The North Carolina Unfair Trade Practices Act, G.S. 75-1.1:
The Learned Profession, Employer-Employee, and Securities "Exemptions"

Case Compilation

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General Limitation

Overarching the three exemptions/exclusions covered in this compilation, the Supreme Court has stated that the phrase "in or affecting commerce" is limited to conduct *between* market participants and is *not* applicable to internal business conflicts:

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

"In or affecting commerce" does ***NOT*** include conduct involving:

- **Internal operations/governance** of a business/entity
- Matters involving a **"single market participant"**

White v. Thompson, 364 N.C. 47 (2010)

The three exemptions/exclusions set out below are closely related to this overarching general limitation, but frequently they are discussed in case law as independent exemptions.

Learned Profession Exemption/Exclusion

Origin:

Statutory language: "For purposes of this section, "commerce" includes all business activities, however denominated, *but does not include professional services rendered by a member of a learned profession*." G.S. 75-1.1(b)(emphasis added)

2-part test:

"In order for the learned profession exemption to apply, a two-part test must be satisfied. First, 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." *Reid v. Ayers*, 138 N.C. App. 261 (2000).

What is a "learned profession" under this statute?

North Carolina state courts have applied this term to the **medical** profession (broadly, including providers *and* institutions) and the **legal** profession. The *State*'s courts have not otherwise defined it. (Note: In one case a *federal* trial court applied it to engineers, and in another case a *federal* trial court applied it to architects.)

Cases Interpreting the Exemption:

- Medical:

  In general, "professional services rendered" has been interpreted very broadly to include not just to the provision of medical care itself but also business and administrative decisions necessary to facilitate the provision of medical services. With the exception of last year's opinion in *Hamlet*, discussed below, North Carolina court opinions have been uniform in generously applying the learned profession exclusion to business-related cases when they revolve around health care.

  Cases in which the exclusion applied:

  - *Aesthetic Facial & Ocular Plastic Surgery Ctr, P.A. v. Zaldivar*, 826 S.E.2d 723 (N.C. Ct. App. March 19, 2019). Alleged breach by physician of covenant not to compete not actionable under Chapter 75 because it related to the ability to practice medicine.

  - *Wheeless v. Maria Parham Med. Ctr.*, 237 N.C. App. 584 (2014). Ch. 75 claim could not be maintained against hospital related to communications about the plaintiff physician that occurred during a medical peer review process.

- *Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120 (2006). Chapter 75 inapplicable to claims brought by group of similarly-situated plaintiffs regarding hospital billing practices for medical services rendered.

- *Burgess v. Busby*, 142 N.C. App. 393 (2001). Physician allegedly sent letters to fellow physicians advising them against treating the plaintiffs, the individuals who had been jurors in a trial in which the physician was found liable. Court held that the learned profession exemption foreclosed a Chapter 75 claim against him.

- *Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372 (2000). Exemption applied in a negligence case alleging that a treating physician had misrepresented his qualifications to do the procedure in question.

- *Abram v. Charter Medical Corp. of Raleigh, Inc.*, 100 N.C. App. 718 (1990). Concluding that the exemption applied in an action against one chemical dependency treatment center against another related to pursuit of a Certificate of Need from the State.

- *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414 (1982). Hospital decisions about medical staff privileges were a necessary part of assuring quality medical services; this administrative function was therefore out of reach of Chapter 75.

    - *See also Sykes v. Health Network Solutions, Inc.*, 2017 NCBC 72 (N.C. Superior Ct. Aug. 18, 2017). Concluding that the exemption applied in a dispute brought by chiropractors over the fairness of a review process used by their chiropractic network management company to evaluate member chiropractors' cost of services.
    - *See also Charlotte Chiropractic Clinic, P.A. v. Williams*, 2015 WL 5431758 (W.D.N.C. Sept. 15, 2015) (not reported). Concluding that advertising and marketing of chiropractic services fell within the exemption.

Case declining to apply the exclusion:

- *Hamlet H.M.A., LLC v. Hernandez*, 821 S.E.2d 600 (N.C. Ct. App. 2018). In a case that the court deemed a matter of first impression, concluding that the learned profession exemption did not apply in a dispute between a physician and hospital alleging false claims by hospital to induce physician to enter into a contract. The court determined that:

    > This case involves a business deal, not rendition of professional medical services. Defendant alleged that the hospital made false representations to induce him to enter into a contract; the fact that he is a physician does not change the nature

of the negotiation of a business contract. Plaintiff declined to enter into an employment contract with defendant; if defendant had been an employee of plaintiff, this situation may be somewhat more similar to *Wheeless* and *Cameron*, but plaintiff wanted defendant to be an independent contractor with an independent practice. *If we were to interpret the learned profession exception as broadly as plaintiffs suggest we should, any business arrangement between medical professionals would be exempted from UDTP claims*. The learned profession exception does not cover claims simply because the participants in the contract are medical professionals. For example, if a physician entered into a lease agreement for space in a medical office building owned by a group of physicians or hospital and then seeks to bring a UDTP claim based upon a dispute over the lease, it should be treated no differently than a similar lease arrangement for parties in any other business. The fact that medical services will be provided in the building does not mean that the lease arrangement arises from rendition of professional services and has no effect on the quality of the medical care provided. (emphasis added)

- Legal:

As applied to the legal profession, the exemption is still broad, but perhaps not as broad as in the medical world. While the exemption extends to some business aspects of the practice of law, an early N.C. Attorney General opinion noted that it probably doesn't include advertising, price fixing, other entrepreneurial aspects focused more on self-interest of the attorney than client interest. 47 Op. Atty Gen. 118 (1977). This language was repeated in the *Reid* opinion noted below.

Cases interpreting the exemption:

- *Moch v. A.M. Pappas & Assocs, LLC*, 794 S.E.2d 898 (N.C. Ct. App. 2016) (citing *Davis Lake Community Ass'n v. Feldmann*, 138 N.C. App. 292 (2000). Plaintiff could not maintain a Chapter 75 claim against Defendant based on letters sent by Defendant's counsel threatening litigation against Plaintiff.

- *Godfredson v. JBC Legal Group, P.C.*, 387 F.Supp.2d 543 (E.D.N.C. 2005). Citing *Reid* and concluding that Ch. 75 action could not be maintained against legal group based on allegedly unfair debt collection practices. Also rejecting the argument that the attorneys in question must be licensed in North Carolina to qualify for the exemption.

- *Reid v. Ayers*, 138 N.C. App. 261 (2000). Attorneys' pursuit of payment of its client's assessments and related attorney fees (i.e., debt collection practice), even when the amount pursued was legally unjustified, fell within the learned profession exemption.

The court said, “Although no bright line exists, we think that the exemption applies anytime an attorney or law firm is acting within the scope of the traditional attorney-client role.” But probably doesn’t include: Advertising, price fixing, or “other entrepreneurial aspects of legal practice that are geared more towards their own interests, as opposed to the interests of their clients.”

- *Sharp v. Gailor*, 132 N.C. App. 213 (1999). Claims by attorney’s former client of malpractice and malfeasance were barred by the statutory exemption.

Employer/Employee Relationship Exemption

Main NC case establishing the exemption:

- *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445 (1982). Employee's alleged action against employee in retaliation for exercising workers' compensation benefits did not fall within scope of Chapter 75: "Unlike buyer-seller relationships, we find that **employer-employee relationships do not fall within the intended scope of G.S. 75-1.1[.]**"

Cases (selected) in which the employer-employee exemption prevented Ch. 75 liability:

- *Dalton v. Camp*, 353 **N.C.** 647 (2001). Plaintiff Dalton owned a business that published an employee newsletter for KFI. Near the end of Dalton's publication contract with KFI, one of Dalton's employees, Camp, began forming his own publication venture and ultimately reached a contract to publish KFI's newsletter at the end of Dalton's contract. The NC Supreme Court concluded that Dalton could not maintain a Chapter 75 claim against Camp. Unlike in *Sara Lee (discussed below)*, Camp had no duty to Dalton beyond a normal employee-employer relationship, and although his conduct was unfortunate for Dalton, it did not give rise to an unfair trade practices claim.

- *Austin Maintenance & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401 (2012). Suit by an employer against four of its former employees who went to work for a competitor could not support a claim under G.S. 75-1.1.

- *Combs v. City Elec. Supply Co.*, 203 N.C. App. 75 (2010). Wrongful discharge and retaliation claim by former employee did not support Chapter 75 liability.

- *Kinesis Advert., Inc. v. Hill*, 187 N.C. App. 1 (2007). Holding that "a violation of a covenant-not-to-compete, essentially a breach of contract within the employer/employee relationship, lies outside the scope of the UDTP.
    - *See also Am. Marble Corp. v. Crawford*, 84 N.C. App. 86 (1987) (same).

- *Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742 (2007). Plaintiff's suit against a firm for interactions with Plaintiff's employer, the NCDOT, that may have adversely impacted Plaintiff's employment status were not "in or affecting commerce" and did not "have any impact beyond his employment relationship with NCDOT." Thus summary judgment was properly granted to the firm on Plaintiff's G.S. 75-1.1 claim.

- *Durling v. King*, 146 N.C. App. 483 (2001). Failure of an employer to pay proper commissions to individuals he hired to help him with his sales work was not conduct that extended beyond the scope of the employment relationship (nor, for that matter,

the contractual one). Those individuals could not, therefore, recover additional damages for unfair trade practices under G.S. 75-1.1.

- *Siegel v. Patel*, 132 N.C. App. 783 (1999). Affirming summary judgment in favor of employer on Ch. 75 claim that was premised on employer's failure to pay employee's medical expenses.

- *Wilson v. Wilson Cook Medical, Inc.*, 720 F.Supp. 533 (M.D.N.C. 1989). Dismissing Chapter 75 claim premised on improper discharge from employment (citing *Buie*).

Cases holding that the employer-employee exclusion did not apply (no exemption from Ch. 75)

- **Key case:** *Sara Lee Corp. v. Carte*r, 351 **N.C.** 22, 33–34 (1999). Defendant was an employee of Sara Lee hired to procure computer parts and services for the company. Instead of making these purchases at competitive prices through the normal marketplace, Defendant engaged in a scheme of self-dealing by selling these parts and services to Sara Lee from his own companies without Sara Lee's knowledge. The Supreme Court determined that this activity fell within the scope of Chapter 75. The court concluded that this fraudulent activity revolved around a buyer-seller relationship and treble damages were not precluded merely because he was Plaintiff's employee at the time he engaged in them. (Distinguishing from *Buie*.)

    - *See also In re E-Z Serve Convenience Stores, Inc.*, No. 02-83138, 2009 WL 901707, at *11 (Bankr. M.D.N.C. Mar. 26, 2009). Employee who engaged in fraudulent actions when selling employer's properties was in a buyer-seller position rather than employer-employee with respect to the actions in question.

- *Songwooyarn Trading Co. v. Sox Eleven, Inc.*, 213 N.C. App. 49 (2011). Concluding (and citing *Sara Lee*) that self-dealing and misappropriation by an employee "interrupted the commercial relationship" between the employer and another entity and thus did not fall within the employer-employee exclusion.

- *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214 (2013), *writ denied, review denied*, 367 N.C. 786 (2014). Affirming Ch. 75 judgment against former employees for activities related to misappropriate of former employer's trade secrets.

    - *See also Medical Staffing Network, Inc., v. Ridgway*, 194 N.C. App. 649 (2009). Former employee's misappropriate of former employer's trade secrets—a violation of the Trade Secrets Protection Act, G.S. 66-146—was a violation of G.S. 75-1.1.

- *See also Spirax Sarco, Inc. v. SSI Eng'g, Inc.*, 122 F. Supp. 3d 408, 436 (E.D.N.C. 2015). Declining to dismiss Ch.75 claim based on former employee's apparent attempt to appropriate (download) and later use the employer's property: "That is not the stuff of run-of-the-mill employment disputes, and depending on what evidence is produced, may constitute part of an unfair or deceptive trade practice."

- *Gress v. the Rowboat Co., Inc.*, 190 N.C. App. 773 (2008). During the process of negotiating Gress's purchase of Defendant corporations, the parties agreed that Gress would become a nominal employee of the corporations. It later became clear that Gress never had any intention of completing the purchase, but instead dragged the matter out in order to gain personal benefit from company operations. Defendants sued Gress under G.S. 75-1.1. Here, the presumption against applicability of Chapter 75 in employee-employer relationships did not apply. The employment relationship was fictitious, existing only as a cover to facilitate due diligence; instead the conduct in question "arises from an underlying contract to purchase corporate assets which satisfies the "in or affecting commerce" element[.]"

- *Mayes v. Moore*, 419 F. Supp.2d 775 (M.D.N.C. 2006). Denying a 12(b)(6) motion to dismiss a Chapter 75 claim in a case where an employee alleged the employer wrongfully induced him into an employment relationship so that he could subject him to sexual advances and harassment. Court concluded that the alleged behavior occurred before the employment relationship and involved a type of fraudulent inducement, so it was not excluded from Chapter 75.

    - *See also Fusco v. NorthPoint ERM, LLC* (W.D.N.C. Jan. 13, 2016) (surviving 12(b)(6) where the allegations revolved around fraudulent inducement to accept employment—thus the employer-employee relationship did not exist at the time).

- *Ausley v. Bishop*, 133 N.C. App. 210 (1999). Reversing grant of summary judgment in favor of employer after concluding that employer's alleged libel against former employee related to his business affairs took place after the employer-employee relationship ended.

- *Johnson v. First Union Corp.*, 128 N.C. App. 450, *on reh'g*, 131 N.C. App. 142 (1998) Employer's alleged fraudulent actions related to payment of claims after the employment relationship ended did "not fall within the scope of the employer-employee relationship governed by the Workers' Compensation Act…we thus hold that

this case is not controlled by *Buie,* 56 N.C. App. at 448, 289 S.E.2d at 120, and a cause of action against the employer exists under N.C. Gen.Stat. § 75–1.1."

- *Cf Walker v. Sloan*, 137 N.C. App. 387, 396 (2000). Group of employees who sought to purchase shares of employer adequately stated a claim under G.S. 75-1.1 against members of employer's board of directors who took actions against the employees that ultimately thwarted the purchase. [Conceptually similar, but does not actually mention the employer-employee exclusion]

Securities (and capital-raising ventures) Exemption

Cases establishing the exemption:

- *Skinner v. E.F. Hutton & Co., Inc.*, 314 N.C. 267 (1985) (forecasted by *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 241 (4th Cir. 1985). Securities fraud action against securities brokers by stock purchasers.
    - "Securities transactions are beyond the scope of N.C.G.S. 75-1.1."
    - Rationale: Securities transactions are already subject to pervasive and intricate regulation; and Chapter 75 exposure could create overlapping supervision and enforcement of securities transactions

- *Hajmm v. House of Raeford Farms, Inc.*, 328 N.C. 578 (1991). Allegations against corporation related to improper retirement of plaintiffs' revolving fund certificates.
    - Expanding the scope of the exemption beyond the regulatory rationale in *Skinner*.
    - Reasoning that the "trade, issuance and redemption of corporate securities or similar financial instruments" are not the regular, day-to-day business activities intended to be covered by Chapter 75 but instead is an "extraordinary event" for the purpose of *raising capital* and "merely works a change in the ownership of the security itself."

Selected cases applying/distinguishing the exemption:

- *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283 (2004). Holding that the exemption did not apply (Ch. 75 suit could proceed) because the product at issue was primarily an insurance product and not a capital-raising device.

- *Sterner v. Penn*, 159 N.C. App. 626 (2003). Plaintiff could not maintain a Ch. 75 claim against investment firms who took investments from the unlicensed individual who lost all of Plaintiff's money in bad investments; the matter related to securities transactions and was therefore subject to the exemption. (Relying on similar outcome in *Harrah v. J.C. Bradford & Co.*, 37 F.3d (4th Cir. 1994)).

- *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52 (2001). Affirming dismissal of a 75–1.1 claim under *HAJMM* because the loan agreement at issue also included an option to purchase stock and was therefore a capital-raising device. (A broad interpretation of *HAJMM*.)

- *McPhail v. Wilson*, 733 F.Supp. 1011 (W.D.N.C. 1990). Citing *Skinner* in holding that Ch. 75 does not apply in alleged fraudulent securities transaction.

- *Ward v. Zabady*, 85 N.C. App. 130 (1987). Summary judgment for defendant in Chapter 75 clam by investor against organizer of holding company based on unfulfilled stock purchase.

Also see: Selected recent cases from North Carolina Business Court (Superior Court) applying the exemption:

- *Tillery Environmental, LLC v. A&D Holdings, Inc.*, 2017 N.C.B.C. 67, (N.C. Superior Ct. Aug. 4, 2017) (applying exemption in dispute over demand for escrow funds related to stock purchase agreement).

- *DeGorter v. Capital Bancorp Ltd.*, 2011 NCBC 28 (N.C. Superior Ct. July 2011) (granting motion to dismiss claim against defendant bank holding company related to misrepresentations in offering trust preferred securities.

- *Charlotte-Mecklenburg Hosp. Auth. v. Wachovia Bank, N.A.*, (N.C. Superior Ct. Oct. 6, 2009) (noting that the exemption encompasses more than just conventional securities.)

- *Latigo Invs. II v. Waddell & Reed Fin., Inc.*, 2007 NCBC 17 (N.C. Superior Court June 11, 2007) (concluding that even representations made in the context of a larger scheme are excluded from liability under the UDTPA if they involved a securities transaction or a capital raising device).