

Spring 1993

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Recommended Citation

Michael R. Smith, Recent Developments Under the South Carolina Unfair Trade Practices Act, 44 S. C. L. Rev. 543 (1993).

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RECENT DEVELOPMENTS UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

MICHAEL R. SMITH*

In 1971 the South Carolina General Assembly enacted the South Carolina Unfair Trade Practices Act (UTPA).¹ The Act's operative language, contained in South Carolina Code section 39-5-20(a),² is very simple:³ "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."⁴ The Act permits actions either by the South Carolina Attorney General⁵ or by a private party who has suffered an ascertainable loss.⁶ Section 39-5-20(a) is substantially similar to the general proscription in the Federal Trade Commission Act⁷ and to the unfair trade practices statutes of other states.⁸ In fact, the UTPA provides that courts construing the Act should be guided by decisions of the Federal Trade Commission (FTC) and federal courts interpreting the FTC Act provision.⁹ Because section 39-5-20

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1. No. 287, 1971 S.C. Acts 369 (codified at S.C. CODE ANN. §§ 39-5-10 to -160 (Law. Co-op. 1985)).

2. S.C. CODE ANN. § 39-5-20(a) (Law. Co-op. 1985).

3. Despite the UTPA's broad language, the South Carolina Supreme Court has ruled that the statute is not unconstitutionally vague. *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 243, 363 S.E.2d 691, 693 (1988).

4. S.C. CODE ANN. § 39-5-20(a). In addition to its general proscription of unfair and deceptive practices, the Act also expressly prohibits pyramid clubs and similar operations. *Id.* § 39-5-30.

5. *Id.* § 39-5-50.

6. *Id.* § 39-5-140.

7. 15 U.S.C. § 45(a)(1) (1988). The entire Federal Trade Commission Act is codified at 15 U.S.C. §§ 41-58 (1988 & Supp. III 1991).

8. *See generally* JONATHAN S. SHELTON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (3d ed. 1991) (discussing unfair and deceptive trade practice applications throughout the United States).

9. S.C. CODE ANN. § 39-5-20(b).

fails to identify specifically prohibited conduct, the task of deciding which acts are deceptive or unfair, and therefore illegal, lies with the South Carolina courts.

In his 1982 *South Carolina Law Review* article,¹⁰ Professor Day noted that the UTPA's effect on unfair and deceptive practices had been minimal.¹¹ He offered many suggestions concerning the proper interpretation of the Act and predicted that it could become an effective tool for providing a remedy to those injured by unfair or deceptive trade practices.¹² The purpose of this Note is to trace the growth and development of UTPA doctrine since Professor Day's article. This Note explores what constitutes a violation of the Act, who may be held liable, and what categories of activities are exempt from UTPA coverage. It also discusses the damages recoverable upon proof of a violation. In relevant areas, the author compares the South Carolina UTPA with the federal scheme and with unfair trade practices statutes and cases from other states. Finally, the author examines recurring UTPA actions as well as areas amenable to UTPA treatment that have yet to be interpreted.

I. SCOPE OF SECTION 39-5-20(a)

A. *Unfair and Deceptive Defined*

Although the UTPA declares unfair acts or practices unlawful,¹³ neither of the South Carolina appellate courts had defined "unfair" until *Young v. Century Lincoln-Mercury, Inc.*¹⁴ In *Young* the plaintiff took her car to the defendant dealership for repairs after the car had been involved in a collision. The dealership charged the plaintiff over \$2,300 more for additional repairs than stated in its written estimate. Rather than informing the plaintiff of the additional work required, the dealership sought and received approval to complete the repairs from the plaintiff's insurance company.¹⁵ The court of appeals upheld the jury's verdict that Century Lincoln-Mercury had engaged in an unfair trade practice.¹⁶ The court held that "[a] trade practice is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive."¹⁷ This broad test is consis-

10. Richard E. Day, *The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea?*, 33 S.C. L. REV. 479 (1982).

11. *Id.* at 515.

12. *Id.*

13. S.C. CODE ANN. § 39-5-20(a).

14. 302 S.C. 320, 396 S.E.2d 105 (Ct. App. 1989), *aff'd in part and rev'd in part on other grounds*, 422 S.E.2d 103 (S.C. 1992) (per curiam).

15. *Id.* at 323-24, 396 S.E.2d at 106-07.

16. *Id.* at 328, 396 S.E.2d at 109.

17. *Id.* at 326, 396 S.E.2d at 108 (citing *Harris v. NCNB Nat'l Bank*, 355 S.E.2d

tent with the court's statement that "[t]he UTPA should be given a liberal construction."¹⁸

Furthermore, the United States Supreme Court has adopted a broad and flexible test of unfairness in construing 15 U.S.C. § 45(a)(1).¹⁹ In *FTC v. Motion Picture Advertising Service Co.*²⁰ the Court noted that Congress intended the phrase "unfair methods of competition" "to be defined with particularity by the myriad of cases from the field of business."²¹ Thus, "[t]he point where a method of competition becomes 'unfair' within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question."²² Consequently, whether a particular practice is unfair under federal law is a fact-specific question to be decided on a case-by-case basis.

The South Carolina Supreme Court first defined "deceptive"²³ in *State ex rel. McLeod v. Brown*.²⁴ Following the approach of the Fourth Circuit, the *Brown* court held that a practice is deceptive if it has a tendency to deceive, but proof of actual deception is not required.²⁵ In addition, the court of appeals further refined the definition of "deceptive" when it ruled that "proof of common law fraud is not required to establish a violation of the Act."²⁶ Accordingly, a party need not "show that a representation was intended to deceive but only that it had the capacity to do so."²⁷

Courts construing 15 U.S.C. § 45(a)(1) have reached the same conclusion concerning the meaning of the term "deceptive" within the federal scheme. They have ruled that neither actual deception²⁸ nor intent

838 (N.C. Ct. App. 1987)).

18. *Id.* at 325, 396 S.E.2d at 108.

19. 15 U.S.C. § 45(a)(1) (1988).

20. 344 U.S. 392 (1953).

21. *Id.* at 394 (citing *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 310-12 (1934)).

22. *Id.* at 396; *accord* *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

23. *See* S.C. CODE ANN. § 39-5-20(a) (Law. Co-op. 1985) (forbidding deceptive acts in the conduct of trade or commerce).

24. 278 S.C. 281, 294 S.E.2d 781 (1982).

25. *Id.* at 285, 294 S.E.2d at 783 (citing *United States Retail Credit Ass'n v. FTC*, 300 F.2d 212, 221 (4th Cir. 1962)).

26. *State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519, 525, 313 S.E.2d 334, 338 (Ct. App. 1984); *accord* *Dowd v. Imperial Chrysler-Plymouth, Inc.*, 298 S.C. 439, 441, 381 S.E.2d 212, 213 (Ct. App. 1989).

27. *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 242, 363 S.E.2d 691, 692 (1988) (citing *C & L Corp.*, 280 S.C. 519, 313 S.E.2d 334); *see also* *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 326, 396 S.E.2d 105, 108 (Ct. App. 1989) ("Even a truthful statement may be deceptive if it has a capacity or tendency to deceive.")

28. *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979); *Thiret v. FTC*, 512 F.2d 176, 180 (10th Cir. 1975).

to deceive²⁹ is required to prove that a practice is deceptive within the meaning of the statute. Furthermore, North Carolina courts, interpreting a state statute³⁰ identical to the federal provision, have held that a capacity to deceive is sufficient³¹ and that proof of fraud or actual deception is not required.³²

B. The Trade or Commerce Requirement

Section 39-5-10(b) of the UTPA provides:

*“Trade” and “commerce” shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.*³³

In *Baker v. Chavis*³⁴ the court of appeals addressed the scope of this section and held that “[t]he statute’s use of the words ‘shall include’ clearly suggests the legislature did not intend to limit ‘trade’ and ‘commerce’ to only the listed transactions.”³⁵ The court also noted that the terms “trade” and “commerce” are synonymous, and that “trade” encompasses the business activities of both buying and selling.³⁶ The court concluded that a time-share resort was engaged in trade and commerce within the meaning of the statute when it sold portions of equity (leasehold interests) in its property.³⁷

After *Baker* questions remain about whether plaintiffs and defendants must have been engaged in the business of buying or selling to each other

29. *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963); *Pep Boys—Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 161 (3d Cir. 1941).

30. N.C. GEN. STAT. § 75-1.1(a) (1988).

31. *Ken-Mar Fin. v. Harvey*, 368 S.E.2d 646, 648 (N.C. Ct. App.), *review denied*, 373 S.E.2d 545 (N.C. 1988); *Pinehurst, Inc. v. O’Leary Bros. Realty*, 338 S.E.2d 918, 923 (N.C. Ct. App.), *review denied and stay denied*, 342 S.E.2d 896 (N.C. 1986).

32. *Marshall v. Miller*, 276 S.E.2d 397, 403 (N.C. 1981).

33. S.C. CODE ANN. § 39-5-10(b) (Law. Co-op. 1985).

34. 306 S.C. 203, 410 S.E.2d 600 (Ct. App. 1991).

35. *Id.* at 208-09, 410 S.E.2d at 603; *cf.* *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1505 (D.S.C. 1989) (explaining that the statutory definitions of trade and commerce are only examples of several acts covered by the UTPA, but that the definitions do not include defamatory statements).

36. *Baker*, 306 S.C. at 209, 410 S.E.2d at 603 (citing *May v. Sloan*, 101 U.S. 231, 237 (1879)).

37. *Id.* at 209, 410 S.E.2d at 603-04.

to fall within the scope of the UTPA. For example, in *Connolly v. People's Life Insurance Co.*,³⁸ an earlier decision interpreting section 39-5-10(b), the court of appeals held that the plaintiff-mortgagor had no cause of action under the Act against an assignee of the original mortgagee because of the trade or commerce requirement.³⁹ The assignee's alleged failure to properly mark the note as paid and to return to the plaintiff the note and mortgage did not involve the advertising, sale, or distribution of services or property to the plaintiff.⁴⁰

Clearly, the defendant-assignee in *Connolly* was in the business of selling insurance, although not to the plaintiff. Moreover, the defendant's relationship to the plaintiff arose because the defendant was in the insurance business, and the defendant's allegedly unfair practices were of the type normally connected with its business activities. Nevertheless, the court of appeals found that the trade and commerce requirement had not been met.⁴¹ This finding suggests that the court of appeals will require proof that some type of buying or selling occurred between the two litigants themselves.

C. Public Impact Requirement

South Carolina appellate courts have created an important element of a UTPA claim by ruling that the Act is unavailable to "redress a private wrong where the public interest is unaffected."⁴² The court of appeals first articulated this public impact requirement in *Noack Enterprises, Inc. v. Country Corner Interiors, Inc.*⁴³ The dispute in *Noack* involved alleged misrepresentations made by the seller of a retail business. The plaintiff-purchaser charged that the defendant failed to carry out its promises in

38. 294 S.C. 355, 364 S.E.2d 475 (Ct. App. 1988), *rev'd*, 299 S.C. 348, 384 S.E.2d 738 (1989).

39. *Id.* at 359, 364 S.E.2d at 477.

40. *Id.*

41. *See id.* However, the South Carolina Supreme Court reversed on the procedural ground that the court of appeals improperly decided the trade or commerce issue when the issue had not been raised or argued at trial. *Connolly v. People's Life Ins. Co.*, 299 S.C. 348, 350-51, 384 S.E.2d 738, 739-40 (1989) (*per curiam*).

42. *Noack Enters., Inc. v. Country Corner Interiors, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App. 1986); *accord* *Florence Paper Co. v. Orphan*, 298 S.C. 210, 379 S.E.2d 289 (1989); *LaMotte v. Punch Line, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105 (Ct. App. 1989); *Columbia E. Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989); *Dowd v. Imperial Chrysler-Plymouth, Inc.*, 298 S.C. 439, 381 S.E.2d 212 (Ct. App. 1989).

43. 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986).

connection with the sale.⁴⁴ The court of appeals affirmed the trial judge's grant of demurrer to the defendant because the complaint failed to allege facts sufficient to show that the private dispute affected the public interest.⁴⁵

The *Noack* court found a public impact requirement based on its examination of three provisions of the UTPA. First, the court noted that section 39-5-70(a)⁴⁶ allows the attorney general to initiate an investigation of an unfair or deceptive trade practice when the public interest is implicated.⁴⁷ Second, section 39-5-140(b)⁴⁸ requires the clerk of court to notify the attorney general of any private suit brought under the Act.⁴⁹ The court found that these two sections, read together, demonstrate the "legislature's intent to limit the application of the UTPA to only those unfair or deceptive acts or practices . . . that affect the public interest."⁵⁰ Finally, the court examined section 39-5-10(b)⁵¹ and concluded that the section's "language [also] reflects the legislature's intent than [sic] an unfair or deceptive act or practice in the conduct of any trade or commerce injuriously affect 'the people of this State,' i.e., the public interest, before it can be actionable under the UTPA."⁵²

Although *Noack* seems to require that a plaintiff allege in his UTPA complaint facts showing an impact upon the public interest, the case does not indicate whether a conclusory allegation of public impact is sufficient to withstand a motion to dismiss. To avoid a possible demurrer, plaintiffs should probably allege public impact in their complaints and plead facts that demonstrate a potential for repetition of the defendant's conduct.⁵³

The plaintiff has the burden of proving an impact on the public interest.⁵⁴ As the court of appeals stated in *Barnes v. Jones Chevrolet, Inc.*,⁵⁵ "a material issue to be proved is that the unfair practice or act affects persons other than the parties to the transaction."⁵⁶ In *Columbia*

44. *Id.* at 476, 479-80, 351 S.E.2d at 348, 350.

45. *Id.* at 480-81, 351 S.E.2d at 350-51.

46. S.C. CODE ANN. § 39-5-70(a) (Law. Co-op. 1985).

47. *Noack*, 290 S.C. at 477-78, 351 S.E.2d at 349.

48. S.C. CODE ANN. § 39-5-140(b).

49. *Noack*, 290 S.C. at 478, 351 S.E.2d at 349.

50. *Id.*

51. S.C. CODE ANN. § 39-5-10(b).

52. *Noack*, 290 S.C. at 478, 351 S.E.2d at 349.

53. See *infra* text accompanying notes 59-60.

54. See *Columbia E. Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989); *Barnes v. Jones Chevrolet, Inc.*, 292 S.C. 607, 358 S.E.2d 156 (Ct. App. 1987).

55. 292 S.C. 607, 358 S.E.2d 156.

56. *Id.* at 612, 358 S.E.2d at 159.

*East Associates v. Bi-Lo, Inc.*⁵⁷ the court of appeals affirmed a directed verdict for the defendant because the plaintiff failed to prove its allegation that the defendant's unfair trade practice affected the public.⁵⁸

In attempting to define which activities affect the public interest, the court of appeals initially held that "unfair or deceptive acts or practices in the conduct of trade or commerce have an impact upon the public interest if the acts or practices have the potential for repetition."⁵⁹ The court later specified that the potential for repetition is a requirement rather than merely a factor that may be considered as evidence of public impact.⁶⁰

South Carolina is not alone in exempting purely private disputes from UTPA coverage. Under the federal scheme, the FTC can serve a complaint charging an unfair or deceptive practice only when doing so is in the public interest.⁶¹ Georgia courts have also required a public impact under that state's version of the UTPA, holding that the statute does "not . . . provide an additional remedy for private wrongs which do not and could not affect the consuming public generally."⁶² However, in response to a series of appellate decisions that required an unfair or deceptive trade practice to affect the public interest, the Connecticut legislature amended the Connecticut UTPA explicitly to remove any public impact requirement.⁶³

D. Liability of Principals and Corporate Personnel

South Carolina courts have held principals liable under the UTPA for their agent's acts.⁶⁴ In *State ex rel. McLeod v. C & L Corp.*⁶⁵ the defendant developer sold subdivision lots as part of a development scheme. The defendant's salesmen made false representations to the plaintiff-buyers

57. 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989).

58. *Id.* at 522, 386 S.E.2d at 263.

59. *Noack Enters., Inc. v. Country Corner Interiors, Inc.*, 290 S.C. 475, 480, 351 S.E.2d 347, 350-51 (Ct. App. 1986) (citing *Anhold v. Daniels*, 614 P.2d 184 (Wash. 1980) (en banc)); see *Dowd v. Imperial Chrysler-Plymouth, Inc.*, 298 S.C. 439, 442, 381 S.E.2d 212, 214 (Ct. App. 1989) (quoting *Noack*, 290 S.C. at 480, 351 S.E.2d at 350-51).

60. *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 327, 396 S.E.2d 105, 109 (Ct. App. 1989).

61. See 15 U.S.C. § 45(b) (1988).

62. *Burdakin v. Hub Motor Co.*, 357 S.E.2d 839, 841 (Ga. Ct. App.) (quoting *Zeeman v. Black*, 273 S.E.2d 910, 913 (Ga. Ct. App. 1980)), *cert. denied*, 357 S.E.2d 839 (Ga. 1987).

63. *SHELDON*, *supra* note 8, § 7.5.3.2, at 390.

64. *E.g.*, *Young*, 302 S.C. 320, 396 S.E.2d 105; *State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984).

65. 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984).

concerning improvements to be made in the subdivision.⁶⁶ The corporation denied liability, asserting that it had no knowledge of the salesmen's activities.⁶⁷ In holding the development corporation liable, the court of appeals noted that, at common law, a principal's actual knowledge is not required to hold him liable for the acts of his agents.⁶⁸ Because the UTPA is remedial and should not impose on plaintiffs additional burdens not found at common law, principals are liable under the UTPA for their agent's acts committed within the scope of the agent's authority.⁶⁹

South Carolina courts have also ruled that persons controlling a corporation can be held liable under the UTPA for the corporation's activities.⁷⁰ The Act's definition of "person" includes "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity."⁷¹ In *C & L Corp.* the court held that this definition includes controlling persons of a corporation and that "both the corporation and its controlling persons are liable for a corporate violation of the Act."⁷² The court defined a controlling person as "one who formulates and directs corporate policy or who is deeply involved in the important business affairs of the corporation."⁷³

Other states have taken various approaches in determining the liability of corporate personnel.⁷⁴ Some states, such as Kentucky, "will disregard the corporate entity only where the individual to be held personally liable actively participated in the scheme, or knew about it and did nothing."⁷⁵ In contrast to this restrictive standard, the South Carolina rulings have broad implications for unwary corporate officers.⁷⁶

66. *Id.* at 524, 313 S.E.2d at 337.

67. *Id.* at 527, 313 S.E.2d at 339.

68. *Id.*

69. *See id.*

70. *E.g.*, *State ex rel. Medlock v. Nest Egg Soc'y Today, Inc.*, 290 S.C. 124, 348 S.E.2d 381 (Ct. App. 1986); *State ex rel. McLeod v. VIP Enters., Inc.*, 286 S.C. 501, 335 S.E.2d 243 (Ct. App. 1985); *C & L Corp.*, 280 S.C. 519, 313 S.E.2d 334; *see also State ex rel. McLeod v. Brown*, 278 S.C. 281, 294 S.E.2d 781 (1982) (finding genuine issues of material fact concerning whether an employee was a controlling person).

71. S.C. CODE ANN. § 39-5-10(a) (Law. Co-op. 1985).

72. *C & L Corp.*, 280 S.C. at 530, 313 S.E.2d at 341.

73. *Id.* at 531, 313 S.E.2d at 341.

74. *See generally* SHELTON, *supra* note 8, § 6.4 (describing various state views concerning the liability of officers and directors for corporate UTPA violations).

75. *Id.* at 347 (citing *Commonwealth ex rel. Beshear v. ABC Pest Control, Inc.*, 621 S.W.2d 705 (Ky. Ct. App. 1981)).

76. *See supra* notes 64-73 and accompanying text.

II. EXEMPTIONS FROM THE UTPA

A. Statutory

Section 39-5-40(a) provides that the UTPA is inapplicable to “[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.”⁷⁷ The South Carolina appellate courts have struggled with the proper interpretation of this ambiguous statute, but the supreme court recently abandoned the “general activity” test that was instituted in *State ex rel. McLeod v. Rhoades*.⁷⁸

The deceptive practice in *Rhoades* involved the sale of corporate stock. The defendants contended that their conduct was exempt from the UTPA under section 39-5-40(a) because stock sales are regulated by the United States Securities and Exchange Commission and the Securities Commissioner of South Carolina.⁷⁹ The supreme court agreed and held that “[w]hen the party claiming exemption from the Act shows that the general activity in question is regulated . . . [then] the opposing party . . . has the burden of showing that the specific acts at issue are not covered by the exemption.”⁸⁰

In *Scott v. Mid Carolina Homes, Inc.*,⁸¹ the court of appeals expressed its dissatisfaction with the *Rhoades* court’s broad interpretation of section 39-5-40(a). *Scott* involved allegations of fraud and misrepresentation in connection with the sale of a mobile home. Applying the general activity test, the court of appeals stated that it was bound by *Rhoades* and hence “constrained to hold the sale of mobile homes is an activity exempt from the Act because it is subject to regulatory control and the imposition of penalties by the Manufactured Housing Board.”⁸² The court noted that “[t]he only remedy available to Mrs. Scott . . . is to ask the Supreme Court to reconsider its decision in *Rhoades* or to persuade the General Assembly to amend the Act.”⁸³

77. S.C. CODE ANN. § 39-5-40(a) (Law. Co-op. 1985).

78. 275 S.C. 104, 267 S.E.2d 539 (1980), *modified*, Ward v. Dick Dyer & Assocs., 304 S.C. 152, 403 S.E.2d 310 (1991).

79. *Id.* at 105, 267 S.E.2d at 540.

80. *Id.* at 107, 267 S.E.2d at 541 (quoting *State v. Piedmont Funding Corp.*, 382 A.2d 819, 822 (R.I. 1978)); *see also* *Anderson v. Citizens Bank*, 294 S.C. 387, 365 S.E.2d 26 (Ct. App. 1987) (holding banking practices exempt from the UTPA under the general activity test), *overruled by Ward*, 304 S.C. 152, 403 S.E.2d 310.

81. 293 S.C. 191, 359 S.E.2d 291 (Ct. App. 1987), *overruled by Ward*, 304 S.C. 152, 403 S.E.2d 310.

82. *Id.* at 201, 359 S.E.2d at 297.

83. *Id.*

In *Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc.*⁸⁴ the court of appeals again expressed its discontent with the broad general activity test. The *Bocook* court indicated that it was willing to examine whether the regulations involved were specifically directed at the alleged unfair practices, rather than merely to ask whether the general activity was regulated. The court held that the outdoor advertising industry was not exempt from the UTPA even though the State Highway Department regulates the issuance of billboard permits to promote highway safety and scenic beauty.⁸⁵ As the court observed: "Neither the statutes nor the regulations promulgated pursuant to the statutes address or regulate unfair competition among outdoor advertisers."⁸⁶

In *Ward v. Dick Dyer & Associates*⁸⁷ the supreme court abandoned the general activity test. The court held that the purpose of section 39-5-40(a) is to prevent a party from being sued under the UTPA for engaging in an activity that other laws specifically allow or authorize.⁸⁸ The court adopted an interpretation of section 39-5-40(a) designed to prevent a conflict between laws rather than to exempt generally regulated activities.⁸⁹ This narrower exemption is the same interpretation that Professor Day urged upon the court.⁹⁰

B. Non-Statutory

In addition to the statutory exemption, South Carolina's appellate courts have created several exemptions to the UTPA. In *Miller v. Fairfield Communities, Inc.*⁹¹ the court of appeals held that the Act does not apply to an employer-employee relationship.⁹² However, the plaintiff-employee in *Miller* could not demonstrate that his employer's actions in firing him had the potential for repetition.⁹³ Thus, a case involving a pattern of unfair employee treatment that is likely to be repeated may be decided differently.

84. 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987).

85. *Id.* at 173-74, 363 S.E.2d at 392.

86. *Id.*

87. 304 S.C. 152, 403 S.E.2d 310 (1991). For a discussion of *Ward*, see Michael R. Smith, Survey, *Tort Law—Ward v. Dick Dyer & Assocs.*, 44 S.C. L. REV. 174 (1992).

88. *Id.* at 156, 403 S.E.2d at 312 (citing *Skinner v. Steele*, 730 S.W.2d 335 (Tenn. Ct. App. 1987)).

89. *Id.*

90. See Day, *supra* note 10, at 500-01.

91. 299 S.C. 23, 382 S.E.2d 16 (Ct. App. 1989), *cert. dismissed*, 302 S.C. 518, 397 S.E.2d 377 (1990).

92. *Id.* at 28, 382 S.E.2d at 20.

93. *Id.* at 29, 382 S.E.2d at 20.

Furthermore, in *Ward*⁹⁴ the supreme court noted in dictum that securities transactions are exempt from the UTPA because such transactions are highly regulated.⁹⁵ Accordingly, the *Ward* court acknowledged an exception to its rule that exempts from the Act only activities specifically authorized by other laws or regulations.⁹⁶

Finally, although South Carolina courts have yet to decide the issue, in *Clarkson v. Orkin Exterminating Co.*⁹⁷ the Fourth Circuit Court of Appeals, applying South Carolina law, ruled that negligence cannot serve as the basis for a UTPA action.⁹⁸ In *Clarkson* a pest control company representative negligently failed to discover a termite infestation in the plaintiff's home. The circuit court reversed the jury verdict for the plaintiff on her UTPA claim, holding that the serviceman's negligence was "simply not the kind of deceptive practice the [South Carolina] statute was intended to reach."⁹⁹

However, in an analogous case concerning the use of the Texas Deceptive Trade Practices Act—the Texas equivalent of the UTPA—against the manufacturer of a defective product, the Texas Court of Appeals held that the statute applies to personal injury actions.¹⁰⁰ This ruling represents a liberal use of the Texas statute compared to the Fourth Circuit's approach in *Clarkson*. Presently, negligence as a cause of action under the UTPA remains untested in the South Carolina appellate courts.

III. DAMAGES UNDER THE UTPA

A. *Appropriate Measure*

Section 39-5-140(a) provides that a person may recover actual damages for a violation of the UTPA.¹⁰¹ In *Fields v. Yarborough Ford, Inc.*¹⁰² the supreme court addressed the measure of damages available under the Act. The plaintiffs in *Fields* purchased a truck from the defendant automobile dealership. Although the plaintiffs had requested a certain sized engine in the vehicle, the dealership sold them a truck with a larger engine, but failed to inform them of this fact. The Fields brought an action against the

94. 304 S.C. 152, 403 S.E.2d 310 (1991).

95. *Id.* at 155 n.1, 403 S.E.2d at 312 n.1.

96. *See supra* text accompanying notes 87-89.

97. 761 F.2d 189 (4th Cir. 1985).

98. *Id.* at 191.

99. *Id.*

100. *Keller Indus., Inc. v. Reeves*, 656 S.W.2d 221, 224-25 (Tex. Ct. App. 1983).

101. S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1985).

102. 307 S.C. 207, 414 S.E.2d 164 (1992).

dealership for fraud, breach of contract accompanied by a fraudulent act, and unfair trade practices.¹⁰³

The supreme court stated that in cases of misrepresentation, a plaintiff can elect either to affirm the contract and seek damages or to rescind the contract and receive restitution.¹⁰⁴ When the plaintiff affirms the contract, the measure of damages is "the difference between the value the plaintiff would have received if the facts had been as represented and the value he actually received," plus any special damages proximately caused by the misrepresentation.¹⁰⁵ However, a party seeking rescission may recover only the consideration paid and any foreseeable incidental damages incurred in reliance on the fraudulent misrepresentation.¹⁰⁶ Applying these rules to the facts in *Fields*, the supreme court found that, because the plaintiffs sought to affirm the contract, they suffered no loss since the truck they received with the larger engine was more valuable than the truck they expected to receive.¹⁰⁷

The supreme court's benefit-of-the-bargain approach in *Fields* stands in sharp contrast to the out-of-pocket approach the court of appeals used in *Payne v. Holiday Towers, Inc.*¹⁰⁸ In *Payne* the court of appeals held that the measure of damages resulting from deception in the sale of real estate is "the difference between the purchase price of the property and its fair market value."¹⁰⁹ Thus, unlike a similarly situated purchaser of goods under the supreme court's approach in *Fields*, a plaintiff who negotiates a purchase of real estate for less than its represented value cannot capture the incremental difference between the value as represented and the actual purchase price. *Payne* limits the plaintiff's recovery to out-of-pocket losses rather than expected benefit.

The Texas Supreme Court has ruled that damages under the Texas equivalent of the UTPA may be measured by either the out-of-pocket or benefit-of-the-bargain approach, whichever is greater.¹¹⁰ This method is more consonant with the court of appeals's statement that the South Carolina UTPA should be construed liberally.¹¹¹ Moreover, no logical reason exists

103. *Id.* at 209, 414 S.E.2d at 165.

104. *Id.* at 211, 414 S.E.2d at 166.

105. *Id.* (citing *Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc.*, 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983)).

106. *Id.* (citing *Baeza*, 279 S.C. at 473, 309 S.E.2d at 766).

107. *Id.* at 211-12, 414 S.E.2d at 166.

108. 283 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984).

109. *Id.* at 216, 321 S.E.2d at 182 (citing *Buzhardt v. Cromer*, 272 S.C. 159, 249 S.E.2d 898 (1978)).

110. *Leyendecker & Assocs. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984).

111. *See Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 325, 396 S.E.2d 105, 108 (Ct. App. 1989) ("The UTPA should be given a liberal construction.") (citing

for creating a more restrictive damages rule for deceptive sales of real estate than for deceptive sales of goods.

B. Treble Damages and Willfulness

Section 39-5-140(a) provides for mandatory trebling of actual damages when the court finds a willful violation of the UTPA.¹¹² Subsection (d) provides that “a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of § 39-5-20.”¹¹³ Although the statute attempts to define “willful” conduct, the language “should have known” suggests a negligence standard. Furthermore, the court of appeals opinion in *State ex rel. Medlock v. Nest Egg Society Today, Inc.*¹¹⁴ apparently supports this interpretation.

In *Nest Egg* the attorney general brought an action against the defendant under UTPA section 39-5-30¹¹⁵ for operating a pyramid scheme.¹¹⁶ The lower court found that the defendant had willfully violated the Act.¹¹⁷ On appeal the defendant contended that actual knowledge of a violation was required before the court could find willfulness.¹¹⁸ However, the court of appeals disagreed: “The standard is not one of actual knowledge, but of constructive knowledge. If, in the exercise of due diligence, a person of ordinary prudence engaged in trade or commerce could have ascertained that his conduct violates the Act, then such conduct is ‘willful’ within the meaning of the statute.”¹¹⁹ The court found *Nest Egg*’s activities to be willful because the company should have known that its activities violated the UTPA.¹²⁰

Also, in *Haley Nursery Co. v. Forrest*¹²¹ the supreme court addressed the issues of willfulness and treble damages under the Act. Haley, a commercial nursery, breached an express warranty to Forrest, a peach grower, by selling him mislabeled peach trees. After reviewing parts of the trial testimony, the court found the violation not willful because Haley had

Paces Ferry Dodge, Inc. v. Thomas, 331 S.E.2d 4 (Ga. Ct. App. 1985)).

112. S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1985).

113. *Id.* § 39-5-140(d).

114. 290 S.C. 124, 348 S.E.2d 381 (Ct. App. 1986).

115. S.C. CODE ANN. § 39-5-30.

116. A pyramid scheme is “[a] device . . . in which a buyer of goods is promised a payment for each additional buyer procured by him.” BLACK’S LAW DICTIONARY 1237 (6th ed.).

117. *Nest Egg*, 290 S.C. at 126, 348 S.E.2d at 382.

118. *See id.* at 128, 348 S.E.2d at 383.

119. *Id.* at 128, 348 S.E.2d at 384.

120. *Id.* at 128-29, 348 S.E.2d at 384.

121. 298 S.C. 520, 381 S.E.2d 906 (1989).

acted in accordance with common trade practices.¹²² Quoting the test from *Nest Egg*, the supreme court upheld the trial court's denial of treble damages.¹²³ However, if South Carolina courts strictly apply the *Nest Egg* reasonable person standard to section 39-5-140(d), treble damages would seem to be warranted in all but the most innocent of UTPA violations.

Most states with multiple damage statutes attempt to limit the application of these provisions. Some states require a showing of intent, bad faith, reckless disregard for the truth, or the knowing nondisclosure of a fact before punitive damages can be assessed.¹²⁴ On the other hand, some states condition multiple damages on the defendant's bad faith refusal to settle a dispute rather than on the willfulness or recklessness of the defendant's conduct.¹²⁵

C. Attorney's Fees

The UTPA provides an incentive for persons to bring suit under the Act by requiring courts to award reasonable attorneys' fees and costs to successful plaintiffs.¹²⁶ When deciding the reasonableness of submitted fees, courts consider factors such as the professional standing of the plaintiff's attorney, the extent and type of legal services rendered, the complexity of the case, and the results obtained for the plaintiff.¹²⁷

Although the UTPAs of most states provide for attorney's fees in some form, the statutes vary in their scope.¹²⁸ For example, in Florida only consumers can recover attorney's fees, but in North Carolina, attorney's fees are awarded only if the defendant's conduct is willful and if the defendant unjustifiably refuses to settle.¹²⁹

IV. TRENDS IN UTPA DEVELOPMENT

As South Carolina courts have developed UTPA doctrine, suits with similar fact patterns have emerged. While certain categories of suits have been very successful, others have been struck down repeatedly. Examination of these patterns helps to assess the viability of bringing a UTPA action.

122. *Id.* at 525, 381 S.E.2d at 909.

123. *Id.*

124. See *SHELDON*, *supra* note 8, § 8.2.4.3.

125. *Id.* § 8.2.4.3.1-.2.

126. S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1985).

127. *Potomac Leasing Co. v. Bone*, 294 S.C. 494, 499, 366 S.E.2d 26, 29 (Ct. App. 1988); *Freeman v. A & M Mobile Home Sales, Inc.*, 293 S.C. 255, 265-66, 359 S.E.2d 532, 538 (Ct. App. 1987).

128. See generally *SHELDON*, *supra* note 8, § 8.6.

129. *Id.* § 8.6.2.1.

A. Consumer Protection Actions

Consumer complaints, the most prolific of UTPA lawsuits, have been brought to redress a variety of unfair and deceptive business practices. Beginning with *Barnes v. Jones Chevrolet Co.*,¹³⁰ South Carolina appellate courts have heard a series of consumer cases involving automobile dealerships.¹³¹ *Barnes* was a classic case of repair bill padding. The plaintiff took his car to the dealership for repairs after the car was damaged in an accident. The itemized repair bill the dealership submitted to the plaintiff included over \$900 in parts and labor that was never expended in fixing the automobile. The plaintiff alleged fraud and deceit, breach of contract, and violation of the UTPA.¹³² The court held that padding auto repair bills is an unfair trade practice and "affects the public interest because of its potential for repetition."¹³³

Plaintiffs have also used the consumer protection component of the Act to bring actions concerning the sale of real estate. In *Payne v. Holiday Towers, Inc.*¹³⁴ a condominium developer allegedly made false representations and fraudulent concealments to prospective purchasers. The trial court granted a default judgment to the plaintiffs on the issue of liability because the vendor failed to file a timely answer. After a trial on the damages issues, the court awarded the plaintiffs treble damages because it found the vendor's violations of the Act were "willful and knowing."¹³⁵ The court of appeals affirmed.¹³⁶

Given the large number of consumer cases that have been brought under the Act,¹³⁷ it seems likely that this area will continue to comprise a large percentage of UTPA claims. With the relative ease of proving both

130. 292 S.C. 607, 358 S.E.2d 156 (Ct. App. 1987).

131. See, e.g., *Ward v. Dick Dyer & Assocs.*, 304 S.C. 152, 403 S.E.2d 310 (1991); *Inman v. Ken Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 363 S.E.2d 691 (1988); *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105 (Ct. App. 1989); *Dowd v. Imperial Chrysler-Plymouth, Inc.*, 298 S.C. 439, 381 S.E.2d 212 (Ct. App. 1989).

132. *Barnes*, 292 S.C. at 609, 358 S.E.2d at 158.

133. *Id.* at 613, 358 S.E.2d at 159-60.

134. 283 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984).

135. *Id.* at 213, 321 S.E.2d at 181.

136. *Id.*

137. For other examples of consumer protection cases, see *State ex rel. McLeod v. Brown*, 278 S.C. 281, 294 S.E.2d 781 (1982) (deceptive sale of surge suppressors); *Potomac Leasing Co. v. Bone*, 294 S.C. 494, 366 S.E.2d 26 (Ct. App. 1988) (deceptive sale of steam cleaning machine); *State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984) (deceptive sale of subdivision lots).

deception¹³⁸ and a public impact when consumers are involved,¹³⁹ the UTPA should continue to provide an effective remedy for consumers.

B. Commercial Disputes

The public impact requirement¹⁴⁰ has repeatedly thwarted businesses attempting to use the UTPA to solve contractual disputes with other businesses.¹⁴¹ An example of this limitation is found in *Columbia East Associates v. Bi-Lo, Inc.*¹⁴² In *Bi-Lo* a grocery store chain entered into a commercial lease agreement with the owners of a shopping center in Columbia, South Carolina. The terms of the lease provided that Bi-Lo, the lessee, could assign the lease or sublet the premises. After operating the grocery store in the shopping center for over ten years, Bi-Lo relocated its store. The shopping center corporation brought suit against Bi-Lo, alleging breach of contract and violation of the UTPA.¹⁴³

Although Bi-Lo continued to pay rent under the lease, the trial court found that Bi-Lo had breached a good faith agreement of continuous operation. However, the trial court directed a verdict in favor of Bi-Lo on the UTPA claim.¹⁴⁴ The court of appeals affirmed both findings. On the UTPA claim, the court held that the lease was a contract between private parties that had no impact upon the public interest; thus, the breach of the lease was not actionable under the Act.¹⁴⁵

Not every commercial dispute has been denied application of the UTPA for lack of public impact. The key factor is the possibility of repetition. In *McTeer v. Provident Life & Accident Insurance*¹⁴⁶ a United States district court applying South Carolina law found that a breach of contract between two commercial parties satisfied the public interest requirement.¹⁴⁷ The defendant-creditors in *McTeer* agreed to waive a sixty-day notice requirement when the plaintiff sought to pay off its note early. Subsequently, the

138. See *supra* text accompanying notes 23-32.

139. See *supra* notes 42-60 and accompanying text.

140. See *supra* notes 42-60 and accompanying text.

141. See, e.g., *Florence Paper Co. v. Orphan*, 298 S.C. 210, 379 S.E.2d 289 (1989); *LaMotte v. Punch Line, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *South Carolina Nat'l Bank v. Silks*, 295 S.C. 107, 367 S.E.2d 421 (Ct. App. 1988); *Key Co. v. Fameco Distribs., Inc.*, 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987); *Noack Enters., Inc. v. Country Corner Interiors, Inc.*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986).

142. 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989).

143. *Id.* at 517-19, 386 S.E.2d at 260-61.

144. *Id.* at 519, 386 S.E.2d at 261.

145. *Id.* at 522, 386 S.E.2d at 263.

146. 712 F. Supp. 512 (D.S.C. 1989).

147. *Id.* at 516.

plaintiff learned that it had been charged sixty days' interest despite the waiver.¹⁴⁸ From the defendants' answers to interrogatories it was clear that "their challenged acts appear[ed] to be their practice in cases of loan prepayment."¹⁴⁹ The court concluded that the transaction was more than just a contract breach because the defendants' actions had a potential for repetition that could affect the public interest.¹⁵⁰

In another commercial dispute case, *Florence Paper Co. v. Orphan*,¹⁵¹ the South Carolina Supreme Court noted that unfair methods of competition could inherently affect the public interest. In *Florence Paper Co.* the plaintiff corporation alleged that the defendant, a former employee of the plaintiff, was using confidential information gained as an employee to the plaintiff's detriment.¹⁵² The plaintiff argued that unfair methods of competition inherently affect the public interest.¹⁵³ The supreme court stated: "While we do not reject this idea, we conclude that such an impact could not be inherent in this situation where only two direct competitors are involved."¹⁵⁴ The court's holding implies that the public impact requirement may be satisfied if unfair methods of competition affect an entire industry or even several competitors within a given market.

Commercial plaintiffs seeking to resolve a business dispute by bringing a UTPA claim against another commercial enterprise should recognize the difficulty of proving public impact in some cases. As *Florence Paper Co.* illustrates, however, commercial plaintiffs may be able to negotiate successfully the UTPA's public impact requirement under appropriate circumstances. To avoid dismissal of UTPA claims, plaintiffs must allege and prove facts sufficient to show that a defendant's challenged acts have the potential for repetition.

C. Dealer Termination Disputes

The alleged wrongful termination of a distributorship or franchise by the parent organization is a specialized type of business dispute that merits separate discussion. Such cases have been litigated under the UTPA infrequently in South Carolina courts, but federal courts applying South Carolina law have developed fairly consistent rules governing these disputes.

148. *Id.* at 514.

149. *Id.* at 516.

150. *Id.*

151. 298 S.C. 210, 379 S.E.2d 289 (1989).

152. *See id.* at 211-12, 379 S.E.2d at 290.

153. *Id.* at 213, 379 S.E.2d at 291.

154. *Id.*

In *Glaesner v. Beck/Arnley Corp.*¹⁵⁵ the Fourth Circuit Court of Appeals held that a supplier's termination of a distributorship is wrongful if "the supplier . . . acted maliciously and without reasonable business justification."¹⁵⁶ The *Glaesner* court found no wrongful termination, and hence denied recovery under the UTPA because the distributorship contract provided that either party could terminate the arrangement at will and because the defendant introduced sufficient evidence that it based the termination on reasonable business justifications.¹⁵⁷ The court also noted that "[i]t is unclear whether wrongful termination alone will support a [UTPA claim]"¹⁵⁸ and that "[o]rdinarily, violations of [UTPA are either antitrust or consumer actions]."¹⁵⁹

As *Glaesner* indicates, wrongful distributorship termination suits are difficult to bring successfully under the UTPA. In order to recover, the plaintiff must show bad faith and a lack of business justification for the termination. Since courts are not likely to second-guess such business decisions,¹⁶⁰ UTPA actions based on wrongful termination are best reserved for the more egregious of distributorship terminations.

In *Chuck's Feed & Seed Co. v. Ralston Purina Co.*,¹⁶¹ another distributorship case, the plaintiff based its UTPA claim on vertical trade restraint¹⁶² as well as wrongful termination.¹⁶³ The plaintiff-distributor charged that the defendant-supplier terminated the parties' distributorship agreement after the plaintiff began to carry a competitor's agricultural feed products. After reviewing federal cases regarding vertical trade restraint, the *Chuck's* court adopted the following test to determine whether a plaintiff states a UTPA cause of action for this type of activity:

First, the court must determine the nature of the relevant market by identifying the particular type of goods and the geographical area involved. Second, the court must determine how much of that market has been closed off to the products of competing manufacturers because

155. 790 F.2d 384 (4th Cir. 1986).

156. *Id.* at 389; accord *Blanton Enters., Inc. v. Burger King Corp.*, 680 F. Supp. 753, 768 (D.S.C. 1988).

157. *Glaesner*, 790 F.2d at 389; see also *Richland Wholesale Liquors v. Glenmore Distilleries Co.*, 818 F.2d 312 (4th Cir. 1987) (holding that terms of contract and business justification supported termination).

158. *Glaesner*, 790 F.2d at 390.

159. *Id.*

160. See *Richland Wholesale Liquors*, 818 F.2d at 317.

161. 810 F.2d 1289 (4th Cir.), cert. denied, 484 U.S. 827 (1987).

162. Vertical trade restraint exists when an agreement between a supplier and a purchaser restricts the purchaser from dealing with third parties. *Id.* at 1294 n.2.

163. See *id.* at 1291-92.

of exclusive dealing arrangements required by the defendant. . . . Third, the court should consider any procompetitive effects of the exclusive dealing arrangements that would justify their use.¹⁶⁴

Applying this test, the court concluded that the lower court should have granted the defendant's motion for judgment notwithstanding the verdict because the plaintiff failed to offer evidence demonstrating that the defendant used an exclusive dealing arrangement "to keep competing brands of feed out of a substantial percentage of the feed dealerships in the area."¹⁶⁵

As in wrongful termination suits, substantial problems exist with bringing a UTPA cause of action based on vertical trade restraint. To avoid a directed verdict in these cases, a plaintiff must introduce evidence about the particular market and geographical area affected by the exclusive dealing arrangement and the extent to which the arrangement affects competition. In addition, a plaintiff should produce evidence showing that the vertical restraint arrangement provides no procompetitive benefits.

D. Antitrust Actions

Another major category of UTPA violations that has been litigated in South Carolina concerns allegations of business monopolization. *Bocook Outdoor Media, Inc. v. Summey Outdoor Advertising, Inc.*¹⁶⁶ is the seminal case in this area. Both parties in *Bocook* were in the business of renting advertising space on billboards. Each company would lease a billboard location from a landowner, erect a billboard, and then solicit customers' advertisements. Bocook alleged that Summey tried to persuade landowners to terminate their oral leases with Bocook and to enter into leases with Summey instead.¹⁶⁷ Bocook also alleged that Summey entered into a noncompetitive market division agreement with another outdoor advertiser to try to monopolize the business to Bocook's detriment.¹⁶⁸ Summey counterclaimed that Bocook violated the UTPA by engaging in similar activity.¹⁶⁹

The court of appeals affirmed the jury's award of \$10,000 for Bocook on the UTPA claim. The court held that the jury could have reasonably concluded that Summey engaged in unfair competition by paying a bonus to its employees for "each billboard face belonging to Bocook that was

164. *Id.* at 1295.

165. *Id.*

166. 294 S.C. 169, 363 S.E.2d 390 (Ct. App. 1987).

167. *Id.* at 172, 175-76, 363 S.E.2d at 391, 393-94.

168. *Id.* at 172, 179, 363 S.E.2d at 391, 395.

169. *Id.* at 172, 363 S.E.2d at 391-92.

removed due to Summey obtaining the lease on the property from the landlord¹⁷⁰ and by obtaining a Bocook lease even though Summey could not erect its own billboard due to regulations.¹⁷¹ The court also affirmed the jury's verdict in favor of Summey on its UTPA counterclaim that Bocook failed to remove its billboards from certain sites in a timely manner.¹⁷²

In *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*¹⁷³ the Fourth Circuit Court of Appeals, construing the South Carolina UTPA, addressed the public impact requirement in the context of an antitrust action. In *Omni* the plaintiff billboard company alleged that the defendant, a competitor, used its influence with local officials to persuade the Columbia City Council to pass an ordinance that prohibited construction of new billboards without the express consent of the Council. As a result of the ordinance, the plaintiff was unable to compete with the established defendant.¹⁷⁴ The court held that "a finding of conspiracy to restrain competition is tantamount to a finding that the underlying conduct has 'an impact upon the public interest.'"¹⁷⁵ Consequently, the court of appeals reversed the district court's entry of judgment notwithstanding the verdict for the defendant and reinstated the jury verdict for the plaintiff.¹⁷⁶

On further appeal, the United States Supreme Court reversed the court of appeals, concluding that no conspiracy existed because governments and parties who lawfully lobby them are exempt from the federal antitrust laws.¹⁷⁷ This ruling effectively negated the court of appeals's holding that a conspiracy to restrain competition automatically affects the public. Nevertheless, the holding may still be applicable to purely private conspiracies not involving a governmental body.

Whether a party can use the UTPA as an antitrust remedy is unclear because few such cases have been reported. As *Bocook* illustrates, though, plaintiffs have been successful in using the Act in the context of antitrust actions. Moreover, the possibility of bringing a claim under the UTPA for

170. *Id.* at 179, 363 S.E.2d at 395.

171. *Id.* at 179-80, 363 S.E.2d at 396.

172. *Id.* at 182, 363 S.E.2d at 397. Apparently neither party argued for dismissal of the other's claim because public impact was lacking. The opinion contains no discussion of the public impact requirement.

173. 891 F.2d 1127 (4th Cir. 1989), *rev'd sub nom.* *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991).

174. *Id.* at 1130.

175. *Id.* at 1143.

176. *Id.*

177. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1356 (1991).

anticompetitive activities, rather than under federal antitrust statutes, should appeal to South Carolina lawyers. The statute is much easier to work with than the complex federal antitrust provisions, and, of course, state courts are available to hear UTPA disputes.

V. UNDEVELOPED TERRITORY

South Carolina appellate courts have yet to address several areas of potential UTPA application. One such area, price discrimination, has strong antitrust overtones. In *Jackson v. Atlantic Soft Drink Co.*,¹⁷⁸ the only reported case in South Carolina to address this type of claim, the supreme court reversed a demurrer and remanded the case on the familiar ground that a question of first impression should not be decided on demurrer.¹⁷⁹ The plaintiff-seller in *Jackson* alleged that the defendant-supplier was undercutting the plaintiff's profits by supplying soft drinks to competitors at substantially lower wholesale prices, which allowed the competitors to charge lower retail prices than the plaintiff for the same products.¹⁸⁰ The case was not appealed again; therefore, the issue of price discrimination as the basis for a UTPA claim remains unresolved.

Other jurisdictions have addressed UTPA issues not yet explored in South Carolina, including unreasonable failure to pay an insurance claim,¹⁸¹ attorney misconduct,¹⁸² and landlord-tenant disputes.¹⁸³

178. 286 S.C. 577, 336 S.E.2d 13 (1985).

179. *Id.* at 579, 336 S.E.2d at 14.

180. *Id.* at 578, 336 S.E.2d at 14.

181. *See, e.g.,* Carpentino v. Transport Ins. Co., 609 F. Supp. 556 (D. Conn. 1985) (holding that employee could bring action under the Connecticut UTPA for damages suffered when employer's workers' compensation insurer allegedly terminated insurance benefits in bad faith); Levy v. North Am. Co. for Life & Health Ins., 586 P.2d 845 (Wash. 1978) (en banc) (holding that plaintiff's complaint that insurance company wrongfully refused to pay disability benefits stated a valid cause of action under the Washington Consumer Protection Act).

182. *See, e.g.,* Guenard v. Burke, 443 N.E.2d 892 (Mass. 1982) (holding that attorney's contingent fee agreement in a divorce case violated Supreme Judicial Court rules and constituted an unfair or deceptive act or practice under Massachusetts law).

183. *See, e.g.,* McGrath v. Mishara, 434 N.E.2d 1215 (Mass. 1982) (holding that landlord's improper deduction from tenant's security deposit was an unfair or deceptive practice under Massachusetts UTPA); Love v. Pressley, 239 S.E.2d 574 (N.C. Ct. App. 1977) (finding that landlord's improper entry into plaintiff's residence and improper conversion of plaintiff's property was an unfair or deceptive act or practice under North Carolina UTPA), *cert. denied*, 241 S.E.2d 843 (N.C. 1978).

VI. CONCLUSION

In his 1982 article Professor Day queried whether the South Carolina Unfair Trade Practices Act was a “sleeping giant” or an “illusive panacea.”¹⁸⁴ To date the Act has been neither. Undoubtedly, it is an effective tool to remedy unfair and deceptive trade practices. Courts have liberally construed the Act, requiring only a capacity to deceive rather than proof of common-law fraud. Courts have also extended the Act to hold principals liable for the actions of their agents and to reach controlling persons of corporations. In addition, the Act’s liberal remedy provision allows recovery of treble damages and attorneys fees in some instances.

However, the Act is also substantially limited. Although the South Carolina Supreme Court recently adopted a less expansive approach to statutorily exempt activities, the stringent public impact requirement continues to defeat the majority of commercial claims brought under the UTPA. Yet, the public impact requirement provides a necessary counterbalance within the Act. Without this requirement, plaintiffs who were not actually deceived could use the Act in an oppressive manner to resolve purely private disputes. Also, the requirement ensures that a statement or omission that did not actually deceive will not serve as the basis for a claim unless the plaintiff can show at least a potential for wide-spread deceit.

As the UTPA has developed, it has begun to take its place among traditional contract and fraud actions. The Act has not become all-consuming in its breadth, nor should it. Courts have fashioned sensible rules governing its application, particularly with the recent supreme court ruling that narrows the previously overbroad exemption for regulated conduct. Nevertheless, substantial issues remain undecided, and until they are addressed, the full impact of the UTPA will remain unknown.

184. DAY, *supra* note 10.