Advanced Topics Under Section 75-1.1

Matt Sawchak

February 7, 2013

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ELLIS&WINTERS LLP

Topics for Today

- Overview of section 75-1.1
- The uncertain scope of "unfairness" liability
- Per se violations
- Choice of law

Overview of section 75-1.1

Overview of N.C. Gen. Stat. § 75-1.1

- First enacted in 1969
- Part of a wave encouraged by the FTC
- Key text: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."
- Private remedies: automatic treble damages, plus possible attorney fees

Broad elements of 75-1.1 claim

(1) unfair or deceptive act or practice

(2) in or affecting commerce

(3) proximate cause and injury

Five categories of 75-1.1 claims

- Per se violations
- Unfair methods of competition
- Deceptive conduct
- Aggravated breaches of contract
- Direct unfairness

What Is “Unfair” Under Section 75-1.1?

Definitions of Unfairness

- “Offends established public policy [or] is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers”
- “An inequitable assertion of its power or position”
- “Coercive conduct”

Definitions of Unfairness, ctd.

- “Undermines the ethical standards and good faith dealings between parties engaged in business transactions”
- Unfair “through the lens of equity”
- “To be determined by all the facts and circumstances”

Usual script of opinions in direct unfairness cases

- Quote one of the above definitions
- Summarize the facts
- State conclusion: unfair or not unfair
- No interweaving of law and facts

Problems from current unfairness standard

- Unpredictability
- Inconsistent results
- Research and advocacy devolve into fact matching (at best)
- Encourages courts and defendants to sidestep section 75-1.1 if at all possible
  - “In or affecting commerce” exemptions
  - “Reverse per se” theories
  - Choice of law

Example of inconsistent results

- "We cannot say that defendant's padlocking procedures offend 'established public policy' or constitute a practice which is 'immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.'" *Spinks v. Taylor* (N.C. 1980).

- Landlord's attempt to collect rent on an unfit property "can be considered immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Allen v. Simmons* (N.C. Ct. App. 1990).

Forward to the Past: Follow FTC Standards for Unfairness

- Section 75-1.1 uses the text of FTC Act § 5
- Attorney General Robert Morgan specifically asked the General Assembly to adopt this language, to establish a connection to FTC standards *and thus avoid vagueness*
- 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." *Henderson* (N.C. 1997); *accord Johnson* (N.C. 1980).

FTC Standards for Unfairness

- Where the adjectives came from: 1964 "Cigarette Rule"; *see S&H* (U.S. 1972):
  - First, consider whether the practice, "without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, 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."
  - Second, ask "whether [the practice] is immoral, unethical, oppressive, or unscrupulous."
  - Third, consider whether the practice "causes substantial injury to consumers (or competitors or other businessmen)."

FTC Standards for Unfairness

- FTC's 1980 Statement to Congress backs away from the Cigarette Rule. To qualify as unfair, an injury now
  - "must be substantial,"
  - "must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces," and
  - "must be an injury that consumers themselves could not reasonably have avoided."
- Later codified in FTC Act § 5(n) in 1994

A path forward

- North Carolina law still calls for following FTC pronouncements
- “Not reasonably avoidable” test pays attention to plaintiff’s options, not just defendant’s conduct
- Test promotes more detailed analysis
- FTC case law and pronouncements continue to develop this test

For more details

See Matthew W. Sawchak & Kip D. Nelson, *Defining Unfairness in "Unfair Trade Practices,"* 90 N.C. L. Rev. 2033 (2012).

Per Se Violations of Section 75-1.1

Key concepts

- Per se violation
- Triggering violations
  - Statutes, regulations, torts
- Standards for upgrading

Per se violations in other states

- Nationwide menu of standards for upgrading is similar to the menu in NC
- Two big areas of difference:
  - Texas allows upgrading only when the triggering statute expressly refers to Texas's section 5 analogue
  - Illinois, Massachusetts, Idaho, Missouri, and Connecticut have statutes or AG regulations with express standards for upgrading

North Carolina's Standards for Upgrading

1. Express upgrading: The triggering authority explicitly refers to section 75-1.1 or to an unfair or deceptive practice (true in about 40 statutes)

   - *E.g.,* N.C. Gen. Stat. § 75-38: "Upon a [qualifying disaster], it is prohibited *and shall be a violation of G.S. 75-1.1* for any person to sell or rent or offer to sell or rent any goods or services which are consumed or used as a direct result of an emergency or which are consumed or used to preserve, protect, or sustain life, health, safety, or economic well-being of persons or their property with the knowledge and intent to charge a price that is unreasonably excessive under the circumstances."

North Carolina's Standards for Upgrading, ctd.

2. Illusory per se violations: When the plaintiff, to achieve a "per se violation," must (a) show the triggering violation *and* (b) still meet the regular conduct standard under section 75-1.1

   - *See, e.g., Drouillard* (N.C. Ct. App. 1992): "If a violation of the Trade Secrets Protection Act *satisfies [the usual] three prong test* [under section 75-1.1], it would be a violation of N.C. Gen. Stat. § 75-1.1."

North Carolina's Standards for Upgrading, ctd.

3. Judgmental upgrading

"[A] violation of a regulatory statute which governs business activities . . . *does not automatically result* in an unfair or deceptive trade practice under that statute.' For that reason, a violation of a consumer protection statute *may, in some instances*, constitute a *per se* violation of [section 75-1.1]."

Fifth Third (N.C. Ct. App. 2011).

North Carolina's Standards for Upgrading, ctd.

3. Judgmental upgrading – two standards in play

   a. When the triggering violation states a detailed conduct standard

      - *E.g., Walker* (N.C. 2007): Noted that the statute at issue in *Gray* "*defined in detail* unfair methods of setting claims and unfair and deceptive acts or practices in the insurance industry, *thereby* establishing the General Assembly's intent to equate a violation of that statute with the more general provision of § 75-1.1."

North Carolina's Standards for Upgrading, ctd.

3. Judgmental upgrading standards, ctd.

   b. When the goals of the triggering violation overlap with the goals of section 75-1.1

   - *Noble* states that triggering violations are upgraded "only where the regulatory statute *specifically* defines and proscribes *conduct which is unfair or deceptive* within the meaning of N.C. Gen. Stat. § 75-1.1."

   - As one example, court in *Noble* cited a statute that had only a similarity in goals to section 75-1.1 – no express reference to it.

North Carolina's Standards for Upgrading, ctd.

- A Special Case: Violations of Regulations
  - Harder or impossible to achieve upgrading
  - *Walker* (N.C. 2007): "Although this Court has previously held that violations of some *statutes*, such as those concerning the insurance industry, can constitute unfair and deceptive trade practices as a matter of law, we decline to hold that a violation of *a licensing regulation* is a UDTP as a matter of law."
  - But: *Walker* did imply twice that a violation of a regulation could play a role in a section 75-1.1 claim

Some of the open issues

- What does the judgmental standard for upgrading really require?
  - A detailed specification of prohibited conduct?
  - A similarity in goals between section 75-1.1 and the triggering statute?
  - Both?
- When a triggering violation does not produce a per se violation, does it still promote a violation? How?

“Reverse Per Se” Analysis

- Courts sometimes reason that a 75-1.1 claim fails *simply because* a triggering claim failed
  - Courts rarely ask whether there would be a 75-1.1 violation *even in the absence of* the other statutory violation or tort
  - *But cf. High Country Arts* (4th Cir. 1997): Although unfair claims practices “constitute per se proof of an unfair or deceptive trade practice under N.C. Gen. Stat. § 75-1.1, failure to prove unfair claims practices does not independently necessitate judgment as a matter of law against a related claim for unfair trade practices.”

Choice of Law in Possible Section 75-1.1 Cases

Two general ways to decide choice-of-law issues

- Apply a choice-of-law provision in a contract
- Apply judge-made doctrines of choice of law

The Effect of Choice-of-Law Clauses

- Courts have held that choice-of-law provisions do not govern possible section 75-1.1 claims
  - Section 75-1.1 is "separate and distinct from any contractual relationship between plaintiff and defendants." *United Virginia Bank* (N.C. Ct. App. 1986).
  - "The nature of the liability allegedly to be imposed by [section 75-1.1] is *ex delicto*, not *ex contractu*. No issue of contractual construction . . . is raised by this case." *ITCO* (4th Cir. 1983).
- But: The clauses at issue to date have not expressly tried to cover extracontractual claims

How North Carolina's Choice-of-Law Rules Apply to Possible Section 75-1.1 Claims

- Traditional NC rule: *lex loci deliciti*

- Beginning in 1980s, Fourth Circuit and some North Carolina Court of Appeals opinions began using the "most significant relationship" test when a 75-1.1 claim was in prospect

- North Carolina Supreme Court has not resolved the split

The "Most Significant Relationship" Test

- Factors the court considered in *Andrew Jackson Sales* (N.C. Ct. App. 1984):
  - Plaintiff was based in North Carolina
  - Defendant's home office and principal place of business were located in South Carolina
  - Plaintiff's proposals to defendant were directed to, received in, and accepted in South Carolina
  - Four of the six stores identified in correspondence between the parties were located in South Carolina
  - The representations alleged to have been unfair and deceptive were made in South Carolina

- Reaction to the broad conduct standard and lucrative remedies under section 75-1.1?

Benefits and Drawbacks of Each Test

- *Lex Loci*
  - Generally easy to reply
  - More reproducible/predictable
  - But: Place of injury is sometimes debatable
- "Most Significant Relationship"
  - Looks to the big picture rather than formalism
  - Responsive to due-process concerns
  - But: Generates unpredictable results
- See *New England Leather* (4th Cir. 1991).

Practice Pointers in View of the Unsettled Choice-of-Law Test

- Does the test make a difference?
- Argue the underlying policy concerns
  - Lack of notice
  - Consumer protection goals of section 75-1.1

Extraterritoriality Constraints on Choice of Law

- Even if choice of law otherwise points to section 75-1.1, due-process concerns can trump this choice

- *The "In" Porters* (M.D.N.C. 1987): "Such a sweeping, punitive cause of action should not be given an extended extraterritorial reach, lest notions of fairness be clipped."

Extraterritoriality constraints, ctd.

- *The "In" Porters* creates a two-part test:
  - There must be an "in-state injury to plaintiff before plaintiff can state a valid unfair trade claim"
  - Plaintiff's North Carolina business operations must be *substantial* for the application of North Carolina substantive law to comport with the Commerce Clause and the Due Process Clause

Extraterritoriality constraints, ctd.

Later decisions qualify *The "In" Porters.* See *Verona* (E.D.N.C. 2011); *Ada Liss* (M.D.N.C. 2010).

Now two alternative routes to extraterritorial application of section 75-1.1:

1. Substantial injury inside North Carolina, *or*
2. Culpable acts inside North Carolina.

Discuss among yourselves

- Decisions like *The "In" Porters* stem from the vague conduct standard and lucrative remedies under section 75-1.1
- What if courts addressed the conduct standard directly?

Questions?

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