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INTRODUCTION

In North Carolina, the Unfair Trade Practices Act (UTPA) grants to any person injured by an unfair or deceptive act in or affecting commerce the right to a civil action against a person, firm, or corporation for treble damages. The Insurance Code regulates the business of insurance in North Carolina and contains a section entitled "Unfair Trade Practices Act." The judiciary must reconcile the two statutes to determine what role the regulatory section of the Insurance Code plays in a private action under the more general UTPA.

In an effort to increase consumer protection for insurance buyers, the North Carolina Supreme Court's 1986 decision in Pearce v. American Defender Life Ins. Co. held that any violation of the Insurance Code section defining unfair trade practices was, "as a matter of law," an unfair trade practice for which a consumer could bring a civil action for treble damages. The Pearce decision, however, left some significant unanswered questions. The court did not state whether a regulatory violation creates a per se unfair trade practice under the UTPA. Nor did the court address whether the regulatory statute preempts the UTPA in defining an unfair insurance practice in a civil action. Despite the supreme court's intent to protect insurance consumers, its decision in Pearce ultimately may restrict both the consumer's ability to recover for an unfair trade practice injury and the regulatory agency's ability to effectively regulate the insurance industry.

This Note will address two main issues. The first issue is whether a violation of the Insurance Code regulatory section entitled "Unfair Trade Practices" should be a per se unfair trade practice under the UTPA. The second is whether the Insurance Code

5. Id. at 470, 343 S.E.2d at 179.
preempts the UTPA in defining unfair insurance practices.

The first issue presents itself when an insurance company violates one of the Insurance Code's unfair practices regulations. Is the insurer then *per se* subject to treble damages in a private civil action under the UTPA? Should the company be forced to pay treble damages for an activity that once resulted in only a cease and desist order or fine? Does the insurance company have any recourse at trial if the violation is now a *per se* unfair trade practice?

The second issue arises when a consumer is injured by an insurance practice not listed in the Insurance Code. Is the buyer precluded from recovering for an unfair practice unless he can prove a violation of the Insurance Code? Are consumers better protected by case-by-case determinations of unfairness or by legislative mandates? How should plaintiffs' attorneys plead and attempt to prove such cases? Although *Pearce* enhanced consumer protection for insurance buyers, questions of policy dictate that the judiciary or legislature clarify the decision to serve the purposes of both the UTPA and the Insurance Code.

**The Case**

In *Pearce*, the plaintiff, a young widow, sued American Defender Life Insurance Company (American Defender) for refusing to pay death benefits to her under her deceased husband's accidental life insurance policy. In 1961, when the decedent, Mr. Pearce, was still a college student, he purchased a $20,000.00 life insurance policy from American Defender. At the same time, Mr. Pearce purchased an accidental death rider, with benefits of $40,000.00, naming Mrs. Pearce as the beneficiary. The accidental death rider contained a "flight exception." The clause released American Defender from any obligation to pay the benefits of the policy if Mr. Pearce died in an aircraft accident that occurred while he was a crew member or that was flown for military purposes.

In 1971, Mr. Pearce entered the United States Air Force. He wrote to American Defender to confirm his coverage under the two

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6. Id. at 465, 343 S.E.2d at 176.
7. Id. at 463, 343 S.E.2d at 176.
8. Id.
9. Id.
10. Id.
11. Id. at 463-64, 343 S.E.2d at 176.
CONSUMER PROTECTION AND THE UTPA

policies. The dispute in the case arose as a result of the reply Mr. Pearce received from American Defender. In the letter, American Defender stated that, "in addition to the basic policy, . . . this Accidental Death Rider would also be payable should [Mr. Pearce's] death occur while in the Armed Forces but not as the result of war." Six weeks later, Mr. Pearce was killed in a military aircraft exercise off the coast of England. Although Mr. Pearce's death was not the result of war, American Defender refused to pay the accidental death benefits.

Mrs. Pearce brought this action alleging nine claims for relief, including fraud and unfair trade practices. The unfair trade practices claim was based on the UTPA section 75-1.1 and the Insurance Code section 58-54.4. The pertinent Insurance Code subsection provides:

The following are hereby defined as unfair . . . acts in the business of insurance: (1) Misrepresentations and False Advertising of Policy Contracts - Making, issuing, circulating . . . any estimate, illustration, circular or statement misrepresenting the terms of any policy issued . . . .

The trial court initially granted American Defender's motion to dismiss for failure to state a claim on all nine counts. The appeals court, limiting its holding to the propriety of granting the motion to dismiss, remanded the case for further proceedings. At trial in 1984, the court entered a directed verdict for American Defender on the fraud and unfair trade practices claims. The jury awarded Mrs. Pearce $40,000.00 in accidental death benefits on the contract, but the judge entered a judgment notwithstanding the verdict in favor of defendant. Mrs. Pearce appealed the trial court's directed verdict on the fraud and unfair trade practices claims.

12. Id. at 463, 343 S.E.2d at 176.
13. Id. at 464, 343 S.E.2d at 176.
14. Id.
15. Id. at 465, 343 S.E.2d at 177.
16. Id.
19. Id. at 629, 330 S.E.2d at 14-15.
20. Id. at 624, 330 S.E.2d at 12.
21. Pearce, 62 N.C. App. at 668, 303 S.E.2d at 612.
22. Pearce, 74 N.C. App. at 624, 330 S.E.2d at 12.
The court of appeals then focused on the unfair trade practices claim. The court directed its analysis of the claim to the UTPA section 75-1.1. Relying on prior judicial interpretations of section 75-1.1, the appeals court concluded that the reply letter from American Defender to Mr. Pearce was not, in these circumstances, an unfair act. The supreme court reversed, holding that any violation of the Insurance Code section 58-54.4, including the subsection cited by Mrs. Pearce, was as a matter of law an unfair trade practice under the UTPA section 75-1.1.

**BACKGROUND**

Private litigation based on unfair trade practices of insurance companies is a relatively recent development in North Carolina. In pleading these private actions for their clients, attorneys traditionally base their claims on violations of the regulatory statutes of the Insurance Code rather than on the UTPA alone. This section of the Note will outline the UTPA and the Insurance Code "Unfair Trade Practices Act" and define the concept of *per se* as it relates to this area of law.

**A. The Unfair Trade Practices Act**

North Carolina's consumer protection statute is known as the Unfair Trade Practices Act. The UTPA entitles plaintiffs to recover treble damages for an injury caused by an "unfair or deceptive act in or affecting commerce." The four elements necessary

23. *Id.* at 628, 330 S.E.2d at 14.

24. *Id.* at 629, 330 S.E.2d at 15. *See* Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980). An unfair act includes an act that has the capacity or tendency to deceive the average consumer. The court specifically held that American Defender's representations were not "deceptive" to the average consumer. *Id.* at 263, 266 S.E.2d at 621.

25. *Pearce*, 316 N.C. at 470, 343 S.E.2d at 179. The court reversed the directed verdict in favor of defendant. *Id.* at 472-73, 343 S.E.2d at 180.

26. Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977). Ray was the first North Carolina case to reconcile the UTPA with the Insurance Code. The court held that the insurance industry was not exempt from the UTPA. *See infra* notes 58-61 and accompanying text.


29. N.C. GEN. STAT. §§ 75-1.1 and 75-16. (The statute refers to unfair acts and practices. For purposes of this Note, unfair acts and practices will be referred to as either unfair acts or unfair practices.)
for relief are: an unfair act; an actual injury; proximate cause; and commerce.\textsuperscript{30} Although the statute does not define an "unfair act," the courts have interpreted an "unfair act" to be any act that offends established public policy or that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.\textsuperscript{31} An "unfair act" also includes any act that has the capacity or tendency to deceive the average consumer.\textsuperscript{32} Section 75-16 enforces the prohibition against unfair acts by giving an injured consumer a private right of action.\textsuperscript{33} To encourage private enforcement, sections 75-16 and 75-16.1 entitle a successful plaintiff to recover treble damages and attorney fees.\textsuperscript{34}

B. The Insurance Code Unfair Trade Practices Act

The Insurance Code contains a section entitled "Unfair Trade Practices Act."\textsuperscript{35} This statute prohibits any activities defined in the statute to be an unfair act in the business of insurance.\textsuperscript{36} Section 58-54.4 specifies a list of thirteen unfair acts that includes misrepresentations, false advertising of insurance policies, and unfair claim settlement practices.\textsuperscript{37} The statute authorizes the Insurance Commissioner to institute administrative proceedings against any insurer whom he has reason to believe has engaged in or is engaging in any unfair act as defined in the regulations.\textsuperscript{38} The Commissioner may hold a hearing on the charges and may serve a cease and desist notice or order the payment of a penalty for a violation.\textsuperscript{39} However, the statute neither explicitly nor implicitly

\textsuperscript{30} Id. As an essential element of plaintiff's cause of action, plaintiff must prove not only a violation of § 75-1.1 but also actual injury as a proximate cause of the activity alleged. Ellis, 48 N.C. App at 184, 268 S.E.2d at 273-74.


\textsuperscript{32} Johnson, 300 N.C. at 263, 266 S.E.2d at 621.

\textsuperscript{33} N.C. GEN. STAT. § 75-16.

\textsuperscript{34} N.C. GEN. STAT. §§ 75-16 - 16.1.

\textsuperscript{35} N.C. GEN. STAT. §§ 58-54.1 - 54.13.

\textsuperscript{36} N.C. GEN. STAT. § 58-54.3. N.C. GEN. STAT. § 58-54.4 defines thirteen unfair acts. Pursuant to N.C. GEN. STAT. § 58-54.9, the Insurance Commissioner may also make determinations of unfair acts not otherwise listed in N.C. GEN. STAT. § 58-54.4. (The statute refers to unfair acts and practices. For purposes of this Note, unfair acts and practices will be referred to as either unfair acts or unfair practices.)

\textsuperscript{37} N.C. GEN. STAT. § 58-54.4.

\textsuperscript{38} N.C. GEN. STAT. §§ 58-54.5 - 54.6.

\textsuperscript{39} N.C. GEN. STAT. §§ 58-54.6 - 54.7 and 58-54.11.
authorizes the Commissioner to award damages to an aggrieved person or to determine a right to a private action for damages.

C. Per Se Defined

Generally, a violation \textit{per se} exists when the evidence proves that a particular activity occurred and the law provides no possible justification for that activity.\footnote{North Carolina has not yet articulated a test for a \textit{per se} unfair trade practice,\footnote{But cf. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973). In Rose, the supreme court addressed unfair methods of competition and held that an activity was a \textit{per se} unfair method of competition violative of the Sherman Act if the activity was incapable of any legal or economic justification.} but other states define a \textit{per se} unfair trade practice as an act that is both illegal and against public policy.\footnote{See, e.g., Salois v. Mutual of Omaha Ins. Co., 90 Wash. 2d 355, 581 P.2d 1349 (1978).} Therefore, the test for \textit{per se} status is twofold: first, whether the action is illegal, and, second, whether it is against public policy as declared by the legislature or the judiciary.\footnote{Salois, 581 P.2d at 1350-51.}

Although North Carolina courts have not defined a specific test for \textit{per se} unfair trade acts, they customarily look to the public policy implications in determining whether a particular activity constitutes an unfair trade practice.\footnote{See, e.g., Johnson, 300 N.C. at 263, 266 S.E.2d at 621.} Insurance Code violations are illegal, but they may not always contravene the policy of the UTPA. \textit{Pearce} held that violations of the Code's unfair practices section are, "as a matter of law," unfair trade practices under the UTPA, but it did not term such activities "\textit{per se}" violations.\footnote{Id.}

The question, then, is whether the \textit{Pearce} court in fact intended to create a \textit{per se} rule for Insurance Code violations. In North Carolina, traditionally a judge determined whether a trade practice was unfair, that is, whether the action was against public policy or was immoral, unethical, oppressive, or substantially injurious to consumers,\footnote{Pearce, 316 N.C. at 470, 343 S.E.2d at 179.} based on the facts in each case and on the impact of the practice on the marketplace.\footnote{Johnson, 300 N.C. at 262-63, 266 S.E.2d at 620.}

\begin{footnotes}
\footnote{Morgan, The People's Advocate in the Marketplace — The Role of the North Carolina Attorney General in the Field of Consumer Protection, 6 \textsc{Wake Forest} \textsc{Intra. L. Rev.} 1, 9 (1969).}
\footnote{But cf. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973). In Rose, the supreme court addressed unfair methods of competition and held that an activity was a \textit{per se} unfair method of competition violative of the Sherman Act if the activity was incapable of any legal or economic justification.}
\footnote{Salois, 581 P.2d at 1350-51.}
\footnote{See, e.g., Johnson, 300 N.C. at 263, 266 S.E.2d at 621.}
\footnote{Id.}
\footnote{Pearce, 316 N.C. at 470, 343 S.E.2d at 179.}
\footnote{Johnson, 300 N.C. at 262-63, 266 S.E.2d at 620.}
\end{footnotes}
Carolina Supreme Court in *Hardy v. Toler* held that although the role of the jury is that of a factfinder, the court determines whether the facts, in light of the circumstances of each case, constitute an unfair practice. Therefore, prior to *Pearce*, the trial judge in each case determined as a matter of law whether an unfair practice occurred.

The trial judge, however, does not always have to determine whether an act is unfair in a particular case. Some North Carolina regulatory statutes contain specific provisions providing that a violation of the regulation automatically constitutes an unfair trade practice under the UTPA. These provisions are legislative determinations that the illegal activities designated in the statutes violate the policy of the UTPA. The legislative mandates therefore expressly elevate the activities regulated by these statutes to *per se* violations of the UTPA. Other states have provisions in their regulatory statutes similar to those in the North Carolina statutes.

Perhaps the most sweeping *per se* rule for unfair practices is a California statute providing that any violation of state law in a business context is a *per se* violation of California's unfair trade practices act.

In 1980, the North Carolina Court of Appeals first recognized that some regulatory violations may warrant *per se* treatment even though the regulatory statute does not specifically refer to the UTPA. The North Carolina Supreme Court subsequently adopted this position in 1985. While *Pearce* was pending appeal to the supreme court, the court decided *Winston Realty Co. v.*

49. *Id.* at 309, 218 S.E.2d at 346.
50. See infra notes 81-84 and accompanying text.
G.H.G., Inc.\textsuperscript{55} Winston Realty created a \textit{per se} rule for violations of the regulations governing private personnel agencies.\textsuperscript{56} The \textit{Pearce} court then relied heavily on its decision in \textit{Winston Realty} to conclude that any Insurance Code unfair practices violation was, as a matter of law, an unfair act under the UTPA.\textsuperscript{57}

\textbf{D. The UTPA and the Business of Insurance}

The Western District Court of North Carolina opened the door to private consumer litigation for unfair trade practices of insurance companies in \textit{Ray v. United Family Life Ins. Co.}.\textsuperscript{58} Even though the Insurance Code provides a mechanism for the administrative regulation of unfair insurance practices, the court allowed the plaintiff to recover under UTPA section 75-1.1.\textsuperscript{59} The \textit{Ray} court emphasized that the Insurance Code had no provision for civil damage actions.\textsuperscript{60} It concluded that the source of the UTPA's private right of action, section 75-16, was the vehicle for individual consumer redress against insurers.\textsuperscript{61}

The North Carolina Court of Appeals followed \textit{Ray} in \textit{Ellis v. Smith-Broadhurst, Inc.}.\textsuperscript{62} The plaintiff in \textit{Ellis} alleged that misrepresentations by his insurance company violated the Insurance Code section 58-54.4 defining unfair insurance practices.\textsuperscript{63} He contended further that misconduct prohibited by the Insurance Code could be the basis of recovery pursuant to the UTPA section 75-1.1.\textsuperscript{64} Without considering the role of section 58-54.4 of the Insurance Code, the court held that the UTPA provides a remedy for unfair

\textsuperscript{55} 314 N.C. 90, 331 S.E.2d 677 (1985). The court held that two subsections of the section entitled "Prohibited Acts" in regulatory statutes governing private personnel agencies were unfair "as a matter of law." \textit{Id.} at 91-92, 331 S.E.2d at 678.

\textsuperscript{56} \textit{Id.} at 97, 331 S.E.2d at 681.

\textsuperscript{57} \textit{Pearce}, 316 N.C. at 470, 343 S.E.2d at 179.

\textsuperscript{58} 430 F. Supp. 1353 (W.D.N.C. 1977).

\textsuperscript{59} \textit{Id.} at 1356.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.} at 1356-57.

\textsuperscript{62} 48 N.C. App. 180, 268 S.E.2d 271 (1980) (unfair acts in the insurance industry are not regulated exclusively by the insurance statutes). The Insurance Code § 58-54.8(d) provides: "No order of the Commissioner . . . shall in any way relieve or absolve any person . . . from any liability under any other laws of this State."

\textsuperscript{63} \textit{Id.} at 181, 268 S.E.2d at 272.

\textsuperscript{64} \textit{Id.}
insurance practices by creating a private right of action against insurers under section 75-1.1.66

The appeals court in *Phillips v. Integon Corp.*,67 subsequently reiterated that the Insurance Code was not the exclusive vehicle for obtaining relief from those who engage in unfair trade practices in the insurance industry.68 Yet, until *Pearce*, no North Carolina court explained the specific effect of the Insurance Code definitions of unfair practices on consumers and insurers in civil suits for treble damages.

**ANALYSIS**

The Insurance Code section 58-54.4 lists thirteen activities for which the Insurance Commissioner may issue cease and desist orders or fines.69 The evolution in the law from Ray to *Pearce* allows a private citizen to bring suit against an insurance company for these regulatory violations. The *Pearce* ruling creates the question of whether a violation of this regulatory section will now be elevated to the determining factor in a private claim based on unfair insurance practices. This raises a very important issue because an unfair trade practice in a civil suit under the UTPA warrants treble damages whereas a violation of the regulatory code results in only injunctions or fines. *Pearce* held that a violation of section 58-54.4 was, as a matter of law, an unfair trade practice within the meaning of section 75-1.1.70 The two specific issues *Pearce* raises are, first, whether proof of a violation of the Insurance Code section 58-54.4 is conclusive proof of an unfair act in a private action and, second, whether proof of such a violation is necessary to sustain a private cause of action.

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65. Id. at 183, 268 S.E.2d at 272.
66. Id. at 183-84, 268 S.E.2d at 273-74.
68. Id. at 443, 319 S.E.2d at 675. In *Phillips*, the court reconciled N.C. GEN. STAT. Chap. 58 with N.C. GEN. STAT. Chap. 75 in a claim against an insurer for unfair methods of competition.
69. N.C. GEN. STAT. § 58-54.4. The thirteen activities are: (1) misrepresentations and false advertising of policy contracts; (2) false information and advertising generally; (3) defamation; (4) boycott, coercion, and intimidation; (5) false financial statements; (6) stock operations and insurance company advisory board contracts; (7) unfair discrimination; (8) rebates; (9) advertising of health, accident, or hospitalization insurance; (10) soliciting, etc., unauthorized insurance contracts in other states; (11) unfair claim settlement practices; (12) misuse of borrowers' confidential information; and (13) overinsurance in credit or loan transactions.
70. *Pearce*, 316 N.C. at 470, 343 S.E.2d at 179.
A. Pearce's Per Se Rule

The Code forbids insurance companies from engaging in misrepresentation, false advertising, defamation, coercion, discrimination, presentation of false financial statements, and unfair settlement practices.\(^1\) The court in *Pearce* could have resolved the narrow issue of whether American Defender's action was unfair by holding that a violation of subsection one of section 58-54.4 constitutes an unfair or deceptive act under the broad UTPA standard. The court instead made the sweeping holding that any of the thirteen activities listed in section 58-54.4 constitutes an unfair trade practice under the UTPA "as a matter of law."\(^2\)

The *Pearce* court apparently examined all the activities listed in the Code section 58-54.4 and determined that each met the judicially promulgated tests for unfairness under the UTPA. According to *Pearce*, proof of any violation of section 58-54.4 satisfies unconditionally the first of the four elements required for a UTPA private action, an unfair act. Since a *per se* violation exists when the evidence proves that a particular activity occurred, the *Pearce* holding then seems to say that a violation of section 58-54.4 constitutes a *per se* unfair act under the UTPA.

1. Reliance on Winston Realty

In *Pearce*, the supreme court relied heavily on its recent decision in *Winston Realty*.\(^3\) In *Winston Realty*, the court held that certain statutes regulating private personnel agencies were, as a matter of law, unfair trade practices under the UTPA.\(^4\) At the appellate court level, a strong dissent urged that, although there may be instances in which a violation of the regulatory statute supports a finding of an unfair practice in violation of section 75-1.1, the regulatory violation should not be the exclusive determining factor.\(^5\) The *Pearce* decision invites the criticism that finding that an insurer violated a regulation does not necessarily resolve the issue

\(^{71}\) Id.

\(^{72}\) *Pearce*, 316 N.C. at 470, 343 S.E.2d at 179.

\(^{73}\) Id. at 469, 343 S.E.2d at 179. *Winston Realty* was decided while *Pearce* was on appeal to the supreme court from the appellate court.

\(^{74}\) *Winston Realty*, 314 N.C. at 97, 331 S.E.2d at 681. The regulatory statute referred to in *Winston Realty* governing private personnel agencies is N.C. GEN. STAT. § 95-47.6, entitled "Prohibited Acts."

\(^{75}\) *Winston Realty*, 70 N.C. App. at 382, 320 S.E.2d at 291 (Hedrick, J., dissenting).
of whether the act was unfair to the plaintiff. Significantly, the supreme court in *Winston Realty* confined its decision to the particular subsections presented to the court in the complaint rather than encompassing the entire regulatory section. In contrast, the *Pearce* decision applied to section 58-54.4 in its entirety, even though the complaint alleged a violation of only one of the thirteen subsections.

2. **The Court's Role In Determining Unfairness**

If *Pearce* constitutes a *per se* rule for section 75-1.1, the rule seems contrary to the traditional case law requirement that a trial judge determines the unfairness of an act in light of the circumstances of a particular case. The *Pearce* holding requires the trial judge to find a section 75-1.1 unfair act as a matter of law once a jury determines that the insurance company violated section 58-54.4. The *Pearce* decision did not change the jury's traditional duty of factfinder, but it dramatically impacted the consequences of the jury's factual findings. The true effect of *Pearce* is that the legislature, and not the trial judge, is now the ultimate determiner of unfairness.

Many of the Code's proscribed activities are mechanical in nature and require only a determination of whether or not a specific action took place. For example, section 58-54.4(10) prohibits an insurer from soliciting, advertising, or entering into insurance contracts in states in which it is not licensed. A jury can objectively find as a matter of fact that an insurer advertised in a state in which it was not licensed. Other provisions require more subjective determinations, such as an insurer's state of mind or the effect of an act on the consumer. Section 58-54.4(1) forbids an insurer from making misleading statements to induce a policyholder to surrender his insurance. In a case like this, the jury must determine subjective elements such as deceit or intent, taking into consideration all of the facts and circumstances of a particular case. Traditionally, once the jury found as a fact that one of these activities occurred, the court then exercised its authority to decide whether the activity was unfair. With *Pearce*, the court merely relinquished to the legislature the judiciary's traditional role as the de-

76. *Hardy*, 288 N.C. at 310, 218 S.E.2d at 346.
79. *Hardy*, 288 N.C. at 310, 218 S.E.2d at 346.
terminer of unfairness. Now, when a jury finds as a fact that an insurer performed an act proscribed by the Code, that act automatically constitutes an unfair act under the UTPA. The insurer then will be subject to treble damages provided the consumer proves injury and proximate cause.

3. Legislative Action and Inaction

The most persuasive argument against the appropriateness of a judicially created per se rule for a Code violation is that the legislature did not specify it as such. In other regulatory areas, the legislature clearly stated its intent that a violation of a regulatory code provision simultaneously constitutes a violation of the UTPA section 75-1.1. For example, the last subsection of the Business Opportunity Sales Act states that “any violation of the provisions of this article shall constitute an unfair trade practice under G.S. 75-1.1.” Similar provisions appear in the Loan Broker's Statute, the Prepared Entertainment Contracts Statute, and the Debt Collection Policies Act.

Even so, North Carolina courts ruled in two prior cases that violations of particular regulatory statutes are violations of section 75-1.1 even though the legislature did not specifically provide for such in the regulatory statute. Moreover, the response of the legislature to the Pearce decision indicates that it approves of the Pearce per se rule. In State ex rel. Edmisten v. J.C. Penny Co., the supreme court advised that if it had not properly interpreted section 75-1.1 the General Assembly could amend the statute. The Pearce decision recognized private claims based on violations of any of the thirteen regulatory prohibitions contained in section 58-54.4 of the Insurance Code. The legislature subsequently amended the Code by adding a proviso to subsection eleven of

80. See infra notes 81-84 and accompanying text.
82. N.C. GEN. STAT. § 66-111(d) (1987).
88. Id. at 320, 233 S.E.2d at 901.
89. 1986 N.C. Sess. Laws ch. 1027, sec. 20 (currently N.C. GEN. STAT. § 58-
Code section 58-54.4:

(11) Unfair Claim Settlement Practices - Committing or performing with such frequency as to indicate a general business practice of any of the following: Provided, however, that no violation of this subsection shall of itself create a cause of action in favor of any person other than the Commissioner.\(^90\)

The general effect of a proviso is to except something from the enacting clause, qualify or restrain it, or exclude some possible ground of misinterpretation of it.\(^91\) Where a statute contains distinct subsections, an amendment to one of the subsections does not apply to the other subsections because it is presumed that if the legislature had intended the amendment to apply to the other subsections it would have expressed that intention.\(^92\) The language of the proviso to section 58-54.4 of the Insurance Code indicates that subsection eleven alone cannot be the basis of a private claim. Therefore, this amendment expressly excepts a subsection eleven violation from per se status. By placing the critical language in subsection eleven rather than in the enacting clause of section 58-54.4, all of section 58-54.4 except subsection eleven is defined by exclusion as a per se violation of section 75-1.1.\(^93\)

The legislature's amendment to subsection eleven implicitly acknowledges the per se rule created by the Pearce decision. However, the amendment represents a direct response to the decision as to only one of the thirteen regulatory violations defined in section 58-54.4. It negates the effect of the per se rule only in the sensitive area of unfair claims settlement techniques. Although the legislature expressly repudiated the effect of the rule concerning this one particular subsection, it declined to either adopt or repudiate the rule concerning the other twelve subsections. The legislature could have enacted a provision mandating that a violation of any regulation in section 58-54.4 constitutes an unfair act under the UTPA, as it has done with similar provisions in other regula-

\(^{54.4(11)}\) (Interim Supp. 1987)).


93. See Arrington, 264 N.C. at 42, 140 S.E.2d at 762, for an example of the application of the statutory rules discussed in notes 91-92 and accompanying text.
tory statutes, but it conspicuously declined to do so. Perhaps the same powerful lobbying efforts that successfully protected the insurance industry from the effect of a *per se* rule for unfair settlement techniques also persuaded the legislature to move slowly in overtly approving a *per se* rule for other activities listed in section 58-54.4.

4. **Statutory Purposes**

The public policy implications provide another strong argument against a *per se* rule. *Pearce* failed to consider the reason the legislature defined the specified Insurance Code activities as regulatory violations. The Insurance Code's prohibition of unfair acts is preventive in nature. The statute gives the Insurance Commissioner, as agent for the public, the power and duty to force a company to stop practices that may at some point injure the public. The UTPA, however, is remedial in nature. This statute gives an individual, in his private capacity, the right to a remedy from a business whose practices actually injured the person.

An activity proscribed by the Insurance Code regulations may warrant injunctive action by the state but may not be sufficiently culpable to constitute an unfair practice under section 75-1.1. For instance, section 58-54.4(10) prohibits an insurer from advertising in foreign states in which the insurer is not licensed. Although this act is an unlawful violation of the regulatory statute, it does not necessarily offend established public policy, nor is it necessarily immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Whether a particular act, such as foreign advertising, offends public policy or is substantially injurious to a consumer is more appropriately determined based on the facts in a particular case than by an inflexible legislative mandate.

5. **The Effect of Pearce**

The decision in *Pearce* forces insurers to be particularly careful to comply with the regulations of section 58-54.4 of the Code.

94. *See supra* notes 81-84 and accompanying text.
97. *N.C. GEN. STAT.* § 58-54.4(10).
98. *Johnson*, 300 N.C. at 263, 266 S.E.2d at 621.
Failure to comply can now subject insurers not only to a cease and desist order or fine but also to a potential treble damage lawsuit as well. The *Pearce* decision also forces attorneys to make some adjustments in the way they present their claims.

Section 58-54.4 contains two types of regulations, "objective" and "subjective." 99 Even with a *per se* rule, insurers can defend against both types of regulations. A consumer still must prove an actual injury proximately caused by the insurer's unfair act. 100 For the objective regulations, the insurer must focus its defense on the injury and causation issues. For the subjective regulations, the insurer must concentrate on arguing such issues as deceit, inducement, misrepresentation, and falsity to the jury at trial rather than to a judge on brief. These adjustments certainly will impact pleading and defense tactics for attorneys attempting to vindicate their insurance clients.

**B. Preempting The UTPA**

Assume that the supreme court intended that an insurer who violates the Insurance Code section 58-54.4 is subject to treble damages in a civil suit based only on a showing that the consumer was injured as a result of the violation. Did the court also intend that an insurer who does not violate section 58-54.4 is not subject to treble damages? In other words, does the Insurance Code preempt the UTPA in private litigation of unfair insurance acts? Although the question was not specifically before the court in *Pearce*, the court could have resolved this issue in its otherwise sweeping decision. The statutes 101 and case law from North Carolina, 102 as well as from other states 103 that have confronted this issue, indicate that the controlling standard for private UTPA claims is whether the actions were unfair or oppressive to the consumer in that instance, not whether the actions are included in those listed in the regulations of the Insurance Code.

**1. Statutory Construction of the UTPA and the Insurance Code**

Applying the traditional rules of statutory interpretation, a

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99. See supra notes 77-78 and accompanying text.
100. Ellis, 48 N.C. App at 184, 268 S.E.2d at 273-74.
101. See infra notes 105-115 and accompanying text.
102. See infra notes 144-156 and accompanying text.
103. See infra notes 116-143 and accompanying text.
later statute generally will not be deemed to repeal or modify an earlier statute on the same subject. All existing statutes pertaining to the same subject matter are construed so as to make each effective and to avoid undesirable consequences.104 The UTPA and the Insurance Code each prohibit unfair trade practices in the insurance industry. However, the purpose of each statute and the methods provided within each to effect its purpose are distinct. To give effect to each according to the rules of construction above, the purpose of each and the consequences of the interpretation of each must be considered.

The purpose of the UTPA is to enable injured individuals to recover damages for injuries incurred from unethical business practices.105 The purpose of the Insurance Code is to regulate insurance to prevent potential injury to the public.106 The broad language of the UTPA section 75-1.1 vests in the court the power to determine whether an act is immoral, unethical, oppressive, unscrupulous, or substantially injurious to a consumer, depending on the facts in the case.107 The Insurance Code vests in the Commissioner only the power to determine whether an insurer violated the regulatory statute, and not whether the purpose or effect of an insurer's actions is injurious to an individual consumer.108 To allow a plaintiff to recover only for the specific prohibitions listed in the Insurance Code would not only give the Commissioner power beyond that delegated to him in the Code, but would render the UTPA ineffective as a means of redress for insurance consumers.

Under the Insurance Code, the Commissioner issues cease and desist orders or fines for violations of the regulations.109 The Commissioner, however, has no power to determine whether and to what extent a consumer has been injured by a violation.110 Since the purpose of the UTPA is to remedy and not restrain, and the power vested in the court is broad and not limited, the legislature

105. Marshall, 302 N.C. at 549, 276 S.E.2d at 403.
106. Phillips, 70 N.C. App. 440, 319 S.E.2d 673 (1984). See generally State ex rel. Comm'r v. Integon Corp., 28 N.C. App. 7, 220 S.E.2d 409 (1975) (Commissioner's power to act in regard to unfair trade practices is limited to investigating, bringing charges, and ordering violator to cease and desist. Commissioner has only the express and incidental powers given to him by the legislature).
107. Johnson, 300 N.C. at 262-63, 266 S.E.2d at 621.
109. N.C. GEN. STAT. §§ 58-54.5 - 54.7 and 58-54.11.
110. Phillips, 70 N.C. App. at 444, 319 S.E.2d at 675.
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apparently did not intend that the specific activities defined in the Insurance Code dictate an individual’s right to relief under the UTPA. The consequences of restricting the activities for which consumers can recover would give insurers the ability to avoid the UTPA through evasive defensive tactics while requiring buyers to prove that the insurer’s misconduct fits into one of the thirteen listed activities.

The broad language of the UTPA indicates that its scope and application are not limited to precise acts that can be readily catalogued. The standard of unfairness for private injuries considers public values beyond simply those enshrined in the letter of the law. When the General Assembly adopted the UTPA it refused to adopt the section of the model act that listed activities considered to be unfair. The legislature probably feared that including a list would necessarily imply that relatively dissimilar practices should be excluded. Likewise, such a list created only for unfair insurance practices is inappropriate. Specifically defining all known unfair trade practices is futile because the inventiveness of human nature renders the list obsolete at the outset. A definitive list thus creates the potential for abuse, weakening the purpose and effect of the UTPA to redress private injuries.

2. Statutes From Other States

Furthermore, if the legislature intended that a plaintiff can recover under the UTPA only for the specific activities prohibited by the Insurance Code, it would have included the list in the UTPA or provided a private right of action under the Insurance Code as other states have done. For example, the Arkansas UTPA includes a section on unfair settlement practices virtually identical to North Carolina’s section 58-54.4(11). The Arkansas UTPA clearly states that when alleging an unfair settlement practice, an individ-

111. Johnson, 300 N.C. at 262, 266 S.E.2d at 621.
112. Id. at 265, 266 S.E.2d at 622.
114. Id.
115. H.R. REP. No. 1142, 63rd Cong., 2d sess. 19 (1914) (one congressman explaining why the federal legislation did not adopt a list of proscribed unfair acts).
ual must prove the mandates of that section to recover under the UTPA. The Texas Insurance Code provides that an individual can recover in a private right of action for a violation of the Insurance Code unfair trade practices section, a violation of the rules and regulations of the Board of Insurance, or any practice prescribed by the UTPA. The North Carolina statutes make no such reference to each other in this manner.

States are continually deciding whether or not regulatory statutes preempt their UTPAs. Many courts decide the issue based on whether the regulatory statute contains a remedy for consumers so that it is complete within itself. In Chelsea Plaza Homes v. Moore, the Kansas Supreme Court held that since the Residential Landlord and Tenant Act controls the rights and remedies for landlords and tenants, it preempts all transactions within its purview. A Missouri court in Dover v. Stanley held that even though its Odometer Unlawful Practices Act is part of its consumer protection act, it contains its own private remedy and therefore the remedy preempts any treble damages award. The North Carolina Insurance Code contains no such private remedy for unfair insurance practices. Therefore, following this line of reasoning, it does not preempt the UTPA.

3. The Case Law

The most frequently litigated area of Insurance Code violations involves unfair trade practices in settling claims. Settlement claims litigation is particularly troubling to consumers because most state insurance code regulations require the Commissioner to prove that the insurer performed the unfair settlement technique with “such frequency to indicate a general business practice.”

121. 601 P.2d at 1104.
122. 652 S.W.2d 258 (Mo. App. 1983).
123. Id.
124. Many states have adopted substantially the Model Act proposed by the National Association of Insurance Commissioners entitled “An Act Relating to Unfair Methods of Competition in the Business of Insurance.” See Houser, Un-
On the issue of preemption, the rule in California\(^\text{125}\) and Illinois\(^\text{126}\) is that the Insurance Code does not preempt the UPTA, but Connecticut,\(^\text{127}\) Montana,\(^\text{128}\) New York,\(^\text{129}\) and West Virginia\(^\text{130}\) have held that the Insurance Code prevails. The North Carolina courts, while they have not addressed the preemption issue directly, have assessed claims of unfair insurance practices solely on whether the impact on the consumer was unfair or oppressive.\(^\text{131}\) These decisions indicate that North Carolina's Insurance Code does not preempt its UTPA. However, where a claim expressly rests on a violation of the Insurance Code, the courts have been strict in requiring a plaintiff to prove the articulated activity.\(^\text{132}\)

The leading case against preemption is *Royal Globe Ins. Co. v. Superior Court.*\(^\text{133}\) In *Royal Globe*, the California Supreme Court held that its UTPA statute was not preempted by its Insurance Code.\(^\text{134}\) California's Insurance Code, virtually identical to North Carolina's subsection 58-54.4(11), requires that unfair settlement practices be "performed with such frequency as to constitute a general business practice."\(^\text{135}\) The plaintiff claimed only a single instance of unfair treatment.\(^\text{136}\) The California court reasoned that, while repetition of prohibited acts is relevant to the duty of the Insurance Commissioner to halt the practice, the frequency of the insurer's misconduct and its application to others is irrelevant to

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131. *See infra* notes 144-156 and accompanying text.

132. *Id.*

133. 23 Cal. 3d 880, 153 Cal. Rptr. 842, 592 P.2d 329 (1979). In California, a third party may not bring suit until the insured and insurer have litigated the unfair practice issue and the insured prevailed. *Id.*


135. *Id.*

136. *Id.* at 336.
an injured private litigant seeking redress under the UTPA.\textsuperscript{137} Otherwise, if the Code provision preempts the UTPA, the first person mistreated by an insurance company cannot recover until the mistreatment becomes so consistent as to become a general business practice.\textsuperscript{138} Since a person has the right to redress under the UTPA for insurance claims, it would seem absurd to suggest that the first few mistreated persons would have no cause of action in the absence of evidence of a general business practice.\textsuperscript{138} Therefore, preemption of the UTPA by the Insurance Code regulations would seriously affect a consumer's ability to recover for an injury resulting from only one instance of misconduct.

Connecticut's district and state courts disagree on the issue of whether the Connecticut Insurance Code preempts its UTPA. The district court in \textit{Doyle v. St. Paul Fire & Marine Ins. Co.}\textsuperscript{140} emphasized that a private cause of action was a means to redress a wrong done to an individual and that proof of a general course of conduct would go beyond the wrong done to an individual.\textsuperscript{141} But the Connecticut Supreme Court in \textit{Mead v. Burns}\textsuperscript{142} deferred to the legislative judgment that an isolated instance of unfair settlement practices was "not so violative of public policy as to warrant statutory intervention."\textsuperscript{143} However, the \textit{Mead} court failed to consider that the statutory intervention for a general course of conduct is the function of the Commissioner and not a private individual. More importantly, if the Insurance Code preempts the UTPA, an insurer may proceed with the misconduct without fear of reprisal as long as the misconduct is carefully scheduled at irregular intervals.

4. Recent North Carolina Decisions

In North Carolina, the courts have dealt with the issue of preemption only indirectly. The litigation of unfair insurance acts has resulted in dismissals for both pleading and proof deficiencies. As the following cases show, if the plaintiff cannot show that the in-

\begin{footnotesize}
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\item\footnotesize[137] Id.
\item\footnotesize[139] Id.
\item\footnotesize[140] 583 F. Supp. 554 (D. Conn. 1984).
\item\footnotesize[141] Id.
\item\footnotesize[142] 199 Conn. 651, 509 A.2d 11 (1986).
\item\footnotesize[143] Mead, 509 A.2d at 19. However, in a footnote, the court indicated that the claim might survive in a common law action for unfair trade practices. Id. at 19 n.8.
\end{enumerate}
\end{footnotesize}
surer violated a Code section, he must plead his claim in such a manner that the court will review the claim under the standard of the UTPA. Of course, if the plaintiff can show a Code violation, the plaintiff will now have the benefit of the \textit{Pearce per se} rule, with the exception of unfair claim settlement practices.\footnote{144. See infra notes 89-93 and accompanying text.}

\textit{Smith v. King}\footnote{145. 52 N.C. App. 158, 277 S.E.2d 875 (1981).} and \textit{Beasley v. National Savings Life Ins. Co.}\footnote{146. 75 N.C. App. 104, 330 S.E.2d 207 (1985).} were decided before \textit{Pearce}. In both cases, the plaintiffs alleged that the insurer committed an unfair practice in violation of the UTPA and section 58-54.4(11) of the Insurance Code. The appellate court adhered to the strict requirements of the Code section, dismissing \textit{Smith} for failing to prove more than a single instance of unfair claim settlement\footnote{147. 52 N.C. App. at 161, 277 S.E.2d at 876-77.} and \textit{Beasley} for failing to plead more than one such instance.\footnote{148. The supreme court initially agreed to review \textit{Beasley}, but withdrew, leaving the issue of preemption still undecided.\footnote{149. \textit{Beasley}, 75 N.C. App. 104, 330 S.E.2d 207, disc. rev. improvidently granted, 316 N.C. 372, 341 S.E.2d 338 (1986).} These cases illustrate the potential damage to consumers should the Insurance Code ultimately be held to preempt the UTPA.

Since \textit{Pearce}, the court of appeals appears willing to consider an unfair insurance practice claim based on the UTPA standard of unfairness, provided the action is properly pled. In \textit{Marshburn v. Associated Indemnity Corp.},\footnote{150. 84 N.C. App. 365, 353 S.E.2d 123 (1987).} the plaintiff brought suit alleging that the insurer’s settlement techniques were unfair trade practices in violation of the UTPA section 75-1.1 or, alternatively, that the insurer’s practices violated the Insurance Code section 58-54.4 together with section 75-1.1.\footnote{151. Opening Brief for Appellent at 9, \textit{Marshburn v. Associated Indemnity Corp.}, 84 N.C. App. 365, 353 S.E.2d 123 (1987) (No. 864SC243).} Reviewing the first claim under section 75-1.1 together with section 58-54.4, the court held that failure to allege more than a single instance of unfair settlement practices was fatal to a cause of action under section 58-54.4.\footnote{152. 84 N.C. App. at 374, 353 S.E.2d at 129.} Yet the court held that plaintiff’s second claim under section 75-1.1 alone failed because the acts were not unethical, oppressive, or de-
ceptive in any way. Marshburn then stands for the proposition that the court will use the broad unfairness standard of the UTPA for a section 75-1.1 claim for insurance practices but will adhere to the strict letter of the Code if the Code is pled.

In a later case, Dull v. Mutual of Omaha, the unfair insurance practice was pled in alternative claims as in Marshburn. The appeals court reviewed at length the case law pertaining to the scope, standard, and determination of unfair trade practices in the insurance industry. In its analysis of the section 75-1.1 claim the court stated in part:

i. The UTPA section 75-1.1 is sufficiently broad to cover unfair practices in the insurance industry.
ii. 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.
iii. The determination of whether specific conduct amounts to an unfair or deceptive practice in violation of section 75-1.1 is a question of law for the court.

The fact that the Dull court examined the section 75-1.1 claim so thoroughly signals that a litigant can prevail in a claim against an insurance company solely on a violation of the UTPA section 75-1.1.

The Pearce decision created a per se rule for violations of the Insurance Code section 58-54.4 but did not settle the issue of whether the section preempts the UTPA. The per se rule offers a new avenue of recovery for injured consumers. Furthermore, decisions of the court of appeals after Pearce indicate that an alternative exists if a consumer is unable to plead and prove a section 58-54.4 violation. To overcome pleading and proof deficiencies in claiming unfair insurance practices, attorneys should base their clients' claims on a Code violation only if they can prove the violation with absolute certainty. Otherwise, an attorney should rest the claim on the UTPA section 75-1.1 alone, which requires only that the insurer's actions violate the broad section 75-1.1 standard and that the violation injure the plaintiff.

153. Id. at 375, 353 S.E.2d at 129 (citing Johnson, 300 N.C. 247, 266 S.E.2d 610).
155. Id. at 315-16, 354 S.E.2d at 755-56.
156. Id. (The court examined separately plaintiff's claim that defendant's actions were misleading in violation of N.C. GEN. STAT. § 58-54.4(2).)
CONCLUSION

The result of the *Pearce* decision is that a violation of the Insurance Code section 58-54.4 is a *per se* violation of the UTPA section 75-1.1. *Marshburn* is but one case that clearly shows that an unfair trade practice action can be litigated independent of a Code violation. This Note has examined the appropriateness of the *per se* rule and the pleading implications of the decision. The distinction between Code violations and UTPA infringements is important because each serves a purpose and, although their purposes overlap, they are not synonymous. For example, treble damages are punitive in nature and are not necessarily suitable to every regulatory violation. In addition, future changes in the insurance regulations may be needed to encourage or discourage industry practices for economic or social purposes. The legislature should be able to adapt the Insurance Code regulations without having to decide if each change constitutes an unfair trade practice warranting treble damages. Until the supreme court or the legislature addresses the issues discussed throughout this Note, these problems will remain unresolved and will create confusion for all of the parties involved in these actions.

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