

813.21 TRADE REGULATION—VIOLATION—ISSUE OF UNFAIR METHODS OF  
COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES.<sup>1</sup>

*NOTE WELL: Determining what constitutes an unfair<sup>2</sup> or deceptive<sup>3</sup> trade practice is an issue of law for the judge.<sup>4</sup> The only question of fact to be determined by the jury in connection with this issue is whether the defendant actually did what is alleged to have been done.<sup>5</sup> Good faith and lack of willfulness are irrelevant.<sup>6</sup>*

*Special interrogatories should be submitted to the jury on each of these questions of fact.<sup>7</sup> Examples of special interrogatories may be found in the Model Instruction, N.C.P.I.-Civil 813.05.*

The (state number) issue reads:

"Did the defendant do (at least one of) the following: (here state in special interrogatories the acts of the defendant which allegedly violate N.C. Gen. Stat. § 75-1.1)?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant did (at least one of) the act(s) as contended by the plaintiff. In this case the plaintiff contends, and the defendant denies, that the defendant: (State the alleged acts of the defendant which plaintiff contends violate N.C. Gen. Stat. § 75-1.1).<sup>8</sup>

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant did (at least one of) the act(s) contended by the plaintiff, then you would answer "Yes" in the space beside each act so found.

If, on the other hand, you fail to so find, then you would answer "No" in the space provided.

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1. N.C. Gen. Stat. § 75-1.1(a) reads: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

Four significant N.C. Supreme Court cases construing this statute are *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981), *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980), *State ex. rel. Edmisten v. J. C. Penny Co.*, 292 N.C. 311, 233 S.E.2d 895 (1977) and *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975). All these cases note the similarity between the language of N.C. Gen. Stat. § 75-1.1 and § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and have opined that the General Assembly intended for the federal law to provide guidance in interpreting the state statute. "The similarity in language was apparently not accidental. . . . Consequently, we have said that the federal decisions construing the FTC Act may furnish some guidance as to the meaning of N.C. Gen. Stat. § 75-1.1." *State ex. rel. Edmisten*, 292 N.C. at 314, 233 S.E.2d at 898 (citing *Hardy*, 288 N.C. at 308, 218 S.E.2d at 346).

For the North Carolina common law definition of unfair competition, see *Extract Co. v. Ray*, 221 N.C. 269, 272, 20 S.E.2d 59 (1942).

2. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. *Accord Johnson*, 300 N.C. at 263, 266 S.E.2d at 621; *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 98, 718 S.E.2d 408, 412 (2011) ("A practice is unfair if it is unethical or unscrupulous . . .") (citing *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001)).

3. "[A] practice is deceptive if it has the capacity or tendency to deceive . . . 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 . . . ." *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. See also *Johnson*, 300 N.C. at 265–66, 266 S.E.2d at 622.

4. Unfairness and deception are to be "gauged by consideration of the effect of the practice on the marketplace . . . ." *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403. As a result, the "intent of the actor is irrelevant," and "good faith is equally irrelevant." *Id.* Thus, neither a lack of willfulness nor good faith is a defense to an action under N.C. Gen. Stat. § 75-1.1. "What is relevant is the effect of the actor's conduct on the consuming public," and that is a matter for the trial judge to decide as a matter of law. *NOTE WELL: Private actions under N.C. Gen. Stat. § 75-16 brought upon alleged violations of N.C. Gen. Stat. § 75-1.1 should be distinguished from actions brought under other sections of Chapter 75 or other sections of other chapters, e.g., N.C. Gen. Stat. § 25A-44(4), where good faith or willfulness may be material.*

5. *NOTE WELL: Because the scope of jury inquiry is limited to this narrow issue of fact, in charging the jury under N.C. Gen. Stat. § 75-1.1 the words "unfair" and "deceptive" should never be mentioned.*

6. See note 4, *supra*.

7. It is recommended that each special interrogatory be structured to constitute a violation in itself. See the Model Instruction N.C.P.I.-Civil 813.05.

8. There are a variety of statutory and judicial exemptions to the applicability of N.C. Gen. Stat. § 75-1.1. The statutory exemptions include one for those in a "learned profession" (N.C. Gen. Stat. § 75-1.1(b)), one for media coverage (N.C. Gen. Stat. § 75-1.1(c)), one for properly organized agricultural cooperatives (N.C. Gen. Stat. §§ 54-129 *et. seq.*), one for cooperative development and production of oil and gas (N.C. Gen. Stat. § 113-393(c)), one for certain conduct of soft drink bottlers (15 U.S.C. § 3501), one for local government actions (15 U.S.C. §§ 34-36) and one for certain cooperative agreements among hospitals and other persons (N.C. Gen. Stat. § 131E-192.1, *et. seq.*). The judicially created exemptions include one for securities and commodities transactions, *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 403 S.E.2d 483 (1991); *Skinner v. E. F. Hutton & Co.*, 314 N.C. 267, 337 S.E.2d 236 (1985); *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 248 S.E.2d 567 (1978), *rev. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979), employment relationships, *HAJMM Co. v. House of Raeford Farms, Inc.*, *supra*, *Brandis v. Lightmotive Fatman, Inc.*, 115 N.C. App. 59, 443 S.E.2d 887, 891 (1994); *American Marble Corp. v. Crawford*, 84 N.C. App. 86, 351 S.E.2d 848, *disc. rev. denied*, 319 N.C. 464, 356 S.E.2d 1 (1987); *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 289 S.E.2d 118, *disc. rev. denied*, 305 N.C. 759, 292 S.E.2d 574 (1982), the private sale of residential homes, *Adams v. Moore*, 96 N.C. App. 359, 385 S.E.2d 799 (1989) *rev. denied*, 326 N.C. 46, 389 S.E.2d 83 (1990); *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979); *cf.*, *Davis v. Sellers*, 115 N.C. App. 1, 443 S.E.2d 879 (1994) and certain charity fund raising activities, *Malone v. Topsail Area Jaycees, Inc.*, 113 N.C. App. 498, 439 S.E.2d 192 (1994). There are other judicial limitations on the scope of N.C. Gen. Stat. § 75-1.1, with examples including the following: the doctrines of exclusive and primary jurisdiction; the "Noerr-Pennington" doctrine; the "state action" doctrine, *see Sperry Corp. v. Patterson*, 73 N.C. App. 123, 125, 325 S.E.2d 642, 644 (1985) ("[C]onsumer protection and antitrust laws of Chapter 75 of the General Statutes do not create a cause of action against the State, regardless of whether sovereign immunity exists."); and the doctrine of preemption.

