I. Introduction

- The North Carolina Unfair Trade Practice Act is one of the most important statutes for civil litigators in the state.

- Although it was originally enacted as a measure of consumer protection, it has been expanded to almost all business litigation.

- Although its use in personal injury and insurance litigation has been more limited, in certain cases Chapter 75 claims are valuable weapons for a plaintiff.

Section 75-1.1.

- The text of 75-1.1 defines the types of activity that are unlawful under Chapter 75.
- "Unfair methods of competition in or affecting commerce, and unfair or deceptive practices in or affecting commerce are declared unlawful.
- The term "commerce" includes "all business activities, however denominated" other than "professional services rendered by a member of a learned profession."
- Also exempted are publishers, owners, agents or employees of any advertising medium that disseminates an advertisement where there was no knowledge by that owner or employee and no direct financial stake in the product or service.
- The burden of proving either a § 75-1.1(b) or (c) exemption rests on the party claiming to be exempt.

B. Section 75-16.

- Section 75-16 of the Unfair Trade Practice Act grants a private right of action to those harmed by acts unlawful under § 75-1.1.

- If any person shall be injured or the business of any person, firm, or corporation shall be broken up, destroyed, or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm, or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amounts fixed by the verdict.

In order to make a valid claim under § 75-16, the plaintiff must be able to show

(1) defendants committed an unfair or deceptive act or practice;

(2) in or affecting commerce; and

(3) that plaintiff was injured thereby."

- The statute is not entirely punitive in nature, "in that it clearly serves as a deterrent to future violations."
- However, "it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties.

C. Section 75-16.1

- A plaintiff who brings a successful claim under 75-16 may in some circumstances be awarded attorneys' fees pursuant to § 75-16.1(1).
- The award is dependent upon a finding by the trial judge that that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis for such suit."
- The purpose of the trebled damages and award of attorneys' fees "were to encourage private enforcement in the marketplace and to make the bringing of such a suit more economically feasible

D. Section 75-16.2.

- The statute of limitations for a Chapter 75 claim is governed by § 75-16.2. Under this Section, “any civil action . . . to enforce the provisions [of Chapter 75] shall be barred unless commenced within four years after the cause of action accrues

- Section § 75-16.2 in the insurance setting was heavily discussed in a recent North Carolina Court of Appeals case, Piles v. Allstate Ins. Co.

- The case revolved around the alleged forging of the plaintiff's signature on a selection/rejection form for uninsured/underinsured motorist coverage, purportedly denying coverage.

- Although the alleged forgery took place in 1998, the Court of Appeals overturned the trial court's dismissal of the complaint due to the running of the statute of limitations. The wreck which caused her injuries took place in 2000, and her settlement with the other driver, which exhausted that driver's policy limits, took place in 2004.

- She was denied coverage under the insurance in November of 2004. Judge Wynn, writing for the Court, stated that her claims for "unfair and deceptive trade practices are premised at least in part on Allstate Insurance's actions in response to the claim she filed for UIM insurance. As such they accrued in November 2004, when she was denied UIM coverage

- Accordingly, under Piles, claims for unfair and deceptive trade practices arising out of the wrongful denial of insurance coverage accrue at the date of denial, as opposed to the date of the underlying fraudulent or wrongful act that created the purported grounds for denial. However, the jury may still determine whether the plaintiff should have discovered the alleged fraud or negligence sooner through reasonable diligence, and find that the claim is time barred, if reasonable diligence would have led to discovery prior to four years before the action was filed.

III. LITIGATING UNFAIR TRADE PRACTICE CLAIMS

- Under certain circumstances, Chapter 75 may be used in claims for personal injury. They can be brought for the underlying injury, as well as for fraudulent or unfair acts by an insurer in processing a personal injury claim.

Utilizing Chapter 75 in personal injury claims.

- In certain situations, a Chapter 75 claim is applicable under personal injury settings. There are several benefits to the use of such a claim, where appropriate, by a plaintiff, including the fact that contributory negligence is not a defense to § 75-16 actions. ______________________________

- *See* Concrete Serv. Corp. v. Inv. Group, Inc., 79 N.C. App. 678, 685, 340 S.E.2d 755, 760 (1986) ("An action for unfair or deceptive acts or practices is *sui generis*. The legislation creating these actions expanded existing common law remedies. Therefore traditional common law defenses such as contributory negligence or good faith are not relevant."); Winston Realty, 70 N.C. App. at 381, 320 S.E.2d at 290 (...the Legislature did not intend for violations of this Chapter to go unpunished upon a showing of contributory negligence. If unfair trade practitioners could escape liability upon showing that their victims were careless, gullible, or otherwise inattentive to their own interests, the Act would soon be a dead letter.")

i. Unfair or deceptive act or practice

- There is no precise definition of what constitutes an "unfair act or practice" under North Carolina law. However, whether or not an act is unfair is a matter of law for the court to determine, guided by the facts as found by the jury. Generally, an act or practice is unfair under § 75-1.1 if it "offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Alternatively, a party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position."

- As regards deceptive conduct, an act is deceptive under the statute if the act or practice “possessed the tendency or capacity to mislead or created the likelihood of deception.” “It is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception.” Further, “[w]ords or phrases, though literally true, may still be deceptive.”

- Certain specific acts that may be implicated in a personal injury action could be false or misleading advertising, especially of the safety benefits of a product, Howerton v. Arai Helmet, 358 N.C. 440, 597 S.E.2d 674 (2004).

- Nondisclosure of a reputation for poor or unsafe work by an independent contractor or subcontractor used by the defendant. *See* South Atl. Partnership of Tenn., L.P. v. Reese, 284 F.3d 518 (4th Cir. 2002) (limited partner's nondisclosure to partnership of subcontractor's reputation for poor work was sufficiently egregious to constitute a Chapter 75 violation).

- The use of the UDTPA in these situations would allow the plaintiff to avoid problems involving common law defenses such as contributory negligence, and, in the latter case, could provide the plaintiff with the means of showing direct liability on the part of the independent contractor's principal, where the principal's vicarious liability is difficult to prove.

ii. In or affecting commerce

- North Carolina courts have generally given an expansive interpretation of what constitutes acts or practices "in or affecting commerce" that would lead to liability under the Act. The only statutory restraint is that the act or practice constitutes a "business activity", and that it not consist of professional services rendered by a member of a learned profession.

- "Business activities is a term which connotes the manner in which businesses conduct their regular, day to day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized."

- These acts tend to involve buyer and seller relationships, but "courts have also recognized actions based on other types of commercial relationships, including those outside of contract."

- “Although this statutory definition of commerce is expansive, the Act is not intended to apply to all wrongs in a business setting.”
- It does not apply to employer-employee relationships, nor does it apply to the sale of securities.
- Also, courts have held that the UDTPA has been preempted by federal law in certain circumstances.

iii. The injury to the Plaintiff

- The North Carolina Unfair Trade Practice Act does not disqualify personal injury actions from being brought under it, unlike similar acts in other states.

- "If any person shall be injured . . ." N.C.G.S. § 75-16 (2008).

- On the other hand, a similar statute in Oregon allows for treble damage recovery of "any ascertainable loss of money or property," thereby directly precluding the recovery of personal injury damages in the language of the statute itself. O.R.S. § 646.638(1) (2008). Likewise, the Hawaii statute also limits damages within the actual statutory language, allowing only someone "who is injured in . . . business or property" to recover under the statute. H.R.S. § 480-13 (2008).

- In Howerton v. Arai Helmet, Ltd., the North Carolina Supreme Court allowed recovery under Chapter 75 for personal injury.
- The plaintiff in Howerton was rendered a quadriplegic after falling from a motocross bike. Upon impact, the chin guard attached to his helmet broke free, pushing his chin into his chest, causing cervical fractures in the C5 and C6 vertebrae.
- Howerton brought suit against the manufacturer of the helmet for, among other claims, violation of § 75-1.1. He claimed that the manufacturer "intentionally disseminated false and misleading information concerning the safety of his helmet, which led him to believe that the helmet provided superior protection from injury and was 'the best in the market

- The North Carolina Supreme Court overturned summary judgment for the defendant manufacturer, stating that the advertisement and placement of a safety sticker on the helmet could constitute an unfair act or practice, and that the plaintiff’s reliance on the statements concerning the safety of the helmet and the placement of stickers that were known to signify that a helmet was suitably safe for use with motocross cycles was enough to allow the jury to determine liability.

- Under the North Carolina UDTPA, there does not have to be a financial or business injury in order for the plaintiff to recover. Recovery for injury to the person is expressly allowed, where that personal injury was proximately caused to the plaintiff by the unfair or deceptive acts or practices of the Defendant.

- Dellinger v. Pfizer 2006 U.S. Dist. LEXIS 96355, Western District of N.C., Statesville Division: Judge Richard Voorhees

- Summary: Dellinger suffered numerous injuries associated with "off label" use of Neurontin. Pfizer, Inc., and Parke-Davis had developed a well-designed and extensive scheme to promote Neurontin as an "off-label" drug.

- Reportedly, the scheme involved Defendants' violations of statutes and regulations that prohibit a manufacturer of prescription drugs regulated by the FDA from promoting or marketing the use of the drugs for purposes or in dosages other than those approved by the FDA. Promotion of "off-label" uses of prescription drugs, such as Neurontin, is strictly illegal and contrary to policies and regulations of the United States Government.

- More specifically, in order to increase the sale of Neurontin, Defendants developed a strategy to take advantage of a loophole in the law regarding "off-label" promotions by hiring "medical liaisons." Allegedly, "medical liaisons" were trained to use knowingly false information about Neurontin's "off label" uses when speaking with doctors and were told to lie about their credentials. "Medical liaisons" also allegedly engaged in repetitive distribution of non-scientific, anecdotal data designed to convince physicians that "off-label" uses of Neurontin were safe and effective.

- According to the Plaintiff, the key to selling Neurontin as an "off-label" drug was misrepresentation in that the fraudulent promotional scheme by Parke-Davis corrupted the information process relied upon by doctors in their medical decisions.
- Plaintiff further contends that no valid scientific evidence supports the contention that Neurontin is safe and effective for pain or other "off-label" uses. In fact, Parke-Davis is currently conducting actual legitimate trials investigating the use of Neurontin for relief of certain types of pain. However, these trials are not complete.

- Defendants filed a Motion for Summary Judgment as to the claim for unfair and deceptive trade practices, contending that it did not cover personal injury claims. The trial Court stated:
- Defendants contend the Court should dismiss Plaintiffs claim of unfair and deceptive trade practices on the grounds that the statute does not provide redress for consumers' personal injury damages. In response, Plaintiff contends that an action for unfair and deceptive practices is its own separate and discrete statutory action and is, therefore, *sui generis.*

- As an initial matter, the Court is not convinced that Plaintiff has no "economic injury." Defendants posit that Plaintiff has "no out-of-pocket loss relating to the cost of the drug or any other consumer injury." Defendants' argument relies in part on the fact that Plaintiff received worker's compensation benefits and was not required to pay for the Neurontin at the time it was prescribed or any of the costs associated with his illness. However, in evaluating whether Plaintiffs action is cognizable (as opposed to the calculation of a monetary damages award), the Court considers the *existence* of Plaintiffs damages (i.e., medical expenses, lost wages, and the like) - not whether Plaintiffs damages were offset by a collateral source.

- Secondly, N.C. Gen. Stat. § 75-16 fails to include or exclude specific types of injuries giving rise to a cause of action under the statute. Section 75-16 provides a cause of action:

- "[i]f *any person shall be injured* or the business of any person, firm or corporation shall be broken up, destroyed *or injured by reason of any act or thing done by any other person,* [*14] firm or corporation in violation of the provisions of this Chapter..."N.C. GEN. STAT. § 75-16 (2006) (emphasis added). Thus, the provision expressly contemplates persons being injured and that a cognizable injury may be the result "of any act or thing done by any other person..." *Id.* Section 75-16 does not support Defendants' position.

- Notwithstanding the statute, Defendants argue that "the UDTPA nowhere provides for the recovery of damages resulting from a claim of personal injury," due to the Act's treble damages provision and the lack of case law addressing personal injuries under the Act. Defendants point to the availability of treble damages under the UDTPA as *evidence* that recovery under the Act is limited to economic damages incurred by consumers as opposed to damages resulting from personal injury. On the contrary, Defendants' argument essentially advances a suggested policy. Further, Defendants concede that the private enforcement aspect of the UDTPA is necessary to protect "aggrieved consumers" given that "common law remedies were often ineffective." Here, Plaintiffs breach of warranty and product liability claims were time-barred by the time Plaintiff discovered the alleged fraudulent scheme and are, therefore, ineffective remedies. According to North Carolina case law, such gaps in the consumer protection laws are precisely what the UDTPA contemplated.

B. Chapter 75 in insurance litigation.

- One of the Unfair Trade Practice Act's greatest benefits to a plaintiff is the ability to maintain an action against an insurer for the failure to properly cover a loss or defend a claim. Since its inception, Chapter 75 has been used against insurers for their failures to properly defend or indemnify their insured.

- Unfair insurance practices are properly subject to Chapter 75.

- "The business of insurance is unquestionably in commerce insofar as an exchange of value occurs when a customer purchases an insurance policy; people who buy insurance are consumers whose welfare Chapter 75 was intended to protect."

- Proof of unfair insurance claims practices under Chapter 58 of the North Carolina Statutes constitutes per se proof of unfair or deceptive trade practices under North Carolina law.

- Fourteen acts which constitute unfair claims settlement practices are defined in N.C.G.S. § 58-63-15(11).

- These include
- (a) misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
- (b) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- (c) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- (d) refusing to pay claims without conducting a reasonable investigation based upon all available information;
- (e) failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed;

- (f) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
- (g) compelling insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured;
- (h) attempting to settle a claim for less than the amount which a reasonable man would have believed he was entitled;
- (i) attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;

- (j) making claims payments to insureds or beneficiaries not accompanied by statement setting forth the coverage under which the payments are being made;
- (k) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
- (l) delaying the investigation or payment of claims by requiring an insured claimant, or the physician, or either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information;
- (m)failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy;

- and (n) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or of the offer of a compromise settlement. N.C.G.S. § 58-63-15(11) (2008).

- Chapter 58 does not grant anyone other than the insurance commissioner a right of action against the insurer, unless there is a pattern and practice of abuse.
- However, a plaintiff may bring a claim for a single violation of § 58-63-15(11) under § 75-16.
- Such a violation is a per se violation of § 75-1.1 and recoverable by a private party against the insurer.

- A final judgment against the insured is not necessary for the insurer to be liable under Chapter 75 for failure to properly defend and offer coverage.

- The Fourth Circuit held in ABT v. National Union that such a requirement "would substantially undermine § 58-63-15(11)(f), which does not require a final judgment before an insurer has a duty to effectuate a settlement."

- Although Chapter 58 defines unfair claims practices, "failure to prove unfair claims practices does not independently necessitate judgment as a matter of law against a related claim for unfair trade practice."

- Independent bases for an unfair act or practice in the claims context include misrepresentations by the insurer about the nature of its investigation and utilizing unfair and improper rationales for their exclusion of coverage.

- In claims by the insured against the insurer, trebled damages awarded under § 75-16 are available.
- However, under North Carolina law, treble damages are only available to the insured, and not to a third party beneficiary. Wilson v. Wilson, 121 N.C. App. 662, 665, 468 S.E.2d 495, 498 (1996).
- An injured third party may only directly recover from the insurer the limits of the insurer's coverage.
- The plaintiff may only proceed against the insurer for its policy limits once there has been a judgment against the defendant.
- Unfair trade practice claims are not directly assignable, and so an insured may not contract away his right to a § 75-16 to the injured party as part of any settlement agreement.

- One method for the injured party to reach the insurance company for trebled damages and attorneys' fees under Chapter 75 would be through the insured's bankruptcy.
- In North Carolina, potential Unfair Trade Practice claims may be pursued by the bankruptcy trustee on behalf of the bankruptcy estate. The injured party would have to execute on a judgment against the insured and force the insured into bankruptcy. The bankruptcy trustee, on behalf of the insured and the bankruptcy estate may have a bad faith or Unfair Trade Practice claim as part of the estate.
- Then, as a judgment creditor, he may have the right to the proceeds by the bankruptcy estate against the insurance company, up to the amount of the underlying judgment.
- Although untested in North Carolina, this method seems to create the greatest chance for a plaintiff to recover damages over and above the underlying policy limits.

- The North Carolina Unfair Trade Practice Act is a potential avenue for recovery where the defendant's wrongful conduct constituted an unfair or deceptive act of business. It has numerous benefits to a potential plaintiff, specifically the unavailability of a defense of contributory negligence and trebled damages and a potential award of attorneys' fees. Further, it can constitute a method of recovery against an insurer that wrongfully refuses to defend or cover a claim.

- There are several cases in which the courts have held that an insurer was required to at least defend against the UDTPA claim, but perhaps not indemnify against one. One can argue that if there is a duty to defend based on the policy language then there is insurance coverage for the claim.

- The determination of whether a UDTPA claim will be defended against hinges largely on the court's interpretation of the policy agreement, the complaint in the underlying claim, and the scope of the statutory basis for the UDTPA claim.

- In Granutec, Inc. v. St. Paul Fire & Marine Ins. Co., 1998 U.S. Dist. LEXIS 3527 (M.D.N.C., Jan. 16, 1998), the court held that the insurer was required to defend the insured against the underlying claims of a third-party. In Granutec the court stated that an insurer's "duty to defend arises only if: (1) an action alleged in the complaint is either explicitly stated in the policy or arguably covered by a more general category; and (2) the complaint identifies some causal nexus between the offenses alleged and the injury sustained." The court held that where one of the third-party's claims is arguably covered under the insurance policy, the insurer was under a duty to defend. Here, the unfair competition claim by the third-party was analogous to the "misappropriation of advertising and ideas or style of doing business" provision of the insurance policy.

- In Sibley v. Nat'l Union Fire Ins. Co. of Pittsburgh, 921 F. Supp 1526 (E.D.Tex. 1996) the court held that a law firm sued under the Louisiana Unfair Trade practices Act was entitled to defense by the insurer. Because the law firm could be held liable for one underlying claim without a showing of intent, the policy exclusion regarding dishonest, fraudulent, or malicious acts was not a proper basis upon which the insurer could deny its duty to defend.

- Auto Europe, L.L.C. v. Conn. Indemnity Co., 2002 U.S. Dist LEXIS 5249 (Maine, Mar. 28, 2002): In the Auto Europe case, the court noted that the underlying complaint alleged bad faith and intentional conduct as well as alleged deceptive conduct under the Maine Unfair Trade Practices Act (which did not require proof of intent). The court held that the insurer was required to defend the insured under the policy since the potential liability for mere negligence under the MUTPA would bring the complaint within the policy terms.

- Several cases in which the insurer has not been held to be under a duty to defend were found as well. In these, the court found that the facts, policy provisions, or interpretations of common policy definitions were unambiguous or necessitated a determination that the acts were plainly outside of the policy's provisions. See Am Nat'l Fire Ins. Co. v. Methods Research Corp., 2000 U.S. Dist. LEXIS 17748 (N.D. Ill., Dec. 4, 2000); Open Software Foundation, Inc. v. United States Fidelity & Guaranty Co., 2001 U.S. Dist. LEXIS 12019 (Mass., Aug. 16, 2001); Pacific Group v. First State Ins. Co., 62 F.3d 1425 (9th Cir. 1995); Western Int'l. Syndication Corp. v. Gulf ins. Co., 2004 U.S. Dist. LEXIS 17867 (C.D. Cal., Sept. 1, 2004).

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