2014

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REFINING PER SE UNFAIR TRADE PRACTICES

MATTHEW W. SAWCHAK**

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
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.

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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.” 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.”

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. Second, the definition of conduct that violates section 75-1.1 is so vague that


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).


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

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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, eliminating 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).

remedies even when an underlying violation allows no private recovery at all.\textsuperscript{9}

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

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

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


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).


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).

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,

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

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.


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. A section 75-1.1 plaintiff, moreover, can prevail without showing a defendant’s bad faith, intent, willfulness, or knowledge. Further, a plaintiff’s contributory negligence is no defense to a claim under the statute. 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.

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. 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.


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).


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. Over its forty-five-year history, the statute has generated over 2000 reported decisions, 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.

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.

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

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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.”).


violation of the prohibition against unfair and deceptive acts . . . ."  

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.” About forty-five North Carolina statutes contain similar cross-references. 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.

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


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).


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 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

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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.


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.


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 attempted 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.”

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.

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., the supreme court held that “violations of a licensure regulation . . . are not per se unfair or deceptive trade practices.” In dicta, moreover, the court appeared to extend this rule to “violation[s] of a regulatory statute which governs business activities.”

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).

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.

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

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


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. Based on these violations, the North Carolina Court of Appeals expressly recognized a per se violation of section 75-1.1.

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

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. 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*, an earlier case in which the court had upheld liability under section 75-1.1. 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,

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

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).
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].

The Walker court also noted several times that the regulations at issue were connected with licensing. 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.

In any event, the holding in Walker is explicit: “[V]iolations of a licensure regulation . . . are not per se unfair or deceptive trade practices.” 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.” This reasoning was a dictum—and perhaps even a slip of the pen—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 Sterns, 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

76. See supra notes 63 and accompanying text.

77. See supra notes 47–56 and accompanying text (defining semi-explicit upgrading and selective
upgrading).


79. 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).

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...
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

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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.
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

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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.
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.”

- 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.”

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. 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.

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, there is little reason to believe that busy trial

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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 claims105 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).


104. Id.


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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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 \textit{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.

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

\textsuperscript{109} \textit{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 \textit{Gray}, 132 N.C. App. at 73, 510 S.E.2d at 402–03.

\textsuperscript{110} \textit{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 \textit{Gray} as a per se case. See infra notes 172–85 and accompanying text.

\textsuperscript{111} \textit{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.


[^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. 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. Several of these decisions say, for example, that a given predicate violation “may be” a violation of section 75-1.1.

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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, 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.”

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. At least two courts, however, have treated the decision that Walker cited for this point, Drouillard v. Keister Williams Newspaper Services, Inc., as a basis for finding a per se violation.

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.”).

Id. at 163, 681 S.E.2d 448 (2009).

125. 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).

126. 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. 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. 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.”

The court in Noble 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).
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, what is the relevance of a predicate violation? 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. 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. 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.


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.\textsuperscript{137} Unpredictability makes lawsuits under section 75-1.1
last longer and arise more often.\textsuperscript{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.\textsuperscript{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.\textsuperscript{140} First, the
court has implied that upgrading will occur when a predicate violation
states a detailed conduct standard.\textsuperscript{141} Second, the court has upgraded
predicate violations whose goals overlap with the goals of section 75-
1.1.\textsuperscript{142}

\textsuperscript{137} See, e.g., Neil W. Averitt, The Elements of a Policy Statement on Section 5,
\textit{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); \textit{supra}
note 21 and accompanying text (explaining the relationship between section 5 and
section 75-1.1).

\textsuperscript{138} See \textit{supra} notes 31, 33–34 and accompanying text (discussing the high volume
of litigation under section 75-1.1); \textit{supra} note 4, at 2035–36 (discussing how
unpredictable standards affect litigation strategy in section 75-1.1 cases).

\textsuperscript{139} See \textit{supra} notes 52–56 and accompanying text (defining and discussing selective
upgrading).

\textsuperscript{140} See \textit{supra} notes 52–56 and accompanying text.

\textsuperscript{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”).

\textsuperscript{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 \textit{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*,

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.”

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*,

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.”

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.”

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).
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).
agency to issue sanctions when a dealer “commit[s] unfair or deceptive acts or practices.”\textsuperscript{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.\textsuperscript{149} That statute states only that “[a] private personnel service shall not engage in” twelve listed acts.\textsuperscript{150} The listed acts do not expressly include unfair or deceptive conduct.\textsuperscript{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.\textsuperscript{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.\textsuperscript{153}

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

\textsuperscript{148} N.C. GEN. STAT. § 143-143.13(a)(7) (2013). These statutes, moreover, were enacted for the express purpose of protecting consumers. \textit{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.” \textsc{Allen, supra} note 1, § 9.04, at 9-34 to -36; \textit{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.”).

\textsuperscript{149} Noble, 199 N.C. App. at 170 n.3, 681 S.E.2d at 454 n.3; \textit{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 \textit{Winston Realty} is surprising as well, because \textit{Winston Realty} does not apply per se analysis. \textsc{See supra} notes 112–20 and accompanying text.

\textsuperscript{150} N.C. GEN. STAT. § 95-47.6.

\textsuperscript{151} \textit{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.” \textit{Id.} § 95-47.2(d)(3)(b)(4).

\textsuperscript{152} \textit{See Walker}, 362 N.C. at 71, 653 S.E.2d at 399; Noble, 199 N.C. App. at 70–71, 681 S.E.2d at 454–55.

\textsuperscript{153} \textit{See Walker}, 362 N.C. at 71, 653 S.E.2d at 399; Noble, 199 N.C. App. at 71, 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] commit[ted] 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).

\(^{158}\) 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

\^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).


of law” with this meaning in *State ex rel. Edmisten v. Zim Chemical Co.* The defendant in *Zim* violated a statute that prohibited the misbranding of antifreeze. 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.” 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.

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. *Country Club of Johnston County v. United States Fidelity & Guaranty Co.* 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.” Here, “as a matter of law” described the trial court’s decision-making process, not the

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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.”).

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).
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,\textsuperscript{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.\textsuperscript{180} In Noble,\textsuperscript{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.”\textsuperscript{182} Even more recently, in Weber, Hodges & Godwin,\textsuperscript{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.\textsuperscript{184} In both decisions, the court of appeals recounted the passage in Winston Realty that uses the phrase “as a matter of law.”\textsuperscript{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.
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.\textsuperscript{186} They also promote slippage from one decision to another, where ambiguous phrasing causes narrow precedents to be misunderstood in later cases.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{189} Holdings like these give future courts no reference points to guide their analysis.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{186} See supra notes 119–28, 164–85 and accompanying text.
\item \textsuperscript{187} See supra notes 123–28, 172–85 and accompanying text.
\item \textsuperscript{188} See supra notes 93–137 and accompanying text.
\item \textsuperscript{189} See supra notes 99–100, 111, 123–28, 131–36 and accompanying text.
\item \textsuperscript{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.
\item \textsuperscript{191} See supra notes 104–08 and accompanying text.
\end{itemize}
support a finding of unfair or deceptive acts or practices." If earlier decisions had ruled out this type of difference splitting, the court might well have analyzed the upgrading issues that the case presented. Further, if Gray had addressed upgrading, the supreme court’s guidance would have eased the courts’ struggles in later per se cases.

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. 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. Upgrading turns a claim that allows single damages into one that generates automatic treble damages and possible attorney fees. Indeed, upgrading can produce this effect even when a predicate violation lacks any private right of action of its own. 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. Indeed, it is not even clear whether the two current standards for selective upgrading are cumulative or alternative.

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. 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.

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).
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. 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.

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.

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.

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.

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. Case law on the widest-ranging aspect of section 75-1.1—
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.”® 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.°

_Noble v. Hooters of Greenville (NC), LLC_ 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.® They claimed that the bar violated North Carolina alcohol statutes and related regulations.® They went on to argue that these violations supported a section 75-1.1 violation because, among other reasons,® the bar’s actions “offend[ed] established public policy.”® 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

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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.


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).
Thus, Noble, like other similar decisions, 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. 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." In view of this express statutory language, the court did not discuss how it would analyze less graphic expressions of public policy.

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.


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.


219. N.C. GEN. STAT. § 24-2.1(g).

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.
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.
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.”

- 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.”

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


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 law231 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.”).


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. 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. 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, courts have often avoided selective upgrading, even when it might have been justified. In addition, courts have insufficient tools to help them decide whether to engage in selective upgrading.

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).


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).


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, overstudied . . . .”)

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, courts would benefit from using authorities on public policy under section 5 to decide which predicate violations justify liability under section 75-1.1.

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. 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. Over time, by asking whether predicate violations reflect unambiguous conclusions of unjustified injuries, 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. If courts ended selective upgrading, eliminated the near relatives of per se violations, and began analyzing the public-policy basis of predicate violations, 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.


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, ACCESSNORTHA.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* 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.” 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.”

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. 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. The textual connection between the predicate violations and unfair or deceptive practices would have prevailed over the fact that the predicate violations were “regulatory.”

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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).


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. As a nonstatutory theory, fraud has no text that could support explicit or semi-explicit upgrading. 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.

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. Likewise, fraud and other forms of deception are the main concern that led to the enactment of similar statutes in other states and the “deceptive acts or practices” aspect of section 5.

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. 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”).


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”).


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”).
One might respond that the approach proposed in this Article would not be better than selective upgrading and its near relatives. 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. They could also decide that a defendant’s conduct satisfies another part of the standards for unfairness or deception. The difference would be that courts would not face the daunting challenges posed by selective upgrading.

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. 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.

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

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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.


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. 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. If courts consult the FTC’s criteria for public-policy-based unfairness, they will find standards that at least begin to solve this problem. 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.

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).