REFINING PER SE UNFAIR TRADE PRACTICES*

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North Carolina's "unfair or deceptive acts or practices" statute, section 75-1.1 of the North Carolina General Statutes, is a central feature of North Carolina litigation. The statute allows lucrative remedies, but it defines prohibited conduct with only vague standards. Courts have difficulty applying these standards in any detail, so they often use analytical shortcuts in decisions under the statute.

One key shortcut under section 75-1.1 is the "per se violation." A per se violation arises when actions that violate a source of law outside section 75-1.1—a different statute, a regulation, or a nonstatutory doctrine—automatically violate section 75-1.1 as well. A per se violation has a transformative effect: in one stroke, it turns a claim for single damages into a claim for treble damages and possible attorney fees.

Courts in section 75-1.1 cases have struggled to decide when to carry out, and when to refuse, this transformation. They have accepted and rejected per se theories with no explanation or with question-begging explanations. They have also sidestepped the problems with a per se theory by applying a number of variations on per se theories. This variety of approaches leaves courts and lawyers to guess at what analysis to apply in future cases.

The courts can end this confusion by sharpening the per se theory and replacing parts of it. In many instances, the General

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Assembly has announced, directly or indirectly, that a violation of a given statute is also a violation of section 75-1.1. Courts should continue to apply these per se violations. In all other cases, however, courts should ask whether the conduct that makes up a separate violation satisfies the tests for unfairness under section 75-1.1. The tests for unfairness already address violations of separate statutes and other expressions of public policy. This streamlined approach will strengthen the analysis of per se and non-per-se violations alike.

INTRODUCTION

Section 75-1.1 of the North Carolina General Statutes is a prominent feature of North Carolina litigation. The statute condemns an undefined category of conduct: "unfair or deceptive acts or practices."[1] A claim under section 75-1.1 is "a boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina."[2]

Two factors make section 75-1.1 claims so common. First, a violation of the statute triggers powerful remedies: automatic treble damages, plus an opportunity to recover attorney fees.[3] Second, the definition of conduct that violates section 75-1.1 is so vague that

1. N.C. GEN. STAT. § 75-1.1(a) (2013). This Article refers to this statute as "section 75-1.1." This phrasing mirrors the phrasing in recent North Carolina appellate opinions. *See, e.g.*, Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 747 S.E.2d 220 (2013).

The title of this Article uses the phrase "unfair trade practices" because lawyers and judges recognize this phrase most readily. *See* GE Betz, Inc. v. Conrad, __ N.C. App. __, __, 752 S.E.2d 634, 650 n.6 (2013) (noting that the phrase "unfair or deceptive trade practices" still "remains common in legal parlance today"), *petition for disc. rev. filed*, No. 111P10-2 (N.C. Jan. 7, 2014); NOEL L. ALLEN, NORTH CAROLINA UNFAIR BUSINESS PRACTICE § 1.01, at 1-1 (3d ed. 2014) (making a similar point).

2. Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 347 (4th Cir. 1998) (quoting Allied Distribs., Inc. v. Latrobe Brewing Co., 847 F. Supp. 376, 379 (E.D.N.C. 1993)).

3. *See* N.C. GEN. STAT. §§ 75-16, -16.1.

For other statutes that allow automatic treble damages, see, for example, Clayton Act § 4, 15 U.S.C. § 15 (2012); Racketeer Influenced and Corrupt Organizations (RICO) Act § 4(c), 18 U.S.C. § 1964(c); N.C. GEN. STAT. § 75D-8(c) (North Carolina's RICO statute).

unless a categorical exemption applies, there is almost always a credible prospect that a claim will succeed.[4]

Because the conduct standard under section 75-1.1 is vague, courts struggle to apply the statute consistently and to explain their decisions.[5] Courts often avoid these struggles by applying judicially created exemptions or other analytical shortcuts.[6]

A key type of shortcut under section 75-1.1 is the "per se violation." A per se violation occurs when actions that violate a standard outside section 75-1.1—a separate statute, a regulation, or a common-law doctrine—automatically violate section 75-1.1 as well.[7]

A per se theory has a powerful effect: it turns a claim that offers only single damages into a claim that offers treble damages and possible attorney fees.[8] Indeed, a per se theory can produce these

4. *See, e.g.*, Matthew W. Sawchak & Kip D. Nelson, *Defining Unfairness in "Unfair Trade Practices*," 90 N.C. L. REV. 2033, 2043–50 (2012) (discussing the standards for violations of section 75-1.1).

5. *See, e.g.*, *id.* at 2051–54; *see also* Thomas A. Farr, *Unfair and Deceptive Legislation: The Case for Finding North Carolina General Statutes Section 75-1.1 Unconstitutionally Vague as Applied to an Alleged Breach of a Commercial Contract*, 8 CAMPBELL L. REV. 421, 426–32 (1986) (describing the unpredictable application of section 75-1.1 and arguing that, at least in non-consumer cases, the statute is unconstitutionally vague).

6. *See, e.g.*, R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 396 (M.D.N.C. 2002) (holding that the failure of federal antitrust claims defeated a section 75-1.1 claim "for essentially the same reasons"), *aff'd mem.*, 67 F. App'x 810 (4th Cir. 2003); White v. Thompson, 364 N.C. 47, 53, 691 S.E.2d 676, 680 (2010) (holding that section 75-1.1 does not apply to a business's internal operations); Sawchak & Nelson, *supra* note 4, at 2053–56 (noting these and other analytical shortcuts).

7. Per se violations of section 75-1.1 resemble cases of negligence per se in tort law. Negligence per se allows a statute or regulation to become a standard that creates liability for negligence, whether or not the predicate violation itself would otherwise create civil liability. *See, e.g.*, Baldwin v. GTE S., Inc., 335 N.C. 544, 546, 439 S.E.2d 108, 109 (1994) (stating the North Carolina standard for negligence per se). *See generally* Robert F. Blomquist, *The Trouble with Negligence Per Se*, 61 S.C. L. REV. 221 (2009) (laying out the disorderly state of the doctrine of negligence per se and proposing partial solutions).

In antitrust law, in contrast, a per se theory does not involve the relationship between a separate source of law and antitrust doctrine. Instead, it is a streamlined way of applying antitrust doctrine itself. A per se rule treats certain "categories of restraints as necessarily illegal, eliminat[ing] the need to study the reasonableness of an individual restraint in light of the real market forces at work." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007). *But cf.* ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS 376 & n.7 (2009) (using the term "per se" to refer to specific lists of prohibited conduct in statutes similar to section 75-1.1); John F. Graybeal, *Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina*, 80 N.C. L. REV. 1927, 1956–57 (2002) (discussing the occasional role of section 75-1.1 as an antitrust statute).

8. *See, e.g.*, Kettle v. Leonard, No. 7:11-CV-189-BR, 2012 WL 4086595, at *12 (E.D.N.C. Sept. 17, 2012) (treating a fraud claim as a per se violation of section 75-1.1 and awarding treble damages as a result); Trantham v. Michael L. Martin, Inc., __ N.C. App.

remedies even when an underlying violation allows no private recovery at all.[9]

Although per se violations of section 75-1.1 have existed for almost forty years,[10] courts have not developed reliable standards to decide when per se violations will and will not arise.[11] In one recent decision, for example, the North Carolina Court of Appeals stated that courts recognize per se violations "only where the regulatory

__, __, 745 S.E.2d 327, 335 (2013) (doing the same with claims for fraud and negligent misrepresentation).

9. *See, e.g.*, Guessford v. Pa. Nat'l Mut. Cas. Ins. Co., 983 F. Supp. 2d 652, 660 (M.D.N.C. 2013) (noting that N.C. GEN. STAT. § 58-63-15(11) creates no private right of action, but then stating: "[I]f Plaintiff can prove that Defendant acted in a way that violated § 58-63-15(11) . . . then Plaintiff will be able to establish his [section 75-1.1] claim and thereby may seek treble damages arising from the alleged [section 75-1.1] violation").

10. *See* Hardy v. Toler, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975) ("Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts . . . .").

11. *See infra* notes 44–81, 139–63 and accompanying text (analyzing the case law on per se violations).

Likewise, the nationwide literature on statutes like section 75-1.1 does not analyze standards for per se violations in depth. *See, e.g.*, ABA SECTION OF ANTITRUST LAW, *supra* note 7, at 376 (describing explicit per se provisions in some states' statutes); ANTITRUST & UNFAIR COMPETITION LAW SEC., STATE BAR OF CAL., CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW § 16.04[B], at 16-19 to -22 (Cheryl Lee Johnson ed., rev. ed. 2013) (discussing which federal and California statutes can be "predicate acts" that establish a violation of California's Unfair Competition Law); CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES §§ 3.2.7.3 to .4 (8th ed. 2012 & Supp. 2013) (discussing potential sources of per se violations, but not standards for creating or rejecting per se violations); MICHAEL C. GILLERAN, THE LAW OF CHAPTER 93A § 4.14 (2d ed. 2007 & Supp. 2013) (volume 52 in MASSACHUSETTS PRACTICE SERIES) (discussing standards for per se violations under the Massachusetts statute); J. CLARK KELSO, UNFAIR TRADE PRACTICES LITIGATION (1995) (containing no discussion of per se violations); ROBERT M. LANGER ET AL., CONNECTICUT UNFAIR TRADE PRACTICES, BUSINESS TORTS AND ANTITRUST § 2.8, at 87–94 (2013-2014 ed.) (volume 12 in CONNECTICUT PRACTICE SERIES) (describing cases in which courts have recognized other violations as per se violations of the Connecticut Unfair Trade Practices Act); 1 DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 3:27, at 156–66 (2013-2014 ed.) (listing instances in which violations of state or federal statutes have established per se violations of a statute like section 75-1.1); Mark S. Fistos, *Per Se Violations of the Florida Deceptive and Unfair Trade Practices Act*, 76 FLA. B.J. 62, 62–64 (2002) (discussing standards for per se violations of the Florida Deceptive and Unfair Trade Practices Act); James A. McKenna, *Consumer Protection and the Unfair Trade Practices Act*, 9 ME. B.J. 78, 80 (1994) (listing specific statutes that constitute "per se and prima facie evidence" violations of the Maine Unfair Trade Practices Act); Jonathan A. Mark, Comment, *Dispensing with the Public Interest Requirement in Private Causes of Action Under the Washington Consumer Protection Act*, 29 SEATTLE U. L. REV. 205, 212–13 (2005) (discussing contradictory holdings on the test for a per se violation of Washington's statute like section 75-1.1); Joseph Thomas Moldovan, Comment, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 BROOK. L. REV. 509, 560–61 (1982) (arguing that New York courts should recognize per se violations of New York's statute).

statute [that creates the underlying violation] specifically defines and proscribes conduct which is unfair or deceptive within the meaning of [section] 75-1.1."[12] If one could identify "conduct which is unfair or deceptive" as easily as this passage assumes, there would be little need for per se violations. Unclear standards like these have produced muddled doctrine.[13]

In part because of the underdeveloped standards for per se violations, courts have improvised a number of variations on per se theories—approaches that give some weight to other violations, but do not treat them as automatic violations of section 75-1.1. The case law reveals at least four of these variations.[14] Courts have not explained why these approaches exist. Nor have they explained when each approach applies.

This Article proposes that courts end this chaos by sharpening the per se theory and replacing parts of it with better-established doctrine.

In many statutes, the North Carolina General Assembly has announced expressly, or almost expressly, that a violation of a given statute is a violation of section 75-1.1.[15] Courts should continue to treat these statutes as sources of per se violations. In the absence of such a statement by the legislature, however, courts should not apply a per se analysis or any of its variants. Instead, courts should ask whether the conduct that makes up a separate violation satisfies, on a non-per-se basis, the test for unfairness under section 75-1.1.[16]

12. Noble v. Hooters of Greenville (NC), LLC, 199 N.C. App. 163, 170, 681 S.E.2d 448, 454 (2009) (emphasis deleted).

Although this language might imply that the court of appeals was requiring an explicit cross-reference to section 75-1.1, the rest of the decision shows that the court was not. *See id.* at 170 n.3, 171, 681 S.E.2d at 454 n.3, 455 (treating statutes without any explicit cross-reference to section 75-1.1 as ones that met the court's "specifically define and proscribe" test).

13. *See, e.g.*, *In re* Fifth Third Bank, Nat'l Ass'n—Vill. of Penland Litig., 217 N.C. App. 199, 207, 719 S.E.2d 171, 176 (2011) ("[A] violation of a consumer protection statute *may, in some instances*, constitute a per se violation of [section 75-1.1]." (emphasis added and deleted)); Battleground Veterinary Hosp., P.C. v. McGeough, No. 05 CVS 18918, 2007 WL 3071618, at *8 (N.C. Bus. Ct. Oct. 19, 2007) ("[P]roof of an independent tort *generally is sufficient* to make out a separate [section 75-1.1] claim." (emphasis added)).

14. *See infra* notes 83–87 and accompanying text.

15. *See* ALLEN, *supra* note 1, § 1.03, at 1-8 n.22 (listing statutes with explicit cross-references to section 75-1.1).

16. That test provides, in relevant part, that "[a] practice is unfair when it offends established public policy." *E.g.*, Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 72, 653 S.E.2d 393, 399 (2007) (quoting Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981)).

Sources that define unfairness show how to analyze violations of separate statutes, regulations, and other expressions of public policy.[17]

This streamlined analysis will give courts, lawyers, and clients a consistent way to decide how violations of other sources of law affect claims under section 75-1.1. It will also give the General Assembly an incentive to create per se violations expressly when it intends them. Finally, by unifying the case law on per se violations with the case law on public-policy-based violations of section 75-1.1, the proposed analysis will help courts refine both theories under the statute.

Part I of this Article gives an overview of section 75-1.1, its history, and litigation under the statute. Part II describes the current doctrine on per se violations of section 75-1.1. Part III discusses the problems with the current standards for per se violations and related theories. Part IV proposes solutions to these problems. Specifically, it proposes that courts refocus the per se doctrine on legislatively declared violations and replace the remaining theories in this area with parts of the unfairness doctrine.

I. AN OVERVIEW OF SECTION 75-1.1

Section 75-1.1 provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."[18] The North Carolina General Assembly enacted section 75-1.1 in 1969.[19] The statute was part of a nationwide wave of consumer-protection measures that states enacted in the 1960s and early 1970s, partly at the encouragement of the Federal Trade Commission.[20]

One mark of the FTC's role in promoting section 75-1.1 is the text of the statute, which mirrors the text of section 5 of the Federal Trade Commission Act.[21] Because of this parallel statutory language,

17. *See infra* notes 221–34 and accompanying text.

18. N.C. GEN. STAT. § 75-1.1(a) (2013).

19. Act of June 12, 1969, ch. 833, § 1(b), 1969 N.C. Sess. Laws 930, 930 (codified at N.C. GEN. STAT. § 75-1.1 (2013)).

20. *See, e.g.*, Marshall v. Miller, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981); ABA SECTION OF ANTITRUST LAW, *supra* note 7, at 375; Graybeal, *supra* note 7, at 1933–34; William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 730 (1972).

21. *Compare* N.C. GEN. STAT. § 75-1.1(a) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."), *with* 15 U.S.C. § 45(a)(1) (2012) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."). *See generally* Robert Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRAMURAL L. REV. 1, 18–20 (1969) (discussing

North Carolina courts have said that in section 75-1.1 cases, they take guidance from authorities under section 5.[22]

A section 75-1.1 claim offers lucrative private remedies. Successful claims under the statute generate mandatory treble damages.[23] In addition, a prevailing plaintiff can recover attorney fees if she proves that the defendant violated the statute willfully and committed an "unwarranted refusal . . . to fully resolve the matter which constitutes the basis of" a section 75-1.1 lawsuit.[24] Unsurprisingly, claims under the statute have generated large verdicts and settlements.[25]

Section 75-1.1 combines these lucrative remedies with a vague test for liability. Unlike parallel statutes in most other states,[26] section 75-1.1 does not contain a list of specifically prohibited business practices. Instead, the courts have used broadly worded tests to assess liability under the statute. According to the Supreme Court of North Carolina, "[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. [A] practice is deceptive if it has the capacity or tendency to deceive."[27]

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the history of the enactment of section 75-1.1, including the intentional decision to follow the language of section 5).

Given the close relationship between section 5 and state statutes like section 75-1.1, this Article uses the term "section 5 analogues" to describe state statutes that condemn unfair and deceptive acts and practices (including but not limited to statutes with a text that mirrors section 5). *See, e.g.*, PRIDGEN & ALDERMAN, *supra* note 11, § 2:10, at 41–43 (describing the multiple forms of section 5 analogues).

22. *See, e.g.*, Henderson v. U.S. Fid. & Guar. Co., 346 N.C. 741, 749, 488 S.E.2d 234, 239 (1997) (stating that 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" (citation omitted)); *see also* Sawchak & Nelson, *supra* note 4, at 2064–65 (discussing other decisions to the same effect).

23. *See* N.C. GEN. STAT. § 75-16; Bhatti v. Buckland, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) ("If a violation of Chapter 75 is found, treble damages must be awarded.").

24. N.C. GEN. STAT. § 75-16.1(1). Section 75-16.1 also allows *reverse* fee shifting if "[t]he party instituting the action knew, or should have known, the action was frivolous and malicious." *Id.* § 75-16.1(2). Reverse fee awards under section 75-16.1, however, are relatively rare. *See* ALLEN, *supra* note 1, § 11.10, at 11-35 to -42.

25. *See, e.g.*, *Large Verdicts & Settlements*, N.C. LAW. WKLY., Jan. 31, 2011, at 8 (reporting a $10.1 million arbitration award on a counterclaim for "unfair/deceptive trade practices"); *Top Verdicts & Settlements*, N.C. LAW. WKLY., Feb. 6, 2012, at 9 (reporting an $8.7 million verdict for "unfair and deceptive trade practices").

26. *See, e.g.*, PRIDGEN & ALDERMAN, *supra* note 11, app. 3B, at 174–76 (listing thirty-eight states and territories whose section 5 analogues include a list—in most cases, a nonexclusive list—of prohibited acts).

27. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 72, 653 S.E.2d 393, 399 (2007) (second alteration in original) (citation omitted) (quoting Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981)). As noted below, there are also three other

The case law under section 75-1.1 reflects the open-ended nature of these tests. For example, North Carolina courts have declined to limit the statute to consumer claims or to buyer-seller relationships.[28] A section 75-1.1 plaintiff, moreover, can prevail without showing a defendant's bad faith, intent, willfulness, or knowledge.[29] Further, a plaintiff's contributory negligence is no defense to a claim under the statute.[30] As these examples suggest, the conduct standard under section 75-1.1 is so broad that unless a categorical exemption applies, there is almost always a credible prospect that a section 75-1.1 claim will succeed.[31]

In view of the lucrative remedies and vague standards for claims under section 75-1.1, it should be no surprise that North Carolina lawyers include a section 75-1.1 claim in almost every lawsuit that involves business conduct.[32] Indeed, "[i]n modern business litigation

types of section 75-1.1 claims: (1) claims for unfair methods of competition, (2) claims based on "aggravated" breaches of contracts, and (3) claims for per se violations of section 75-1.1. *See infra* note 35 and accompanying text.

28. *See, e.g.*, United Labs., Inc. v. Kuykendall, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988).

29. *See, e.g.*, Marshall v. Miller, 302 N.C. 539, 544, 276 S.E.2d 397, 400–01 (1981).

30. *See, e.g.*, Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 95–96, 331 S.E.2d 677, 680–81 (1985); *cf.* Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1233, 1235 (M.D.N.C. 1996) (rejecting, on the facts, the defenses of unclean hands and *in pari delicto*), *aff'd in part, rev'd in part on other grounds*, 194 F.3d 505 (4th Cir. 1999).

31. To be sure, not every claim that has a prospect of success prevails in the end. For example, in a recent case, a section 75-1.1 claim prevailed in the trial court and in the North Carolina Court of Appeals, but was rejected in the Supreme Court of North Carolina. Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 92, 747 S.E.2d 220, 229 (2013), *rev'g* 215 N.C. App. 307, 718 S.E.2d 408 (2011).

32. *See* ALLEN, *supra* note 1, § 1.02, at 1-2 to -5 (commenting on the widespread assertion of section 75-1.1 claims); Mack Sperling, *The Business Court Takes a Narrow View of When Claims Are "In or Affecting Commerce" Under Chapter 75 of the General Statutes*, N.C. BUS. LITIG. REP. (Jan. 31, 2014), http://www.ncbusinesslitigationreport.com/2014/01/articles/watching-the-court/the-business-court-takes-a-narrow-view-of-when-claims-are-in-or-affecting-commerce-under-chapter-75-of-the-general-statutes (same). Indeed, courts have commented with disfavor on the ubiquity of section 75-1.1 claims. *See, e.g.*, Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 347 (4th Cir. 1998); Veolia Water Solutions & Techs. Support v. Siemens Indus., No. 5:11-CV-296-FL, 2012 WL 4793472, at *2 n.2 (E.D.N.C. Oct. 9, 2012); Allied Distribs., Inc. v. Latrobe Brewing Co., 847 F. Supp. 376, 379 (E.D.N.C. 1993).

This pattern is not limited to North Carolina. Across the country, the number of claims under section 5 analogues more than doubled between 2000 and 2007. SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION: PRELIMINARY REPORT, at xii, 19 (2009). A recent study found that states (like North Carolina) with vague definitions of prohibited conduct have more lawsuits—or at least more reported decisions—under their section 5 analogues than states with more clearly defined proscriptions have. *Id.* at 26.

Lawsuits under section 5 analogues, especially putative class actions under these statutes, have grown increasingly controversial in recent years. This controversy has

in North Carolina, it is increasingly rare to see a complaint that does *not* contain a claim under" section 75-1.1.[33] Over its forty-five-year history, the statute has generated over 2000 reported decisions,[34] to say nothing of unreported decisions.

As section 75-1.1 claims have multiplied, several categories of these claims have emerged. One can divide section 75-1.1 claims into the following categories:

- claims for per se violations of section 75-1.1;
- claims of unfair methods of competition, which involve alleged harm to the competitive process;
- claims of deceptive conduct;
- claims of aggravated breaches of contract; and
- claims of unfair conduct alone.[35]

This Article focuses on per se violations of section 75-1.1. The next part of this Article describes per se violations and related theories in detail.

sparked proposals for state legislatures to narrow the scope of section 5 analogues. *See, e.g.*, JOANNA SHEPHERD-BAILEY, CONSUMER PROTECTION ACTS OR CONSUMER LITIGATION ACTS?: A HISTORICAL AND EMPIRICAL EXAMINATION OF STATE CPAs 26–27 (2014), *available at* http://atra.org/sites/default/files/documents/Shepherd-Bailey%20White%20Paper%20-%20FINAL_0.pdf (praising recent legislation that narrowed Tennessee's section 5 analogue and suggesting that other states adopt similar—and further—amendments); Dee Pridgen, *Wrecking Ball Disguised as Reform: ALEC's Model Act on Private Enforcement of Consumer Protection Statutes*, 39 N.Y.U. REV. L. & SOC. CHANGE (forthcoming Apr. 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426381 (describing, and criticizing, legislation proposed by the American Legislative Exchange Council).

33. John Buford, *Supreme Court Rejects Chapter 75 Claim Between Partners*, N.C. BUS. LITIG. REP. (Apr. 21, 2010), http://www.ncbusinesslitigationreport.com/2010/04/articles/fiduciary-duty/supreme-court-rejects-chapter-75-claim-between-partners (emphasis added); *accord* Sperling, *supra* note 32 ("[T]here is not much doubt about why [section 75-1.1 claims] are included in almost every Complaint in the [North Carolina Business] Court. The prospect of treble damages (per G.S. § 75-16) and attorneys' fees (per G.S. § 75-16.1) is too tempting for many to pass up.").

34. ALLEN, *supra* note 1, § 1.01, at 1-2. To analyze ongoing developments under section 75-1.1, my colleagues and I recently launched a blog on the law under the statute. *See* WHAT'S FAIR?: A BLOG ON THE LAW OF UNFAIR AND DECEPTIVE TRADE PRACTICES, http://www.unfairtradepracticesnc.com/.

35. *See* Sawchak & Nelson, *supra* note 4, at 2050–56 (giving a detailed overview of these types of claims).

II. PER SE VIOLATIONS AND RELATED THEORIES

When one analyzes a section 75-1.1 claim, the most difficult question is usually whether the facts satisfy the conduct standard under the statute.[36] Instead of addressing this conduct standard directly, a party can bypass it by pursuing a per se theory. A per se violation of section 75-1.1 occurs when a violation of another source of law—a different statute, a regulation, or a nonstatutory duty—automatically satisfies the conduct standard for a section 75-1.1 claim.[37]

For brevity, one can use the term "upgrading" to describe converting a violation of another source of law to a violation of section 75-1.1. One can call the violation of another source of law a "predicate violation." The other source of law can be called a "predicate statute," a "predicate regulation," or the like.

Per se theories are important because of their decisive effect. Under a per se theory, a plaintiff can show a violation of section 75-1.1 just by proving that a predicate violation has occurred.[38] In addition, once a court recognizes a given predicate violation as a per se violation of section 75-1.1, that conclusion usually carries over to all future instances of that predicate violation.[39]

The first per se case under section 75-1.1, *Hardy v. Toler*,[40] was decided six years after the statute was enacted. The Supreme Court of North Carolina wrote: "Proof of fraud would *necessarily* constitute a

36. *See, e.g.*, ALLEN, *supra* note 1, § 1.01, at 1-2 ("The broad wording of the statute invites a quasi-constitutional form of case analysis. The courts have . . . [stated] that the law is necessarily comprehensive and subject to case-by-case interpretation."); *supra* notes 26–31 and accompanying text (describing the open-ended conduct standard under section 75-1.1).

37. *See, e.g.*, CARTER & SHELDON, *supra* note 11, § 3.2, at 178 (giving a similar definition); Fistos, *supra* note 11, at 62–63 (same).

38. *See, e.g.*, State *ex rel.* Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 607, 263 S.E.2d 849, 851 (1980) ("Upon application of [N.C. GEN. STAT. § 106-571] to the facts in this case, we find that defendant's failure to properly label the drums of antifreeze constitutes a misbranding [in violation of section 106-571]. . . . We think, therefore, and so hold that defendant's misbranding of the antifreeze, which is undisputed, is a deceptive practice within the meaning of [section] 75-1.1 as a matter of law.").

39. *See, e.g.*, Kettle v. Leonard, No. 7:11-CV-189-BR, 2012 WL 4086595, at *12 (E.D.N.C. Sept. 17, 2012) ("[P]roof of fraud, either actual or constructive, is sufficient, in and of itself, to prove a violation of [section 75-1.1]." (citing Jones v. Harrelson & Smith Contractors, LLC, 194 N.C. App. 203, 217, 670 S.E.2d 242, 252 (2008), *aff'd*, 363 N.C. 371, 677 S.E.2d 453 (2009))). *But cf.* Keister v. Nat'l Council of the Young Men's Christian Ass'n of the U.S., No. 12 CVS 1137, 2013 WL 3864583, at *3 (N.C. Bus. Ct. July 18, 2013) ("Fraud or misrepresentation occurring during a commercial transaction is not a *per se* violation of Chapter 75, but such conduct can be the basis of a claim under Chapter 75.").

40. 288 N.C. 303, 218 S.E.2d 342 (1975).

violation of the prohibition against unfair and deceptive acts . . . ."[41] Applying this rule, the court moved directly from the conclusion that the defendants had committed fraud to the conclusion that they had violated section 75-1.1.[42]

Hardy illustrates one pattern of upgrading: selective upgrading. In selective upgrading, the source of law for a predicate violation does not expressly refer to section 75-1.1, but courts nonetheless upgrade the predicate violation.[43]

Subsection A below outlines the existing patterns of upgrading (selective and otherwise) under North Carolina law. Subsection B identifies variations on per se analysis that have taken root in North Carolina cases.

A. Patterns of Upgrading Under Section 75-1.1

North Carolina decisions recognize a per se violation of section 75-1.1 in three different patterns of reasoning:

- Explicit upgrading, when the source of law for a predicate violation expressly states that a violation of that source of law is also a violation of section 75-1.1;

- Semi-explicit upgrading, when the source of law simply describes conduct as unfair or deceptive; and

- Selective upgrading, when the source of law does not meet either of the above tests, but the court nonetheless upgrades the predicate violation.

This subsection describes these three patterns in turn. It then discusses a decision of the Supreme Court of North Carolina that cuts through these patterns and announces a discrete limit on upgrading.

41. *Id.* at 309, 218 S.E.2d at 346 (emphasis added).

42. The court went on to state: "[W]e hold as a matter of law that the false representations made by defendants to plaintiff constituted unfair or deceptive acts or practices in commerce contrary to the provisions of [section] 75-1.1 . . . ." *Id.* at 311, 218 S.E.2d at 347. The court in *Hardy* otherwise used the phrase "as a matter of law" to state that a judge, rather than a jury, decides liability under section 75-1.1. *See id.* at 309–11, 218 S.E.2d at 346–47. This dual meaning of "as a matter of law" has caused confusion in later cases. *See infra* notes 164–85 and accompanying text.

43. *See, e.g.*, *Hardy*, 288 N.C. at 309–10, 213 S.E.2d at 346 (upgrading fraud to a section 75-1.1 violation by following, without further elaboration, D.D.D. Corp. v. FTC, 125 F.2d 679, 682 (7th Cir. 1942)); *infra* notes 52–56, 139–63 and accompanying text (discussing selective upgrading and problems with it).

1. Explicit Upgrading

Explicit upgrading occurs when the source of law for a predicate violation specifically refers to section 75-1.1. For example, North Carolina's state trademark statute provides that infringement or fraudulent registration of a state-law trademark "constitutes a violation of G.S. 75-1.1."[44] About forty-five North Carolina statutes contain similar cross-references.[45] When a source of law contains an explicit cross-reference to section 75-1.1, courts recognize per se violations of section 75-1.1 without difficulty.[46]

44. N.C. GEN. STAT. § 80-12 (2013).

45. *See* ALLEN, *supra* note 1, § 1.03, at 1-8 n.22 (listing these statutes); *id.* §§ 3.01 to .06, at 3-1 to -31 (describing many of these statutes and related case law).

Explicit upgrading plays an even greater role in Texas, where the section 5 analogue *limits* per se theories to instances of explicit upgrading. *See* TEX. BUS. & COM. CODE ANN. § 17.43 (West 2011) ("A violation of a provision of law other than this subchapter is not in and of itself a violation of this subchapter. An act or practice that is a violation of a provision of law other than this subchapter may be made the basis of an action under this subchapter if the act or practice is proscribed by a provision of this subchapter or is declared by such other law to be actionable under this subchapter.").

Although North Carolina has no limiting provision like the one in the Texas statute, North Carolina courts have sometimes reached equivalent results through statutory interpretation. They have reasoned that when the legislature refers to section 75-1.1 in certain statutes but not others, it implicitly disapproves upgrading violations of the statutes without the cross-references. *See, e.g.*, Odell v. Legal Bucks, LLC, 192 N.C. App. 298, 318, 665 S.E.2d 767, 780 (2008); *see also* Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 804–05 (4th Cir. 2001) (applying the same analysis to predicate federal statutes). *But see* Drouillard v. Keister Williams Newspaper Servs., Inc., 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992) ("[T]he fact that the Trade Secrets Protection Act was not one of the regulatory statutes specifically listed in Chapter 66 as violative of [section] 75-1.1 is immaterial. This Court has repeatedly held that the violation of regulatory statutes which govern business activities may also be a violation of [section] 75-1.1 whether or not such activities are listed specifically in the regulatory act as a violation of [section] 75-1.1.").

46. *See, e.g.*, Oset v. Interstate Brokerage of the Se., Inc., No. 5:99-CV-185-BO(2), 1999 WL 33236225, at *4 (E.D.N.C. Nov. 30, 1999) ("Since the Court has already found that Defendant violated [North Carolina's Business Opportunity Sales Act], and N.C.G.S. § 66-100 of [that Act] provides that '[t]he violation of any provisions of this Article shall constitute an unfair practice under G.S. § 75-1.1,' it follows that this Court must find that Defendant violated N.C.G.S. § 75-1.1 . . . ." (quoting N.C. GEN. STAT. § 66-100(e))), *aff'd per curiam*, No. 00-1029, 2000 WL 1853332, at *1 (4th Cir. Dec. 19, 2000); Ferrmily Corp. v. Amodeo, No. 01 CVS 12596, 2002 WL 34192854, at *2 (Wake Cnty., N.C. Super. Ct. Aug. 23, 2002) (upgrading a violation of the North Carolina trademark statutes, relying on the explicit cross-reference to section 75-1.1 in those statutes); *cf.* Llera v. Sec. Credit Sys., Inc., 93 F. Supp. 2d 674, 677 (W.D.N.C. 2000) (treating a claim under N.C. GEN. STAT. § 58-70-130(c), which explicitly refers to section 75-1.1, as an implicit claim under section 75-1.1).

For one major predicate statute, the North Carolina Trade Secrets Protection Act, N.C. GEN. STAT. §§ 66-152 to -157, some decisions have applied explicit upgrading mistakenly. They have done so by citing N.C. GEN. STAT. § 66-146, an explicit-upgrading provision in a neighboring, but unrelated statute. *See, e.g.*, Med. Staffing Network, Inc. v.

2. Semi-Explicit Upgrading

Semi-explicit upgrading occurs when the source of law for a predicate violation does not refer to section 75-1.1, but calls certain conduct unfair or deceptive.

To date, the only successful instance of semi-explicit upgrading in North Carolina involves N.C. Gen. Stat. § 58-63-15(1), which bans false and misleading statements about the terms of insurance policies.[47] In *Jefferson-Pilot Life Insurance Co. v. Spencer*,[48] the Supreme Court of North Carolina stated: "[A] violation of [section] 58-63-15(1) *is* an unfair and deceptive practice under [section] 75-1.1."[49]

When a court, like the court in *Jefferson-Pilot*, writes that a predicate statute that says "unfair or deceptive" is a per se violation of section 75-1.1, the court appears to be stating one or both of two conclusions. First, the court might be concluding that the legislature has announced a section 75-1.1 violation explicitly, but without citing

Ridgway, 194 N.C. App. 649, 659–60, 670 S.E.2d 321, 329 (2009) (committing this error); Akzo Nobel Coatings Inc. v. Rogers, No. 11 CVS 3013, 2011 WL 5316772, at *23 (N.C. Bus. Ct. Nov. 3, 2011) (same); *see also* Awarepoint Corp. v. Noel, No. 11 CVS 19136, 2012 WL 2603309, ¶ 23 n.1 (N.C. Bus. Ct. May 14, 2012) (pointing out this error in the above decisions).

47. *See* N.C. GEN. STAT. § 58-63-15(1) (stating, without literally referring to section 75-1.1, that misrepresentations of the terms of insurance policies "are hereby defined as unfair methods of competition and unfair and deceptive acts or practices").

In a case that involved mobile-home regulations, the North Carolina courts nearly applied semi-explicit upgrading again, but ultimately refused. The North Carolina Court of Appeals applied semi-explicit upgrading, but the Supreme Court of North Carolina reversed that part of the decision. *See* Walker v. Fleetwood Homes of N.C., Inc., 176 N.C. App. 668, 672, 627 S.E.2d 629, 632 (2006), *aff'd in part and modified in part*, 362 N.C. 63, 71–72, 653 S.E.2d 393, 399 (2007); *see also infra* notes 58–80, 252–57 and accompanying text (discussing these aspects of *Walker*).

48. 336 N.C. 49, 442 S.E.2d 316 (1994).

49. *Id.* at 53, 442 S.E.2d at 318 (emphasis added) (attributing this rule to Pearce v. Am. Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986)).

In *Pearce*, the supreme court had held that a violation of the predecessor of section 58-63-15(1) "as a matter of law constitutes an unfair or deceptive trade practice in violation of [section] 75-1.1." *Pearce*, 316 N.C. at 470, 343 S.E.2d at 179. For additional decisions that upgrade violations of section 58-63-15(1) or its predecessor, see FSI v. Newson, No. COA13-222, 2013 WL 5947132, at *6 (N.C. Ct. App. Nov. 5, 2013) (unpublished); Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 579, 589 S.E.2d 423, 431 (2003); Kron Med. Corp. v. Collier Cobb & Assocs., Inc., 107 N.C. App. 331, 335, 341, 420 S.E.2d 192, 194, 197–98 (1992).

In contrast, the supreme court has applied a non-per-se analysis to another, more commonly invoked, subsection of section 58-63-15. *See infra* notes 103–11 and accompanying text (discussing a key decision under N.C. GEN. STAT. § 58-63-15(11)).

In the end, the court in *Jefferson-Pilot* found no section 75-1.1 violation, because there was not actually a violation of section 58-63-15(1). 336 N.C. at 53, 442 S.E.2d at 318.

section 75-1.1. Second, the court might be inferring a legislative finding that whenever the predicate violation occurs, those acts satisfy the usual conduct standards under section 75-1.1.[50] The North Carolina decisions to date, however, do not offer these or any other explanations for semi-explicit upgrading.[51]

3. Selective Upgrading

Selective upgrading occurs when a predicate violation does not meet the above conditions, but still triggers a per se violation of section 75-1.1. Few North Carolina decisions have mentioned criteria for selective upgrading. The few decisions that have done so, however, have alluded to two tests.

First, the Supreme Court of North Carolina has implied that for a predicate violation to be upgraded, the source of law for the predicate violation must contain a detailed standard. In *Walker v. Fleetwood Homes of North Carolina, Inc.*,[52] the court stated that the predicate statute in an earlier case[53] "*defined in detail* unfair methods of [settling] claims and unfair and deceptive acts or practices in the insurance industry."[54]

Second, the supreme court has suggested that it will upgrade a predicate violation when the goals of the source of law overlap with the goals of section 75-1.1. For example, in *Pearce v. American Defender Life Insurance Co.*,[55] the court emphasized that the goal of

50. *See* Fistos, *supra* note 11, at 63–64 (offering a similar explanation for "per se [violations] by description" under Florida's section 5 analogue).

51. *See* cases cited *supra* note 49.

52. 362 N.C. 63, 653 S.E.2d 393 (2007).

53. *See* Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000) (the earlier case); *see also* N.C. GEN. STAT. § 58-63-15(11) (2013) (the statute at issue in *Gray*).

54. *Walker*, 362 N.C. at 70–71, 653 S.E.2d at 398–99 (emphasis added). As shown below, the decision that the *Walker* court was discussing, *Gray*, did not actually involve a per se violation. *See infra* notes 103–11 and accompanying text.

55. 316 N.C. 461, 343 S.E.2d 174 (1986).

It takes close reading to conclude that *Pearce* involves a per se violation. The opinion does not use the term "per se." It uses only the ambiguous phrase "as a matter of law." *Id*. at 470, 343 S.E.2d at 179; *see also infra* notes 172–85 and accompanying text (explaining the ambiguity of this phrase). In addition, although the court held that "a violation of N.C.G.S. § 58-54.4 as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1," it also discussed whether the defendant's statement "had the capacity or tendency to deceive." *Pearce*, 316 N.C. at 470, 470–71, 343 S.E.2d at 179, 180. The discussion of "capacity or tendency to deceive" suggests that the court was applying the usual conduct standard for deception under section 75-1.1—an inquiry that a per se violation would make unnecessary. *See, e.g.*, Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 98, 331 S.E.2d 677, 682 (1985) (stating this requirement for a

the predicate violation at issue was "to define and prohibit unfair and deceptive trade practices."[56]

Because these two standards for selective upgrading are open-ended, it is hard to tell, based on these standards alone, whether a new predicate violation will qualify for per se treatment. Section III(B) of this Article analyzes this and other problems with selective upgrading.[57]

4. The Special Rule for Violations of Regulations (and Perhaps for Violations of Certain Statutes As Well)

Recently—and in some tension with the above decisions—the Supreme Court of North Carolina has announced a categorical limit on upgrading. The court's decision illustrates some of the lingering ambiguities in North Carolina upgrading standards.

In *Walker v. Fleetwood Homes of North Carolina, Inc.*,[58] the supreme court held that "violations of a licensure regulation . . . are not *per se* unfair or deceptive trade practices."[59] In dicta, moreover, the court appeared to extend this rule to "violation[s] of a regulatory statute which governs business activities."[60]

deception claim under section 75-1.1); *see also supra* notes 36–37 and accompanying text (noting that a per se theory makes proof under the usual conduct standards unnecessary).

On a close reading, however, the *Pearce* opinion seems to be probing capacity or tendency to deceive in connection with section 58-54.4, the predicate statute. *See, e.g.*, *Pearce*, 316 N.C. at 470, 343 S.E.2d at 180 ("[I]n order for Mrs. Pearce to make out a claim under section 58-54.4 as augmented by section 75-1.1, she must show only some—but not all—of the same elements essential to making out a cause of action in fraud."); *id.* at 472, 343 S.E.2d at 181 (concluding that "[t]he evidence supporting the unfair trade practice claim *by a violation of N.C.G.S. § 58-54.4* was sufficient" (emphasis added)); *see also id.* at 471–72, 343 S.E.2d at 180–81 (discussing a non-conduct-related aspect of section 75-1.1: the requirement that the plaintiff rely on the defendant's alleged misstatements).

56. *Pearce*, 316 N.C. at 469, 343 S.E.2d at 179.

In *In re Fifth Third Bank, National Ass'n—Village of Penland Litigation*, 217 N.C. App. 199, 719 S.E.2d 171 (2011), the North Carolina Court of Appeals likewise hinted at a "goal overlap" standard for upgrading. The court noted that the plaintiffs were arguing for upgrading on the theory that " 'the banking laws' are, in a general sense, intended to further the public interest." *Id.* at 209, 719 S.E.2d at 178 (appearing to quote plaintiffs' brief); *see also id.* at 207, 719 S.E.2d at 176 (explaining that the court was evaluating a possible per se violation of section 75-1.1).

In the end, however, the court held that the plaintiffs' reference to "the banking laws" was too vague to support any further analysis of upgrading. *See id.* at 209, 719 S.E.2d at 178.

57. *See infra* notes 139–63 and accompanying text.

58. 362 N.C. 63, 653 S.E.2d 393 (2007).

59. *Id.* at 64, 653 S.E.2d at 395.

60. *Id.* at 70, 653 S.E.2d at 398.

The trial court in *Walker* held that a mobile-home manufacturer had violated North Carolina regulations on mobile-home sales and service.[61] Based on these violations, the North Carolina Court of Appeals expressly recognized a per se violation of section 75-1.1.[62]

The decision of the court of appeals involved semi-explicit upgrading.[63] The regulations at issue specifically state that "unfair or deceptive commercial acts or practices shall include" the acts in question.[64] The court of appeals highlighted this aspect of the regulations when the court found a per se violation of section 75-1.1.[65]

Despite this linkage between the text of the regulations and unfairness or deception, the Supreme Court of North Carolina reversed the finding of a per se violation.[66] To explain this conclusion, the court drew a contrast between the regulations at issue in *Walker* and the predicate statute involved in *Gray v. North Carolina Insurance Underwriting Ass'n*,[67] an earlier case in which the court had upheld liability under section 75-1.1.[68] The *Walker* court stated that the predicate statute in *Gray*

> defined in detail unfair methods of [settling] claims and unfair and deceptive acts or practices in the insurance industry,

61. *Id.* at 69–70, 653 S.E.2d at 398 (quoting jury verdict and trial court's judgment).

62. *See* Walker v. Fleetwood Homes of N.C., Inc., 176 N.C. App. 668, 672, 627 S.E.2d 629, 632 (2006) ("We conclude that the trial court properly decided that defendant's violations of the Board's regulation regarding [unfair and deceptive practices] constitute factors sufficient to support a claim under N.C. Gen. Stat. § 75-1.1."), *aff'd in part and modified in part*, 362 N.C. 63, 653 S.E.2d 393 (2007).

The state supreme court, likewise, framed the issue as the presence or absence of a per se violation. *See, e.g.*, *Walker*, 362 N.C. at 64, 653 S.E.2d at 395 (stating, in introduction to opinion, that the supreme court had decided that "violations of a licensure regulation . . . are not *per se* unfair or deceptive").

Interestingly, the judgment that the appellate courts reviewed in *Walker* had less of a per se cast than the appellate opinions. The trial court, instead of relying on the mere existence of the predicate violation, stated that the "*acts* [found by the jury] constitute, as a matter of law, unfair or deceptive acts or practices in violation of [section 75-1.1]." *Id.* at 70, 653 S.E.2d at 398 (emphasis added) (quoting trial court's judgment); *cf. supra* text accompanying notes 36–37 (stating that the essence of a per se violation is treating the existence of the predicate violation, rather than the underlying facts, as dispositive).

63. *See supra* text accompanying note 47 (defining semi-explicit upgrading).

64. 11 N.C. ADMIN. CODE 8.0907 (2014); *see also Walker*, 362 N.C. at 69–70, 653 S.E.2d at 398 (quoting the jury findings, which mirrored the wording of parts of this regulation).

65. *Walker*, 176 N.C. App. at 672, 627 S.E.2d at 632.

66. *Walker*, 362 N.C. at 71–73, 653 S.E.2d at 399–400.

67. 352 N.C. 61, 529 S.E.2d 676 (2000).

68. *Walker*, 362 N.C. at 70–71, 653 S.E.2d at 398–99; *see Gray*, 352 N.C. at 71, 529 S.E.2d at 683. As shown below, *Gray* does not actually apply per se reasoning. *See infra* notes 103–11 and accompanying text. Thus, *Gray* was an inapt decision for the supreme court to use to draw a contrast between *Walker* and a per se case.

> thereby establishing the General Assembly's intent to equate a violation of that statute with the more general provision of [section] 75-1.1. In contrast, the regulation at issue here was promulgated by the Department of Insurance pursuant to N.C.G.S. §§ 143-143.10 and 143-143.13. Because a violation of these statutes would not constitute a [section 75-1.1 violation] as a matter of law, we do not believe that a violation of a licensing regulation based upon those statutes is necessarily a [section 75-1.1 violation].[69]

The *Walker* court also noted several times that the regulations at issue were connected with licensing.[70] These licensing regulations, however, do not seem different in kind from the insurance statutes at issue in *Gray*. For example, state officials can use administrative proceedings to enforce both the statutes at issue in *Gray* and the regulations at issue in *Walker*.[71]

In any event, the holding in *Walker* is explicit: "[V]iolations of a licensure regulation . . . are not *per se* unfair or deceptive trade practices."[72]

The *Walker* court also stated that "a violation of a regulatory *statute* which governs business activities . . . does not automatically result in an unfair or deceptive trade practice."[73] This reasoning was a dictum[74]—and perhaps even a slip of the pen[75]—because the court

69. *Walker*, 362 N.C. at 71, 653 S.E.2d at 399; *see also infra* notes 143–44 and accompanying text (analyzing this reasoning further).

70. *See, e.g.*, *Walker*, 362 N.C. at 71, 653 S.E.2d at 399 ("[W]e decline to hold that a violation of a licensing regulation is a [section 75-1.1 violation] as a matter of law."); *see also id*. at 68–69, 653 S.E.2d at 397–98 (describing the role of regulations in the licensing scheme for mobile-home manufacturers).

71. *Compare* N.C. GEN. STAT. §§ 58-63-20 to -50 (2013) (providing administrative remedies for the statutes at issue in *Gray*), *with id.* § 143-143.13(a), (c) (providing administrative remedies for the statutes and rules at issue in *Walker*).

72. 362 N.C. at 64, 653 S.E.2d at 395.

73. *Id.* at 70, 653 S.E.2d at 398 (emphasis added).

74. Because the Supreme Court of North Carolina analyzed *Walker* as a case based on regulations, the court's statements about the effects of statutory violations are dicta. *See, e.g.*, Wood v. N.C. State Univ., 147 N.C. App. 336, 340, 556 S.E.2d 38, 40 (2001) (treating as dicta statements that involved a factual context different from the facts before the court); Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1074 (2005) (stating that "when a general proposition depends on a particular factual predicate, that factual predicate must be true on the facts of a case, or the factual predicate must be assumed to be true," or the general proposition is a dictum (footnote omitted)).

75. The full passage that includes the phrases quoted above makes unclear whether the court was referring to a statutory violation or a violation of regulations. *See Walker*, 362 N.C. at 70, 653 S.E.2d at 398 ("[A] violation of a *regulatory statute* which governs business activities 'may also be a violation of N.C. Gen. Stat. § 75-1.1.' While such a *regulatory violation* may offend N.C.G.S. § 75-1.1, the violation does not automatically result in an unfair or deceptive trade practice under that statute." (emphasis added and

stated repeatedly that violations of licensing regulations were at issue.[76]

The court's rejection of regulatory statutes as predicate statutes is also surprising on the merits. The court did not define the disfavored category of regulatory statutes.[77] Further, it is unclear why the court disfavored the two statutes that it cited. One of those statutes, after all, allows an agency to deny, suspend, or revoke a license for "[u]sing unfair methods of competition or committing unfair or deceptive acts or practices."[78]

As noted above, *Walker* involved semi-explicit upgrading.[79] The court's rejection of upgrading of regulatory violations, however, will probably apply with even greater force in cases of selective upgrading. By definition, the predicate regulations in selective-upgrading cases, unlike the regulations at issue in *Walker*, would make no reference to unfairness or deception.[80]

No decision since *Walker* has added any substance, scope, or limits to the decision. For example, no decision has elaborated on the court's discussion of regulatory statutes.[81]

deleted) (citation omitted) (quoting Drouillard v. Keister Williams Newspaper Servs., Inc., 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992))).

76. *See id.* at 64, 66, 68, 70, 71, 653 S.E.2d at 395, 396, 397, 398, 399.

The lower courts in *Walker*, however, put greater emphasis on the statutory violations than the supreme court did. The court of appeals held that the "defendant engaged in acts which are direct violations of N.C. Gen. Stat. § 143-143.13, which specifies grounds for denying, suspending, or revoking licenses of or imposing civil penalties on members of the manufactured housing industry." *Walker*, 176 N.C. App. at 671, 627 S.E.2d at 632. The trial court in *Walker*, likewise, implied that the manufacturer had violated the underlying statute. The court stated: "North Carolina General Statute § 143-143.13(a)(7) sets out using unfair and deceptive acts or practices as defined in 11 NCAC 8.0907 as a ground for denying, suspending or revoking the license of a manufacturer of manufactured housing." *Walker*, 362 N.C. at 69–70, 653 S.E.2d at 398 (quoting trial court's judgment).

77. *See Walker*, 362 N.C. at 70–71, 653 S.E.2d at 398–99. The court's statements about regulatory statutes, moreover, silently departed from earlier decisions. For example, in *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985), the court specifically rejected the argument that "a Chapter 75 violation may not be based on the jury's finding that [a] defendant violated [a statute that is] regulatory in nature." *Id.* at 97, 331 S.E.2d at 681; *see also infra* notes 112–20 and accompanying text (discussing *Winston Realty*).

78. N.C. GEN. STAT. § 143-143.13(a)(7) (2013).

79. *See supra* note 63 and accompanying text.

80. *See* 11 N.C. ADMIN. CODE 8.0907 (2014) (the regulations at issue in *Walker*); *supra* notes 47–56 and accompanying text (defining semi-explicit upgrading and selective upgrading).

81. *Cf.* Taylor v. United States, No. 7:11-CV-268-FL, 2014 WL 1096298, at *8 (E.D.N.C. Mar. 19, 2014) (citing this aspect of *Walker* with a "cf." signal and deciding that an administrator of a military health insurance program did not violate section 75-1.1 by

Section III(B) below further discusses the ambiguities in *Walker* and the distinctions applied in the decision.[82]

B. The Near Relatives of Per Se Violations

In addition to the per se theories discussed above, North Carolina courts have also created several near relatives of per se violations. These theories arise when courts split the difference between recognizing a per se violation of section 75-1.1 and deciding that a predicate violation has no effect on the analysis under section 75-1.1.

The near relatives fall into four categories:

- First, courts sometimes state that a predicate violation is not a per se violation, but is "evidence of" or "relevant to" a section 75-1.1 violation.[83]

- Second, courts occasionally state that a predicate violation provides an example of conduct that violates the usual conduct standard under section 75-1.1.[84]

- Third, courts often state that a predicate violation "may be" a violation of section 75-1.1.[85] Although this phrase could

committing a minor violation of regulations), *appeal docketed*, No. 14-1476 (4th Cir. May 16, 2014).

A number of courts have made decisions within the ambit of *Walker* without addressing *Walker*. *See, e.g.*, *In re* Hinson, 481 B.R. 364, 377 (Bankr. E.D.N.C. 2012) (holding, on a non-per-se basis and without citing *Walker*, that violations of federal agency pronouncements that implement the Home Affordable Modification Program "can constitute the type of unfair or unscrupulous behavior which N.C.G.S. § 75-1.1 seeks to prevent"); Weber Hodges & Godwin Commercial Real Estate Servs., LLC v. Hartley, No. COA13-207, 2013 WL 4716368, at *4–5 (N.C. Ct. App. Sept. 3, 2013) (unpublished) (holding, without citing *Walker*, that violations of a trade association's self-regulatory rules were not a per se violation of section 75-1.1); Bartlett Milling Co. v. Walnut Grove Auction & Realty Co., 192 N.C. App. 74, 82–83, 665 S.E.2d 478, 486 (2008) (holding, without citing *Walker*, that the plaintiffs did not preserve an argument that violations of auctioneer-licensing statutes were a per se violation of section 75-1.1).

82. *See infra* notes 143–53 and accompanying text.

83. *E.g.*, Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 71, 653 S.E.2d 393, 399 (2007); *see infra* notes 97–102 and accompanying text.

84. *E.g.*, Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000); *see infra* notes 103–11 and accompanying text.

85. *E.g.*, Stanley v. Moore, 339 N.C. 717, 724, 454 S.E.2d 225, 229 (1995); Drouillard v. Keister Williams Newspaper Servs., Inc., 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992); Keister v. Nat'l Council of the Young Men's Christian Ass'n of the U.S., No. 12 CVS 1137, 2013 WL 3864583, at *3 (N.C. Bus. Ct. July 18, 2013).

suggest that a predicate violation might be a per se violation of section 75-1.1, courts more often use the phrase to reject the conclusion that the existence of a predicate violation *bars* a claim under section 75-1.1.[86]

- Finally, a few decisions contain what one might call illusory per se reasoning. They announce that a predicate violation states a violation of section 75-1.1 *if the plaintiff also satisfies the usual conduct standard for a section 75-1.1 claim*.[87]

Having these near-relative theories on the books alongside per se violations, with no explanation of the role of each, is a recipe for confusion. Section III(A) below analyzes the near-relative theories and the problems they create.

III. THE KEY PROBLEMS WITH PER SE THEORIES UNDER SECTION 75-1.1

Part II of this Article has described the existing standards for per se violations and their near relatives. The following part of the Article explains three sets of problems with these standards.

The first problem is the very existence of the near relatives. Under current law, some predicate violations generate per se violations of section 75-1.1, but other predicate violations produce weaker effects. The nature of these weaker effects is unclear. Even less clear is why courts have announced these effects, as opposed to per se violations.[88]

The second set of problems involves the current standards for selective upgrading. These standards are ambiguous in several respects.[89] Moreover, even when courts have announced standards in clear language, the standards break down under close scrutiny.[90]

The third set of problems stems from the ambiguity of a key phrase used in this area: "as a matter of law." This phrase has allowed courts to blur the line between per se theories and their near

86. *See infra* notes 112–28 and accompanying text.

87. *See, e.g.*, *Drouillard*, 108 N.C. App. at 172, 423 S.E.2d at 326; *see infra* notes 129–36 and accompanying text.

88. *See infra* notes 94–138 and accompanying text.

89. *See infra* notes 139–53 and accompanying text.

90. *See infra* notes 154–63 and accompanying text.

relatives.[91] It has also caused non-per-se decisions to be misunderstood, in later cases, as per se decisions.[92]

The following subsections discuss these three sets of problems in turn.

A. The Problems of the Near Relatives

When North Carolina courts have considered per se violations of section 75-1.1, they have often made compromise decisions. They have not been willing to say that a predicate violation is a per se violation of section 75-1.1 (and thus automatically generates treble damages under section 75-16).[93] However, they have also been unwilling to say the opposite—that a predicate violation makes no difference to the analysis under section 75-1.1.

Instead, the courts have often split the difference between these two outcomes. They have used a variety of phrases to say that a predicate violation does not automatically establish a section 75-1.1 violation, but is not a matter of indifference either. These theories, discussed below, are the near relatives of per se violations.

The near relatives are a problem, not a solution. Studying the near relatives in the context of decided cases shows their essential flaws: courts have not explained what these variations on a per se theory really mean, when each variation applies, or why any of the variations even exist. This lack of explanation leaves the effect of new predicate violations unclear.

1. "Relevant to" or "Evidence of"

In *Walker*,[94] the Supreme Court of North Carolina mentioned two near-relative theories. In doing so, the court illustrated some of the problems with these theories.

Walker held that a violation of a licensing regulation is not a per se violation of section 75-1.1.[95] The court, however, did not hold that a violation of a licensing regulation *adds nothing to* a section 75-1.1

91. *See infra* notes 164–71 and accompanying text.

92. *See infra* notes 172–85 and accompanying text.

93. *See* N.C. GEN. STAT. § 75-16 (2013); Bhatti v. Buckland, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) ("If a violation of Chapter 75 is found, treble damages must be awarded.").

94. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393 (2007); *see also supra* notes 58–80 and accompanying text (discussing the rejection of a per se violation in *Walker*).

95. *Walker*, 362 N.C. at 64, 70, 653 S.E.2d at 395, 398; *see supra* notes 58–72 and accompanying text.

claim.[96] On the contrary, the court stated twice that a violation of a licensing regulation adds something:

- "[A] regulatory licensure violation may be *evidence of* a [section 75-1.1 violation]. Thus, even though defendant's violations of [the regulations at issue] are not unfair or deceptive trade practices per se, those violations *are potentially relevant to* any claim that defendant violated [section] 75-1.1."[97]

- Jury findings that show violations of a licensing regulation "can *be evidence of* unfair or deceptive practices *and, in combination with other facts, might be sufficient* to prove a [section 75-1.1] claim."[98]

In these passages, the supreme court stated that a violation of a licensing regulation falls short of a per se violation of section 75-1.1, but still promotes a section 75-1.1 violation.[99] The court, however, did not say how much (or how little) help a regulatory violation would give a plaintiff. Likewise, the court did not explain the respective roles of a regulatory violation and other facts when a court analyzes a section 75-1.1 claim. In the seven years since *Walker*, no other opinion has taken up these questions.[100]

Thus, the case law leaves unclear how a predicate violation that does not support a per se violation of section 75-1.1 affects a court's non-per-se analysis. In particular, the case law offers no answer to the pivotal question: Why would a predicate violation fall short of a per se violation, but still be important enough to turn facts that do not violate section 75-1.1 into facts that do?

Given the problems that appellate courts have had in applying per se violations,[101] there is little reason to believe that busy trial

96. *See Walker*, 362 N.C. at 71, 653 S.E.2d at 399.

97. *Id.* (emphasis added; stylistic italics deleted).

98. *Id.* at 72, 653 S.E.2d at 400 (emphasis added).

99. *See id.* at 70–71, 653 S.E.2d at 398–99.

100. The only known use of *Walker*'s non-per-se reasoning appears in an unpublished decision of the Fourth Circuit. In *Country Vintner of North Carolina, LLC v. E & J Gallo Winery, Inc.*, 461 F. App'x 302 (4th Cir. 2012), the court observed that a "violation of . . . a regulatory statute may be evidence of an unfair or deceptive trade practice, even if it is not a per se violation of [section 75-1.1]." *Id.* at 305 (citing *Walker*, 362 N.C. at 70–71, 653 S.E.2d at 398–99). The court, however, did not apply this principle, because it found no violation of the regulatory statute in question. *Id.*

101. *See infra* notes 139–63 and accompanying text.

courts can answer the above questions with any rigor or consistency.[102]

2. "Examples" of a Violation of the Usual Conduct Standard

In other opinions, courts likewise shy away from a per se theory, but hold that a predicate violation satisfies the usual conduct standard under section 75-1.1.[103]

The most important decision of this type is *Gray v. North Carolina Insurance Underwriting Ass'n*.[104] The plaintiffs in *Gray* won in the trial court by arguing that a violation of a North Carolina statute on the handling of insurance claims[105] was a per se violation of section 75-1.1.[106] Trouble arose, however, when the court of appeals decided that a key element of this predicate violation was missing.[107] In the state supreme court, the parties debated whether a predicate

102. The history of *Walker* on remand illustrates the low likelihood that trial courts can apply a "less than per se" analysis rigorously. On remand, the trial court held that the same predicate violations that the supreme court had rejected as per se violations still violated section 75-1.1—indeed, violated it in seven ways. Although the trial court had earlier relied on a per se theory, it held on remand that the defendant's violations of the mobile-home statutes and regulations were "contrary to public policy and substantially injurious to the plaintiffs, consumers," "unfair and unscrupulous," acts that "amounted to an inequitable assertion of power by the defendant over the plaintiffs, consumers," "deceptive," "substantially aggravated by the *repeated* failures to respond to consumer complaints and the *repeated* failures to properly repair the known defects in the home," acts that had "a substantial impact on the market place of manufactured housing," and "unethical, unscrupulous, oppressive, and . . . substantially injurious to consumers." Amended Judgment concls. of law 6–12, Walker v. Fleetwood Homes of N.C., Inc., No. 02 CVS 569 (Craven Cnty., N.C. Super. Ct. July 1, 2008).

103. *See, e.g.*, Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 71, 73, 529 S.E.2d 676, 683, 684 (2000).

104. *Id.*

105. N.C. GEN. STAT. § 58-63-15(11) (2013).

106. Gray v. N.C. Ins. Underwriting Ass'n, 132 N.C. App. 63, 65, 510 S.E.2d 396, 398 (1999) (reciting this history), *rev'd*, 352 N.C. at 61, 529 S.E.2d at 676; Plaintiff-Appellant's Brief at 12, *Gray*, 352 N.C. 61, 529 S.E.2d 676 (No. 84PA99).

107. *See Gray*, 132 N.C. App. at 68–69, 510 S.E.2d at 400 ("[W]e find that there was insufficient evidence from which a reasonable jury could find that any of the acts of defendant were done with such frequency as to indicate a 'general business practice.' "); *see also* N.C. GEN. STAT. § 58-63-15(11) (requiring, for a violation, that an insurer commit specified bad acts "with such frequency as to indicate a general business practice").

The plaintiffs faced an additional hurdle as well: the claims-handling statute, section 58-63-15(11), expressly disclaimed a private right of action. *See id.* ("[N]o violation of this subsection shall of itself create any cause of action in favor of any person other than the Commissioner [of Insurance]."). In earlier cases, however, the state courts had decided that for another subsection of section 58-63-15, section 75-1.1 creates the otherwise missing right of action. *See, e.g.*, Jefferson-Pilot Life Ins. Co. v. Spencer, 336 N.C. 49, 53, 442 S.E.2d 316, 318 (1994); Pearce v. Am. Defender Life Ins. Co., 316 N.C. 461, 470, 343 S.E.2d 174, 179–80 (1986).

violation that was missing a key element could nonetheless establish a per se violation of section 75-1.1.[108]

The supreme court did not resolve this debate. Instead of finding a per se violation of section 75-1.1, the court found a violation "separate from and not based upon a violation of" the predicate statute.[109] The court held that conduct that violates the predicate statute "embodies the broader standards of [section] 75-1.1 because such conduct is inherently unfair, unscrupulous, immoral, and injurious to consumers. Thus, such conduct . . . constitutes a violation of [section] 75-1.1, as a matter of law."[110]

When the court applied these broader standards, it stated that it "agree[d] with the practice of looking to [the predicate statute] for *examples of conduct to support* a finding of unfair or deceptive acts or practices."[111] The court, however, did not explain how a statute might state examples of violations of section 75-1.1, yet fail to establish a per se violation of that statute. Although the word "examples" suggests that some violations of the predicate statute in *Gray* fall short of violating section 75-1.1, the opinion does not explain when such a shortfall could occur.

3. Extending a Conclusion That a Section 75-1.1 Claim Is Not Barred

In several of the early cases that contributed to the per se theory, the North Carolina courts did not apply upgrading at all. Instead, the courts simply rejected arguments that because a more specific statute covered the acts at issue, section 75-1.1 could not apply. In several of these "claim not barred" cases, the courts went on to uphold non-per-se liability under section 75-1.1. The decisions, however, expressed both of these conclusions in ambiguous language. These ambiguities have caused the early opinions to be misunderstood in later cases.

108. See Plaintiff-Appellant's Brief at 17, *Gray*, 352 N.C. 61, 529 S.E.2d 676 (No. 84PA99); Defendant-Appellee's New Brief at 11, *Gray*, 352 N.C. 61, 529 S.E.2d 676 (No. 84PA99).

109. *Gray*, 352 N.C. at 67, 529 S.E.2d at 680 ("Plaintiffs contend that defendant violated [the claims-handling statute] constituting a violation of N.C.G.S. § 75-1.1 and that defendant violated N.C.G.S. § 75-1.1 separate from and not based upon a violation of [the claims-handling statute]. We agree with plaintiffs' latter contention."). Notably, the trial court had rejected this non-per-se theory, and the court of appeals had affirmed that ruling. *See Gray*, 132 N.C. App. at 73, 510 S.E.2d at 402–03.

110. *Gray*, 352 N.C. at 71, 529 S.E.2d at 683. As shown below, this use of "as a matter of law" has led later courts to misread *Gray* as a per se case. *See infra* notes 172–85 and accompanying text.

111. *Gray*, 352 N.C. at 71, 529 S.E.2d at 683 (emphasis added).

An often-cited decision of this type is *Winston Realty Co. v. G.H.G., Inc.*[112] An employee-placement firm falsely told a client that it had investigated the background of a new bookkeeper.[113] When the bookkeeper embezzled from the client, the client sued the placement firm.[114] The client alleged violations of a North Carolina statute that regulates placement firms,[115] as well as section 75-1.1.

The placement firm argued that "a Chapter 75 violation may not be based on the jury's finding that defendant violated the [placement-firm statute], because these provisions are regulatory in nature."[116] The Supreme Court of North Carolina rejected this argument. The court stated: "Although the authority to enforce the [placement-firm statute] rests with the Commissioner of Labor, it is obvious that the list of proscribed acts found in [that statute was] designed to protect the consuming public."[117] This point led the court to conclude that a violation of the placement-firm statute "as a matter of law constitutes an unfair or deceptive trade practice in violation of [section 75-1.1]."[118]

Although the phrase "as a matter of law" might imply that the court was recognizing a per se violation,[119] the opinion as a whole contradicts that reading. The court never used the phrase "per se." More importantly, it affirmed a judgment under section 75-1.1 only after reviewing the evidence and applying the usual conduct standard

112. 314 N.C. 90, 331 S.E.2d 677 (1985); *see, e.g.*, *Gray*, 352 N.C. at 70, 529 S.E.2d at 682 (citing *Winston Realty*, 341 N.C. at 97, 331 S.E.2d at 681); Stanley v. Moore, 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995) (citing generally *Winston Realty*); Ellis v. N. Star Co., 326 N.C. 219, 225, 388 S.E.2d 127, 131 (1990) (same); *Pearce*, 316 N.C. at 469–70, 343 S.E.2d at 179–80 (discussing *Winston Realty*); *In re* Fifth Third Bank, Nat'l Ass'n—Vill. of Penland Litig., 216 N.C. App. 482, 490, 716 S.E.2d 850, 856 (2011) (quoting Winston Realty Co. v. G.H.G. Inc., 70 N.C. App. 374, 380–81, 320 S.E.2d 286, 290 (1984), *aff'd*, 314 N.C. 90, 331 S.E.2d 677 (1985)); Media Network, Inc. v. Long Haymes Carr, Inc., 197 N.C. App. 433, 452–53, 678 S.E.2d 671, 684 (2009) (discussing *Winston Realty*).

113. *Winston Realty*, 314 N.C. at 93, 331 S.E.2d at 679.

114. *See id.*

115. N.C. GEN. STAT. § 95-47.6(2), (9) (2013).

116. *Winston Realty*, 314 N.C. at 97, 331 S.E.2d at 681. The supreme court also noted that the regulatory statute contained no private right of action, but the court did not attribute that point to an argument by the defendant. *See id.*

117. *Id.*

118. *Id.*

119. In fact, the phrase "as a matter of law" in section 75-1.1 opinions usually states much less than a per se violation. It usually refers to the rule that courts, not juries, decide whether a fact pattern violates the conduct standard under section 75-1.1. *See, e.g.*, Hardy v. Toler, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975) (the seminal case on this rule); *see also supra* note 42 (discussing the two meanings of "as a matter of law" in *Hardy*); *infra* notes 164–85 and accompanying text (discussing the problems caused by the ambiguity of "as a matter of law" in potential per se cases under section 75-1.1).

under the statute.[120] A per se analysis would have made this evaluation of the evidence unnecessary.

In sum, *Winston Realty*, one of the most frequently cited precedents in per se cases, is not itself a per se decision. It simply rejects arguments that when other statutes and regulations apply, section 75-1.1 cannot.

Other decisions follow a similar pattern. They reject defendants' arguments, but they stop well short of upgrading predicate violations to per se violations of section 75-1.1.[121] Several of these decisions say, for example, that a given predicate violation "may be" a violation of section 75-1.1.[122]

120. *See Winston Realty*, 314 N.C. at 97–98, 331 S.E.2d at 681–82; *see also id.* at 98, 331 S.E.2d at 682 ("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. [A] practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required." (citations omitted) (quoting Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981))).

121. *See, e.g.*, Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000) ("Although N.C.G.S. § 58-63-15(11) does regulate settlement claims in the insurance industry, insurance companies are not immune to the general principles and provisions of [section] 75-1.1."); Golden Rule Ins. Co. v. Long, 113 N.C. App. 187, 196, 439 S.E.2d 599, 604 (1993) ("[U]nfair and deceptive acts in the insurance area are not regulated exclusively by [section] 58-63 . . . but are also actionable under [section] 75-1.1."); Drouillard v. Keister Williams Newspaper Servs., Inc., 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992) ("[The counterclaim defendants] contend that because the Legislature did not specifically provide that any violation of [the North Carolina Trade Secrets Protection Act] would constitute unfair or deceptive acts or practices under N.C. Gen. Stat. § 75-1.1, such a result was not intended. We disagree. . . . This Court has repeatedly held that the violation of regulatory statutes which govern business activities *may also be a violation of* N.C. Gen. Stat. § 75-1.1 . . . ." (emphasis added)); Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 183, 268 S.E.2d 271, 273 (1980) (rejecting arguments similar to the ones that were rejected in *Winston Realty*, then stating: "We hold, therefore, that *G.S. 75-1.1 provides a remedy for* unfair trade practices in the insurance industry" (emphasis added)). *But see* Brinkman v. Barrett Kays & Assocs., P.A., 155 N.C. App. 738, 745, 575 S.E.2d 40, 45 (2003) ("We conclude that plaintiffs may not utilize Chapter 75 to create a private right of action where none existed and thereby circumvent the intent of the legislature to have the honesty requirement in the enforcement section of the Clean Water Act enforced as provided for in that section."); *cf.* Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 91–92, 747 S.E.2d 220, 228–29 (2013) (rejecting section 75-1.1 claim for charging "excessive" prices, in part because North Carolina's price-gouging statute, N.C. GEN. STAT. § 75-38, which contains an explicit cross-reference to section 75-1.1, did not apply).

122. *E.g.*, Stanley v. Moore, 339 N.C. 717, 724, 454 S.E.2d 225, 229 (1995) (rejecting defendants' arguments, then stating that "it is clear that conduct which violates the Ejectment of Residential Tenants Act may also constitute a violation of the Unfair and Deceptive Practices Act"); *Drouillard*, 108 N.C. App. at 172, 423 S.E.2d at 326 (rejecting defendants' arguments, then holding that a violation of the North Carolina Trade Secrets Protection Act "may also be a violation of N.C. Gen. Stat. § 75-1.1"); *see also* United Labs., Inc. v. Kuykendall, 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988) (rejecting similar arguments, then refusing to limit section 75-1.1 to the fact patterns in earlier cases).

In later decisions, however, these limited conclusions have been extended beyond their history as rejections of defendants' arguments. For example, in *Noble v. Hooters of Greenville (NC), LLC*,[123] the North Carolina Court of Appeals cited *Winston Realty* for the following proposition: "North Carolina appellate courts have held that violations of certain regulatory statutes are *per se* violations of [section] 75-1.1."[124]

Courts have likewise misinterpreted the "may be" decisions. In *Walker*, the Supreme Court of North Carolina emphasized that just because a predicate violation *may* violate section 75-1.1, that possibility does not necessarily establish a per se violation.[125] At least two courts, however, have treated the decision that *Walker* cited for this point, *Drouillard v. Keister Williams Newspaper Services, Inc.*,[126] as a basis for finding a per se violation.[127]

These problems arose because in *Winston Realty*, *Drouillard*, and similar decisions, the courts did not clarify which of three possible holdings they were announcing:

- The mere fact that a predicate statute or regulation covers certain activities does not bar section 75-1.1 from applying to those activities.

This "may be" reasoning has spread to decisions that do not focus on defendants' arguments. *See, e.g.*, Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 70, 653 S.E.2d 393, 398 (2007) ("While [a violation of a regulatory statute] *may* offend N.C.G.S. § 75-1.1, the violation does not automatically result in an unfair or deceptive trade practice under that statute."); *In re* Fifth Third Bank, Nat'l Ass'n—Vill. of Penland Litig., 217 N.C. App. 199, 207, 719 S.E.2d 171, 176 (2011) (quoting same sentence from *Walker*, then stating: "For that reason, a violation of a consumer protection statute may, in some instances, constitute a *per se* violation of [section 75-1.1]"); Ausley v. Bishop, 133 N.C. App. 210, 216, 515 S.E.2d 72, 77 (1999) ("[S]lander *per se* may constitute a violation of section 75-1.1.").

123. 199 N.C. App. 163, 681 S.E.2d 448 (2009).

124. *Id.* at 170, 681 S.E.2d at 454. For the same point, the court also cited *Gray*, another non-per-se decision. *See supra* notes 104–11 and accompanying text (explaining *Gray*); *see also infra* notes 172–78 (discussing other decisions that misinterpret *Gray*).

125. *Walker*, 362 N.C. at 70, 653 S.E.2d at 398.

126. 108 N.C. App. at 172, 423 S.E.2d at 326 (rejecting defendants' arguments, then holding that a violation of the North Carolina Trade Secrets Protection Act "may also be a violation of N.C. Gen. Stat. § 75-1.1"); *see also infra* notes 129–36 and accompanying text (further discussing *Drouillard* and its problems).

127. *See* Static Control Components, Inc. v. Darkprint Imaging, Inc., 240 F. Supp. 2d 465, 487 (M.D.N.C. 2002) (citing *Drouillard*, 108 N.C. App. at 172, 423 S.E.2d at 326, and then concluding that trade secret misappropriation, with no additional substantive showing, violated section 75-1.1); Kewaunee Sci. Corp. v. Pegram, 130 N.C. App. 576, 581, 502 S.E.2d 417, 420 (1998) (citing *Drouillard*, 108 N.C. App. at 172, 423 S.E.2d at 326, and then concluding, with no additional substantive showing, that a violation of a criminal statute on commercial bribery "should also be considered a violation of G.S. 75-1.1").

- A predicate violation states a per se violation of section 75-1.1—that is, every instance of that predicate violation satisfies the conduct standard under section 75-1.1.

- The predicate violation falls short of a per se violation of section 75-1.1, but nonetheless promotes a non-per-se violation of section 75-1.1.

Phrases like "may be" could state any one of these propositions. *Winston Realty* and *Drouillard*, however, stand only for the first proposition—a rejection of defendants' arguments.[128]

As the above decisions illustrate, conclusions like "may be" are so elastic that they cause confusion in later cases.

4. A Per Se Violation if There Is a Non-Per-Se Violation

Finally, North Carolina courts have issued what one might call illusory per se decisions. An illusory per se decision states that a predicate violation is a "per se" violation of section 75-1.1, but only if a conflicting condition is satisfied: that the defendant's acts meet the usual conduct standard under section 75-1.1.

The leading decision of this type is *Drouillard*.[129] In that case, the North Carolina Court of Appeals stated that if a violation of North Carolina's "Trade Secrets Protection Act *satisfies [the usual] three prong test [under section 75-1.1]*, it would be a violation of [section] 75-1.1."[130]

The court in *Noble*[131] relied on similar reasoning. The court quoted *Drouillard*, then stated: "Plaintiffs have failed to allege actions which constitute the first element of a claim under [section 75-1.1]: 'an unfair or deceptive act or practice, or an unfair method of competition[.]' Thus, the alleged violation of the statutes and regulations cited by Plaintiffs does not constitute a violation of

128. *See supra* notes 112–20, 125 and accompanying text.

129. 108 N.C. App. at 169, 423 S.E.2d at 324.

130. *Id.* at 172, 423 S.E.2d at 326 (emphasis added); *accord* Awarepoint Corp. v. Noel, No. 11 CVS 19136, 2012 WL 2603309, ¶ 23 (N.C. Bus. Ct. May 14, 2012) (containing similar reasoning).

131. Noble v. Hooters of Greenville (NC), LLC, 199 N.C. App. 163, 681 S.E.2d 448 (2009).

[section 75-1.1]."[132] This reasoning is a contradiction in terms. If a plaintiff has to satisfy the usual conduct standard under section 75-1.1 in any event,[133] what is the relevance of a predicate violation?[134]

Unsurprisingly, the illusory per se decisions have been interpreted inconsistently in later cases. Some courts have taken *Drouillard* literally and have required plaintiffs to make the same showing that they would have to make in the absence of a predicate violation.[135] Other courts, however, have upgraded predicate violations to per se violations of section 75-1.1, citing *Drouillard*—an illusory per se decision—as authority for this upgrading.[136] In short, illusory per se reasoning has produced only confusion.

* * *

As the above subsections suggest, the near relatives of per se violations are little more than coping mechanisms. They relieve courts from choosing between two absolute outcomes: (1) deciding that a predicate violation does nothing to promote a section 75-1.1 violation or (2) deciding that it automatically amounts to a section 75-1.1 violation.

132. *Id.* at 171, 681 S.E.2d at 455 (second alteration in original) (citation omitted) (quoting Furr v. Fonville Morisey Realty, Inc., 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998)).

133. *See Drouillard*, 108 N.C. App. at 172, 423 S.E.2d at 326.

134. Proving the elements of a predicate violation, after all, will often present daunting challenges of its own. *See, e.g.*, AECOM Tech. Corp. v. Keating, No. 11 CVS 9225, 2012 WL 370296, at *3–4 (N.C. Bus. Ct. Feb. 6, 2012) (upholding section 75-1.1 claim but rejecting plaintiffs' claim for misappropriation of trade secrets).

135. *See, e.g.*, *Awarepoint*, 2012 WL 2603309, ¶¶ 23–24 (citing *Drouillard*, 108 N.C. App. at 172, 423 S.E.2d at 326, but then analyzing the facts of *Awarepoint* in light of non-per-se case law); Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., No. 00 CVS 10358, 2003 WL 21017456, at *50–54 (N.C. Bus. Ct. May 2, 2003) (conducting similar, but more extensive, analysis), *aff'd*, 174 N.C. App. 49, 620 S.E.2d 222 (2005).

136. *See, e.g.*, Static Control Components, Inc. v. Darkprint Imaging, Inc., 240 F. Supp. 2d 465, 487 (M.D.N.C. 2002) ("The North Carolina Court of Appeals has held that trade secret misappropriation can constitute a violation of § 75-1.1 if it also affects commerce and is the proximate cause of Static Control's actual injury. *See* [*Drouillard*]. . . . Static Control has thus demonstrated a cause of action for unfair or deceptive trade practices."); Kewaunee Sci. Corp. v. Pegram, 130 N.C. App. 576, 581, 503 S.E.2d 417, 420 (1998) (citing *Drouillard*, 108 N.C. App. at 172, 423 S.E.2d at 326, then concluding that a violation of a criminal bribery statute "should also be considered a violation of G.S. 75-1.1 as an unfair and deceptive trade practice"); Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C., No. 00 CVS 10358, 2002 WL 31002955, at *16–17 (N.C. Bus. Ct. July 10, 2002) (citing generally *Drouillard*, then reasoning that because a claim under North Carolina Trade Secrets Protection Act had survived summary judgment, a section 75-1.1 claim necessarily survived summary judgment as well), *aff'd on other grounds*, 174 N.C. App. 49, 620 S.E.2d 222 (2005).

This relief comes at a steep price. Opinions that apply the near relatives offer no standards to help a court decide whether the next predicate violation—or, for that matter, the same predicate violation—generates liability under section 75-1.1. This lack of standards makes the outcome of later cases unpredictable to lawyers and clients.[137] Unpredictability makes lawsuits under section 75-1.1 last longer and arise more often.[138]

B. Unclear Standards for Selective Upgrading

Problems with the relationship between predicate violations and section 75-1.1 are not limited to the near-relative theories described above. Similar problems arise when courts consider selective upgrading.[139] Only a few North Carolina decisions announce tests to govern this important form of upgrading. As shown below, these tests are ambiguous. Even the clearly defined aspects of these tests, moreover, draw questionable distinctions.

1. Ambiguous Standards

As noted above, the Supreme Court of North Carolina has mentioned two possible circumstances in which it will upgrade a predicate violation to a per se violation of section 75-1.1.[140] First, the court has implied that upgrading will occur when a predicate violation states a detailed conduct standard.[141] Second, the court has upgraded predicate violations whose goals overlap with the goals of section 75-1.1.[142]

137. *See, e.g.*, Neil W. Averitt, *The Elements of a Policy Statement on Section 5*, ANTITRUST SOURCE 1, 15 (Oct. 2013), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct13_averitt_10_29f.authcheckdam.pdf (discussing the importance of predictable standards under section 5 of the FTC Act); *supra* note 21 and accompanying text (explaining the relationship between section 5 and section 75-1.1).

138. *See supra* notes 31, 33–34 and accompanying text (discussing the high volume of litigation under section 75-1.1); *see also* Sawchak & Nelson, *supra* note 4, at 2035–36 (discussing how unpredictable standards affect litigation strategy in section 75-1.1 cases).

139. *See supra* notes 52–56 and accompanying text (defining and discussing selective upgrading).

140. *See supra* notes 52–56 and accompanying text.

141. *See, e.g.*, Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 71, 653 S.E.2d 393, 399 (2007) (noting that a predicate statute that had supported upgrading in an earlier case "defined in detail unfair methods of [settling] claims and unfair and deceptive acts or practices in the insurance industry").

142. *See, e.g.*, Pearce v. Am. Defender Life Ins. Co., 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986) (upgrading a predicate violation because its goal "is to define and prohibit unfair and deceptive trade practices"); *see also In re* Fifth Third Bank, Nat'l Ass'n—Vill. of Penland Litig., 217 N.C. App. 199, 209, 719 S.E.2d 171, 178 (2011) (implying that

These implied standards for upgrading raise unanswered questions. For example, does a predicate violation need to satisfy only one, or both, of the above tests? Recent decisions use ambiguous language on this point.

In *Walker*,[143] for instance, the supreme court noted that the statute at issue in *Gray* "defined *in detail* unfair methods of [settling] 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 [section] 75-1.1."[144] Which feature established the General Assembly's intent—the detailed definition, the focus of the predicate statute on unfair and deceptive acts, or both? The unclear antecedent of the word "thereby" in *Walker* leaves this question unanswered.

Likewise, in *Noble*,[145] the court of appeals stated that a per se violation of section 75-1.1 arises when a predicate statute "*specifically* defines . . . conduct *which is unfair or deceptive* within the meaning of [section] 75-1.1."[146] This phrase, too, is ambiguous on whether a specific definition of prohibited conduct in a predicate statute is sufficient, or merely necessary.

To try to resolve these ambiguities, one can analyze the predicate statutes discussed in these opinions. Here, however, this technique does not add much clarity.

The court in *Walker* stated, for example, that a violation of the manufactured-home statutes that underlie the regulations at issue "would not constitute a [section 75-1.1 violation] as a matter of law."[147] Under the standards discussed above, this conclusion is surprising. The manufactured-home statutes allow a regulatory

violations of banking laws could support a per se violation of section 75-1.1 because the banking laws are "intended to further the public interest").

143. 362 N.C. at 71, 653 S.E.2d at 399.

144. *Id.* (emphasis added).

145. Noble v. Hooters of Greenville (NC), LLC, 199 N.C. App. 163, 681 S.E.2d 448 (2009).

146. *Id.* at 170, 681 S.E.2d at 454 (emphasis added). The court applied the same standard when it rejected upgrading because the predicate statutes at issue "do not specifically define and proscribe unfair or deceptive conduct within the meaning of N.C. Gen. Stat. § 75-1.1." *Id.* at 171, 681 S.E.2d at 455; *cf.* Trimark Foodcraft, Inc. v. Leger, No. COA13-923, 2014 WL 2781761, at *3–4 (N.C. Ct. App. June 17, 2014) (unpublished) (opining that N.C. GEN. STAT. § 44A-24 meets this standard, but holding that the defendant's conduct did not violate section 44A-24).

147. *Walker*, 362 N.C. at 71, 653 S.E.2d at 399.

agency to issue sanctions when a dealer "commit[s] unfair or deceptive acts or practices."[148]

The discussion of predicate statutes in *Noble* is equally surprising. As one example of a per se violation, the *Noble* court cited N.C. Gen. Stat. § 95-47.6, the statute at issue in *Winston Realty*.[149] That statute states only that "[a] private personnel service shall not engage in" twelve listed acts.[150] The listed acts do not expressly include unfair or deceptive conduct.[151]

According to *Walker* and *Noble*, then, a predicate statute that penalizes unfair or deceptive acts—in those terms—in the sale of a consumer product does not support a per se violation of section 75-1.1, but a predicate statute that involves a business service, and that does not literally refer to unfair or deceptive acts, does support a per se violation. These counterintuitive conclusions offer little guidance to a court that must decide whether a different predicate violation states a per se violation of section 75-1.1.

The situation does not improve if one focuses on the language in *Walker* and *Noble* that mentions the degree of specificity or detail in predicate statutes.[152] Neither of those decisions, nor any later one, announces any standards for the level of specificity required. Indeed, the courts in *Walker* and *Noble* did not analyze the level of specificity of the predicate statutes they cited.[153]

Finally, identifying the courts' conclusions on these issues requires a reader to draw inferences from the statutes cited in the

148. N.C. GEN. STAT. § 143-143.13(a)(7) (2013). These statutes, moreover, were enacted for the express purpose of protecting consumers. *See id.* § 143-143.8 (noting the "legislative intent to promote the general welfare and safety of manufactured home residents in North Carolina"). Given the overt focus of these statutes on consumer protection, one can disagree with a leading commentator's statement that "the manufactured housing regulations at issue in *Walker* were not based upon statutes which in and of themselves described violations of § 75-1.1." ALLEN, *supra* note 1, § 9.04, at 9-34 to -36; *see also id.* ("[T]he result [in *Walker*] could be different if the regulation(s) at issue in a case have been promulgated pursuant to statutory authority that adequately proscribes unfair or deceptive practices by licensees.").

149. *Noble*, 199 N.C. App. at 170 n.3, 681 S.E.2d at 454 n.3; *see* Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 98–99, 313 S.E.2d 677, 681–82 (1985). The court's citation of *Winston Realty* is surprising as well, because *Winston Realty* does not apply per se analysis. *See supra* notes 112–20 and accompanying text.

150. N.C. GEN. STAT. § 95-47.6.

151. *See id.* A separate section of the statute, however, does direct the commissioner of labor to deny a license to a placement service whose principals have engaged in "deceptive or unfair practices in the conduct of business." *Id.* § 95-47.2(d)(3)(b)(4).

152. *See Walker*, 362 N.C. at 71, 653 S.E.2d at 399; *Noble*, 199 N.C. App. at 170–71, 681 S.E.2d at 454–55.

153. *See Walker*, 362 N.C. at 71, 653 S.E.2d at 399; *Noble*, 199 N.C. App. at 171, 681 S.E.2d at 455.

opinions. The opinions themselves do not expressly analyze the statutes or otherwise announce standards for upgrading.

In sum, the current standards for selective upgrading in North Carolina are ambiguous. The case law to date leaves many of these ambiguities unresolved.

2. Questionable Distinctions

To be sure, not every aspect of the standards for selective upgrading is ambiguous. Even the clearly stated reasoning, however, rests on questionable distinctions.

For example, *Walker* holds directly that a violation of a regulation issued by a licensing agency does not state a per se violation of section 75-1.1.[154] To explain this conclusion, the supreme court implied that licensing regulations are less fit for upgrading than the insurance statute in *Gray* was.[155] On closer review, however, these predicate violations seem parallel. Under both the statutes in *Gray* and the regulations in *Walker*, state officials can use administrative proceedings as an enforcement method.[156] Also, one of the statutes that underlies the regulations in *Walker* allows a state agency to deny a license when an applicant has used "unfair methods of competition or [has] committ[ed] unfair or deceptive acts or practices."[157]

To defend the holding in *Walker*, one might argue that a predicate statute reflects a legislative decision to condemn certain types of conduct, whereas a regulation is produced by unelected decision-makers.[158] This distinction between statutes and regulations,

154. *Walker*, 362 N.C. at 64, 70–71, 653 S.E.2d at 395, 398–99; *see supra* notes 70–78 and accompanying text (analyzing *Walker*).

155. *See Walker*, 362 N.C. at 70–71, 653 S.E.2d at 398–99; Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000). This discussion in *Walker* implies that *Gray* is a per se decision. As shown above, that implication is mistaken. *See supra* notes 103–11 and accompanying text.

156. *Compare* N.C. GEN. STAT. §§ 58-63-20 to -50 (providing administrative remedies for the statutes in *Gray*), *with id.* § 143-143.13(a), (c) (providing administrative remedies for the statutes and rules in *Walker*).

157. *Id.* § 143-143.13(a)(7).

Ken-Mar Finance v. Harvey, 90 N.C. App. 362, 368 S.E.2d 646 (1988), is perplexing for similar reasons. The court of appeals stated in dicta that a violation of the FTC's Credit Practices Rule, 16 C.F.R. § 444.2(a)(4) (2013), "would not . . . constitute a *per se* violation of G.S. 75-1.1." *Ken-Mar*, 90 N.C. App. at 367, 368 S.E.2d at 650. Like the regulation at issue in *Walker*, however, the regulation in *Ken-Mar* states that particular practices are unfair and deceptive. *See* 16 C.F.R. § 444.2(a)(4).

158. *See, e.g.*, David Arkush, *Democracy and Administrative Legitimacy*, 47 WAKE FOREST L. REV. 611, 611–12 (2012) ("Agency officials write laws of general applicability but lack the political accountability of elected legislators. . . . At the same time, the

however, played no stated role in the *Walker* opinion.[159] Indeed, the supreme court implicitly rejected this distinction when it disapproved a per se violation based on the statutes at issue.[160] As these points show, the holding in *Walker* rests on a questionable distinction between licensing regulations and other predicate violations.

Other decisions on selective upgrading are likewise questionable. The case law on upgrading of intentional torts, in particular, is a thicket of inconsistent outcomes.[161] Some intentional torts, such as defamation, state per se violations of section 75-1.1;[162] others, such as conversion, do not.[163] The decisions in this area do not acknowledge these varying outcomes, let alone explain them.

As these examples show, the selective-upgrading opinions contain ambiguous standards and unconvincing applications of those standards.

C. The Ambiguity of "as a Matter of Law"

The phrase "as a matter of law" has further tangled the relationship between predicate violations and section 75-1.1. In the context of section 75-1.1, this phrase has two meanings, only one of which denotes a per se violation. This dual meaning of "as a matter of law," combined with the frequent use of the phrase in decisions under section 75-1.1, has led courts to misinterpret non-per-se decisions as per se decisions.

1. The Two Meanings of "as a Matter of Law" in This Context

In decisions on section 75-1.1, courts use the phrase "as a matter of law" to convey two different points.

First, courts sometimes use this phrase to report that they are upgrading a predicate violation to a per se violation of section 75-1.1. For example, the North Carolina Court of Appeals used "as a matter

administrative process is often inaccessible to the public, . . . and the public lacks tools to assess adequately the quality of regulatory policies and outcomes.").

159. *See Walker*, 362 N.C. at 70–71, 653 S.E.2d at 398–99. Indeed, a leading commentator has argued that "[*Walker*] did not necessarily remove all regulatory violations from the list of per se unfair or deceptive business practices." ALLEN, *supra* note 1, § 9.04, at 9-35.

160. *See Walker*, 362 N.C. at 71, 653 S.E.2d at 399; *see also supra* notes 70–78 and accompanying text (analyzing this aspect of *Walker*).

161. *See generally* ALLEN, *supra* note 1, § 19.02[3], at 19-11 to -19 (discussing the relationship between several intentional torts and section 75-1.1).

162. *See, e.g.*, Exclaim Mktg., LLC v. DIRECTV, Inc., No. 5:11-CV-684-FL, 2012 WL 3023429, at *9 (E.D.N.C. July 24, 2012).

163. *See, e.g.*, Hancock v. Renshaw, 421 B.R. 738, 744 (M.D.N.C. 2009).

of law" with this meaning in *State ex rel. Edmisten v. Zim Chemical Co.*[164] The defendant in *Zim* violated a statute that prohibited the misbranding of antifreeze.[165] The court wrote: "[T]he failure to label the drums [of antifreeze] properly is statutorily deemed to be a misbranding, which we in turn declare to be deceptive *as a matter of law*."[166] The court did not analyze the usual conduct standard for deception under section 75-1.1; instead, it simply upgraded the violation of the misbranding statute to a per se violation of section 75-1.1. It used the phrase "as a matter of law" to state this conclusion.[167]

Second, and in contrast, courts often use "as a matter of law" to state that the presence or absence of a section 75-1.1 violation is a question of law for the court, rather than a jury question.[168] *Country Club of Johnston County v. United States Fidelity & Guaranty Co.*[169] illustrates this use of the phrase. The court of appeals stated: "[T]he trial court determined, *as a matter of law*, that [the defendant's] *acts* constituted a violation of [section] 75-1.1."[170] Here, "as a matter of law" described the trial court's decision-making process, not the

164. 45 N.C. App. 604, 263 S.E.2d 849 (1980).

165. *See id.* at 606–07, 263 S.E.2d at 851. The misbranding statute in *Zim*, N.C. GEN. STAT. § 106-571 (1974), is now codified at N.C. GEN. STAT. § 106-579.6 (2013).

166. *Zim*, 45 N.C. App. at 608, 263 S.E.2d at 852 (emphasis added).

167. For further examples of this pattern, see, for example, ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 472 F.3d 99, 125 (4th Cir. 2006) (stating that a violation of section 58-63-15(11)(f) constitutes a violation of section 75-1.1 "as a matter of law" because such a violation is "inherently unfair"); Westchester Fire Ins. Co. v. Johnson, 5 F. App'x 111, 115 (4th Cir. 2001) ("[C]onduct that violates § 58-63-15(11)(f) constitutes a violation of § 75-1.1 as a matter of law.").

168. When courts use the phrase "as a matter of law" with this meaning, they often cite the seminal case on judges' and juries' roles under section 75-1.1: *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975). *See, e.g.*, Atl. Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 715 (4th Cir. 1983); United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049, 1058–59 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir. 1981); Ford v. All-Dry of the Carolinas, Inc., No. COA10-931, 2011 WL 1483726, at *3 (N.C. Ct. App. Apr. 19, 2011) (unpublished).

In *Hardy*, the Supreme Court of North Carolina held: "Ordinarily it would be for the jury to determine the facts, and based on the jury's finding, the court would then determine, as a matter of law, whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce." 288 N.C. at 310, 218 S.E.2d at 346–47.

Although *Hardy* largely uses the phrase "as a matter of law" to describe judges' role under section 75-1.1, it also uses that phrase to express a per se violation. *See id.* at 311, 218 S.E.2d at 347. The fact that even this seminal opinion uses "as a matter of law" with two meanings highlights the ambiguity of this phrase.

169. 150 N.C. App. 231, 563 S.E.2d 269 (2002).

170. *Id.* at 246, 563 S.E.2d at 279 (emphasis added). To reinforce this meaning, the court of appeals stated: "[T]he determination of whether an act or practice is an unfair or deceptive practice that violates N.C. Gen. Stat. § 75-1.1 is a question of law for the court . . . ." *Id.* (citing Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000)).

dispositive significance of a predicate violation. In fact, a key issue in the case was whether the *absence* of a predicate violation barred liability under section 75-1.1.[171]

In sum, although the phrase "as a matter of law" can report a per se violation of section 75-1.1, it can also just summarize the role of judges in litigation under the statute.

2. Slippage in the Meaning of "as a Matter of Law"

Unsurprisingly, courts' use of the phrase "as a matter of law" to mean two different things has caused confusion in decisions under section 75-1.1.

The most notable instances of this confusion involve *Gray v. North Carolina Insurance Underwriting Ass'n*.[172] As shown above, *Gray* does not apply per se analysis.[173] Nevertheless, several courts have cited *Gray* to support per se holdings in later cases.[174]

A recent federal decision illustrates this type of error. In *Guessford v. Pennsylvania National Mutual Casualty Insurance Co.*,[175] the court used the "as a matter of law" language in *Gray* to support a per se violation of section 75-1.1.[176] Citing *Gray*, the *Guessford* court stated: "[I]f Plaintiff can prove that Defendant acted in a way that violated [section] 58-63-15(11) . . . then Plaintiff *will be able to establish his [section 75-1.1] claim* . . . ."[177] This per se reasoning is a long distance from *Gray* itself, a non-per-se decision in which the court used "as a matter of law" to describe the judge's role in a section 75-1.1 case.[178]

171. *See id.* at 243–44, 563 S.E.2d at 277–78 (analyzing this question and answering it in the negative).

172. 352 N.C. 61, 529 S.E.2d 676 (2000).

173. *See id.* at 67, 529 S.E.2d at 680; *supra* notes 103–11 and accompanying text.

174. *See infra* notes 175–78 and accompanying text.

175. 983 F. Supp. 2d 652 (M.D.N.C. 2013).

176. *Id.* at 660.

177. *Id.* (emphasis added) (citing *Gray*, 352 N.C. at 74–75, 529 S.E.2d at 684–85). The court also misread *Country Club* as a per se decision. *See id.* As noted above, *Country Club* did not involve a predicate violation at all, so it could not involve upgrading a predicate violation to a violation of section 75-1.1. *See* Country Club of Johnston Cnty. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 243–44, 563 S.E.2d 269, 277–78 (2002); *supra* notes 169–71 and accompanying text.

178. *See Gray*, 352 N.C. at 71, 529 S.E.2d at 683; *see also supra* notes 103–11 and accompanying text (explaining the reasoning in *Gray*).

For similar misreadings of *Gray*, see, for example, ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 472 F.3d 99, 125 (4th Cir. 2006) ("In North Carolina, a violation of section 58-63-15(11)(f) . . . constitutes an unfair or deceptive trade practice under [section 75-1.1], as a matter of law. . . . Because the evidence supports the jury's finding that National Union engaged in conduct violating section 58-63-

Winston Realty,[179] likewise, has been misread as a per se case because it uses the phrase "as a matter of law." The court in *Winston Realty* reviewed the evidence and applied the usual conduct standard under section 75-1.1—steps that a per se analysis would not involve.[180] In *Noble*,[181] however, the North Carolina Court of Appeals cited *Winston Realty* for the following proposition: "[V]iolations of certain regulatory statutes are *per se* violations of [section] 75-1.1."[182] Even more recently, in *Weber, Hodges & Godwin*,[183] the court of appeals cited *Winston Realty* for the proposition that "[v]iolations of regulatory statutes can constitute *per se* unfair acts" that violate section 75-1.1.[184] In both decisions, the court of appeals recounted the passage in *Winston Realty* that uses the phrase "as a matter of law."[185]

As these cases illustrate, the ambiguous phrase "as a matter of law" has compounded the problems with per se theories and related theories under section 75-1.1.

IV. REFINING PER SE THEORIES UNDER SECTION 75-1.1

As part III of this Article shows, the standards for per se violations and similar violations of section 75-1.1 are in disarray. This part IV proposes three solutions to these problems. Section IV(A) lays out two relatively simple solutions. Section IV(B) lays out a third, more ambitious, one. As shown below, the North Carolina courts can and should adopt all three solutions.

15(11)(f) . . . and because such a violation is 'inherently unfair' and a violation of [section 75-1.1], the district court's ruling that National Union violated [section 75-1.1] was not erroneous." (citing *Gray*, 352 N.C. at 70, 529 S.E.2d at 683)); Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 70–71, 653 S.E.2d 393, 398–99 (2007) (noting that "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" (citing *Gray*, 352 N.C. at 71, 529 S.E.2d at 683), then stating that in *Gray* the court had discerned "the General Assembly's intent to *equate* a violation of [a predicate] statute with the more general provision of § 75-1.1" (emphasis added)); Noble v. Hooters of Greenville (NC), LLC, 199 N.C. App. 163, 170, 681 S.E.2d 448, 454 (2009) (citing *Gray*, 352 N.C. at 71, 529 S.E.2d at 683, for the proposition that "North Carolina appellate courts have held that violations of certain regulatory statutes are *per se* violations of N.C. Gen. Stat. § 75-1.1").

179. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 97, 331 S.E.2d 677, 681 (1985).

180. *See id.* at 97–98, 331 S.E.2d at 681–82; *supra* note 120 and accompanying text.

181. Noble v. Hooters of Greenville (NC), LLC, 199 N.C. App. 163, 681 S.E.2d 448 (2009).

182. *Id.* at 170, 681 S.E.2d at 454. The court cited *Gray* for the same proposition. *Id.*

183. Weber Hodges & Godwin Commercial Real Estate Servs., LLC v. Hartley, No. COA13-207, 2013 WL 4716368 (N.C. Ct. App. Sept. 3, 2013) (unpublished).

184. *Id.* at *4.

185. *See id.* (quoting *Winston Realty*, 314 N.C. at 98–99, 331 S.E.2d at 677); *Noble*, 199 N.C. App. at 170, 681 S.E.2d at 454 (paraphrasing *Winston Realty*).

A. Two Easy Solutions: Avoiding Ambiguous Holdings and "Split the Difference" Decisions

Two straightforward solutions would address some of the analytical problems with per se violations of section 75-1.1.

First, courts should avoid stating their conclusions in ambiguous phrases like "as a matter of law" and "may be." As shown above, these phrases obscure the meaning of opinions under section 75-1.1.[186] They also promote slippage from one decision to another, where ambiguous phrasing causes narrow precedents to be misunderstood in later cases.[187]

Second, courts should disown the near relatives of per se violations. No decision to date explains when the various near relatives apply, or why these variations even exist.[188] In addition, when many of the near-relative decisions describe how predicate violations affect section 75-1.1 claims, the decisions say, in essence, "it depends."[189] Holdings like these give future courts no reference points to guide their analysis.[190]

These problems call for abandoning the near relatives outright. To decide the relationship between a predicate violation and section 75-1.1, courts should choose between two options: (1) recognizing a per se violation or (2) applying the regular conduct standards under section 75-1.1.

Requiring a choice between those two options is likely, over time, to strengthen North Carolina doctrine on upgrading. *Gray* illustrates the opportunities for improvement. The parties in that case debated difficult questions on per se liability: whether a predicate violation that was missing a key element, and that involved a statutory disclaimer of a private cause of action, could nonetheless establish a per se violation of section 75-1.1.[191] A near-relative analysis, however, led the Supreme Court of North Carolina to avoid these questions. The court did not find a per se violation, but it still held that a predicate violation could be an "example[] of conduct to

186. *See supra* notes 119–28, 164–85 and accompanying text.

187. *See supra* notes 123–28, 172–85 and accompanying text.

188. *See supra* notes 93–137 and accompanying text.

189. *See supra* notes 99–100, 111, 123–28, 131–36 and accompanying text.

190. In contrast, if courts adopt the analysis proposed below, they will have extensive reference points: decisions, statements, and scholarship on section 5. *See infra* notes 225–34 and accompanying text.

191. *See supra* notes 104–08 and accompanying text.

support a finding of unfair or deceptive acts or practices."[192] If earlier decisions had ruled out this type of difference splitting, the court might well have analyzed the upgrading issues that the case presented.[193] Further, if *Gray* had addressed upgrading, the supreme court's guidance would have eased the courts' struggles in later per se cases.[194]

B. Tackling the Bigger Challenge: Except in Cases of Explicit or Semi-Explicit Upgrading, Apply the "Public Policy" Aspect of the Unfairness Doctrine

At the same time that courts take the steps described above, they should address the core problem with per se violations of section 75-1.1: the murky standards for upgrading predicate violations.

This subsection of the Article proposes that courts limit per se violations to cases of explicit or semi-explicit upgrading. Outside of these cases, courts should instead apply the unfairness doctrine under section 75-1.1. To apply this doctrine, courts should consult an accepted source of law under section 75-1.1: the law under section 5 of the FTC Act. Section 5 doctrine defines the violations of external norms that transgress public policy and thus are unfair.

1. Limiting Per Se Violations to Cases of Explicit or Semi-Explicit Upgrading

As shown above, North Carolina courts have struggled to decide when to upgrade predicate violations that have no stated connection with section 75-1.1. It is time to abandon this struggle. Instead, the courts should recognize per se violations only in cases of explicit upgrading or semi-explicit upgrading.[195] Limiting per se violations to these cases makes sense for several reasons.

192. Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000); *see id.* at 67, 529 S.E.2d at 680 ("Plaintiffs contend that defendant violated [the predicate statute] constituting a violation of N.C.G.S. § 75-1.1 and that defendant violated N.C.G.S. § 75-1.1 separate from and not based upon a violation of [the predicate statute]. We agree with plaintiffs' latter contention.").

193. *See supra* notes 104–11 and accompanying text.

194. Later courts have been unsure how close *Gray* comes to recognizing a per se violation. *See supra* notes 174–78 and accompanying text. They have also had trouble applying the upgrading standards in *Gray*. *See, e.g.*, Noble v. Hooters of Greenville (NC), LLC, 199 N.C. App. 163, 170, 681 S.E.2d 448, 454 (2009) (synthesizing *Gray* and other decisions by stating that courts recognize per se violations "only where the regulatory statute [that makes up the predicate violation] *specifically* defines and proscribes conduct which is unfair or deceptive within the meaning of N.C. Gen. Stat. § 75-1.1").

195. *See supra* text accompanying notes 44–51 (defining and discussing these forms of upgrading).

First, upgrading involves high stakes. When a court upgrades a predicate violation, that decision, in one stroke, satisfies the conduct standard under section 75-1.1.[196] Upgrading turns a claim that allows single damages into one that generates automatic treble damages and possible attorney fees.[197] Indeed, upgrading can produce this effect even when a predicate violation lacks any private right of action of its own.[198] The law should not produce these case-changing results based on weak standards.

Second, the standards for selective upgrading currently lack rigor. As shown above, decisions on selective upgrading suffer from ambiguous language and questionable distinctions.[199] Indeed, it is not even clear whether the two current standards for selective upgrading are cumulative or alternative.[200]

Third, treating explicit and semi-explicit upgrading more favorably than selective upgrading is only logical. In cases of explicit upgrading, the General Assembly has already stated that a violation of a given statute or regulation is a violation of section 75-1.1.[201] Semi-explicit upgrading has an equally strong legislative basis. When a statute or regulation calls misconduct in a particular context unfair or deceptive, there can be little doubt that the lawmakers equate that misconduct with a violation of section 75-1.1.[202]

Fourth, courts need not engage in selective upgrading to define the relationship between predicate violations and section 75-1.1. Instead, they can apply a non-per-se analysis: the unfairness doctrine

196. *See supra* notes 7–9, 37 and accompanying text (defining a per se violation as one that has this effect).

197. *See* N.C. GEN. STAT. §§ 75-16, -16.1(1) (2013).

198. *See, e.g.*, Guessford v. Pa. Nat'l Mut. Cas. Ins. Co., 983 F. Supp. 2d 652, 660 (M.D.N.C. 2013) (noting that N.C. GEN. STAT. § 58-63-15(11) creates no private right of action, but then stating: "[I]f Plaintiff can prove that Defendant acted in a way that violated § 58-63-15(11), and that he suffered an actual injury proximately caused by that violation, then Plaintiff will be able to establish his [section 75-1.1] claim and thereby may seek treble damages arising from the alleged [section 75-1.1] violation"); *see also id.* at 666 (applying this per se theory and granting offensive summary judgment on a plaintiff's claim under section 75-1.1).

199. *See supra* notes 140–63 and accompanying text.

200. *See supra* notes 147–57 and accompanying text.

201. *See* CARTER & SHELDON, *supra* note 11, § 3.2.6, at 181 ("Such language leaves no room for doubt about the availability of a UDAP cause of action . . . ."); *see also* ALLEN, *supra* note 1, § 1.03, at 1-8 n.22 (listing statutes with cross-references to section 75-1.1).

202. *See, e.g.*, Dickson v. Rucho, 366 N.C. 332, 341, 737 S.E.2d 362, 369 (2013) ("It is always presumed that the Legislature acted with full knowledge of prior and existing law." (quoting Ridge Cmty. Investors, Inc. v. Berry, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977))); *see also* CARTER & SHELDON, *supra* note 11, § 3.2.7.4.1, at 190 ("If a statute says that it was enacted to prevent unfair and deceptive acts, then surely a violation is a UDAP violation.").

under section 75-1.1.[203] As shown below, an aspect of the unfairness doctrine—the rule that violations of an established public policy are unfair—already provides standards for the relationship between predicate violations and section 75-1.1.[204]

2. Replacing Selective Upgrading with the Public-Policy Aspect of Unfairness

In the absence of explicit or semi-explicit upgrading, courts should not apply per se analysis or any of its variants. Instead, they should ask whether the conduct that establishes a predicate violation satisfies the test for unfairness under section 75-1.1.[205]

The unfairness test, after all, already refers to predicate statutes and other external standards. One part of the test asks whether a defendant's conduct "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."[206]

When North Carolina courts apply this public-policy aspect of unfairness, they need not do so without guidance. Pronouncements under section 5 of the FTC—the statute on which section 75-1.1 is based—define the violations of external sources of public policy that rise to the level of unfairness.[207]

As shown below, replacing selective upgrading with the public-policy test for unfairness will make the problems with selective upgrading moot. This approach will also give the courts more chances to apply, and thus refine, the public-policy analysis itself.

a. The Public-Policy Aspect of the North Carolina Test for Unfairness

Section 75-1.1, of course, allows for more than per se violations.[208] Case law on the widest-ranging aspect of section 75-1.1—

203. *See generally* Sawchak & Nelson, *supra* note 4, at 2050–52 (describing the key features of the unfairness doctrine under section 75-1.1).

204. *See infra* notes 208–20 and accompanying text.

205. *See infra* notes 206–07, 236–45 and accompanying text.

206. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 263 n.6, 266 S.E.2d 610, 621 n.6 (1980) (emphasis added) (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972)), *overruled on other grounds by* Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988).

207. *See infra* notes 221–34 and accompanying text.

208. *See supra* note 35 and accompanying text (listing the major types of section 75-1.1 violations).

unfairness—refers to sources of law outside section 75-1.1, under the heading of public policy.

The relevant part of the North Carolina definition of unfairness states that a "practice is unfair when it offends established public policy."[209] No North Carolina decisions, however, define the public policies that support a violation of section 75-1.1. Indeed, most decisions address the public-policy aspect of unfairness only summarily.[210]

Noble v. Hooters of Greenville (NC), LLC[211] illustrates this pattern. The plaintiffs alleged that a bar served them and their companion an excessive number of drinks, resulting in a drunk-driving accident.[212] They claimed that the bar violated North Carolina alcohol statutes and related regulations.[213] They went on to argue that these violations supported a section 75-1.1 violation because, among other reasons,[214] the bar's actions "offend[ed] established public policy."[215] The North Carolina Court of Appeals, however, did not analyze whether the alcohol statutes and regulations announced a public policy that could support a section 75-1.1 violation. The court stated only that the one case that the plaintiffs cited was not on

209. *E.g.*, Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 91, 747 S.E.2d 220, 228 (2013) (quoting Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 72, 653 S.E.2d 393, 399 (2007)). This public-policy aspect of unfairness under section 75-1.1 has existed since 1980. *See Johnson*, 300 N.C. at 263, 266 S.E.2d at 621, *quoted supra* text accompanying note 206. In *Johnson*, the Supreme Court of North Carolina described the public-policy aspect of unfairness by quoting an FTC definition of unfairness under section 5. *See Johnson*, 300 N.C. at 262–64, 266 S.E.2d at 620–21 (citing, among other decisions, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972)); Sawchak & Nelson, *supra* note 4, at 2057–63 (describing the history of this test in FTC doctrine); *see also infra* notes 221–34 and accompanying text (recommending using section 5 doctrine to shape the public-policy test under section 75-1.1).

210. *See infra* notes 252–64 and accompanying text. In fact, the public-policy aspect of unfairness under section 75-1.1 is currently applied so rarely that the leading treatise on section 75-1.1 mentions it only briefly. *See* ALLEN, *supra* note 1, § 19.02, at 19-4 to -5.

211. 199 N.C. App. 163, 170, 681 S.E.2d 448, 454 (2009).

212. *Id.* at 164–65, 681 S.E.2d at 450–51.

213. *Id.* at 169–70, 681 S.E.2d at 453–54.

214. The plaintiffs also argued that the violations of the alcohol statutes and regulations established a per se violation of section 75-1.1. *See id.* at 167–71, 681 S.E.2d at 452–55; *see also supra* notes 145–46, 149–53 and accompanying text (discussing the per se analysis in *Noble*).

215. *Noble*, 199 N.C. App. at 172, 681 S.E.2d at 455. In addition to seeking the enhanced remedies associated with a section 75-1.1 claim, the plaintiffs apparently pursued a section 75-1.1 claim to avoid the defense of contributory negligence. *See id.*; *see also* Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 96, 331 S.E.2d 677, 681 (1985) (holding that contributory negligence is not a defense under section 75-1.1).

point.[216] Thus, *Noble*, like other similar decisions,[217] does not establish standards to decide which violations of public policy show unfairness.

In two other decisions, the court of appeals has held that violations of a North Carolina usury statute establish a public-policy-based violation of section 75-1.1.[218] In both cases, however, the court had an unusually easy path to this conclusion. The usury statute provides that "[i]t is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws."[219] In view of this express statutory language, the court did not discuss how it would analyze less graphic expressions of public policy.[220]

216. *See Noble*, 199 N.C. App. at 172, 681 S.E.2d at 455. The decision that the plaintiffs cited did not address liability under section 75-1.1. Instead, it held that a bar's negligence supported liability under a North Carolina alcohol statute. *See* Hutchens v. Hankins, 63 N.C. App. 1, 12, 303 S.E.2d 584, 591 (1983), *cited in Noble*, 199 N.C. App. at 172, 681 S.E.2d at 455.

217. *See, e.g.*, Spinks v. Taylor, 303 N.C. 256, 265, 278 S.E.2d 501, 506 (1981) ("We cannot say that defendant's padlocking procedures offend 'established public policy' . . . ." (quoting Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *overruled on other grounds by* Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988))); Adams v. Jones, 114 N.C. App. 256, 259, 441 S.E.2d 699, 700 (1994) (holding, without explanation, that an agreement produced by extortion not only was "void as against public policy," but also violated the public-policy aspect of the unfairness doctrine under section 75-1.1).

The leading decision of the North Carolina Supreme Court on the public-policy aspect of unfairness, *Stanley v. Moore*, 339 N.C. 717, 454 S.E.2d 225 (1995), likewise analyzes the policy behind the relevant statute only summarily. The statute at issue in *Stanley* contained an explicit declaration of public policy. *See* N.C. GEN. STAT. § 42-25.6 (2013), *quoted in Stanley*, 339 N.C. at 724, 454 S.E.2d at 229. Thus, the supreme court was able to conclude easily that the statute "embodies the public policy of this state, as determined by the legislature, that residential tenants not be evicted through self-help measures without resort to judicial process." *Stanley*, 339 N.C. at 724, 454 S.E.2d at 228–29.

In fact, *Stanley* did not actually decide whether the predicate statute supported liability under section 75-1.1. The court of appeals had already found a violation of section 75-1.1. *Stanley v. Moore*, 113 N.C. App. 523, 525–26, 439 S.E.2d 250, 252 (1994), *rev'd*, 339 N.C. 717, 454 S.E.2d 339 (1995). It had concluded, however, that a remedy-limiting provision in the predicate statute barred the courts from *awarding treble damages or attorney fees* based on the section 75-1.1 claim. *Id.* at 527, 439 S.E.2d at 252–53. That remedial limit was the only conclusion that the plaintiff appealed further, so it was the only conclusion that the supreme court could review and reverse. *See Stanley*, 339 N.C. at 720, 454 S.E.2d at 226–27.

218. *See* Odell v. Legal Bucks, LLC, 192 N.C. App. 298, 319–20, 665 S.E.2d 767, 780–81 (2008); State *ex rel.* Cooper v. NCCS Loans, Inc., 174 N.C. App. 630, 641, 624 S.E.2d 371, 378 (2005).

219. N.C. GEN. STAT. § 24-2.1(g).

220. *See Odell*, 192 N.C. App. at 319–20, 665 S.E.2d at 780–81; *NCCS Loans*, 174 N.C. App. at 641, 624 S.E.2d at 378.

As these cases illustrate, the public-policy aspect of unfairness has the potential to take over the function of selective upgrading: identifying sources of law that do not refer to section 75-1.1, but still establish a section 75-1.1 violation. In North Carolina, however, the public-policy theory has suffered from a lack of standards. The next subsection of this Article identifies a source of standards that will improve the public-policy theory (both in its own right and as a replacement for selective upgrading).

b. Section 5 Standards on Public Policy

To find standards to guide the public-policy analysis under section 75-1.1, courts can turn to an already accepted source of law: doctrine under section 5.

As noted above, section 75-1.1 shares its substantive language with section 5.[221] Courts in North Carolina have long cited the parallel language of the two statutes as a reason to take guidance from section 5 authorities.[222] For example, in a seminal decision on section 75-1.1, *Marshall v. Miller*,[223] the Supreme Court of North Carolina called it "established" that "federal decisions interpreting the FTC Act may be used as guidance in determining the scope and meaning of G.S. 75-1.1."[224]

A key FTC pronouncement under section 5 clarifies the role of public policy in the unfairness doctrine, as well as the types of public policy that can play that role. In a 1980 statement on unfairness, the FTC announced that it would treat violations of external sources of public policy as "additional evidence on the degree of consumer injury caused by specific practices."[225]

221. *See supra* note 21 and accompanying text.

222. *See, e.g.*, Hardy v. Toler, 288 N.C. 303, 308, 218 S.E.2d 342, 345 (1975); Sykes v. Health Network Solutions, Inc., No. 13 CVS 2595, 2013 WL 6410591, at *3 (N.C. Bus. Ct. Dec. 5, 2013); *see also* Sawchak & Nelson, *supra* note 4, at 2066–68 (discussing other decisions to the same effect).

223. 302 N.C. 539, 276 S.E.2d 397 (1981).

224. *Id.* at 542, 276 S.E.2d at 399. In an earlier article, Kip Nelson and I have urged North Carolina courts to use this authority and to seek guidance from section 5 authorities on the meaning of unfairness under section 75-1.1. Sawchak & Nelson, *supra* note 4, at 2070–82.

225. Letter from the FTC to Sens. Ford & Danforth (Dec. 17, 1980), *reprinted in* Int'l Harvester Co., 104 F.T.C. 949, 1070, 1075 (1984) [hereinafter 1980 Statement, with pinpoint citations to the reprint in *International Harvester*]; *see, e.g.*, Remarks of Commissioner Mary L. Azcuenaga Before the Third International Conference on Consumer Law (Mar. 11, 1992), *reprinted in* [1985–1997 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,076, at 48,790 (describing the changes brought about by the 1980 Statement); Letter from the FTC to Sens. Packwood and Kasten (Mar. 5, 1982), *reprinted in* 42 Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 568, 570 (Mar. 11, 1982) (same;

When one considers substitutes for selective upgrading, however, the more notable part of the 1980 Statement is its discussion of when violations of public policy *independently suffice* to show unfairness. The 1980 Statement lays out the following principles:

- Violations of external sources of public policy can independently show unfairness only "when the policy is so clear that it will entirely determine the question of consumer injury. . . . In these cases the legislature or court, in announcing the policy, has already determined that such injury does exist and thus [consumer injury] need not be expressly proved in each instance."[226]

- To qualify as a standard for unfairness, a public "policy should be declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from the general sense of the national values."[227]

- "The policy should likewise be one that is widely shared, and not the isolated decision of a single state or a single court."[228]

containing no reference to public policy as an independent basis for finding unfairness); J. Howard Beales III, Director, Bureau of Consumer Prot., Fed. Trade Comm'n, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL'Y & MARKETING 192, 193 (2003) (discussing the history of the 1980 Statement); Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1952–54 (2000) (same).

226. 1980 Statement, *supra* note 225, at 1075.

227. *Id.* at 1076. As this language implies, the 1980 Statement ends the practice of finding unfairness based on the penumbra of a statute, regulation, or judge-made theory. *See* David L. Belt, *Should the FTC's Current Criteria for Determining "Unfair Acts or Practices" Be Applied to State "Little FTC Acts"?*, ANTITRUST SOURCE 1, 3 (Feb. 2010), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb10_Belt2_25f.authcheckdam.pdf (noting this effect of the 1980 Statement); *see also id.* at 10 ("The difficulty of determining or explaining to a jury the boundaries of the 'penumbra' of an 'established concept of unfairness' [is] obvious."); *cf.* Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 263 n.6, 266 S.E.2d 610, 621 n.6 (1980) (quoting the FTC's pre-1980 definition of unfairness, including its reference to penumbras), *overruled on other grounds by* Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988).

A Maryland decision illustrates the effects of rejecting this penumbral version of the public-policy theory. *See* Legg v. Castruccio, 642 A.2d 906, 918–19 (Md. Ct. Spec. App. 1994). In *Legg*, Maryland's intermediate appellate court decided to follow the FTC's 1980 Statement as the standard for unfairness under Maryland's section 5 analogue. *See id.* at 917–18 & n.5. Applying this standard, the court rejected an argument that even though certain regulatory statutes did not apply by their own terms, they could support a public-policy-based claim of unfairness. *See id.* at 918–20.

228. 1980 Statement, *supra* note 225, at 1076; *see* Calkins, *supra* note 225, at 1955.

- Finally, to qualify as a standard for unfairness, a policy should be unambiguous.[229]

Applying these principles, the FTC has accepted public-policy theories that have a firm grounding in state and federal decisions and statutes.[230] It has rejected theories that rely on ephemeral sources of law[231] or sources of law that do not apply to the conduct at issue.[232]

In sum, the 1980 Statement offers a helpful standard for predicate violations that show unfairness: violations that are convincingly recognized as unambiguous evidence of unjustified injury to consumers.[233] Given the North Carolina courts' history of looking to section 5 authorities to define section 75-1.1, the 1980 Statement is a logical source of standards to flesh out the public-policy analysis under section 75-1.1.[234]

229. *See* 1980 Statement, *supra* note 225, at 1075–76 (stating twice that a public policy, to suffice to show unfairness, should be clear); Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 278 (1981) (summarizing this aspect of the 1980 Statement as follows: "Finally, an enforceable public policy must be relatively specific. It must grant certain rights or prohibit certain practices in terms that are free from ambiguity.").

230. *See, e.g.*, FTC v. Accusearch Inc., 570 F.3d 1187, 1194 (10th Cir. 2009) (affirming liability under section 5 when a defendant subverted the privacy safeguards in Telecommunications Act § 222, 47 U.S.C. § 222 (2012)); Horizon Corp., 97 F.T.C. 464, 851 & n.73 (1981) (holding, based on U.C.C. § 2-302 and "a developing trend in state and federal law," 97 F.T.C. at 851, that forfeiture clauses in land-sale contracts violate the public-policy aspect of unfairness); *see also* Amrep Corp., 102 F.T.C. 1362, 1668–69 (1983) (following the reasoning in *Horizon*), *aff'd*, 768 F.2d 1171 (10th Cir. 1985).

231. *See, e.g.*, Orkin Exterminating Co., 108 F.T.C. 263, 332 (1986) (rejecting the argument that state enforcers' decisions not to take action against Orkin's conduct showed a public policy that *barred* an unfairness claim by the FTC), *aff'd*, 849 F.2d 1354 (11th Cir. 1988).

232. *See, e.g.*, Beltone Elecs. Corp., 100 F.T.C. 68, 219–20 (1982) (rejecting the claim that the physician-patient privilege established a public policy that barred Beltone from turning over customers' names from terminated hearing-aid dealers to successor dealers or other businesses).

233. *See* 1980 Statement, *supra* note 225, at 1075–76; *see also* Belt, *supra* note 227, at 11 ("By requiring public policy to be clear and well-established before it could provide an independent basis for a finding of unfairness . . . , the [1980 Statement] removed significant potential ambiguity from the criteria for determining unfairness.").

234. *See, e.g.*, Henderson v. U.S. Fid. & Guar. Co., 346 N.C. 741, 749, 488 S.E.2d 234, 239 (1997) (noting that 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"); *see also* Sawchak & Nelson, *supra* note 4, at 2065–68 (analyzing the relationship between section 5 and section 75-1.1).

In 1994, Congress codified most of the 1980 Statement in a new subsection (n) of section 5. That subsection further narrows the role of public policy as a basis for unfairness enforcement. Under subsection 5(n), "public policy considerations may not serve as a

C. Benefits of the Suggested Approach

To solve the problems with selective upgrading, this Article recommends that courts recognize per se violations of section 75-1.1 only in cases of explicit or semi-explicit upgrading.[235] In all other cases with predicate violations, courts should apply the public-policy aspect of unfairness under section 75-1.1, using section 5 doctrine to shape their analysis of public policy.[236] This approach would offer a number of benefits.

First and foremost, the suggested approach would give courts a workable alternative to selective upgrading. Because selective upgrading dramatically expands the remedies for a predicate violation,[237] courts have often avoided selective upgrading, even when it might have been justified.[238] In addition, courts have insufficient tools to help them decide whether to engage in selective upgrading.[239]

primary basis for" FTC determinations that an act or practice is unfair. 15 U.S.C. § 45(n). Unlike the 1980 Statement, however, this statutory limit on the FTC's ability to rely on public policy is unlikely to carry over to section 75-1.1. The legislative history of subsection 5(n) states expressly that the enactment is not meant to change the interpretation of states' section 5 analogues. *See* S. REP. NO. 103-130, at 13, *reprinted in* 1994 U.S.C.C.A.N. 1776, 1788 ("Sound principles of federalism limit the impact of this section to the FTC only."). The 1980 Statement, in contrast, has no similar history. *See* Michael M. Greenfield, *Unfairness Under Section 5 of the FTC Act and Its Impact on State Law*, 46 WAYNE L. REV. 1869, 1895–1934 (2000) (detailing how states have responded to the 1980 Statement).

In a recent illustration of the differences between state unfairness doctrines and section 5, a prominent "patent troll" settled claims under New York's section 5 analogue on the same day that the company sued the FTC, asserting that section 5 did not apply to its patent-enforcement activities. *Compare* Assurance of Discontinuance, *In re* MPHJ Tech. Invs., LLC, No. 14-015 (N.Y. Att'y Gen. Jan. 13, 2014), *available at* http://www.ag.ny.gov/pdfs/FINALAODMPHJ.pdf, *with* Complaint ¶¶ 139–60, MPHJ Tech. Invs., LLC v. FTC, No. 6:14-cv-11-WSS (W.D. Tex. filed Jan. 13, 2014), *available at* http://patentlyo.com/wp-content/uploads/2014/01/gov.uscourts.txwd.669787.1.0.pdf.

235. *See supra* notes 195–204 and accompanying text; *see also supra* notes 139–63 and accompanying text (discussing the problems in North Carolina selective-upgrading doctrine).

236. *See supra* notes 221–34 and accompanying text.

237. *See, e.g.*, N.C. GEN. STAT. §§ 75-16, -16.1(1) (2013) (allowing treble damages and attorney fees for violations of section 75-1.1); *see also* Sawchak & Nelson, *supra* note 4, at 2038–41 (discussing the effects of the lucrative remedies for section 75-1.1 claims).

238. *See, e.g.*, Walker v. Fleetwood Homes of North Carolina, Inc., 362 N.C. 63, 71, 653 S.E.2d 393, 399 (2007); Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 67, 529 S.E.2d 676, 680 (2000); Noble v. Hooters of Greenville (NC), LLC, 199 N.C. App. 163, 171, 681 S.E.2d 448, 455 (2009); *see also supra* notes 104–11, 141–60 (discussing the analysis in these decisions).

239. For example, in *Walker*, the Supreme Court of North Carolina concluded that violations of licensing regulations generally, and even violations of the licensing statutes at issue, would not support selective upgrading. *See* 362 N.C. at 70–71, 653 S.E.2d at 298–99. The court, however, gave only limited reasons for these conclusions. *See id.*, *quoted supra* text accompanying note 69.

This lack of tools has led courts to create unexplained new theories—the near relatives—to justify rulings without adopting approaches that seem too absolute.[240]

The public-policy approach would address the root cause of these problems: a lack of standards.[241] As the FTC's 1980 Statement on unfairness illustrates, there is thoughtful jurisprudence on unfairness standards under section 5.[242] Indeed, this jurisprudence is constantly being expanded by new decisions and new scholarship.[243] Given how difficult it is for courts to create upgrading standards out

240. *See supra* notes 93–138 and accompanying text (discussing the near relatives and their role as coping mechanisms).

241. *See supra* notes 139–63 and accompanying text.

A few states have created upgrading standards by adopting statutes or regulations on upgrading itself. *See* FLA. STAT. § 501.203 (2013); IDAHO ADMIN. CODE r. 04.02.01.033 (2013); 940 MASS. CODE REGS. 3.16 (1994); MO. CODE REGS. ANN. tit. 15, § 60-8.090 (2011). There is no indication, however, that the legislature or any state agency in North Carolina is poised to do the same.

242. *See, e.g.*, Sawchak & Nelson, *supra* note 4, at 2056–64 (discussing this jurisprudence); *cf.* Calkins, *supra* note 225, at 1942 n.27 ("The FTC is, if anything, over-studied . . . .").

243. For example, when the FTC approved a recent consent decree with Apple, the commissioners debated whether the unfairness criteria in the 1980 Statement were violated by an undisclosed App Store feature that allowed users to avoid reentering their passwords on a strict transaction-by-transaction basis—a feature that allowed some children to make unauthorized purchases. *Compare* Statement of Chairwoman Ramirez and Commissioner Brill at 3, Apple Inc., No. 1123018 (Fed. Trade Comm'n Jan. 15, 2014), *available at* http://www.ftc.gov/sites/default/files/documents/cases/140115applestatement ramirezbrill.pdf (reasoning that Apple's failure to disclose this feature caused a substantial consumer injury in an absolute sense), *with* Dissenting Statement of Commissioner Wright at 11–16, Apple Inc., *available at* http://www.ftc.gov/sites/default/files/documents/cases/140115applestatementwright_0.pdf (reasoning that Apple's failure to disclose the feature was not unfair because, among other points, the nondisclosure offered some users increased convenience that outweighed the injuries that the nondisclosure caused for other users).

In another example that shows the rigor of unfairness decisions under section 5, a federal court ruled that consumers and businesses whose credit information was stolen from the computers of Wyndham hotels could suffer a substantial injury even if federal statutes and the practices of most credit-card issuers would shield those consumers and businesses from any unauthorized charges. FTC v. Wyndham Worldwide Corp., No. 2:13-CV-1887, 2014 WL 1349019, at *15–18 (D.N.J. Apr. 7, 2014), *petition for leave to appeal granted,* No. 14-8091 (3d Cir. July 29, 2014).

Even so, some scholars argue that individual decisions and consent decrees like these offer too little guidance to businesses. This scholarship urges the FTC to make further policy statements that would expand on the 1980 Statement, especially in difficult areas like data security. *See, e.g.*, GEOFFREY A. MANNE, HUMILITY, INSTITUTIONAL CONSTRAINTS AND ECONOMIC RIGOR: LIMITING THE FTC'S DISCRETION 35–37 (2014), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Supplemental-Testimony-Manne-CMT-FTC-100-Academic-Perspective-2014-2-28.pdf. If the FTC responds to these suggestions, the resulting guidelines will add further to the materials that courts can use to help them apply section 75-1.1.

of whole cloth,[244] courts would benefit from using authorities on public policy under section 5 to decide which predicate violations justify liability under section 75-1.1.[245]

Second, driving selective-upgrading cases into the public-policy aspect of unfairness would help courts refine the public-policy analysis itself. As noted above, few North Carolina decisions apply the public-policy aspect of unfairness.[246] If courts used the public-policy analysis to decide cases in which litigants rely on external standards, this "game pressure" would probably lead courts to analyze public policy more thoroughly.[247] Over time, by asking whether predicate violations reflect unambiguous conclusions of unjustified injuries,[248] the courts could achieve a more predictable relationship between predicate violations and section 75-1.1.

Third, limiting per se violations to cases of explicit or semi-explicit upgrading will give the General Assembly an incentive to decide the scope of per se liability expressly. In recent years, the legislature has enacted a number of statements that a violation of a given statute is also a violation of section 75-1.1.[249] If courts ended selective upgrading, eliminated the near relatives of per se violations, and began analyzing the public-policy basis of predicate violations,[250] the General Assembly might well engage in explicit upgrading more often. At a minimum, the legislature would know the courts' approach to upgrading, so it would have a clear foundation on which to build new law on the scope of section 75-1.1.[251]

244. *See, e.g.*, Noble v. Hooters of Greenville (NC), LLC, 199 N.C. App. 163, 170, 681 S.E.2d 448, 454 (2009) (illustrating these difficulties).

245. *See, e.g.*, Sawchak & Nelson, *supra* note 4, at 2072–78 (discussing the benefits of using section 5 doctrine to shape other aspects of the unfairness doctrine under section 75-1.1).

246. *See supra* notes 208–20 and accompanying text.

247. The Associated Press, *Duke Ends Tech's Season with 82-70 Victory*, ACCESSNORTHGA.COM (Mar. 14, 2008, 10:15 PM), http://www.accessnorthga.com/detail.php?n=208012&c=5 (quoting Duke University basketball coach Mike Krzyzewski's use of the term "game pressure" to describe the prospect that one's actions will decide the outcome of a game); *supra* notes 206–18 and accompanying text (noting that most public-policy cases to date contain only conclusory analysis).

248. *See supra* notes 223–32 and accompanying text.

249. *See, e.g.*, N.C. GEN. STAT. § 47H-8 (2013) (enacted 2010); *id.* § 14-344.2 (enacted 2008); *id.* § 66-67.5 (enacted 2007); *id.* § 66-356 (enacted 2006); *id.* § 75-38 (enacted 2003).

250. *See supra* notes 195–234 and accompanying text.

251. The General Assembly has a history of responding to significant changes in the case law under section 75-1.1. The most notable response occurred after the Supreme Court of North Carolina decided, in *State ex rel. Edmisten v. J.C. Penney Co.*, 292 N.C. 311, 320, 233 S.E.2d 895, 901 (1977), that section 75-1.1 did not cover debt-collection practices. Within the same year, the legislature enacted subsection 75-1.1(b), which states that, except for certain express exclusions, section 75-1.1 covers "all business activities,

D. Examples of How the Proposed Analysis Would Affect North Carolina Decisions

If courts limit per se violations of section 75-1.1 to cases of explicit or semi-explicit upgrading and replace selective upgrading with the unfairness doctrine, those changes will affect the outcome of some, but not all, section 75-1.1 cases.

For example, under the approach proposed here, *Walker*[252] would produce a per se violation, not the rejection of one. In the predicate regulations at issue in *Walker*, the types of conduct that occurred in that case are specifically described as "unfair or deceptive acts or practices."[253] Likewise, the predicate statute in *Walker* allows a regulatory agency to deny, suspend, or revoke licenses when licensees "commit[] unfair or deceptive acts or practices."[254]

In light of these express references to unfair or deceptive conduct, the Supreme Court of North Carolina could have decided the case by applying semi-explicit upgrading, instead of rejecting selective upgrading.[255] If not for the pressures of selective upgrading, the court would not have needed to decide that a violation of a licensing regulation or a "regulatory statute" fails to state a per se violation of section 75-1.1.[256] The textual connection between the predicate violations and unfair or deceptive practices would have prevailed over the fact that the predicate violations were "regulatory."[257]

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however denominated." Act of June 27, 1977, ch. 747, § 2, 1977 N.C. Sess. Laws 984, 984 (codified at N.C. GEN. STAT. § 75-1.1(b)); *see also* Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 261 n.5, 266 S.E.2d 610, 620 n.5 (1980) (noting that this statutory amendment occurred "in the wake of our decision in *Penney*"), *overruled on other grounds by* Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988).

252. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 653 S.E.2d 393 (2007); *see supra* notes 58–80 and accompanying text (discussing the key reasoning in *Walker*).

253. 11 N.C. ADMIN. CODE 8.0907 (2014); *see Walker*, 362 N.C. at 69, 653 S.E.2d at 398 (quoting the jury's findings, which tracked the wording of 11 N.C. ADMIN. CODE 8.0907(1)–(4)).

254. N.C. GEN. STAT. § 143-143.13(a)(7); *see Walker*, 362 N.C. at 69–70, 653 S.E.2d at 398 (quoting trial court's judgment, which referred to this statute).

255. *See Walker*, 362 N.C. at 70–71, 653 S.E.2d at 398–99 (considering and rejecting selective upgrading), *quoted supra* in text accompanying note 69.

256. *Id.* at 70, 653 S.E.2d at 398; *see id.* at 70–71, 653 S.E.2d at 398–99; *see also supra* notes 196–98 and accompanying text (discussing the high stakes of selective upgrading).

257. *Walker*, 362 N.C. at 70, 71, 653 S.E.2d at 398, 399. Indeed, in *Gray* and *Winston Realty*, the court had already rejected the argument that other statutes cannot support liability under section 75-1.1 because those statutes contemplate regulation by an administrative agency. *See* Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000) ("Although N.C.G.S. § 58-63-15(11) does regulate settlement claims in the insurance industry, insurance companies are not immune to the general principles and provisions of [section] 75-1.1."); Winston Realty Co. v. G.H.G., Inc., 314

In contrast, if the courts adopted the analysis proposed here, the relationship between common-law fraud and section 75-1.1 would change in form, but not in substance.[258] As a nonstatutory theory, fraud has no text that could support explicit or semi-explicit upgrading.[259] Thus, under the analysis proposed here, courts would apply the public-policy aspect of unfairness under section 75-1.1. They would ask whether fraud is convincingly recognized as offering unambiguous evidence of unjustified injury to consumers.[260]

Courts would surely answer yes to this question. As the Supreme Court of North Carolina has recognized, the General Assembly enacted section 75-1.1 to make it easier for customers to recover for fraud and other deceptive conduct.[261] Likewise, fraud and other forms of deception are the main concern that led to the enactment of similar statutes in other states[262] and the "deceptive acts or practices" aspect of section 5.[263]

As this history shows, preventing fraud is a widely shared public policy—the type of policy that courts are likely to enforce through the unfairness doctrine under section 75-1.1.[264] Thus, under the analysis proposed here, fraud will no longer be a per se violation of section 75-1.1, but it will violate the statute nonetheless.

N.C. 90, 97, 331 S.E.2d 677, 681 (1985) (rejecting the arguments that section 75-1.1 could not apply because the predicate statute was "regulatory in nature" and that "the authority to enforce the [statute] rests with the Commissioner of Labor").

258. *See, e.g.*, Kettle v. Leonard, No. 7:11-CV-189-BR, 2012 WL 4086595, at *12–13 (E.D.N.C. Sept. 17, 2012); Hardy v. Toler, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975). *But cf.* Keister v. Nat'l Council of the Young Men's Christian Ass'n of the U.S., No. 12 CVS 1137, 2013 WL 3864583, at *3 (N.C. Bus. Ct. July 18, 2013) ("Fraud or misrepresentation occurring during a commercial transaction is not a *per se* violation of Chapter 75, but such conduct can be the basis of a claim under Chapter 75.").

259. *See supra* notes 44–51 and accompanying text (defining explicit and semi-explicit upgrading).

260. *See supra* notes 225–29 and accompanying text.

261. Marshall v. Miller, 302 N.C. 539, 543–44, 276 S.E.2d 397, 400 (1981); *see also* Morgan, *supra* note 21, at 19 (stating that North Carolina's attorney general sought the enactment of section 75-1.1 "to stop fraud and deception").

262. *See, e.g.*, Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 168–69 (2011); Lovett, *supra* note 20, at 724–26.

263. *See* Federal Trade Commission (Wheeler-Lea) Amendments of 1938, ch. 49, sec. 3, § 5(a), 52 Stat. 111, 111 (codified as amended at 15 U.S.C. § 45(a)(1) (2012)); *see also* Averitt, *supra* note 229, at 231–35 (discussing the Supreme Court decisions in deception cases that led to the 1938 amendment to section 5, as well as the content of the 1938 amendment).

264. *See supra* notes 225–29 and accompanying text; *cf.* CARTER & SHELDON, *supra* note 11, § 3.2.4, at 180 (opining, on a nationwide basis, that "[i]f a court or jury finds for the jury on a common law fraud count . . . the court must, as a matter of law, find a [section 5 analogue] violation").

E. Possible Objections to the Suggested Approach

One might respond that the approach proposed in this Article would not be better than selective upgrading and its near relatives.[265] The predicted objections, however, are unpersuasive.

First, one might object that limiting per se violations to instances of explicit or semi-explicit upgrading is too restrictive—i.e., that courts should continue to engage in selective upgrading in some cases. Under the approach proposed here, however, courts would still have options for finding a violation of section 75-1.1 in the absence of express statutory language. For example, they could apply the public-policy aspect of unfairness.[266] They could also decide that a defendant's conduct satisfies another part of the standards for unfairness or deception.[267] The difference would be that courts would not face the daunting challenges posed by selective upgrading.[268]

Second, one might say that this Article proposes to replace a single-stroke analysis—a decision that all instances of a particular predicate violation do or do not satisfy the conduct standard under section 75-1.1—with a less categorical analysis.[269] That is true, but courts are already hesitating to engage in the single-stroke analysis. By crafting less categorical alternatives to selective upgrading—the near relatives—courts have shown that they see the categorical nature of selective upgrading as a problem, not as a desirable feature.[270]

Finally, one might argue that replacing selective upgrading with the public-policy aspect of unfairness would replace one nebulous

265. *See supra* notes 93–163 and accompanying text (showing problems with the current near relatives of per se violations and with the current standards for selective upgrading).

266. *See supra* notes 205–34 and accompanying text.

267. *See* Marshall v. Miller, 302 N.C. 539, 548–49, 276 S.E.2d 397, 403 (1981) (establishing standards for deception claims under section 75-1.1); *see also* Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 87–88, 747 S.E.2d 220, 226–27 (2013) (refining these standards); Sawchak & Nelson, *supra* note 4, at 2050–56, 2070–72 (giving an overview of the current standards for unfairness and proposing revisions to those standards).

268. *See supra* notes 7, 37 and accompanying text (defining per se violations); *supra* notes 94–110 and accompanying text (describing cases in which courts have recoiled from selective upgrading).

269. *Compare supra* notes 7, 36–37 and accompanying text (defining per se violations as having this effect), *with supra* notes 208–34 and accompanying text (discussing the criteria for the public-policy aspect of unfairness).

270. *See, e.g.*, Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 67, 71, 529 S.E.2d 676, 680, 683 (2000) (rejecting the argument that a predicate violation "constitut[ed] a violation of N.C.G.S. § 75-1.1," but "agree[ing] with the practice of looking to [the predicate statute] for *examples of conduct* to support a finding of unfair or deceptive acts or practices" (emphasis added)); *see also supra* notes 121–22, 129–36 and accompanying text (discussing other decisions that apply the near relatives of per se violations).

analysis with another. To be sure, the FTC's criteria for public-policy-based unfairness require judgment calls.[271] Even so, these criteria are better defined than the current North Carolina criteria for selective upgrading. North Carolina decisions, after all, do not expressly state criteria for selective upgrading; one has to distill the criteria from a group of opinions.[272] If courts consult the FTC's criteria for public-policy-based unfairness, they will find standards that at least begin to solve this problem.[273] Further, a court that applies the FTC standards can take guidance from explicit decisions of courts and the FTC, as well as thoughtful commentary, on the public-policy aspect of unfairness.[274]

CONCLUSION

Per se violations of section 75-1.1 have powerful effects across entire categories of conduct. For good reason, courts have become reluctant to create these effects without legislative endorsement. The multiple theories that courts have used to express this reluctance, however, have created a morass.

Courts can begin to find their way out of this morass by avoiding ambiguous language like "as a matter of law" and "may be." They can improve things further by avoiding the near relatives of per se violations. The near relatives might have allowed a compromise in past cases, but they have given today's courts a confusing menu of standards for deciding the role of predicate violations. Finally, by limiting per se violations to those that the General Assembly has explicitly recognized, and by applying the public-policy aspect of unfairness in all other cases, the courts can end their struggle with selective upgrading.

As a group, these changes will make the law under section 75-1.1 more stable, rigorous, and predictable.

271. *See* 1980 Statement, *supra* note 225, at 1075–76 (stating these criteria); *supra* notes 221–30 and accompanying text (discussing these criteria); *see also* MANNE, *supra* note 243, at 30–34 (criticizing recent FTC unfairness enforcement approaches as too unpredictable).

272. *See supra* notes 52–56, 139–51 and accompanying text (inferring and discussing these criteria).

273. *See* 1980 Statement, *supra* note 225, at 1075–76; *supra* notes 221–30 and accompanying text (discussing these criteria).

274. *See, e.g.*, FTC v. Accusearch Inc., 570 F.3d 1187, 1194 (10th Cir. 2009); Orkin Exterminating Co., 108 F.T.C. 263, 331–32 (1986), *aff'd*, 849 F.2d 1354 (11th Cir. 1988); Int'l Harvester Co., 104 F.T.C. 949, 1044–46 (1984); Azcuenaga, *supra* note 225, ¶ 50,076, at 48,789–90; Averitt, *supra* note 229, at 268–78; Beales, *supra* note 225, at 194–95; Greenfield, *supra* note 234, at 1875–77, 1880–82.