
813.62 TRADE REGULATION—COMMERCE—UNFAIR AND DECEPTIVE METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES.

NOTE WELL: Use this instruction only in connection with N.C.P.I. - Civil 813.21, "Unfair and Deceptive Methods of Competition and Unfair or Deceptive Acts or Practices," which must be given prior to this issue on commerce.

The (*state number*) issue reads:

"Was the defendant's conduct in commerce or did it affect commerce?"¹

You will answer this issue only if you have found in the plaintiff's favor on the preceding issue. 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's conduct was either "in commerce" or that it "affected commerce."²

Conduct is "in commerce" when it involves a business activity.³

Conduct "affects commerce" whenever a business activity is adversely and substantially affected.⁴

(A "business activity" is the way a business conducts its regular, day-to-day activities or affairs (such as the purchase or sale of goods), or whatever other activities the business regularly engages in and for which it is organized.)⁵

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant's conduct was "in commerce" or that it "affected commerce," then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find then it would be your duty to answer this issue “No” in favor of the defendant.

1. If sufficient facts are admitted or stipulated to permit the court to find that the defendant's conduct was “in commerce” or “affected commerce,” the court may find that this issue is proven as a matter of law. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975). See *Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 56 n.4, 714 S.E.2d 162, 167 n.4 (2011) (noting that, although whether an act is an unfair or deceptive trade practice is a question of law for the court, it was not inappropriate to submit to the jury the issue of whether a defendant’s acts were “in or affecting commerce”); see also *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 425, 344 S.E.2d 297, 300 (1986) (“The only such ‘issue’ answered by the jury was whether defendant’s misrepresentations to plaintiff were conduct in commerce or affecting commerce, which was appropriate.”).

2. N.C. Gen. Stat. § 75-1.1(b) specifically excludes “professional services rendered by a member of a learned profession” from the definition of “commerce.” The burden of establishing the applicability of this exclusion is upon the party seeking it. N.C. Gen. Stat. § 75-1.1(d). For the “learned profession” exclusion to apply, “a two-part inquiry must be conducted: ‘[f]irst, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services.’” *Wheless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 587, 589, 768 S.E.2d 119, 123 (2014) (quoting *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000)) cited with approval in *Sykes v. Health Network*, 372 N.C. 326, 334, 828 S.E.2d 467, 472 (2019). Although the legislature has not defined what professions are “learned,” *Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235, the Supreme Court of North Carolina has recognized three learned professions: law, medicine and the clergy. *Patronelli v. Patronelli*, 360 N.C. 628, 630, 636 S.E.2d 559, 561 (2006). The exception for medicine has been interpreted broadly to include “medical professionals.” See *Sykes v. Health Network*, 237 N.C. at 334, 828 S.E.2d at 472. Furthermore, an opinion of the North Carolina Attorney General’s Office that the exception applies to related professions “characterized by need of unusual learning, existence of confidential relations, [and] adherence to a standard of ethics higher than that of the marketplace,” 47 N.C. Op. Att’y Gen. 118, 119-20, citing *Commonwealth v. Brown*, 302 Mass. 523, 527, 20 N.E.2d 478, 481 (1939), has been cited as authority in North Carolina appellate decisions. See *Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235.

Where the conduct alleged to be an UDTP is too far removed from the defendant professional’s practice, the claim will not be exempted from N.C.G.S. § 75-1.1. *Sykes*, 828 S.E.2d at 473 (noting that the learned profession exception does not apply to every contract in which a party is of a learned profession). Exemption occurs only when the claim is sufficiently related to the professional service being rendered. *Id.*

Depending on the relationship between the parties, applicability of N.C. Gen. Stat. § 75-1.1 may be precluded. Because it has been determined that the General Assembly did not intend the Unfair and Deceptive Trade Practices statute to apply to a business’ internal operations, the Supreme Court of North Carolina has held that N.C. Gen. Stat. § 75-1.1 does not apply to the conduct of a partner within a partnership. See *White v. Thompson*, 364 N.C. 47, 47-51, 691 S.E.2d 676, 676-680 (2010). Likewise, a defendant’s status as an employee

will normally preclude application of the act in a suit brought by the defendant's employer, but an employee may be held liable where the activity in question is better characterized as a business activity outside of the employer-employee relationship. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 34, 519 S.E.2d 308, 312 (1999). An independent contractor may be held liable as well. *Weaver Inv. Co. v. Pressly Dev. Assocs.*, 234 N.C. App. 645, 656, 760 S.E.2d 755, 762 (2014).

In addition, the courts have held that certain types of conduct are not business activities "in commerce" or do not "affect commerce" for Chapter 75 purposes. These include the following: 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); *c.f.*, *Davis v. Sellers*, 115 N.C. App. 1, 443 S.E.2d 879 (1994); certain charity fund raising activities, *Malone v. Topsail Area Jaycees, Inc.*, 113 N.C. App. 498, 439 S.E.2d 192 (1994); and the issuance and redemption of securities for the purpose of raising capital, *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991).

3. N.C. Gen. Stat. § 75-1.1(b).

4. *Hospital Bldg. Co. v. Trustees of the Rex Hosp.*, 425 U.S. 738, 743 (1976).

5. *HAJMM Co.*, 328 N.C. at 594, 403 S.E.2d at 493; *Malone*, 113 N.C. App. at 502, 439 S.E.2d at 194.

