out-of-pocket rule simply is not applicable and recovery is based upon the rules applying in tort to determine consequential damages. See *infra* notes 272-74 and accompanying text.

269. See PROSSER AND KEETON, *supra* note 25, § 110, at 767.

270. See *id.*

271. The out-of-pocket rule fully compensates the claimant for losses caused by the misrepresentation. The argument for considering the defendant's potential gain from the misrepresentation as grounds for adopting the more favorable measure of recovery is less compelling when the representation is negligent rather than intentional.

272. *Stanford v. Owens*, 46 N.C. App. 388, 394-95, 265 S.E.2d 617, 622, *disc. rev. denied*, 301 N.C. 95, 273 S.E.2d 300 (1980).

273. *Shoffner Indus. v. W.B. Lloyd Constr. Co.*, 42 N.C. App. 259, 265-66, 257 S.E.2d 50, 55, *disc. rev. denied*, 298 N.C. 296, 259 S.E.2d 301 (1979).

a result of reliance on the negligent misrepresentation.

When liability for misrepresentation is based on negligence, the contributory negligence of the recipient in relying on the representation is a complete defense.²⁷⁵

IV. UNFAIR OR DECEPTIVE TRADE PRACTICES

Misrepresentation may give rise to a cause of action for unfair or deceptive trade practices under Chapter 75 of the North Carolina General Statutes.²⁷⁶ The statutory cause of action may offer substantial advantages over the common-law action for misrepresentation. First, section 75-16 authorizes recovery of treble damages.²⁷⁷ Reasonable attorney fees also may be awarded in the discretion of the trial judge when the statutory violation is willful and "there is an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit."²⁷⁸ Furthermore, establishing a statutory cause of action may be easier in some instances because the common law's stringent requirements for misrepresentation need not always be present for conduct to constitute an unfair trade practice.²⁷⁹ Defenses that operate to bar the common-law action may not be recognized in the unfair or deceptive trade practices claim.²⁸⁰ Finally, the compensatory damages recoverable

274. *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 666, 255 S.E.2d 580, 583-84, *disc. rev. denied*, 298 N.C. 295, 259 S.E.2d 911 (1979).

275. *Stanford v. Owens*, 76 N.C. App. 284, 287, 332 S.E.2d 730, 732 (appeal after remand), *disc. rev. denied*, 314 N.C. 670, 336 S.E.2d 402 (1985).

276. See N.C. GEN. STAT. §§ 75-1.1, 75-16 (1988).

277. *Id.* § 75-16. When an unfair or deceptive trade practice is shown, the trebling of damages is automatic rather than discretionary with the trial judge. *Kim v. Professional Business Brokers Ltd.*, 74 N.C. App. 48, 52-53, 328 S.E.2d 296, 299-300 (1985). The total damages fixed by the jury are trebled, and deductions for any amount the claimant owes the defendant or receives from others liable for payment are made after the jury's award is trebled. See *Washburn v. Vandiver*, 93 N.C. App. 657, 664, 379 S.E.2d 65, 69-70 (1989) (deducting amount claimant owes to defendant); *Olivetti Corp. v. Ames Business Sys., Inc.*, 81 N.C. App. 1, 24-25, 344 S.E.2d 82, 96 (1986) (same), *aff'd in part and rev'd in part*, 319 N.C. 534, 356 S.E.2d 578 (1987); *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 416-17, 363 S.E.2d 643, 652-53 (deducting amount claimant received by others liable for payment), *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988).

278. N.C. GEN. STAT. § 75-16.1(1).

279. The cases suggest that requirements relating to fault, actual reliance, reasonable reliance, and damages may be less stringent for an unfair or deceptive trade practice claim than for a fraud claim. See *infra* notes 324-40 and accompanying text.

280. Contributory negligence is not a defense to an unfair or deceptive trade practice claim. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 96, 331 S.E.2d 677, 681 (1985). Similarly, the supreme court has occasionally stated that good faith and the absence of deception are not defenses to an unfair or deceptive trade practice claim. See, e.g., *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403-04 (1981).

in the two actions may differ.²⁸¹ Thus, the unfair trade practices claim may provide an alternative theory or the sole basis for recovery in misrepresentation cases.

The North Carolina appellate courts repeatedly have held that fraud automatically constitutes an unfair or deceptive trade practice.²⁸² Likewise, the court of appeals recently held that negligent misrepresentation constitutes an unfair or deceptive trade practice.²⁸³ By the same reasoning, nondisclosure amounting to fraud is within the same statute.²⁸⁴ Promissory representations made with the intent not to perform them may constitute unfair or deceptive trade practices.²⁸⁵ An unfair or deceptive trade claim cannot be based on subsequent nonperformance, however, when no such intent exists.²⁸⁶ In other words, proof sufficient to establish a tort cause of action in either branch of misrepresentation will also establish a cause of action for an unfair or deceptive trade practice.

Although recovery for both fraud and unfair trade practices would constitute double recovery and thus is impermissible,²⁸⁷ a claim may be

281. The cases suggest that the appellate courts will use a flexible approach in awarding damages for unfair or deceptive trade practices and reflect willingness to compensate a wide range of consequential losses. For a discussion of these cases, see *infra* notes 341-52 and accompanying text.

282. *E.g.*, *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975); *Douglas v. Doub*, 95 N.C. App. 505, 514, 383 S.E.2d 423, 428 (1989); *Leake v. Sunbelt Ltd.*, 93 N.C. App. 199, 204, 377 S.E.2d 285, 288, *disc. rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989); *Powell v. Wold*, 88 N.C. App. 61, 68, 362 S.E.2d 796, 800 (1987); *Kim v. Professional Business Brokers Ltd.*, 74 N.C. App. 48, 53, 328 S.E.2d 296, 300 (1985); *Kent v. Humphries*, 50 N.C. App. 580, 589, 275 S.E.2d 176, 183, *disc. rev. allowed*, 302 N.C. 398, 279 S.E.2d 357, *modified*, 303 N.C. 675, 281 S.E.2d 43 (1981).

283. *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991).

284. See *Starling v. Sproles*, 66 N.C. App. 653, 656, 311 S.E.2d 688, 690 (1984). Failure to disclose, as well as positive representations, may in some circumstances constitute an unfair or deceptive trade practice when the facts would be insufficient to establish fraud. See *Leake*, 93 N.C. App. at 205, 377 S.E.2d at 289; *Rosenthal v. Perkins*, 42 N.C. App. 449, 452, 454-55, 257 S.E.2d 63, 66-67 (1979), *limited by* *Bhatti v. Buckland*, 328 N.C. 240, 246-47, 400 S.E.2d 440, 444 (1991) (holding that *Rosenthal's* exemption from § 75-1.1 for homeowners selling a residence is limited to those who sell their own residence).

285. *Kent*, 50 N.C. App. at 588, 275 S.E.2d at 182.

286. *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452, 279 S.E.2d 1, 6 (1981); *Marshall v. Miller*, 47 N.C. App. 530, 542-43, 268 S.E.2d 97, 103 (1980), *modified*, 302 N.C. 539, 276 S.E.2d 397 (1981). An unfair or deceptive trade practice resulted when a condominium developer made promises about planned recreational facilities without disclosing that a vote of the homeowners' association and increased dues would be necessary before the facilities could be built. *Leake*, 93 N.C. App. at 204-05, 377 S.E.2d at 288-89.

287. *Process Components, Inc. v. Baltimore Aircoil Co.*, 89 N.C. App. 649, 655, 366 S.E.2d 907, 912, *aff'd per curiam*, 323 N.C. 620, 374 S.E.2d 116 (1988); *Borders v. Newton*, 68 N.C. App. 768, 770, 315 S.E.2d 731, 732 (1984); *Marshall*, 47 N.C. App. at 542, 268 S.E.2d at 103; *cf. Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 230, 333 S.E.2d 299, 306 (1985).

pursued on alternative theories and recovery had under the theory that proves most advantageous.²⁸⁸ Because treble damages²⁸⁹ and, in appropriate circumstances, an award of attorney's fees²⁹⁰ are recoverable in the unfair trade claim, the statutory action will usually be preferred.

When double compensation for the same injury is not involved, adoption of one theory may or may not preclude reliance on the other. Because both punitive and treble damages are punitive in nature, recovery of both in the same action has been denied on policy grounds.²⁹¹ In these circumstances the choice of theories depends on whether the award of compensatory and punitive damages in the fraud action or treble damages in the unfair trade practice action is greater. A more difficult situation arises when total damages in the fraud action exceed treble damages and attorney fees awarded in the unfair trade practice action. The court of appeals, confronted with this situation, permitted recovery of compensatory and punitive damages on a fraud theory while upholding an award of attorney's fees based on an unfair trade practice claim.²⁹² The significance of this case may be limited to its facts; there does not seem to be any other situation in which the two theories could be combined to gain some advantages of each.

The statutory claim for unfair or deceptive trade practices may in some instances be the only provable claim. While proof of the common-law tort action may establish the unfair trade practice claim, the requirements of the tort action need not always be present for conduct to constitute an unfair trade practice. In contrast to fraud, for which well-defined substantive requirements exist, the statutory cause of action is defined simply as "unfair or deceptive acts or practices."²⁹³ The task of distilling

("Where the same course of conduct gives rise to a traditionally recognized cause of action, . . . and as well gives rise to a cause of action for [an unfair or deceptive trade practice], damages may be recovered for [either cause of action], but not for both.').

288. *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 426-27, 344 S.E.2d 297, 301 (permitting election after jury verdict), *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986). When neither the pleadings nor the evidence gives notice of an unfair or deceptive trade practice claim, however, an after-verdict request for treble damages comes too late. *North Carolina Nat'l Bank v. Carter*, 71 N.C. App. 118, 122, 322 S.E.2d 180, 183 (1984).

289. N.C. GEN. STAT. § 75-16 (1988).

290. *Id.* § 75-16.1.

291. *Process Components*, 89 N.C. App. at 656, 366 S.E.2d at 912; *Mapp*, 81 N.C. App. at 426, 344 S.E.2d at 301; *Wilder v. Hodges*, 80 N.C. App. 333, 334, 342 S.E.2d 57, 58 (1986); *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 62, 338 S.E.2d 918, 925, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986). Punitive damages are recoverable in the tort action only; the statute does not authorize punitive damages in the unfair or deceptive trade practice action. *Pinehurst*, 79 N.C. App. at 63, 338 S.E.2d at 925.

292. *United Labs., Inc. v. Kuykendall*, 102 N.C. App. 484, 492-93, 403 S.E.2d 104, 110 (1991).

293. N.C. GEN. STAT. § 75-1.1(a).

the statutory action's substantive elements from the cases is not an easy one.

The cases leave no doubt that the appellate courts take an expansive view of the statute's coverage. Following precedent under the Federal Trade Commission Act,²⁹⁴ on which the North Carolina statute is patterned,²⁹⁵ the cases define broadly the terms "unfair" and "deceptive." A trade practice is unfair when it "offends established public policy" or is "immoral, unethical, oppressive, unscrupulous, or substantially injurious."²⁹⁶ A practice is "deceptive" when it has a capacity or tendency to deceive.²⁹⁷ This expansive view also is reflected in the judicial statements regarding the purpose of the statute²⁹⁸ and the courts' frequent observation that, in light of this purpose, good faith, intent, actual deception, and reliance are irrelevant in determining whether conduct constitutes an unfair or deceptive trade practice.²⁹⁹

The statutory cause of action applies only to unfair or deceptive acts or practices "in or affecting commerce."³⁰⁰ "Commerce" is defined broadly by the statute to include "all business activities, however denominated."³⁰¹ The statute expressly excludes from its coverage "professional services rendered by a member of a learned profession"³⁰² and the publication or dissemination of an advertisement without knowledge of its deceptive character and without a direct financial interest in the product or service advertised.³⁰³

The court, in determining when a transaction is in or affects commerce, has given full effect to the broad language of the statute. The court has extended the statute's protection not only to consumers but

294. 15 U.S.C. § 45(a)(1) (1988).

295. See *Marshall v. Miller*, 302 N.C. 539, 542-44, 276 S.E.2d 397, 399-400 (1981); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 620-21 (1980).

296. E.g., *Johnson*, 300 N.C. at 263, 266 S.E.2d at 621; *Pinehurst*, 79 N.C. App. at 59-60, 338 S.E.2d at 923; *Winston Realty Co. v. G.H.G., Inc.*, 70 N.C. App. 374, 380, 320 S.E.2d 286, 290 (1984), *aff'd*, 314 N.C. 90, 331 S.E.2d 677 (1985).

297. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403; *Johnson*, 300 N.C. at 265, 266 S.E.2d at 622.

298. See, e.g., *Winston Realty*, 314 N.C. at 95, 331 S.E.2d at 680; *Barber v. Woodmen of the World Life Ins. Soc'y*, 95 N.C. App. 340, 346, 382 S.E.2d 830, 835 (1989), *disc. rev. denied*, 326 N.C. 363, 389 S.E.2d 820 (1990); *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 685-86, 340 S.E.2d 755, 760, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

299. See, e.g., *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403; *F. Ray Moore Oil Co. v. State*, 80 N.C. App. 139, 142, 341 S.E.2d 371, 373, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 139 (1986); *Concrete Serv.*, 79 N.C. App. at 685, 340 S.E.2d at 760; *Wilder v. Squires*, 68 N.C. App. 310, 316, 315 S.E.2d 63, 66, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984).

300. N.C. GEN. STAT. § 75-1.1(a) (1988).

301. *Id.* § 75-1.1(b).

302. *Id.*

303. *Id.* § 75-1.1(c).

also to competitors³⁰⁴ and noncompeting companies³⁰⁵ that have suffered injuries to their business. The court has rejected attempts to limit the scope of the statute to buyers and sellers, parties to some other contractual relationship, or parties to the transaction out of which the claim arose.³⁰⁶ The statute has been applied to a wide range of transactions, including: Selling consumer products or services;³⁰⁷ renting residential housing;³⁰⁸ renting spaces in a mobile home park;³⁰⁹ selling realty;³¹⁰ interfering with a loan transaction;³¹¹ referral of prospective employees by an employment agency;³¹² providing loan brokerage services;³¹³ false advertising³¹⁴ by or disparagement³¹⁵ of a business competitor; leasing land

304. *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 52, 338 S.E.2d 918, 919, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986); *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 180-81, 268 S.E.2d 271, 272 (1980); *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 396, 248 S.E.2d 739, 741-42 (1978), *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).

305. *Olivetti Corp. v. Ames Business Sys., Inc.*, 81 N.C. App. 1, 21-23, 344 S.E.2d 82, 94-95 (1986), *aff'd in part and rev'd in part*, 319 N.C. 534, 356 S.E.2d 578 (1987); *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 685, 340 S.E.2d 755, 760, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986); *Chastain v. Wall*, 78 N.C. App. 350, 351, 337 S.E.2d 150, 151 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 891 (1986); *Kent v. Humphries*, 50 N.C. App. 580, 589, 275 S.E.2d 176, 182, *modified*, 303 N.C. 675, 281 S.E.2d 43 (1981).

306. *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988) (holding statute's application to businesses not limited to buyer-seller relationship or fraudulent advertising); *J.M. Westall & Co. v. Windswept View of Asheville, Inc.*, 97 N.C. App. 71, 75, 387 S.E.2d 67, 69 (holding that claimant need not be in contractual relationship or a party to transaction), *disc. rev. denied*, 327 N.C. 139, 394 S.E.2d 175 (1990).

307. *Hardy v. Toler*, 288 N.C. 303, 310-11, 218 S.E.2d 342, 347 (1975) (automobile); *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 32, 376 S.E.2d 488, 495-96 (insurance), *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989); *Northwestern Bank v. Roseman*, 81 N.C. App. 228, 236-37, 344 S.E.2d 120, 126 (loan), *aff'd per curiam*, 319 N.C. 394, 354 S.E.2d 238 (1987); *Eastern Roofing & Aluminum Co. v. Brock*, 70 N.C. App. 431, 431-32, 320 S.E.2d 22, 22-23 (1984) (aluminum siding); *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 231, 314 S.E.2d 582, 584 (truck), *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984).

308. *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E.2d 574, 582-83 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

309. *Marshall v. Miller*, 47 N.C. App. 530, 541, 268 S.E.2d 97, 102 (1980), *modified*, 302 N.C. 539, 276 S.E.2d 397 (1981).

310. *Rucker v. Huffman*, 99 N.C. App. 137, 141, 392 S.E.2d 419, 421 (1990) (builder-vendor); *Leake v. Sunbelt Ltd.*, 93 N.C. App. 199, 200, 377 S.E.2d 285, 286 (vendor), *disc. rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989); *Robertson v. Boyd*, 88 N.C. App. 437, 443, 363 S.E.2d 672, 676 (1988) (real estate broker); *Wilder v. Squires*, 68 N.C. App. 310, 311, 315 S.E.2d 63, 64 (vendor), *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984); *Love*, 34 N.C. App. at 516, 239 S.E.2d at 583.

311. *Pedwell v. First Union Nat'l Bank*, 51 N.C. App. 236, 237-38, 275 S.E.2d 565, 566-67 (1981).

312. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 98-99, 331 S.E.2d 677, 682 (1985).

313. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980).

314. *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 396, 248 S.E.2d 739, 742 (1978), *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).

for a restaurant parking lot;³¹⁶ renting commercial property in a shopping center;³¹⁷ selling a retail business;³¹⁸ selling a motel;³¹⁹ a developer's furnishing misleading information to the contractor's supplier;³²⁰ dealings between a dealer and his distributors;³²¹ interference with contract;³²² and breach of fiduciary duty.³²³

A consequence of the court's expansive construction of the unfair or deceptive trade practices statute is that the statute does not simply provide additional remedies for existing common-law actions but creates a new cause of action free from many of the requirements for fraud or negligent misrepresentation. Negligent, reckless, or intentional falsity is not essential for a misrepresentation to constitute an unfair or deceptive trade practice.³²⁴ Liability may be imposed even though the misrepresentation is made innocently and without intent to deceive or mislead.³²⁵ The court often has observed that the actor's intent or good faith is

315. *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 54, 59, 338 S.E.2d 918, 920, 923, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986); *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 181-82, 268 S.E.2d 271, 272-73 (1980).

316. *Wilder v. Hodges*, 80 N.C. App. 333, 333, 342 S.E.2d 57, 57 (1986).

317. *Kent v. Humphries*, 50 N.C. App. 580, 581-82, 275 S.E.2d 176, 178, *modified*, 303 N.C. 675, 281 S.E.2d 43 (1981).

318. *Chastain v. Wall*, 78 N.C. App. 350, 351, 337 S.E.2d 150, 151 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 891 (1986).

319. *Kim v. Professional Business Brokers Ltd.*, 74 N.C. App. 48, 53, 328 S.E.2d 296, 300 (1985).

320. *J.M. Westall & Co. v. Windswept View of Asheville, Inc.*, 97 N.C. App. 71, 72-73, 387 S.E.2d 67, 68, *disc. rev. denied*, 327 N.C. 139, 394 S.E.2d 175 (1990).

321. *Process Components, Inc. v. Baltimore Aircoil Co.*, 89 N.C. App. 649, 650-51, 366 S.E.2d 907, 909, *aff'd per curiam*, 323 N.C. 620, 374 S.E.2d 116 (1988); *Olivetti Corp. v. Ames Business Sys., Inc.*, 81 N.C. App. 1, 21-23, 344 S.E.2d 82, 94-95 (1986), *aff'd in part and rev'd in part*, 319 N.C. 534, 356 S.E.2d 578 (1987).

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

323. *Adams v. Moore*, 96 N.C. App. 359, 361, 385 S.E.2d 799, 801 (1989), *disc. rev. denied*, 326 N.C. 46, 389 S.E.2d 83 (1990); *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 406-07, 363 S.E.2d 643, 647, *writ of supersedeas and temporary stay denied*, 321 N.C. 745, 366 S.E.2d 871, *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988); *Starling v. Sproles*, 66 N.C. App. 653, 656, 311 S.E.2d 688, 690 (1984); *Whitman v. Forbes*, 55 N.C. App. 706, 714-15, 286 S.E.2d 889, 894 (1982).

324. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 471, 343 S.E.2d 174, 180 (1986); *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991); *Leake v. Sunbelt Ltd.*, 93 N.C. App. 199, 205, 377 S.E.2d 285, 289, *disc. rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989); *F. Ray Moore Oil Co. v. State*, 80 N.C. App. 139, 142, 341 S.E.2d 371, 373, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 139 (1986); *Chastain v. Wall*, 78 N.C. App. 350, 356, 337 S.E.2d 150, 153-54 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 891 (1986); *Lee v. Payton*, 67 N.C. App. 480, 482, 313 S.E.2d 247, 249 (1984).

325. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981); *F. Ray Moore Oil Co.*, 80 N.C. App. at 142, 341 S.E.2d at 373.

irrelevant.³²⁶

Requirements related to reliance are also less stringent. The extent to which these requirements are relaxed, however, is unclear. In defining an unfair or deceptive trade practice, the appellate courts repeatedly have stated that reliance and actual deception are unnecessary; all that is needed is conduct having the capacity to deceive or mislead the consuming public.³²⁷ While these general propositions are consistent with the overall purpose of the statute, a distinction ought to be made between a private action for treble damages and the other means of enforcement authorized by the statute—a lawsuit by the attorney general for injunction or civil penalty. Rejecting requirements for reliance and actual deception, while sensible in suits by the attorney general to protect the public interest, seems inconsistent with the “injured party” and “treble damages” provisions of the statute’s authorization of private action.³²⁸ Despite the fact that language in opinions involving private actions often disclaims the need for reliance and deception, the actual holdings in the cases are consistent with the distinction suggested. Reliance and deception have been present in cases upholding recovery³²⁹ and no case has allowed recovery without them. Further, the absence of injury,³³⁰ damage,³³¹ or a causal relationship between the conduct alleged to be unfair or deceptive and such injury or damage³³² has been fatal to private ac-

326. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403; *Wilder v. Squires*, 68 N.C. App. 310, 315-16, 315 S.E.2d 63, 66, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984).

327. *See, E.g.*, *Rucker v. Huffman*, 99 N.C. App. 137, 142, 392 S.E.2d 419, 421-22 (1990); *Northwestern Bank v. Roseman*, 81 N.C. App. 228, 237, 344 S.E.2d 120, 126 (1986), *aff'd per curiam*, 319 N.C. 394, 354 S.E.2d 238 (1987); *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 59, 338 S.E.2d 918, 923, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986); *Chastain*, 78 N.C. App. at 356, 337 S.E.2d at 153-54.

328. The supreme court has rejected this distinction in a different context by overturning the court of appeals' reasoning that a defendant's bad faith, while not required in proceedings by the attorney general, must be present in a private damage action. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. That decision, although sound in relation to the good faith issue, is not authority for rejecting the distinction noted here. It is difficult to understand how injury and causation can be present in a private damage action when there is no reliance on the representation on which the claim is based.

329. There are several cases in which such a disclaimer is stated or quoted but in which the facts show that deception and reliance were present. *See Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468-73, 343 S.E.2d 174, 180-81 (1986); *Rucker*, 99 N.C. App. at 141-42, 392 S.E.2d at 421-22; *Northwestern Bank*, 81 N.C. App. at 236-39, 344 S.E.2d at 126-27; *Chastain*, 78 N.C. App. at 354-56, 337 S.E.2d at 152-54; *Lee v. Payton*, 67 N.C. App. 480, 481-83, 313 S.E.2d 247, 248-49 (1984).

330. *See Miller v. Ensley*, 88 N.C. App. 686, 691, 365 S.E.2d 11, 14 (1988); *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 184, 268 S.E.2d 271, 273-74 (1980).

331. *See Mayton v. Hiatt's Used Cars, Inc.*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864, *disc. rev. denied*, 300 N.C. 198, 269 S.E.2d 624 (1980).

332. *See Bailey v. LeBeau*, 79 N.C. App. 345, 351-52, 339 S.E.2d 460, 464, *modified per curiam*, 318 N.C. 411, 348 S.E.2d 524 (1986); *Ellis*, 48 N.C. App. at 184, 268 S.E.2d at 273-74.

tions in several cases.

Proof of *reasonable* reliance, however, is not likely to be required to establish a cause of action for unfair or deceptive trade practices.³³³ In *Rosenthal v. Perkins*,³³⁴ a case in which the plaintiff did not allege reasonable reliance, a fraud claim was dismissed but an unfair and deceptive trade practice claim based on the same facts was upheld.³³⁵ Further support for the position that reliance need not be reasonable is found in cases rejecting contributory negligence as a defense to unfair or deceptive trade practice claims³³⁶ and the rationale underlying such rejection. *Winston Realty Co. v. G.H.G., Inc.*³³⁷ reflected that rationale: "If unfair trade practitioners could escape liability upon showing that their victims were careless, gullible, or otherwise inattentive to their own interests, the Act would soon be a dead letter."³³⁸

Several decisions suggest that even a true representation, if it has the capacity to deceive, may give rise to an unfair or deceptive trade practice claim.³³⁹ Such a representation may also form the basis for a fraud action when the disclosure is incomplete, technical, or deliberately ambiguous.³⁴⁰ The possibility exists that some representations in this category, while insufficient for fraud, would support an unfair or deceptive trade claim. The absence of any requirement that reliance be reasonable, as

333. See *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 93-96, 331 S.E.2d 677, 679-81 (1985) (disavowing language in *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 699-700, 303 S.E.2d 565, 569, *disc. rev. denied*, 309 N.C. 321, 307 S.E.2d 164 (1983), that "this sophisticated plaintiff could and should have verified defendants' assertions"); *Robertson v. Boyd*, 88 N.C. App. 437, 441-43, 363 S.E.2d 672, 675-77 (1988) (denying fraud action on grounds that purchaser had full opportunity to inquire, but upholding unfair or deceptive trade practices claim); *Strickland v. A & C Mobile Homes*, 70 N.C. App. 768, 770, 321 S.E.2d 16, 18-19 (1984) (holding that experienced military personnel's failure to verify seller's claims that government would pay costs of transporting mobile home did not bar finding of misrepresentation), *disc. rev. denied*, 313 N.C. 336, 327 S.E.2d 899 (1985).

334. 42 N.C. App. 449, 257 S.E.2d 63 (1979), *limited by* *Bhatti v. Buckland*, 328 N.C. 240, 246-47, 400 S.E.2d 440, 444 (1991) (holding that *Rosenthal's* exemption from § 75-1.1 for private homeowners selling a residence is limited to those who sell their *own* residence).

335. *Id.* at 452-55, 257 S.E.2d at 66-67.

336. See *Winston Realty*, 314 N.C. at 93-96, 331 S.E.2d at 680-81; *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 598, 394 S.E.2d 643, 649 (1990); *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 685, 340 S.E.2d 755, 760, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

337. 70 N.C. App. 374, 320 S.E.2d 286 (1984), *aff'd*, 314 N.C. 90, 331 S.E.2d 677 (1985).

338. *Id.* at 381, 320 S.E.2d at 290.

339. See *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980) (dictum); *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 32, 376 S.E.2d 488, 496 ("technically true"), *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989); *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 59, 338 S.E.2d 918, 923 ("A statement can have a capacity to deceive without being false . . ."), *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986).

340. See *supra* text accompanying notes 212-16.

well as the more comprehensive nature of the statutory cause of action, can be argued in support of this view. No case, however, has dealt with the issue in a definitive way.

The appellate courts have given little attention to the measure of damages for unfair or deceptive trade practices. The court of appeals has indicated that when the conduct involved supports both a common-law tort and an unfair or deceptive trade claim, determining damages for the latter claim will not necessarily be controlled by the tort damage rules.³⁴¹ Nonetheless, in some cases use of the tort measure of damages in these circumstances may be appropriate. When fraud exists, the tort benefit-of-bargain rule, awarding the difference between the represented and actual value of the transaction, also has been used for the unfair or deceptive trade claim.³⁴² Presumably, a similar approach would be followed when negligent misrepresentation is involved; however, whether the difference between the purchase price and the actual value received (the so-called out-of-pocket rule) or benefit-of-bargain damages are recoverable for negligent misrepresentation has not been decided in North Carolina. In a case in which the facts were insufficient to establish fraud, the court of appeals upheld damages for the difference between the purchase price and the actual value received.³⁴³ Because the purchase price and the represented value were the same, however, the award was consistent with either the benefit-of-bargain or the out-of-pocket rule.

In most of the North Carolina cases considering the damage issue, the transaction had been rescinded and, for this reason, neither the benefit-of-bargain nor the out-of-pocket rule was involved. *Taylor v. Triangle Porsche-Audi, Inc.*,³⁴⁴ an early case relying on the theory that the claimant must elect to rescind or to affirm and recover damages, held that a buyer who recovered the purchase price incident to rescission "was not damaged, nor injured within the meaning of G.S. 75-16."³⁴⁵ Treble damages have been upheld, however, in a number of later cases in which the

341. See *Barber v. Woodmen of the World Life Ins. Soc'y*, 95 N.C. App. 340, 346, 382 S.E.2d 830, 834-35 (1989), *disc. rev. denied*, 326 N.C. 363, 389 S.E.2d 820 (1990); *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 232, 314 S.E.2d 582, 585, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984).

342. *Love v. Keith*, 95 N.C. App. 549, 555-56, 383 S.E.2d 674, 678 (1989); *Quate v. Caudle*, 95 N.C. App. 80, 86-88, 381 S.E.2d 842, 845-46, *disc. rev. denied*, 325 N.C. 709, 388 S.E.2d 462 (1989). In *Bernard*, the court, after noting earlier cases implicitly applying the fraud measure, observed: "We do not believe, however, that the only available measure of damages is that for fraudulent inducement." *Bernard*, 68 N.C. App. at 231-32, 314 S.E.2d at 585.

343. *Lee v. Payton*, 67 N.C. App. 480, 483, 313 S.E.2d 247, 249 (1984).

344. 27 N.C. App. 711, 220 S.E.2d 806 (1975), *disc. rev. denied*, 289 N.C. 619, 223 S.E.2d 396 (1976).

345. *Id.* at 717, 220 S.E.2d at 811.

claimant's recovery consisted solely or essentially of restitution of what had been surrendered in the rescinded transaction.³⁴⁶ The conclusion that *Taylor* is no longer authoritative seems inescapable.

The court of appeals, in granting rescission on grounds of an unfair or deceptive trade practice, has recognized a wide range of losses that go well beyond the recovery allowed when rescission is effected on other grounds. For example, when the sale of a house was set aside, the buyer was permitted to recover expenses and losses incurred in reliance on the seller's representation, without regard to whether these losses conferred benefit on the seller.³⁴⁷ Recovery included payments on the purchase price, moving expenses, closing costs, and the costs of improvements to the house.³⁴⁸ One case permitted recovery of expectancy losses.³⁴⁹ This case allowed recovery of profits that could have been made through a distributorship as well as expenses incurred in establishing it when representations constituting a deceptive trade practice were relied on to terminate the distributorship.³⁵⁰

Flexibility in fixing damages for unfair or deceptive acts and practices seems desirable. Those acts encompass a wide range of conduct that may or may not also constitute one of a variety of common-law torts. That a single measure of recovery could span this whole range of conduct seems doubtful. Further, the facts of individual cases are important in identifying and measuring losses that should be compensated. The court of appeals has found that the legislature intended to extend protection of the public beyond what was available at common law and has recognized that this purpose may be significant in determining damages³⁵¹ as well as in identifying substantive rights.³⁵² The damages rule structure that has

346. See *Douglas v. Doub*, 95 N.C. App. 505, 510, 516, 383 S.E.2d 423, 425, 429 (1989); *Eastern Roofing & Aluminum Co. v. Brock*, 70 N.C. App. 431, 435, 320 S.E.2d 22, 24-25 (1984); *Bernard*, 68 N.C. App. at 233, 314 S.E.2d at 585-86.

347. *Douglas*, 95 N.C. App. at 515-16, 383 S.E.2d at 428-29.

348. *Id.*

349. *Process Components, Inc. v. Baltimore Aircoil Co.*, 89 N.C. App. 649, 651-52, 366 S.E.2d 907, 910, *aff'd per curiam*, 323 N.C. 620, 374 S.E.2d 116 (1988).

350. *Id.*

351. *Barber v. Woodmen of the World Life Ins. Soc'y*, 95 N.C. App. 340, 346, 382 S.E.2d 830, 834-35 (1989), *disc. rev. denied*, 326 N.C. 363, 389 S.E.2d 820 (1990); *Process Components*, 89 N.C. App. at 651-52, 366 S.E.2d at 910; *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 232, 314 S.E.2d 582, 585, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984).

352. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 95, 331 S.E.2d 677, 680 (1985); *Barber*, 95 N.C. App. at 346, 382 S.E.2d at 834-35; *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 685, 340 S.E.2d 755, 760, *disc. rev. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

evolved from the cases decided thus far, although substantially incomplete, reflects a flexible approach.

V. CONCLUSION

The causes of action for negligent misrepresentation and unfair or deceptive trade practices significantly expand the right to recover for misrepresentation in North Carolina. The reduced role of fault in determining liability for misrepresentation may be the most important change effected by these new causes of action. Fraud, the traditional cause of action for misrepresentation, arises only when the defendant makes a representation with knowledge of its falsity. The cause of action for negligent misrepresentation expands liability for misrepresentation by allowing recovery when a defendant acts unreasonably in determining the truth of the representation or in communicating it. An unfair or deceptive trade practices claim may rest in knowing or negligent misrepresentation; such a claim, however, also may arise when neither knowledge nor negligence exists and perhaps even when the representation is true. The statutory claim for unfair or deceptive trade practices further expands recovery for misrepresentation by providing for treble damages and, in some instances, by denying the defense of contributory negligence.

Developments related to the fraud cause of action are mixed. The court's holding that a defendant's reckless disregard for the falsity of his representation is insufficient to establish scienter is surprising and runs counter to the trend diminishing the role of fault in misrepresentation. This development increases the likelihood that a complaint alleging a fraud cause of action will allege in the alternative a cause of action for negligent misrepresentation. The court should reconsider its position on the reckless disregard issue.

Except for scienter, reasonable reliance is the most important concept in determining how extensive liability for fraud will be. Overall, the North Carolina decisions support the view that reasonable reliance may be found when the maker intends for her representation to be taken seriously. Nonetheless, the language used by the court in many decisions is troublesome. Even the term "reasonable reliance" is misleading if reliance upon a representation intended by the maker to induce action meets this test. The "duty to investigate" and "duty to read" language used by the court also implies that the recipient is under an affirmative obligation to ascertain the accuracy of the representation. All of this language seems inconsistent with what the court ought to be and in fact is doing, and should be discarded by the court.

The most significant recent change related to negligent misrepresentation has been the supreme court's express recognition of that cause of action, which court of appeals cases had been developing for more than a decade. Although the supreme court has decided only one such case, many of the basic issues that arise in connection with negligent misrepresentation have been resolved. In particular, the decision upholds recovery by individuals who are not in privity of contract with the person making the representation, as well as recovery when only economic loss occurs. The other overriding issue related to negligent misrepresentation involves deciding whether liability will extend to all persons and transactions in fact influenced by the representation, or only to a more limited group of persons and transactions. The North Carolina Supreme Court has responded by adopting the *Restatement's* view, which permits recovery only by persons for whose guidance the information was supplied and only in connection with a transaction the supplier of the information intended to influence.

The cause of action for unfair or deceptive trade practices may produce the most far-reaching change in the law of misrepresentation. In some instances, it creates a right to recover when none would exist under other misrepresentation theories; in other instances, it provides for a larger recovery than would otherwise be available. The court has indicated that a cause of action for unfair or deceptive trade practices may arise from innocent misrepresentation or representation of true facts and that neither reliance by nor injury to the recipient may be necessary for a successful claim. Many of these statements, however, are dicta and thus caution is clearly warranted in assessing their impact. Nevertheless, the court, in interpreting the statute, perceives a legislative purpose to provide broad protection against unfair or deceptive trade practices. On this basis, the court has readily extended the statute's coverage to an array of activities. The clear indication is that the court's application will be inclusive rather than restrictive.