

DEFINING UNFAIRNESS IN “UNFAIR TRADE PRACTICES”*

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North Carolina’s “unfair or deceptive acts or practices” statute, section 75-1.1 of the North Carolina General Statutes, is a constant presence in North Carolina litigation. The statute combines two explosive ingredients: (1) a private right of action for treble damages and (2) an open-ended conduct standard.

For claims of unfair practices, the conduct standard under section 75-1.1 is open-ended to the point of dysfunction. The standard is no more than a list of adjectives—a list that does not forecast the outcome of a given case. When courts apply this list of adjectives, they usually cannot explain why the adjectives are or are not satisfied. The resulting case law is opaque. This opaqueness makes the outcome of unfairness cases unpredictable.

A solution to these problems is readily available. Section 75-1.1 is based on section 5 of the Federal Trade Commission Act. Early decisions under section 75-1.1 said expressly that courts should take guidance from the law under section 5. The courts need only follow that advice.

The law under section 5 has much to offer courts in section 75-1.1 cases. Most notably, section 5 doctrine holds that conduct is unfair only if it causes injuries that a plaintiff cannot reasonably avoid. Adding this “not reasonably avoidable” test to the unfairness doctrine under section 75-1.1 will make this form of litigation more balanced and predictable.

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of unfairness claims under section 75-1.1. Part III traces the analysis of unfair acts and practices under section 5. Part IV outlines North Carolina courts' history of referring to authorities under section 5 in section 75-1.1 cases. Part V justifies adding the "not reasonably avoidable" test to the test for unfairness under section 75-1.1.

I. THE HISTORY AND ESSENTIAL FEATURES OF SECTION 75-1.1

A. *Section 75-1.1 and Its History*

Section 75-1.1 states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."¹⁴ The North Carolina General Assembly enacted section 75-1.1 in 1969.¹⁵ The statute was part of a nationwide wave of consumer protection measures that states enacted in the 1960s and early 1970s.¹⁶

Section 75-1.1 is based on one version of a model statute, the Unfair Trade Practices and Consumer Protection Law,¹⁷ that the FTC had promoted.¹⁸ Like that version of the model statute, section 75-1.1 mirrors section 5 of the FTC Act.¹⁹

In the first decade that section 75-1.1 was on the books, the General Assembly broadened the statute's scope without changing its conduct standard. This process began with a decision of the Supreme Court of North Carolina. In *State ex rel. Edmisten v. J.C. Penney*

14. N.C. GEN. STAT. § 75-1.1(a) (2011).

15. Act of June 12, 1969, ch. 833, sec. 1(b), 1969 N.C. Sess. Laws 930, 930. The key language in the 1969 version of the statute read: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *Id.* sec. 1(b), § 75-1.1(a), amended by Act of June 27, 1977, ch. 747, §§ 1–2, 1977 N.C. Sess. Laws 984, 984.

16. See John F. Graybeal, *Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina*, 80 N.C. L. REV. 1927, 1933–34 (2002).

17. 28 COMM. OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION, COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION C-4 (1969).

18. See, e.g., *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981); William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 730 (1972); see also Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 170–73 (2011) (outlining the history and contents of the model statute).

19. Compare N.C. GEN. STAT. § 75-1.1(a), with 15 U.S.C. § 45(a)(1) (2006). See generally Robert Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRAMURAL L. REV. 1, 18–20 (1969) (discussing the history of the enactment of section 75-1.1, including the intentional choice to follow the language of section 5).

For reasons similar to those discussed above, see *supra* note 1, we call state statutes that are based on section 5 of the FTC Act "section 5 analogues."

Co.,²⁰ the supreme court decided that the 1969 version of the statute covered only “bargain, sale, barter, exchange or traffic” in goods.²¹ The court therefore held that the statute did not cover abusive debt collection practices.²² Later that year, the General Assembly overruled *J.C. Penney*. It did so by deleting the word “trade” from section 75-1.1 and inserting a statement that, except for certain express exclusions, the statute covers “all business activities, however denominated.”²³ However, neither the *J.C. Penney* decision nor the 1977 statutory amendment addressed the conduct standard under the statute.²⁴

B. *The Remedies for Section 75-1.1 Violations*

One purpose of enacting section 75-1.1 was “to encourage enforcement of the act by private individuals injured by unfair trade practices.”²⁵ To accomplish this goal, the legislature attached lucrative private remedies to section 75-1.1. Most notably, the legislature included section 75-1.1 among the North Carolina statutes that generate automatic treble damages.²⁶ In addition, a claimant who

20. 292 N.C. 311, 233 S.E.2d 895 (1977).

21. *Id.* at 316–17, 233 S.E.2d at 899.

22. *See id.* at 320, 233 S.E.2d at 901.

23. N.C. GEN. STAT. § 75-1.1(b) (2011); *see Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 261 n.5, 266 S.E.2d 610, 620 n.5 (1980) (noting that this statutory amendment occurred “in the wake of our decision in *Penney*”), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). The new definition of “commerce” replaced the following statutory language on the purpose of section 75-1.1:

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

Act of June 12, 1969, ch. 833, sec. 1(b), § 75-1.1(b), 1969 N.C. Sess. Laws 930, 930 (emphasis added), *repealed by* Act of June 27, 1977, ch. 747, § 2, 1977 N.C. Sess. Laws 984, 984.

In *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), the Supreme Court of North Carolina noted the deletion of former subsection 75-1.1(b) in a way that obliquely suggested that the deletion has substantive significance, but the court did not describe the significance. *See id.* at 545–46 & n.1, 276 S.E.2d at 401 & n.1.

24. *See* Act of June 27, 1977, ch. 747, §§ 1–3, 1977 N.C. Sess. Laws 984, 984; *J.C. Penney*, 292 N.C. at 314–17, 233 S.E.2d at 897–99.

25. *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 235, 259 S.E.2d 1, 5 (1979); *see Morgan, supra* note 19, at 14 (discussing this purpose).

26. *See* N.C. GEN. STAT. § 75-16 (2011); *see also* Stephen Mason Thomas, Note, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C. L. REV. 896, 899 (1970) (noting the significance of the fact that section 75-1.1 is part

Finally, instead of addressing the substance of unfairness claims, courts have sometimes relied on the failure of other claims, generally without saying whether the failure of the other claims was independently sufficient to defeat the section 75-1.1 claim. This pattern has played out with federal antitrust claims,¹¹⁸ defamation claims,¹¹⁹ claims for misappropriation of trade secrets,¹²⁰ fraud claims,¹²¹ claims for tortious interference,¹²² and claims for breach of fiduciary duties.¹²³ These decisions leave the unfairness standard and its relationship with other claims unexplained.¹²⁴

In sum, the current standards for unfairness make it difficult for courts to explain why particular conduct is or is not unfair. The multiple techniques that courts use to avoid deciding the merits of section 75-1.1 claims are indirect, but telling, signs of the problems with the unfairness standard.

III. AVAILABLE FOR BORROWING: THE STANDARDS FOR UNFAIRNESS UNDER SECTION 5 OF THE FTC ACT

Courts that must decide unfairness claims under section 75-1.1 have more tools available than the above decisions suggest. As shown below, there is a seventy-year history of FTC statements and court decisions that define unfairness under section 5 of the FTC Act. In fact, the current definition of unfairness under section 5 includes an element that courts applying section 75-1.1 would find helpful.

N.C. App. 414, 420, 248 S.E.2d 567, 570 (1978) (establishing the commodities exemption). In *Lindner*, the Fourth Circuit also relied on the relationship between section 75-1.1 and section 5 of the FTC Act. The court noted “the absence of any federal court decision holding that securities transactions are subject to § 5(a)(1) of the FTC Act.” *Lindner*, 761 F.2d at 167.

118. See, e.g., *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 396 (M.D.N.C. 2002), *aff’d mem.*, 67 F. App’x 810 (4th Cir. 2003).

119. See, e.g., *Radcliff v. Orders Distrib. Co.*, No. COA07-1041, 2008 WL 2415976, at *6 (N.C. Ct. App. June 17, 2008); *Craven v. Cope*, 188 N.C. App. 814, 820, 656 S.E.2d 729, 734 (2008).

120. See, e.g., *Modular Techs., Inc. v. Modular Solutions, Inc.*, No. COA06-813, 2007 WL 2034046, at *5 (N.C. Ct. App. July 17, 2007); *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 526, 586 S.E.2d 507, 512 (2003).

121. See, e.g., *Watson Elec. Constr. Co. v. Summit Cos.*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003).

122. See, e.g., *Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Co. Consol.*, No. 99 CVS 2459, 2003 WL 21017350, at *18 (N.C. Bus. Ct. Apr. 28, 2003).

123. See, e.g., *Campbell v. Bowman*, No. COA05-16, 2005 WL 3046438, at *4 (N.C. Ct. App. Nov. 15, 2005).

124. These decisions, which approach but do not establish a “reverse per se rule” under section 75-1.1, add to the difficulties with per se theories under section 75-1.1. See *supra* notes 46–59 and accompanying text.

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The direct prohibition of unfair acts and practices under section 5 stems from the 1938 amendments to the FTC Act.¹²⁵ When Congress passed the original FTC Act in 1914, section 5 prohibited only unfair methods of competition.¹²⁶ When the first non-competition-oriented case under section 5 came before the United States Supreme Court in 1931, the Court decided that “[u]nfair trade methods are not per se unfair methods of *competition*.”¹²⁷ In 1938, Congress responded to this decision by adding to section 5 an express prohibition of unfair or deceptive acts or practices.¹²⁸ Over the following years, however, the unfairness aspect of section 5 was widely criticized as overbroad and unpredictable.¹²⁹

In 1964, the FTC added definition to its authority to regulate unfair acts and practices. This added content appeared in the FTC’s statement of the basis and purpose of proposed rules to govern cigarette labeling and advertising.¹³⁰ In this statement, the FTC identified three factors that it would use to judge whether a given practice was unfair. First, the FTC would analyze whether the practice, “without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes,

125. Federal Trade Commission (Wheeler-Lea) Amendments of 1938, ch. 49, sec. 3, § 5(a), 52 Stat. 111, 111 (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

126. Federal Trade Commission Act of 1914, ch. 311, § 5(a), 38 Stat. 717, 719 (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

127. *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931). *Raladam* involved the advertising and sale of an alleged obesity cure that apparently had no basis for its therapeutic claims. *See id.* at 644–45. The Court emphasized the lack of any “finding [or] evidence from which the conclusion legitimately can be drawn that these advertisements substantially injured, or tended thus to injure, the business of any competitor or of competitors generally.” *Id.* at 652–53.

128. Wheeler-Lea Amendments § 5(a), 52 Stat. at 111 (codified at 15 U.S.C. § 45(a)(1)).

129. Neil W. Averitt, *The Meaning of “Unfair Acts or Practices” in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 225 (1981) [hereinafter *The Meaning of “Unfair Acts or Practices”*].

130. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose, 29 Fed. Reg. 8324, 8325 (July 2, 1964) (treating the failure to include health warnings on cigarette packs as unfair). In its statement, the FTC acknowledged its responsibility “to determine, within broad limits, what kinds of trade practices should be forbidden in the public interest because they are unfair or deceptive and thus injurious to competitors or the consuming public.” *Id.* at 8349. At the same time, the FTC stated that “[i]t is not possible to give an exact and comprehensive definition of the unfair acts or practices proscribed by [section 5].” *Id.* at 8354.

Current Seventh Circuit Judge Richard Posner is reputed to be the main author of the 1964 statement. J. Howard Beales III, Director, Bur. of Consumer Prot., Fed. Trade Comm’n, *The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL’Y & MARKETING 192, 193 n.4 (2003).

the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness.”¹³¹ Second, the FTC would ask “whether [the practice] is immoral, unethical, oppressive, or unscrupulous.”¹³² Third, the FTC would ask whether the practice “causes substantial injury to consumers (or competitors or other businessmen).”¹³³ This three-part test became known as the “Cigarette Rule.”¹³⁴

A few years later, the United States Supreme Court gave a degree of endorsement to the Cigarette Rule. In *FTC v. Sperry & Hutchinson Co. (S&H)*,¹³⁵ the Court reviewed the FTC’s administrative proceedings against the largest purveyor of trading stamps.¹³⁶ The Court held that the FTC had the authority to regulate unfair business practices even when those practices did not have an adverse effect on competition.¹³⁷ To explain the FTC’s authority to regulate consumer unfairness, the Court neutrally quoted the Cigarette Rule in a footnote.¹³⁸

After receiving this arguable endorsement of its unfairness standards, the FTC sought to pursue rulemakings and adjudications

131. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. at 8355.

132. *Id.*

133. *Id.*

134. *E.g.*, *The Meaning of “Unfair Acts or Practices,” supra* note 129, at 240–41.

135. 405 U.S. 233 (1972).

136. *See id.* at 234, 246–49.

137. *Id.* at 244 (“[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”). The Court, however, held that the FTC’s decision in *S&H* was correctly reversed because the FTC had not based its decision on its consumer unfairness authority, but instead had based the decision on the FTC’s authority to condemn unfair methods of competition. *Id.* at 248–49; *see Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (“It is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”).

138. *See S&H*, 405 U.S. at 244–45 n.5. *Compare Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 n.8 (7th Cir. 1976) (stating that footnote 5 of *S&H* “approved” the Cigarette Rule), *with* David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 GEO. WASH. L. REV. 1, 25–26 (1984) (arguing that in view of the language and context of the *S&H* decision, footnote 5 was not a substantive endorsement of the Cigarette Rule).

Ironically, the FTC statement that became known as the Cigarette Rule had a much longer lifespan than did the proposed rules that the FTC statement addressed. Before the proposed rules could go into effect, Congress enacted statutes that displaced them. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 5(c), 79 Stat. 282, 283 (1965) (codified as amended at 15 U.S.C.A. §§ 1331–1341 (West 2009)).

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on a wide variety of perceived unfair conduct.¹³⁹ The FTC even sought to prohibit most or all advertising directed at children.¹⁴⁰ Complaints that the FTC had become a “national nanny”¹⁴¹ sparked a response in Congress: oversight hearings on the FTC’s use of its unfairness jurisdiction.¹⁴²

To defuse this controversy, in 1980, the FTC issued a policy statement on its unfairness standards (the 1980 Statement).¹⁴³ In this statement, the FTC specifically rejected the “immoral, unethical, oppressive, or unscrupulous” test as a basis for unfairness enforcement.¹⁴⁴ The FTC also wrote that in the future, it would limit the policy considerations that could support unfairness enforcement to “clear and well-established” considerations.¹⁴⁵ The statement also announced that “[u]njustified consumer injury [wa]s the primary

139. See, e.g., *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 969 & n.10 (D.C. Cir. 1985); Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1952–53 (2000); Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 WAYNE L. REV. 1869, 1872–73 (2000); see also Trade Regulation Rules; Labeling and Advertising of Home Insulation, Statement of Basis & Purpose, 44 Fed. Reg. 50,218 (Aug. 27, 1979) (prescribing standardized test methods for thermal characteristics of home insulation materials); Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, Promulgation of Trade Regulation Rule and Statement of Basis & Purpose, 43 Fed. Reg. 59,614 (Dec. 21, 1978) (requiring franchisors and franchise brokers to disclose information to prospective franchisees regarding a sale and/or business opportunity); Advertising of Ophthalmic Goods and Services, Statement of Basis & Purpose, 43 Fed. Reg. 23,992 (June 2, 1978) (prohibiting state laws from banning or burdening the advertising of eyewear or eye examinations and prohibiting restrictions on advertising by private associations); Preservation of Consumers’ Claims and Defenses, Promulgation of Trade Regulation Rule and Statement of Basis & Purpose, 40 Fed. Reg. 53,506, 53,524 (Nov. 18, 1975) (abolishing the holder in due course doctrine in most consumer transactions).

140. See, e.g., Children’s Advertising: Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17,967, 17,967–69 (Apr. 27, 1978).

141. See, e.g., *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

142. Beales, *supra* note 130, at 193.

143. Letter from the FTC to Sens. Ford & Danforth (Dec. 17, 1980), reprinted in Int’l Harvester Co., 104 F.T.C. 949, 1070, 1073 (1984) [hereinafter 1980 Statement, with pinpoint citations to the reprint in *International Harvester*]; cf. *The Meaning of “Unfair Acts or Practices,” supra* note 129, at 227 (“[T]he Commission had itself decided on the desirability of a more precise standard. It therefore used the congressional inquiry as an opportunity to complete the project and make its conclusions public.”).

Because of similar disputes over the FTC’s enforcement regarding deceptive practices, the FTC issued a similar policy statement on deception a few years later. See Karns, *supra* note 75, at 385–86. This deception policy statement has led to similar discussion on the interplay between the federal and state standards for deception cases. See generally *id.* at 389–429 (discussing how state statutes and decisions on deception have resembled, and varied from, FTC doctrine since the deception policy statement).

144. 1980 Statement, *supra* note 143, at 1076.

145. *Id.*

focus of the FTC Act, and the most important of the three [Cigarette Rule] criteria.”¹⁴⁶

In view of the importance of unjustified consumer injury, the 1980 Statement laid out a new three-part standard for such an injury. To meet this standard, an injury (1) “must be substantial,” (2) “must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces,” and (3) “must be an injury that consumers themselves could not reasonably have avoided.”¹⁴⁷ The Commission explained the third part of this standard, the “not reasonably avoidable” test, in the following terms:

Normally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. However, it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. Most of the Commission’s unfairness matters are brought under these circumstances. They are brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.¹⁴⁸

As this explanation shows, the “not reasonably avoidable” test is a significant addition to the definition of unfairness under section 5. The test broadens the analysis of unfairness, allowing the FTC to consider the injured party’s options, not just the defendant’s actions.

146. *Id.* at 1073.

147. *Id.*

148. *Id.* In a seminal article on unfairness, published shortly after the 1980 Statement, then-FTC staff member Neil Averitt offered a nonexclusive list of types of conduct that meets these standards: “(1) overt coercion; (2) covert coercion; (3) exercising undue influence over vulnerable classes of consumers; (4) withholding material information; and (5) engaging in false, deceptive, and misleading statements.” *The Meaning of “Unfair Acts or Practices,”* *supra* note 129, at 252; *see id.* at 252–67 (elaborating on these categories); *see also* Richard Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107, 108–09 (stating that the bulk of the FTC’s unfairness enforcement has concerned “(a) withhold[ing] material information, (b) mak[ing] unsubstantiated advertising claims, (c) depriv[ing] consumers of various post-purchase rights, and (d) us[ing] various high-pressure sales techniques”).

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In this way, the “not reasonably avoidable” test is distinct from the other two elements discussed in the 1980 Statement.

The FTC applied and further explained the “not reasonably avoidable” test in a 1984 decision, *International Harvester Co.*¹⁴⁹ The case involved a dangerous type of tractor fuel tank.¹⁵⁰ The FTC decided that the manufacturer did not adequately inform tractor purchasers of the dangers that would result if they did not follow the manufacturer’s safety instructions.¹⁵¹ The FTC explained that “[w]hether some consequence is ‘reasonably avoidable’ depends, not just on whether people know the physical steps to take in order to prevent it, but also on whether they understand the necessity of actually taking those steps.”¹⁵² Because the manufacturer did not adequately disclose the tractors’ risks, the FTC concluded that the injuries caused by the tractors were not reasonably avoidable.¹⁵³

A few years later, the FTC added an element of foreseeability to the “not reasonably avoidable” test.¹⁵⁴ The national pest-control company Orkin offered a lifetime warranty to its customers as long as they paid a fixed annual renewal fee.¹⁵⁵ Later, however, Orkin unilaterally raised the renewal fee.¹⁵⁶ The FTC concluded that this systematic and widespread breach of contracts, with warranty continuation hanging in the balance, was unfair.¹⁵⁷ It reasoned that “[s]ince Orkin’s customers could not have foreseen that Orkin would increase the annual renewal fee at some future date, they could not have reasonably avoided the injury.”¹⁵⁸ It also concluded that customers could not have avoided the injury by seeking an exception

149. 104 F.T.C. 949 (1984).

150. *Id.* at 950.

151. *Id.* at 1065–66. Although this nondisclosure sounds like the basis of a deception theory, the FTC used it to find unfairness instead. The FTC held that in *International Harvester*, a deception theory would turn on an implied representation that the tractor was fit for its intended purposes. *Id.* at 1063. The FTC held that the number of harmful incidents with the tractor to date was too low to make this implied representation false. *Id.* The FTC thus held that the case was better resolved under the harm/benefit analysis of the unfairness doctrine. *Id.* at 1063–64. Under the unfairness doctrine, in contrast to the deception theory, the FTC found that the then-current total of one death and eleven serious burns qualified as a substantial injury. *Id.* at 1064.

152. *Id.* at 1066.

153. *Id.* at 1066–67.

154. *See Orkin Exterminating Co.*, 108 F.T.C. 263, 321 (1986), *aff’d*, 849 F.2d 1354 (11th Cir. 1988).

155. *Id.* at 341.

156. *Id.* at 282–84.

157. *See id.* at 336.

158. *Id.* at 321.

from Orkin or by switching to Orkin's competitors.¹⁵⁹ Thus, in *Orkin*, the FTC relied in part on the "not reasonably avoidable" test as the FTC found unfairness under section 5. The Eleventh Circuit affirmed the FTC's decision.¹⁶⁰

Over time, the 1980 Statement as a whole has become accepted as the FTC's test for unfairness.¹⁶¹ The "not reasonably avoidable" test, in particular, has exerted some restraint on the FTC's enforcement decisions. Recently, for example, the FTC abandoned its investigation into LimeWire, a peer-to-peer file-sharing application.¹⁶² The FTC alleged that LimeWire "put consumers' personal information in peril" because identity thieves could use the application to retrieve users' private information.¹⁶³ However, the FTC eventually dropped the investigation. It did so in part because

159. *Id.* at 367. In his concurrence in *Orkin*, FTC Commissioner Oliver added the point that consumers could not reasonably avoid the injury by suing Orkin for breach of contract. *See id.* at 379–80 (Oliver, Comm'r, concurring). He observed that such a lawsuit would be uneconomical to pursue. *Id.* In Commissioner Oliver's view, consumers' practical inability to enforce the Orkin contract through individual contract lawsuits was a market failure that justified pursuing an unfairness theory. *Id.* at 379–80 & n.14.

160. *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365–66 (11th Cir. 1988). Other federal courts have reinforced the FTC majority's definition in *Orkin* of what is reasonably avoidable. The Ninth Circuit, for example, recently explained that "[i]n determining whether consumers' injuries were reasonably avoidable, courts look to whether the consumers had a free and informed choice." *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010). Similarly, the D.C. Circuit has written that the "not reasonably avoidable" test "stems from the Commission's general reliance on free and informed consumer choice as the best regulator of the market." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985). As Director Beales has explained, consumers have a free choice if they "could have made a different choice, but did not." Beales, *supra* note 130, at 196.

161. Beales, *supra* note 130, at 195. Congress, indeed, codified most of the 1980 Statement in 1994 as section 5(n) of the FTC Act, 15 U.S.C. § 45(n) (2006). *See infra* notes 170–71 and accompanying text (discussing this enactment).

The FTC has recently relied on its unfairness authority as it has regulated the privacy of consumer data. *See, e.g.*, FTC, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE C-3 (2012) (Rosch, Comm'r, dissenting) (stating that the FTC's 2012 data privacy report "is rooted in [an] insistence that the 'unfair' prong, rather the 'deceptive' prong, of the Commission's Section 5 consumer protection statute, should govern information gathering practices"), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>. To assess the legitimacy of these FTC initiatives, commentators have used the 1980 Statement as a source of standards. *See* Alexei Alexis, *FTC Privacy Goals Could Test Limits of Agency's Authority, Observers Say*, *Antitrust & Trade Reg. Daily (BNA)* (June 5, 2012), http://news.bna.com/adln/ADLNWB/split_display.adp?fedfid=26840242&vname=atdbulallissues&wsn=500732000&searchid=17969021&doctypeid=1&type=date&mode=doc&split=0&scm=ADLNWB&pg=0.

162. Letter from Mary Koelbel Engle, Assoc. Dir., Fed. Trade Comm'n, to George Searle, CEO, Lime Wire LLC (Aug. 19, 2010), available at <http://www.ftc.gov/os/closings/100919limewireletter.pdf>.

163. *Id.*

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the alleged peril was reasonably avoidable: “users of some of the older versions of LimeWire may have been able to avoid disclosure of sensitive information.”¹⁶⁴

In the years since the 1980 Statement, several courts, applying state law, have followed the statement as a standard for unfairness. For example:

- The Louisiana Court of Appeals, in a case against Orkin, relied on the 1980 Statement and FTC decisions that apply it.¹⁶⁵
- The United States District Court for the District of Massachusetts extensively applied the 1980 Statement when it rejected a state-law challenge to regulations on subprime lending.¹⁶⁶
- The Washington Court of Appeals paraphrased the 1980 Statement, then held that a failure to disclose the exact problem with a motorcycle that was undergoing warranty repair did not qualify as a substantial injury.¹⁶⁷
- The Maryland Court of Special Appeals adopted the 1980 Statement and dismissed a tenant’s claim under Maryland’s section 5 analogue because the tenant could have avoided her injury by moving to a different apartment.¹⁶⁸
- Similarly, Maine’s highest court, citing the 1980 Statement, dismissed a claim under Maine’s section 5 analogue

164. *Id.*

165. State *ex rel.* Guste v. Orkin Exterminating Co., 528 So. 2d 198, 201 (La. Ct. App. 1988).

166. See *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 198, 200–04 (D. Mass. 1998). *But cf.* *Greenfield*, *supra* note 139, at 1928–29 (“A review of the Massachusetts cases [as of 2000] suggests that the state has not embraced the [1980] Statement at all, though the federal decision in *United Companies Lending Corporation* may stimulate the state courts to a new application of the statutory admonition to ‘be guided by’ federal interpretations of [section 5].”) (quoting MASS. GEN. LAWS ch. 93A, § 2(b) (2005)).

167. See *Blake v. Fed. Way Cycle Ctr.*, 698 P.2d 578, 583 (Wash. Ct. App. 1985); *cf.* *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 896 (Wash. 2009) (distinguishing unfairness claim from the deception claim at issue, but stating the substance of the 1980 Statement’s test for substantial consumer injury as the test for unfairness, at least in the context of debt collection). The *Blake* court also relied on a number of other standards outside the 1980 Statement. See *Blake*, 698 P.2d at 583.

168. *Legg v. Castruccio*, 642 A.2d 906, 917–18 (Md. Ct. Spec. App. 1994).

because the plaintiff could have avoided his injury by closely reading the terms of his contract.¹⁶⁹

In 1994, Congress codified most of the 1980 Statement in a new subsection of section 5.¹⁷⁰ Subsection 5(n) states that the FTC cannot declare acts or practices unfair unless those acts or practices “cause[] or [are] likely to cause substantial injury to consumers *which is not reasonably avoidable by consumers themselves* and not outweighed by countervailing benefits to consumers or to competition.”¹⁷¹

In summary, with the “not reasonably avoidable” test, the FTC has added useful content to the test for unfairness. Part V below¹⁷² discusses the benefits of this test in the context of North Carolina law.

IV. THE RELATIONSHIP BETWEEN SECTION 75-1.1 AND SECTION 5

As Parts II and III of this Article show,¹⁷³ modern doctrine under section 5 of the FTC Act has features that go beyond current doctrine

169. *Bangor Publ'g Co. v. Union St. Mkt.*, 706 A.2d 595, 597 (Me. 1998). To be sure, not all state courts have followed current FTC doctrine. *See* 12 ROBERT M. LANGER ET AL., *CONNECTICUT PRACTICE SERIES: UNFAIR TRADE PRACTICES, BUSINESS TORTS AND ANTITRUST* app. M (2011) (presenting, in table form, the unfairness test applied in every U.S. state and territory that has a section 5 analogue); *see also* ASRC Servs. Power & Comm'ns, LLC v. Golden Valley Electric Ass'n, Inc., 267 P.3d 1151, 1161 (Alaska 2011) (deciding not to follow FTC standards because, among other reasons, “interpretations of the FTC Act post-1994 are not authorities that the 1974 [Alaska] legislature identified as proper guidance”).

170. FTC Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified at 15 U.S.C. § 45(n) (2006)). Subsection 5(n) also tightens the 1980 Statement's treatment of public policy as a basis for unfairness enforcement. Under subsection 5(n), the FTC retains authority to consider established public policies, but “[s]uch public policy considerations may not serve as a primary basis for” FTC determinations that an act or practice is unfair. 15 U.S.C. § 45(n).

This codification of the 1980 Statement occurred in legislation that reauthorized the FTC for the first time in fourteen years. The FTC's unfairness jurisdiction had remained controversial in the years since the 1980 Statement. *See, e.g.*, Beales, *supra* note 131, at 193–95; Calkins, *supra* note 139, at 1955. In 1982, the FTC had reaffirmed the 1980 Statement and had recommended that Congress codify the 1980 Statement's definition of unfairness. *See* Letter from FTC Chairman Miller to Sens. Packwood & Kasten (Mar. 5, 1982), *reprinted in* H.R. REP. NO. 98-156, at 27–28 (1983).

171. 15 U.S.C. § 45(n) (emphasis added). The emphasis added to this quotation highlights the language that codifies the “not reasonably avoidable” test.

Some state courts that have not expressly relied on the 1980 Statement have relied on the standards in section 5(n). *See, e.g.*, *Camacho v. Auto. Club of S. Cal.*, 48 Cal. Rptr. 3d 770, 777–78 (Ct. App. 2006); *Swiger v. Terminix Int'l Co.*, No. 14523, 1995 WL 396467, at *5–6 (Ohio Ct. App. June 28, 1995); *Tucker v. Sierra Builders*, 180 S.W.3d 109, 116–17 (Tenn. Ct. App. 2005).

172. *See infra* notes 211–48 and accompanying text.

173. *See supra* notes 89–172 and accompanying text.

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under section 75-1.1. Given this fact, is there a basis for the North Carolina courts to take further guidance from section 5?

There is a considerable basis. As shown below, the language and legislative history of section 75-1.1 support references to section 5 authorities. In addition, courts in section 75-1.1 cases have often turned to section 5 authorities for guidance. Courts have done so less often in recent years, but there is nothing to prevent the courts from renewing this practice.

Section 75-1.1 shares its substantive language with section 5.¹⁷⁴ This similarity is intentional: an early proponent of section 75-1.1, North Carolina Attorney General Robert Morgan, specifically asked the General Assembly to adopt this language.¹⁷⁵ Courts in North Carolina have long cited the parallel language of the two statutes as a reason to take guidance from section 5 authorities.¹⁷⁶

The history of the enactment of section 75-1.1 encourages these references. Shortly after Attorney General Morgan convinced the General Assembly to enact section 75-1.1, he stated that he hoped to “draw upon many of the decisions rendered pursuant to the Federal Trade Commission Act in enforcing the North Carolina counterpart.”¹⁷⁷

174. Compare N.C. GEN. STAT. § 75-1.1(a) (2011) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”), with 15 U.S.C. § 45(a)(1) (2006) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”) (emphasis added).

175. Morgan, *supra* note 19, at 19 (“We concluded that the most useful tool that could be made available to us to stop fraud and deception was the operative language of Section 5 of the Federal Trade Commission Act. Accordingly, the 1969 General Assembly was requested to make several amendments to Chapter 75 of the North Carolina General Statutes.”); accord William B. Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C. L. REV. 199, 207 (1972).

176. See, e.g., *Henderson v. U.S. Fid. & Guar. Co.*, 346 N.C. 741, 749, 488 S.E.2d 234, 239 (1997); *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 345 (1975); see also ALLEN, *supra* note 1, § 4.01[5], at 4-13 to -20 (discussing decisions in which courts in North Carolina have drawn guidance from section 5 authorities); *infra* notes 179–96 and accompanying text (same).

The courts have taken this guidance even though section 75-1.1 does not literally “require or direct reference to the FTC Act for its interpretation.” *State ex rel. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 316, 233 S.E.2d 895, 898 (1977). As of 2006, the section 5 analogues of twenty-seven states had express statutory features that called for adherence to, deference to, or at least guidance from section 5 authorities. See Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 148–51 (2006) (presenting these statutes and others in table form).

177. Morgan, *supra* note 19, at 20; accord Thomas, *supra* note 26, at 906 (reporting in 1970 that “the state’s Consumer Protection Division agrees” that “decisions by federal courts interpreting section 5 of the FTC Act should be regarded as authoritative”); see also

This hope came to fruition in the first decision by the Supreme Court of North Carolina on section 75-1.1. In *Hardy v. Toler*,¹⁷⁸ the court stated that “[s]ome guidance may be obtained by reference to federal decisions on appeals from the Federal Trade Commission, since the language of G.S. § 75-1.1 closely parallels that of the Federal Trade Commission Act.”¹⁷⁹ The court then relied on section 5 decisions when it established two seminal rules for section 75-1.1 claims: (1) “the ultimate determination of what constitutes unfair competition and deceptive practices rests with the courts,”¹⁸⁰ and (2) fraud is sufficient, but not necessary, to make out a deception claim under section 75-1.1.¹⁸¹

In the years that followed, the Supreme Court of North Carolina continued to rely on FTC standards in its section 75-1.1 decisions. In *Johnson v. Phoenix Mutual Life Insurance Co.*,¹⁸² the court relied on decisions under section 5 to define unfair and deceptive practices under section 75-1.1.¹⁸³ As part of its analysis, the court quoted the Cigarette Rule that the United States Supreme Court had quoted in *S&H*.¹⁸⁴

Similarly, in *Marshall v. Miller*,¹⁸⁵ the Supreme Court of North Carolina noted several times that section 5 authorities should guide the content of section 75-1.1. The court called it “established” that “federal decisions interpreting the FTC Act may be used as guidance

Aycock, *supra* note 175, at 201 (agreeing in 1972 that section 5 decisions “should be helpful in interpreting some of the provisions of chapter 75”).

Likewise, the rapid statutory overruling of the *J.C. Penney* decision indirectly suggests a legislative intent that the courts follow section 5 precedents. In *J.C. Penney*, the Supreme Court of North Carolina declined to follow section 5 decisions on point, stating that section 5 decisions were “not controlling in construing the North Carolina Act.” 292 N.C. at 315, 233 S.E.2d at 898. The General Assembly overruled *J.C. Penney* by statute the same year. *See supra* notes 23–24 and accompanying text; *see also* *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 261 n.5, 266 S.E.2d 610, 620 n.5 (1980) (acknowledging that this statutory change occurred “in the wake of our decision in *Penney*”), *overruled on other grounds* by *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988).

178. 288 N.C. 303, 218 S.E.2d 342 (1975).

179. *Id.* at 308, 218 S.E.2d at 345.

180. *Id.* (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *FTC v. Keppel & Bro.*, 291 U.S. 304 (1934); *Wisdom v. Norton*, 507 F.2d 750 (2d Cir. 1974); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973)).

181. *Id.* at 309, 218 S.E.2d at 346 (citing *D.D.D. Corp. v. FTC*, 125 F.2d 679, 682 (7th Cir. 1942)).

182. 300 N.C. 247, 266 S.E.2d 610 (1980).

183. *Id.* at 262–64, 266 S.E.2d at 620–21.

184. *Id.* at 263 n.6, 266 S.E.2d at 621 n.6 (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)); *see supra* text accompanying notes 145–48 (discussing this test).

185. 302 N.C. 539, 276 S.E.2d 397 (1981).

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in determining the scope and meaning of G.S. 75-1.1.”¹⁸⁶ The court held that, in a private lawsuit to enforce section 75-1.1, the plaintiff need not show bad faith by the defendant.¹⁸⁷ As the court analyzed this issue, it referred in part to decisions under section 5.¹⁸⁸ Rejecting the earlier reasoning of the court of appeals,¹⁸⁹ the supreme court stated that “nothing in our earlier decisions in *Hardy* and *Johnson* limits the precedential value of FTC jurisprudence to cases or actions brought by the Attorney General.”¹⁹⁰

Since 1981, the Supreme Court of North Carolina has continued to refer to section 5 authorities in section 75-1.1 cases from time to time.¹⁹¹ For example, in *Henderson v. United States Fidelity & Guaranty Co.*,¹⁹² the court relied on decisions from several jurisdictions, all based on statutes that resemble section 5.¹⁹³ The court went on to say directly that section 75-1.1 “is patterned after section 5 of the Federal Trade Commission Act, and we look to federal case law for guidance in interpreting the statute.”¹⁹⁴ The

186. *Id.* at 542, 276 S.E.2d at 399.

187. *Id.*

188. *See id.* (citing *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666 (7th Cir. 1967)).

189. *Marshall v. Miller*, 47 N.C. App. 530, 543–45, 268 S.E.2d 97, 103–04 (1980), *modified in relevant part*, 302 N.C. 539, 276 S.E.2d 397 (1981).

190. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403 (citing *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975); *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988)). The court also cited a 1980 article that recommends using lawsuits under section 5 analogues “to enforce [FTC] jurisprudence.” Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair and Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 522 (1980), *cited in Marshall*, 302 N.C. at 543, 549, 276 S.E.2d at 400, 403.

191. *See Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 274, 333 S.E.2d 236, 241 (1985) (following and quoting at length *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162 (4th Cir. 1985), which relied on section 5 decisions to exempt securities transactions from the scope of section 75-1.1); *see also HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 591–94, 403 S.E.2d 483, 492–93 (1991) (summarizing *Skinner* and *Lindner* and using them, among other authorities, to craft a broader exemption from the scope of “commerce” under section 75-1.1); *cf. N.C. Steel, Inc. v. Nat’l Council on Comp. Ins.*, 347 N.C. 627, 635, 496 S.E.2d 369, 374 (1998) (citing, but not directly following, *FTC v. Ticolor Title Ins. Co.*, 504 U.S. 621 (1992), a section 5 decision in which the United States Supreme Court applied the state-action doctrine, an immunity from antitrust liability); *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 657, 386 S.E.2d 200, 213 (1989) (summarizing and drawing “fortification” from United States Supreme Court decisions that refine the state-action doctrine).

192. 346 N.C. 741, 488 S.E.2d 234 (1997).

193. *Id.* at 746–48, 488 S.E.2d at 238–39.

194. *Id.* at 749, 488 S.E.2d at 239.

North Carolina Court of Appeals¹⁹⁵ and the federal courts¹⁹⁶ have likewise referred to section 5 authorities in section 75-1.1 decisions.

Since the early 1980s, however, courts in section 75-1.1 cases have cited section 5 authorities less often than in earlier years. After the Supreme Court of North Carolina developed a body of its own decisions on section 75-1.1, the court simply began citing its own decisions, as opposed to external sources like decisions under section 5.¹⁹⁷

195. See, e.g., *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 554, 406 S.E.2d 646, 649 (1991) (“[U]nder Section 5 of the FTC Act, a practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. Consistent with federal interpretations of deception under Section 5, state courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the state’s unfair and deceptive practices act.”) (quoting *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403); *Dull v. Mut. of Omaha Ins. Co.*, 85 N.C. App. 310, 316, 354 S.E.2d 752, 755 (1987) (rejecting section 75-1.1 claims and relying on differences between the facts of *Dull* and the facts of a decision under section 5, “interpretations of which are often looked to by North Carolina courts for guidance in construing the language of G.S. § 75-1.1”); *Cameron v. New Hanover Mem’l Hosp., Inc.*, 58 N.C. App. 414, 444, 293 S.E.2d 901, 919 (1982) (stating in dicta that section 5 decisions are instructive on the meaning of section 75-1.1); ALLEN, *supra* note 1, § 4.01[4], at 4-7 to -9 (citing other similar decisions of the North Carolina Court of Appeals).

Surprisingly, research reveals only one North Carolina Business Court decision that relies on any section 5 authorities: *State ex rel. Cooper v. McClure*, No. 03 CVS 5617, 2004 WL 2965983, at *4-5 (N.C. Bus. Ct. Dec. 14, 2004) (drawing parallels to *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990)). See also *id.* at *10 (citing *Ticor*, 505 U.S. at 633, but holding that the state-action doctrine was not satisfied).

196. See, e.g., *Armbruster Prods., Inc. v. Wilson*, No. 93-2427, 1994 WL 489983, at *6 (4th Cir. June 6, 1994) (stating, to establish claim preclusion by an earlier antitrust lawsuit, that “provisions of the North Carolina act are reproduced verbatim from § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), and . . . it is an accepted tenet of basic antitrust law that § 5 of the Federal Trade Commission Act sweeps within its prohibitory scope conduct also condemned by § 1 of the Sherman Act”) (quoting *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 48 (4th Cir. 1983)); *CBP Res., Inc. v. SGS Control Servs., Inc.*, 394 F. Supp. 2d 733, 739 (M.D.N.C. 2005) (relying in part on a section 5 decision to hold that the plaintiff in a section 75-1.1 case need not plead its claim with particularity, as FED. R. CIV. P. 9(b) requires for fraud claims).

197. None of the most recent section 75-1.1 opinions by the Supreme Court of North Carolina cite section 5 authorities. See *White v. Thompson*, 364 N.C. 47, 51-53, 691 S.E.2d 676, 679-80 (2010); *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 69-71, 653 S.E.2d 393, 398-99 (2007); *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004); *Dalton v. Camp*, 353 N.C. 647, 655, 548 S.E.2d 704, 710-11 (2001); *Gray v. N.C. Ins. Underwriting Ass’n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681-82 (2000); *Sara Lee Corp. v. Carter*, 351 N.C. 27, 31-32, 519 S.E.2d 308, 311-12 (1999); *Stanley v. Moore*, 339 N.C. 717, 722-24, 454 S.E.2d 225, 228-29 (1995); *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 189-90, 437 S.E.2d 374, 378-79 (1993); *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 687-88, 413 S.E.2d 268, 271-72 (1992); *Owens v. Pepsi Cola Bottling Co. of Hickory, N.C.*, 330 N.C. 666, 674-75, 412 S.E.2d 636, 641-42 (1992); *Johnson v. Beverly-Hanks & Assocs., Inc.*, 328 N.C. 202, 208-10, 400 S.E.2d 38, 42-44 (1991); *Bhatti v. Buckland*, 328 N.C. 240, 242-44, 400 S.E.2d 440, 442-43 (1991); see also David L. Belt, *The*

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Recent decisions from other North Carolina courts have done likewise.¹⁹⁸ Most of the recent decisions on unfairness simply follow the 1980 decision of the Supreme Court of North Carolina in *Johnson*, the court's 1981 decision in *Marshall*, or decisions that stem from these.¹⁹⁹ *Marshall*, for its definition of unfairness, cites *Johnson*.²⁰⁰ *Johnson* quotes the United States Supreme Court's quotation of the Cigarette Rule in *S&H*.²⁰¹

Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts, 80 CONN. B.J. 247, 304–05 (2006) (noting this pattern in other state courts as well).

198. See, e.g., *Combs v. City Electric Supply Co.*, 203 N.C. App. 75, 86–87, 690 S.E.2d 719, 727–28 (2010); *I-Conn Healthcare Solutions, LLC v. Advanced Internet Techs., Inc.*, No. COA09-81, 2010 WL 10399, at *4–5 (N.C. Ct. App. Jan. 5, 2010); *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 170–74, 684 S.E.2d 41, 49–52 (2009); *Noble v. Hooters of Greenville (NC), LLC*, 199 N.C. App. 163, 166, 681 S.E.2d 448, 452 (2009); *Martini v. Companion Prop. & Cas. Ins. Co.*, 198 N.C. App. 39, 46, 679 S.E.2d 156, 161 (2009), *aff'd in part, rev'd in part*, 364 N.C. 234, 695 S.E.2d 101 (2010); *Henson v. Green Tree Servicing LLC*, 197 N.C. App. 185, 190–91, 676 S.E.2d 615, 619–20 (2009); *Eason v. Cleveland Draft House, LLC*, No. COA08-864, 2009 WL 676951, at *6–7 (N.C. Ct. App. Mar. 17, 2009); *Triton Indus. v. Riverwalk in Highlands, LLC*, No. COA08-583, 2009 WL 368322, at *4 (N.C. Ct. App. Feb. 17, 2009); *Fisher v. Commc'n Workers of Am.*, No. 08 CVS 3154, 2008 WL 4754850, at *6–7 (N.C. Bus. Ct. Oct. 30, 2008).

The most recent North Carolina Court of Appeals opinion that directly addresses the role of section 5 authorities is the fourteen-year-old *DKH Corp. v. Rankin-Patterson Oil Co.*, 131 N.C. App. 126, 506 S.E.2d 256 (1998). *DKH* is a decision under a now-repealed North Carolina antitrust statute, not a decision under section 75-1.1. Even so, the court in *DKH* cited and quoted the operative language about section 75-1.1 and section 5 from *Marshall v. Miller*: “federal decisions interpreting the FTC Act may be used as guidance in determining the scope and meaning of § 75-1.1.” *Id.* at 129, 506 S.E.2d at 258 (quoting *Marshall*, 302 N.C. at 542, 276 S.E.2d at 399); see also *id.* (“[I]t is clear that federal decisions, though not binding on this Court, do provide guidance in determining the scope and meaning of chapter 75.”). *But cf.* *Van Dorn Retail Mgmt., Inc. v. Klausner Furniture Indus.*, 132 N.C. App. 531, 532, 512 S.E.2d 456, 457 (1999) (declining in a 75-1.1 case to follow *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477, 482 (M.D.N.C. 1985), which stated, without direct citation, that “[i]t is undisputed that price discrimination among those similarly situated constitutes a clear violation of North Carolina’s unfair trade practice laws”).

199. See ALLEN, *supra* note 1, § 4.01[3], at 4-6 to -7 (noting this pattern).

200. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403 (citing *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 621 (1980)).

201. *Johnson*, 300 N.C. at 263 n.6, 266 S.E.2d at 621 n.6 (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)), *overruled on other grounds* by *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988).

In addition, *Johnson* and several decisions of the North Carolina Court of Appeals cite the Seventh Circuit's 1976 decision in *FTC v. Spiegel, Inc.*, 540 F.2d 287 (7th Cir. 1976). See *Johnson*, 300 N.C. at 262, 266 S.E.2d at 621–22; *Wilder v. Squires*, 68 N.C. App. 310, 314, 315 S.E.2d 63, 66 (1984); *Lee v. Payton*, 67 N.C. App. 480, 482, 313 S.E.2d 247, 249 (1984); *Marshall v. Miller*, 47 N.C. App. 530, 542–43, 268 S.E.2d 97, 103–04 (1980), *modified in relevant part*, 302 N.C. 539, 276 S.E.2d 397 (1981). The *Spiegel* case involved arguable sham litigation by Spiegel: collection lawsuits against numerous consumers, filed in an Illinois trial court without regard to whether that court could

Because of this pattern of references, unfairness doctrine under section 75-1.1 is mired in the past. As Part III of this Article has shown, the available standards for unfairness now go beyond the Cigarette Rule.²⁰²

Nothing prevents the North Carolina courts from referring to FTC authorities once again. The language of section 75-1.1 still mirrors the language of section 5. In view of this overlapping language, section 5 authorities are still a rational source of guidance on the meaning of section 75-1.1.²⁰³ North Carolina courts, moreover, have expressly acknowledged, and have never disavowed, “the precedential value of FTC jurisprudence.”²⁰⁴ Indeed, in the most recent decision to touch on this issue, the Supreme Court of North Carolina wrote that “we look to federal case law for guidance in interpreting” section 75-1.1.²⁰⁵ As Part V of this Article discusses, the time has come for the courts to renew this practice.

V. DEVELOPING THE STANDARD FOR UNFAIRNESS UNDER SECTION 75-1.1

The current standard for unfairness under section 75-1.1—in essence, the list of adjectives in the 1964 Cigarette Rule—has been insufficient to allow courts to reach well-explained decisions in direct unfairness cases.²⁰⁶ Forty years of unfairness decisions under section

constitutionally assert personal jurisdiction over the consumers. *Spiegel*, 540 F.2d at 290–91.

202. *See supra* notes 125–72 and accompanying text; *cf. Luskis, Inc. v. Consumer Prot. Div.*, 726 A.2d 702, 711 (Md. 1999) (citing the need to avoid freezing the conduct standard for deception as a reason to adopt the FTC’s 1983 policy statement on that subject).

203. *See Leaffer & Lipson, supra* note 190, at 534.

204. *Marshall*, 302 N.C. at 549, 276 S.E.2d at 403. It is true that some North Carolina case law refers to taking guidance from decisions of the federal courts under section 5, rather than the FTC’s own decisions or statements. *See, e.g., Hardy v. Toler*, 288 N.C. 303, 307, 218 S.E.2d 342, 345 (1975); *DKH Corp. v. Rankin-Patterson Oil Co.*, 131 N.C. App. 126, 128, 506 S.E.2d 256, 258 (1998). Federal appellate decisions in section 5 cases, however, embrace the 1980 Statement. *See, e.g., Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1363–64 (11th Cir. 1988); *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985).

205. *Henderson v. U.S. Fid. & Guar. Co.*, 346 N.C. 741, 748, 488 S.E.2d 234, 239 (1997).

206. *See supra* notes 89–124 and accompanying text.

The FTC itself has recognized the problems with the Cigarette Rule. In the years when that standard was in force, the FTC, by its own account, never used it as an independent basis for a finding of unfairness. *See* 1980 Statement, *supra* note 143, at 1073.