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III. Antitrust Law & Trade Regulation

interpretation, plaintiff seamen will be able to raise the issue of whether the seaman's conduct justified his discharge, regardless of whether any fault on the shipowner's or shipmaster's part occasioned the seaman's improper conduct.[68] The *Neathery* decision thus is very broad and certainly will create difficulties for parties attempting to limit the decision solely to cases involving mutual fault.[69]

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III. ANTITRUST LAW & TRADE REGULATION

A. *Authority of State Attorneys General to Bring* Parens Patriae *Suits for Treble Damages Under the Antitrust Improvements Act of 1976*

Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976[1] grants state attorneys general standing to bring treble damage antitrust suits on behalf of consumers injured by violations of the Sherman Act.[2] Congress

68. *See* 700 F.2d at 143 n.3 (*Neathery* court indicated that true issue in § 594 action is whether seaman's conduct justified his discharge).

69. *See id.* at 143 (*Neathery* court stated that § 594 does not require seaman to be faultless to recover under statute); text accompanying notes 66-68 (*Neathery* decision may affect ability of shipowner to discharge seaman without liability even when seaman alone is at fault).

1. Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1394 (1976) (codified at 15 U.S.C. § 15c-h 1976 & Supp. V 1981). Title III of the Hart-Scott-Rodino Act of 1976 authorizes state attorneys general to sue as *parens patriae* for consumers injured by antitrust violations. 15 U.S.C. § 15c (1976 & Supp. V 1981); *see infra* note 10 and accompanying text (parens patriae in title III means that states can sue as representative party for consumers); *infra* notes 3-6 and accompanying text (congressional purposes behind title III); *see also* 15 U.S.C. at § 1311-14 (title I of Hart-Scott-Rodino Act allows Justice Department to issue civil investigative demands to investigate mergers, joint ventures, acquisitions or other related transactions that may lead to antitrust violations); *Id.* at § 18(a) (title II of Hart-Scott-Rodino Act requires reporting of all significant potential mergers and acquisitions to Justice Department and Federal Trade Commission). *See generally* Kintner, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1 (1977) (discussion of Hart-Scott-Rodino Antitrust Improvements Act of 1976); Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 COLUM. L. REV. 679 (1977) (analysis of Hart-Scott-Rodino Antitrust Improvements Act of 1976).

2. *See* 15 U.S.C. § 15c (1976 & Supp. V 1981) (title III authorized state attorneys general to sue in name of state as *parens patriae* on behalf of consumers injured by antitrust violations); *see also id* §§ 1-7 (Sherman Act). Section 1 of the Sherman Act provides that every contract or conspiracy in restraint of trade between the states is illegal. *Id.* at § 1. Section 2 of the Sherman Act provides that any monopolization or conspiracy to monopolize trade is a felony. *Id.* at § 2; *see also id.* at § 15 (Clayton Act allows persons injured in business or property by violations of Sherman Act to sue for treble damages).

enacted title III to enhance consumer protection and remedies under the antitrust laws.[3] To supplement lagging consumer enforcement of antitrust laws,[4]

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3. *See* H.R. REP. No. 499, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2573-74 (title III bolsters enforcement of antitrust laws by permitting attorneys general to act as consumer advocates in enforcement of antitrust laws); S. REP. No. 803, 94th Cong., 2d Sess. 5 (1976) (title III provides compensation for consumers injured by antitrust laws and also deters future antitrust violations). The legislative history of title III indicates that Congress found that the existing antitrust laws did not adequately protect consumers from antitrust violations. H.R. REP. No. 499, 94th Cong., 2d Sess. 3-5, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2573-74. For example, Congress noted that individual consumer antitrust suits are impractical because consumers usually sustain only small amounts of damages from antitrust violations. *Id.* at 6, *reprinted in* 1976 U.S CODE AND CONG. AD. NEWS 2575-76; S. REP. No. 803, 94th Cong., 2d Sess. 39-40. Congress acknowledged that since the total damages consumers sustain from antitrust violations may be very large, the alternative to individual consumer suits is class action suits. H.R. REP. No. 499, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2575-76; S. REP. No. 803, 94th Cong., 2d Sess. 39-40. Congress, however, determined that the procedural requirements of class actions often render class actions difficult, if not impossible, to maintain. *See* H.R. REP. No. 499, 94th Cong., 2d Sess. 6-8, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2576-77 (problems of notice and manageability seriously impair consumer's ability to bring class actions); *see also* FED. R. CIV. P. 23 (class actions must be manageable and class members must receive individual notice of class action whenever practicable); *infra* note 4 (analysis of procedural requirements for class actions). Congress further determined that the lack of adequate means for enforcement of antitrust laws for consumers weakens the deterrent effect of the antitrust laws, thereby encouraging future antitrust violations. H.R. REP. No. 499, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2573-74. Moreover, Congress stated that antitrust violations create high prices and inflation, further injuring consumers and the general economy of the states. *Id.* at 3-4, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS at 2573. Consequently, Congress designed title III to supplement consumer antitrust suits by allowing states to take advantage of title III's procedural innovations to bypass the burdensome procedural requirements of class actions. *See id.* at 8, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS at 2578 (title III allows state attorneys generals to both represent consumers injured by antitrust violations and to avoid manageability requirements of class actions); *infra* note 4 (title III permits notice by publication and aggregate calculation of damages to bypass procedural requirements of class actions).

4. *See* H.R. REP. No. 499, 94th Cong., 2d Sess., 7-8, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2577 (consumer enforcement of antitrust laws is not effective because consumers lack adequate means to enforce antitrust laws); *supra* note 3 (problems with consumer enforcement of antitrust laws). Congress noted that the procedural requirements of class actions, particularly the requirements that the actions be manageable and that class members receive individual notice when possible, often prevented private litigants from maintaining class actions. H.R. REP. No. 499, 94th Cong., 2d Sess. 607, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS at 2576. Rule 23 of the Federal Rules of Civil Procedure provides that class actions must be manageable and that class members must receive individual notice of the class action whenever possible. FED. R. CIV. P. 23(b)(3)(D), (C)(2).

Title III provides for less stringent procedures than the procedures required in class actions to satisfy the due process requirements that parties to an action receive notice of the action and an opportunity to be heard in court. *See* 15 U.S.C. §§ 15c(2)(b), 15e (1976 & Supp. V 1981) (title III provides for aggregate calculation of damages and for notice to class members by publication); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) (primary element of due process is parties' opportunity to be heard in court). Under title III, states may notify consumers of an antitrust claim by publication, including radio and television broadcasts. 15 U.S.C. § 15c(b)(1) (1976 & Supp. V 1981). A court decision on a title III claim binds consumers who did not exclude themselves from the title III action after the state published notice

Congress modified the common law doctrine of *parens patriae*[5] in title III to permit states to sue in lieu of consumers injured by antitrust violations.[6] At common law, a state could sue as *parens patriae* only to protect the state's quasi-sovereign interests in the physical and economic welfare of the people of the state as a whole.[7] A quasi-sovereign interest is a direct state interest in the welfare of the state's populace apart from the claims and interests of individual state citizens.[8] Consequently, a state merely enforcing the claims

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of the action. *Id.* at § 15c(b)(3). Title III avoids the manageability requirements that plagued consumer class action suits by providing for an aggregate calculation of damages. *Id.* § 15e. Courts have discretion under Title III to use reasonable methods, such as statistical sampling and computation of overcharges, in calculating damages. *Id.* Consumers that prove individual damage claims may collect their share of the damages. *Id.* A court may distribute any damages remaining after consumer claims have been satisfied, or may give the excess to the state. *Id.; see* H.R. REP. No. 499, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2585 (Congress intended when enacting title III that courts should use discretion when distributing damages to benefit injured consumers).

5. *See* Malina & Blechman, *Parens Patriae Suits for Treble Damages Under The Antitrust Laws*, 65 N.W.U.L. REV. 193, 197 (1970) (*parens patriae* was term for King of England's royal prerogative to exercise certain powers and duties in King's role as father of country). Under English common law, the King's royal prerogative entailed the King's powers and duties to protect infants, lunatics and other mental incompetents of the realm. *Id.; see* Note, *State Protection of its Economy and Environment: Parens Patriae Suits For Damages*, 6 COLUM. J. L. & SOC. PROBS. 411, 412 (1970) (*parens patriae* traditionally described sovereign's power to protect persons under legal disability). In the United States the royal prerogative rests with the federal and state governments instead of the King. Malina & Blechman, *supra*, at 197. The concept of *parens patriae* under American common law also includes a state's protection of state quais-sovereign interests. *Id.* at 196-97; *see* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982) (parens patriae under American law primarily concerns state protection of quasi-sovereign interests); *supra* notes 7-9 and accompanying text (quasi sovereign interests involve state's interests in general welfare of state citizens). *See generally* Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DE PAUL L. REV. 895 (1976) (analysis of *parens patriae* concept under English and American Law).

6. *See* H.R. REP. No. 499, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2578 (state attorneys general bringing title III actions act as consumer advocates in enforcement of antitrust laws).

7. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez 458 U.S. 592, 600-601 (1982) (states sue as *parens patriae* only on behalf of state quasi-sovereign interests). Quasi-sovereign interests include a state's interests in the environment, the general economy, or the health of state citizens. *See* Georgia v. Pennsylvania Ry. Co., 324 U.S. 439, 450-51 (1945) (state has quasi-sovereign interest in preventing economic discrimination against state residents); Georgia v. Tennessee Copper Co., 206 U.S. 230, 237-38 (1907) (state has quasi-sovereign interest in preventing poisonous fumes from entering state); Kansas v. Colorado, 185 U.S. 125, 145 (1902) (state has quasi-sovereign interest in protecting flow of rivers into state); Missouri v. Illinois, 180 U.S. 208, 241 (1901) (state has quasi-sovereign interest in preventing other states from polluting state's rivers). *See generally* Malina & Blechman, *supra* note 5, at 202-12 (analysis of state quasi-sovereign interests).

8. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez 458 U.S. 592, 600 (1982) (state cannot sue as *parens patriae* if state has only nominal interest in action or is merely representative party). Quasi-sovereign interests derive from a state's duty as sovereign to protect the state's people. *Id.* at 602. Under the federal system, states enforcing quasi-sovereign interests invoke the original jurisdiction of the Supreme Court. *Id.* at 601; *see* Georgia v. Pennsylvania Ry. Co., 324 U.S. 439, 450 (1945) (original jurisdiction provides peaceful mechanism for settling disputes between states over state quasi-sovereign interests). States acting solely on behalf of individual

of individual citizens or acting as a nominal representative of a group of citizens is not asserting a quasi-sovereign interest.[9] Title III expanded the concept of *parens patriae* by allowing states to sue on behalf of individual citizens even though no state quasi-sovereign interest was at issue.[10] Although title III provides that a state's attorney general is to enforce consumer antitrust claims by bringing *parens patriae* actions in the name of the state, litigants have changed the validity of title III *parens patriae* actions because title III permits a state to represent in court the legal claims of individual citizens.[11] In *Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc.*[12] the Fourth Circuit considered whether a state attorney general has the authority to bring a title III *parens patriae* action even though the action primarily benefits consumers.[13]

In *Mid-Atlantic Toyota*, the attorneys general of Delaware, Maryland, Pennsylvania, Virginia and West Virginia, and the Corporation Counsel for the District of Columbia brought title III actions in the District Court for the District of Maryland, against Mid-Atlantic Toyota Distributors, Inc., for conspiring to fix the price of Toyotas.[14] At trial, Mid-Atlantic Toyota moved to dismiss the attorneys general of Delaware, Maryland, and Pennsylvania, and the Corporation Counsel for the District of Columbia (Attorneys General), contending that the Attorneys General lacked authority to bring title III ac-

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state citizens, therefore, are merely enforcing claims which the individual citizens themselves could bring, and not a quasi-sovereign interest which invokes the original jurisdiction of the Supreme Court to protect a state's direct interest in the well-being of the state. *See* Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 394 (1938) (quasi-sovereign concept does not extend to action that states bring solely for benefit of individual citizens); North Dakota v. Minnesota, 263 U.S. 365, 373-76 (1923) (state cannot assert or enforce individual claims of state citizens against another state); *cf.* California v. Frito Lay Inc., 474 F.2d 774, 777 (9th Cir.) (state does not have quasi-sovereign interest in enforcing consumer antitrust claims), *cert. denied*, 412 U.S. 908 (1973). *But see infra* note 51 (Congress effectively overruled *Frito-Lay* decision by enacting title III to permit states to sue as *parens patriae* for consumers injured by antitrust violations).

9. *See supra* note 8 and accompanying text (state quasi-sovereign interests are distinct from claims and interests of individual state citizens).

10. *See* 15 U.S.C. § 15c (1976 & Supp. V 1981) (title III authorizes state attorneys general to bring *parens patriae* suits on behalf of consumers injured by antitrust violations); *In re* Montgomery County Real Estate Antitrust Litig., 452 F. Supp. 54, 59-60 (D. Md. 1978) (state need not allege damage to state quasi-sovereign interest in order to bring title III actions).

11. *See* Tennessee *ex rel.* Leech v. Highland Memorial Cemetery, 489 F. Supp. 65, 68 (E.D. Tenn. 1980) (title III does not violate constitutional requirement of standing in federal courts); *In re* Montgomery County Real Estate Antitrust Litig., 452 F. Supp. 54, 60 (D. Md. 1978) (title III does not violate constitutional requirement of standing in federal courts); *see also* U.S. CONST. art. III, § 2 (parties having standing in federal courts if case or controversy exists between parties).

12. 704 F.2d 125 (4th Cir. 1983).

13. *Id.* at 127.

14. *See id.* (title III actions of states involved in *Mid-Atlantic Toyota* consolidated in District Court of Maryland by Judicial Panel for Multidistrict Litigation); *see also* 15 U.S.C. § 15g(2) (1976 & Supp. V 1981) (District of Columbia is state for purposes of title III because term state in title III means any territory or possession of United States). Title III defines attorney general to mean the chief legal officer of a state, including the Corporation Counsel for the District of Columbia. 15 U.S.C. § 15g(1) (1976 & Supp. V 1981).

tions absent specific state authorization for the actions.[15] The district court denied Mid-Atlantic Toyota's motion to dismiss, holding that title III authorized a state's attorney general to bring a title III action unless the state expressly prohibited its attorney general from bringing the action.[16] Alternatively, the district court held that state grants of authority to the Attorneys General empowered the Attorneys General to maintain title III actions.[17] Mid-Atlantic Toyota appealed the district court's decision to the Fourth Circuit on the question of whether the Attorneys General could prosecute title III actions.[18]

On appeal, Mid-Atlantic Toyota challenged both of the district court's rationales for holding that the Attorneys General could bring title III actions.[19] First, Mid-Atlantic Toyota argued that Congress could not redefine or expand the authority of a state attorney general without unconstitutionally infringing upon the state's sovereign prerogative to define the powers of state officers.[20] Mid-Atlantic Toyota contended that the Tenth Amendment to the

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15. *See In re* Mid-Atlantic Toyota Antitrust Litig., 525 F. Supp. 1265, 1286 (D. Md.), *modified*, 541 F. Supp. 62, 63 (D. Md. 1981), *aff'd*, 704 F.2d 125 (4th Cir. 1983). At trial in *Mid-Atlantic Toyota*, Mid-Atlantic Toyota did not challenge the authority of the West Virginia Attorney General to bring title III actions because the West Virginia state legislature gave the Attorney General express authority to prosecute title III actions. *See* 541 F. Supp. at 63 n.23a; W. VA. CODE § 47-18-17(a) (1980). Mid-Atlantic Toyota also did not challenge the *parens patriae* authority of the Virginia Attorney General because the Judicial Panel for Multidistrict Litigation consolidated the Virginia action in *In re Mid-Atlantic Toyota* after the district court rejected Mid-Atlantic Toyota's motion to dismiss. *See* Pennsylvania v. Mid-Atlantic Toyota Distrib., Inc., 704 F.2d 125, 127 (4th Cir. 1983).

16. *See In re* Mid-Atlantic Toyota Antitrust Litig., 525 F. Supp. 1265, 1286 (D. Md.), *modified*, 541 F. Supp. 62 (D. Md. 1981), *aff'd*, 704 F.2d 125 (4th Cir. 1983). In holding that title III permitted state attorneys general to bring *parens patriae* actions, the district court in *Mid-Atlantic Toyota* followed dicta in another Fourth Circuit case. *Id.;* United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981). In *Colonial Chevrolet*, the Virginia Attorney General sought to require the United States Attorney General to provide the Virginia Attorney General with information concerning a title III *parens patriae* claim against Colonial Chevrolet. 629 F.2d at 946; *see* 15 U.S.C. § 15f(b) (1976 & Supp. V 1981) (United States Attorney General shall provide state attorney general with information relevant to title III actions upon state attorney general's request). In holding that the United States Attorney General must produce the requested information, the Fourth Circuit remarked that through title III Congress invested state attorneys general with authority to maintain *parens patriae* actions on behalf of consumers. *See* 629 F.2d at 950. The *Colonial Chevrolet* court's language is dicta however, because the Fourth Circuit was referring to Congress' intention that title III provide an effective advocate for consumer antitrust claims as creating a need for cooperation between state attorneys general and the United States Attorney General, rather than the separate question of whether state attorneys general have authority to proceed under title III. *Id.*

17. *In re* Mid-Atlantic Toyota Antitrust Litig., 541 F. Supp. 62, 63 (D. Md.), *modifying*, 525 F. Supp. 1265 (D. Md. 1981), *aff'd*, 704 F.2d 125 (4th Cir. 1983); *see infra* note 36 and accompanying text (statutes involved in *Mid-Atlantic Toyota*).

18. *See* 704 F.2d at 127 (defendants in *Mid-Atlantic Toyota* made interlocutory appeal to Fourth Circuit on question whether attorneys general involved in *Mid-Atlantic Toyota* could bring title III *parens patriae* actions).

19. *See* 704 F.2d at 128.

20. *Id.* at 128-29.

Constitution forbids Congress from interfering with state grants of authority to state officials by protecting the states' position as sovereign entities in the federal system.[21] The Tenth Amendment reserves for the state all powers which the Constitution does not give to the federal government.[22] Accordingly, Mid-Atlantic Toyota claimed that the authority of the Attorneys General to proceed under Title III must come from state law.[23]

Second, Mid-Atlantic Toyota argued that the Attorneys General lacked authority to bring the title III actions under state law because none of the states involved granted its attorney general the authority to prosecute title III actions.[24] Mid-Atlantic Toyota contended that the states could sue as *parens patriae* under common law only to protect state quasi-sovereign interests.[25] Since title III actions involve the claims of individual citizens rather than state quasi-sovereign interests, Mid-Atlantic Toyota argued that title III actions were outside the scope of common law *parens patriae* actions.[26] Absent common law authority, Mid-Atlantic Toyota contended that an attorney general could proceed with a title III action only under state constitutional or statutory authority.[27] Mid-Atlantic Toyota claimed that the constitutional and statutory grants of authority to the Attorneys General limited the Attorneys General to bringing actions involving the state's proprietary interests as a consumer, or state quasi-sovereign interests.[28] Because title III actions do not involve

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21. *See id.* The Tenth Amendment reserves all powers to the state that the Constitution did not give to the federal government. U.S. CONST. amend. X. Mid-Atlantic Toyota argued that *National League of Cities v. Usery* stands for the proposition that the Tenth Amendment protects the federal system by forbidding Congress from defining the authority of state officials. Brief for Appellants at 9-11, Pennsylvania v. Mid-Atlantic Toyota Distrib., Inc., 704 F.2d 125 (4th Cir. 1983) [hereinafter cited as Brief for Appellants]; *see* National League of Cities v. Usery, 426 U.S. 833, 853 (1976). In *Usery*, the Supreme Court held that Congress did not have the authority to set minimum wage standards for state employees because the power to set wages for state employees was an attribute of state sovereignty protected by the Tenth Amendment. *See* 426 U.S. at 843-46. Consequently, Mid-Atlantic Toyota argued that under *Usery* Congress could not expand or redefine the authority of a state's attorney general. Brief for Appellants at 10. *But see* 704 F.2d at 130 n.9 (*Mid-Atlantic Toyota* court stated that title III does not redefine authority of state attorneys general but merely creates new right of action in federal courts).

22. U.S. CONST. amend. X.

23. *See* 704 F.2d at 128 (Mid-Atlantic Toyota argued that authority of attorneys general to bring title III actions must come from state law because Congress cannot authorize state attorneys general to act under title III).

24. *Id.* at 129.

25. *Id.; see supra* notes 7-9 and accompanying text (at common law states sued as *parens patriae* only to vindicate state quasi-sovereign interests in general welfare of state and populace).

26. 704 F.2d at 129; *see supra* notes 8-9 and accompanying text (state does not assert quasi-sovereign interests by merely enforcing claims of individual citizens).

27. 704 F.2d at 129.

28. *Id.* In *Mid-Atlantic Toyota*, the defendants argued that the constitutional and statutory grants of authority to the attorneys general involved in *Mid-Atlantic Toyota (Attorneys General) limited the Attorneys General to bringing actions on behalf of the states. Brief for Appellants, supra* note 21, at 15-16, 25-26, 28-30, 36-37. Mid-Atlantic Toyota claimed that only actions involving a state's proprietary interests as a consumer, or state quasi-sovereign interests are actions on behalf of the state because the state has a direct interest in state proprietary or quasi-sovereign interests. *Id.*

state proprietary or quasi-sovereign interests, Mid-Atlantic Toyota contended that the Attorneys General did not have authority under state law to prosecute title III actions.[29]

The *Mid-Atlantic Toyota* court rejected both of Mid-Atlantic Toyota's arguments and affirmed that the district court's denial of Mid-Atlantic Toyota's motion to dismiss.[30] The *Mid-Atlantic Toyota* court did not address the district court's holding that federal law authorized the Attorneys General to bring title III actions.[31] Instead, the court focused solely on whether the Attorneys General could bring title III actions pursuant to state laws.[32] In considering Mid-Atlantic Toyota's argument that the Attorneys General could not bring title III actions under state law, the court agreed with Mid-Atlantic Toyota that the Attorneys General had no common law authority to bring title III actions.[33] The court, however, rejected Mid-Atlantic Toyota's argument that the Attorneys General could not bring title III actions pursuant to either state constitutional or state statutory grants of authority.[34] As support for its position, the court noted that each of the states' grant of authority to the Attorneys General were similar because each state had a statutory or constitutional provision that empowered its attorney general to bring actions on behalf of the state's interests.[35] The court also noted that title III was merely a pro-

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29. 704 F.2d at 129.

30. 704 F.2d at 129-30; *see* 15 U.S.C. § 15c (1976 & Supp. V 1981) (title III creates right of action for states to sue as *parens patriae* for consumers injured by antitrust violations).

31. *See* 704 F.2d at 128-29. Since the *Mid-Atlantic Toyota* court held that state law authorized the Attorneys General to bring title III actions, the court did not have to consider Mid-Atlantic Toyota's argument that Congress could not define the authority of a state official. *See id.* at 129; *infra* note 38 and accompanying text (court's acceptance of Mid-Atlantic Toyota's argument that Congress lacks power to expand authority of state attorneys general does not affect question whether attorneys general may prosecute title III actions pursuant to state law).

32. 704 F.2d at 129.

33. *See id.* at 129 n.8 (*Mid-Atlantic Toyota* court accepted Mid-Atlantic Toyota's argument that title III's right of action expands common law *parens patriae* actions); *supra* note 7 and accompanying text (common law *parens patriae* suits involve state quasi-sovereign interests).

34. *See* 704 F.2d at 129 (*Mid-Atlantic Toyota* court rejected Mid-Atlantic Toyota's contention that state constitutional and statutory grants of authority to Attorneys General limited Attorneys General to bringing actions vindicating state proprietary or quasi-sovereign interests).

35. *See* 704 F.2d at 130. The *Mid-Atlantic Toyota* court acknowledged that the statutes defining the powers of the Attorneys General all possess similar language. *Id.* For example, the District of Columbia Code provides that the Corporation Counsel for the District of Columbia has authority to conduct the law business of the District. *See* D.C. CODE ANN. § 1-361 (1981). The law business of the District of Columbia includes suits by or against the District, and representation of public interests. *Id.* The Delaware Code provides that the Delaware Attorney General may prosecute violations of state and federal antitrust laws on behalf of the state and state institutions. *See* DEL. CODE ANN. tit. 6, § 2105 (Supp. 1983) (Delaware Antitrust Act). Similarly, the Maryland Constitution states that the Maryland Attorney General may bring actions on the part of or in the interests of the state. *See* MD. CONST. art. V, § 3(a)(2). Furthermore, Pennsylvania's Commonwealth Attorney's Act provides that the Attorney General shall represent Pennsylvania and her citizens in federal antitrust suits. *See* PA. STAT. ANN. tit. 71, § 732-204(c) (Purdon Supp. 1982). Accordingly, the *Mid-Atlantic Toyota* court determined that essentially all the attorneys general involved in *Mid-Atlantic Toyota* had the authority to represent their respective jurisdiction's interests in litigation. 704 F.2d at 130.

cedural device creating a federal right of action for the states.[36] The *Mid-Atlantic Toyota* court then articulated two theories for holding that the Attorneys General may bring a title III action pursuant to the Attorneys General's authority under state law to represent the state's interests.[37]

In developing the first theory for holding that the Attorneys General may maintain title III actions pursuant to state constitutional or statutory grants of authority, the Fourth Circuit maintained that state law permitted the Attorneys General to sue in the name of each state on a federally created cause of action.[38] The *Mid-Atlantic Toyota* court stated that the Attorneys General bring title III actions in the name of the state, and thus on behalf of the state, even though the action primarily benefitted consumers, because title III created the action for the states and designated the states as the proper party litigants to bring the action.[39] Consequently, the court rejected Mid-Atlantic Toyota's argument that a state's attorney general brings title III actions on behalf of consumers and not on behalf of the state.[40] Since title III created a cause of action for the states, the Fourth Circuit held that an attorney general bringing a title III action is representing the state's interests by enforcing a state cause of action.[41]

As a second theory in support of the holding that the Attorneys General may maintain title III actions pursuant to state constitutional or statutory grants of authority, the *Mid-Atlantic Toyota* court determined that the authority of an attorney general to represent his state's interests in litigations included the authority to bring actions protecting the state's public interests.[42] The court rejected Mid-Atlantic Toyota's argument that under the statutes involved the

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36. 704 F.2d at 128. The *Mid-Atlantic Toyota* court stated that Congress designed title III merely to create a new right of action for the states in the federal courts without affecting the substantive requirements for establishing liability under antitrust law. *Id.* The court noted that title III provided that a state's attorney general brings the action in the name of the state. *Id.; see* 15 U.S.C. § 15c(a)(1) (1976 & Supp. V 1981) (title III actions are in state's name even though state is representative party for consumers); *infra* notes 53 and accompanying text (title III's legislative history shows that Congress intended title III to change antitrust law procedurally rather than substantively).

37. *See* 704 F.2d at 130-32.

38. *Id.* at 130. The *Mid-Atlantic Toyota* court noted that the court's acceptance of the defendant's argument that Congress could not redefine the authority of a state attorney general was not relevant either to Congress' power to grant standing in the federal courts or to create new rights of action in the federal courts. *Id.* at 130 n.9. The Fourth Circuit determined that Congress was not redefining or expanding the authority of state attorneys general by creating for the states a new right of action if the state attorneys general had the power under state law to prosecute new federal rights of action. *See id.*

39. *See id.* at 130-31. Since title III provides that states bring title III actions in the name of the state, the *Mid-Atlantic Toyota* court determined that title III actions exist in favor of the state regardless of whether the state is acting in a representative capacity for consumers. *Id.; see* Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 390-91 (1938) (state may bring statutory action even if state is only nominal plaintiff provided statute names state as proper party).

40. 704 F.2d at 130-31.

41. 704 F.2d at 131; *see* 15 U.S.C. § 15c(a)(1) (1976 & Supp. V 1981) (state attorneys general bring title III actions in name of state).

42. *See* 704 F.2d at 131-32.

states only had an interest in an action if state proprietary or quasi-sovereign interests were at issue.[43] The court stated that states have a legitimate interest in fostering a healthy economy by protecting state citizens from antitrust violations even though the state interest is not a quasi-sovereign interest independent of the claims of individual citizens.[44] Additionally, the Fourth Circuit noted that state attorneys general have broad discretion in determining where state interests lie.[45] Since title III actions involve a legitimate public interest, the Fourth Circuit held that title III actions are well within an attorney general's authority to exercise broad discretion to protect state public interests.[46]

After discussing the two theories for holding that the authority of the Attorneys General to represent their respective state's interests in litigation included the authority to bring title III actions, the *Mid-Atlantic Toyota* court noted that title III allows states to win substantial damages for deposit in the state treasuries.[47] The court stated that undoubtedly all of the states involved in *Mid-Atlantic Toyota* had empowered their respective attorneys general to bring federal actions which would secure for the state substantial damage awards.[48] The *Mid-Atlantic Toyota* court therefore, declared that the Attorneys General's authority to bring title III actions was consistent with the Attorneys General's authority to instigate suits to recover damages for their respective states.[49]

The *Mid-Atlantic Toyota* court's holding that the Attorneys General had

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43. *Id.* at 132; *see supra* note 28 and accompanying text (defendants in *Mid-Atlantic Toyota* argued that Attorneys General could only represent state proprietary or quasi-sovereign interests pursuant to Attorneys General's authority to bring actions on behalf of state).

44. 704 F.2d at 132. The Supreme Court has held that a state may have a legitimate public interest in an action even though that interest is not a quasi-sovereign interest which invokes the original jurisdiction of the Supreme Court. *See* Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 394-96 (1938) (Court upheld Oklahoma statute providing that state could sue to liquidate assets of insolvent banks for distribution to creditors). In *Johnson*, the Supreme Court stated that Oklahoma had a legitimate economic interest in protecting state citizens who were creditors of insolvent banks. 304 U.S. at 394-96. The Court, however, held that even though Oklahoma had a legitimate economic interest in protecting citizen creditors of insolvent banks, the interest was not a state quasi-sovereign interest independent of the claims of individual citizens. *Id.* at 396. Since the action did not involve a state quasi-sovereign interest, the Court denied Oklahoma original jurisdiction under the common law doctrine of *parens patriae. Id.; see supra* notes 7-9 and accompanying text (states enforcing quasi-sovereign interests invoke original jurisdiction of Supreme Court). Notwithstanding the *Johnson* holding, a state attorney general may bring a title III action pursuant to the attorney general's authority to represent the state's public interest even though the interest is not a quasi-sovereign interest because states suing under Title III are not attempting to invoke the original jurisdiction of the Supreme Court. 15 U.S.C. § 15c (1976 & Supp. V 1981); *see supra* note 10 and accompanying text (title III gives states standing to sue as *parens patriae* on behalf of consumers injured by antitrust violations although no state quasi-sovereign interest is at issue).

45. 704 F.2d at 132 n.15; *see infra* note 84 and accompanying text (most courts hold that state attorneys general have broad discretionary powers to determine public interest).

46. 704 F.2d at 132.

47. *Id.; see supra* note 4 (state retains amount of damages in title III actions remaining after consumer claims have been satisfied).

48. 704 F.2d at 132.

49. *Id.*

authority under state law to prosecute title III actions effectuates the congressional purpose of title III to allow state attorneys general to represent consumers injured by antitrust violations.[50] Title III was a legislative response to cases holding that states could not bring common law *parens patriae* suits on behalf of injured consumers.[51] By permitting states to bring suits on behalf of consumers injured by antitrust violations, Congress intended courts to allow state attorneys general to bring cases like *Mid-Atlantic Toyota*.[52] Additionally, the legislative history of title III indicates that Congress designed title III as a procedural device that gave states standing to sue for consumers in-

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50. *See id.* (*Mid-Atlantic Toyota* court held that Attorneys General had authority to bring title III *parens patriae* actions on behalf of consumers); *supra* note 3 and accompanying text (Congress enacted title III to bolster lagging consumer enforcement of antitrust laws).

51. *See* California v. Frito Lay, Inc., 474 F.2d 774, 778 (9th Cir.) (California could not bring common law *parens patriae* suit on behalf of consumers injured by antitrust violations), *cert. denied*, 412 U.S. 908 (1973); H.R. REP. No. 449, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2577-78 (Congress specifically stated that title III overrules *Frito Lay* by permitting state attorneys general to act for consumers in enforcement of antitrust laws). In *Frito Lay*, the California Attorney General sued Frito Lay, alleging that Frito Lay violated § 1 of the Sherman Act by fixing the prices of snack foods. 474 F.2d at 775. The California Attorney General attempted to bring the suit as *parens patriae* on behalf of California residents injured by Frito Lay's alleged violation of the Sherman Act. *Id.* At trial, Frito Lay moved to dismiss the action, claiming that the California Attorney General could not bring the *parens patriae* action because no state quasi-sovereign interests were at issue. *See* California v. Frito Lay, Inc., 333 F. Supp. 977, 979 (C.D. Calif. 1971), *rev'd*, 474 F.2d 774 (9th Cir. 1973). The district court denied Frito Lay's motion to dismiss, holding that California could sue as *parens patriae* for California residents because the state had a duty to provide an economy free from antitrust violations for its residents. *Id.* at 981-82. On appeal, the Ninth Circuit reversed the district court's denial of Frito Lay's motion to dismiss, holding that California's action was not a *parens patriae* action because the California Attorney General sued for injuries to individual citizens rather than a state quasi-sovereign interest. 474 F.2d at 775, 776-77; *see* Alfred L. Snapp & Son v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600-601 (1982) (states can sue as *parens patriae* under common law only on behalf of state quasi-sovereign interests); *In re* Motor Vehicle Air Pollution Control Equip; 52 F.R.D. 398, 401 (C.D. Cal. 1970) (court held that *parens patriae* suit for consumers injured by antitrust violations was not valid substitute for consumer class action); Philadelphia Hous. Auth. v. American Radiator & Standard Sanitation Corp., 309 F. Supp. 1053, 1062-63 (E.D. Pa. 1969) (court held that common law *parens patriae* suit for consumers injured by antitrust violations was without merit and not a valid substitute for consumer class action). Although the *Frito Lay* court granted Frito Lay's motion to dismiss, the court stated in dicta that allowing states to bring *parens patriae* suits on behalf of consumers injured by antitrust violations was a suitable solution to the problems of enforcing antitrust laws and protecting consumers from antitrust violations. 474 F.2d at 777. Accordingly, the court invited Congress to authorize state *parens patriae* actions under federal antitrust laws. *See id.* (authority for state *parens patriae* suits must come from legislation and rule making rather than from judicial improvisation); *supra* note 4 (consumer class actions are inadequate as means of enforcing consumer's antitrust claims).

52. *See In re* Montgomery County Real Estate Antitrust Litig., 452 F. Supp. 54, 59 (D. Md. 1978) (Congress intended title III to allow type of *parens patriae* action which *Frito Lay* disallowed); H.R. REP. No. 499, 94th Cong., 2d Sess. 9, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2578 (purpose of title III is to permit state attorneys general to sue on behalf of consumers in enforcement of antitrust laws).

jured by antitrust violations.[53] The Fourth Circuit's holding in *Mid-Atlantic Toyota*, therefore, furthers the congressional intent of title III by interpreting title III as a procedural device creating a right of action under the federal antitrust laws for the states.[54]

Although the Supreme Court has not considered whether a state attorney general has authority to maintain title III *parens patriae* actions, one other circuit court has agreed explicitly with the Fourth Circuit's interpretation of title III concerning the authority of an attorney general to bring a title III action.[55] The Fifth Circuit, in *Texas v. Scott & Fetzer Co.*,[56] examined whether the Texas Attorney General had authority to bring title III actions.[57] In *Scott & Fetzer*, the Texas Attorney General brought suit against the defendant Scott and Fetzer, alleging that the defendant illegally maintained high prices for vacuum cleaners which the defendant sold.[58] Scott and Fetzer challenged the authority of the Texas Attorney General to bring the title III action, claiming that the Texas Code[59] limited the Texas Attorney General to recovering damages that Texas sustained in its proprietary capacity.[60] The Texas Code authorized the Texas Attorney General to bring actions on behalf of the state of Texas

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53. *See* H.R. REP. No. 499, 94TH CONG., 2d SESS. 9, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2578-79 (title III provides alternative remedy for enforcement of existing substantive antitrust claims without creating new substantive liability under antitrust law); *see* SENATE REPORT, *supra* note 3, at 39 (title III merely creates an effective mechanism for consumer recoveries under anti-trust laws); *supra* notes 3-4 and accompanying text (Congress intended title III to supplement consumer enforcement of and protection under antitrust laws). *But see* 122 Cong. Rec. 29,372 (1977) (remarks of Senator Hart) (title III has more than procedural effect on antitrust law by easing substantive requirements for proving causation of damage under antitrust law). *See generally*, Scher, *supra* note 1, at 722-24 (totality of title III's legislative history suggests that Congress intended title III to be procedural device creating new state cause of action without affecting substantive requirements of antitrust law).

54. *See* 704 F.2d at 128; *see also supra* note 53 (Congress designed title III as procedural device to give states cause of action without changing substantive requirements for liability under antitrust laws). Like the Fourth Circuit in *Mid-Atlantic Toyota*, the Supreme Court has interpreted title III as a procedural device having no affect on substantive antitrust law. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 734 n.14 (1977) (title III only created new remedy for enforcement of existing substantive antitrust claims); *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 344 n.7 (1979) (Congress enacted title III to authorize states to sue as *parens patriae* for consumers injured by antitrust violations).

55. *See* Texas v. Scott & Fetzer Co., 709 F.2d 1024, 1028 (5th Cir. 1983) (Texas Attorney General has authority to prosecute title III actions).

56. 709 F.2d 1024 (5th Cir. 1983).

57. *See id.* at 1024-28 (Jolly, J., dissenting).

58. *See id.* at 1029 n.3.

59. TEX. BUS & COM. CODE ANN. § 15.40(a) (Vernon Supp. 1982) (Texas Attorney General may bring suit on behalf of state to recover damages for violations of federal antitrust laws).

60. 709 F.2d at 1025-26. In *Scott & Fetzer*, the defendants argued that title III only allows state attorneys general who have express authority under state law to bring *parens patriae* actions to bring title III actions. *Id.* Since Texas' Attorney General lacked express legislative authority to bring title III actions, Scott & Fetzer claimed that the Attorney General could not bring title III actions. *Id.*

to recover damages for violations of the federal antitrust laws.[61] The district court denied the defendant's motion to dismiss the case but certified the issue for appeal to the Fifth Circuit.[62]

On appeal, the Fifth Circuit rejected Scott and Fetzer's argument that the Texas Code limited the Texas Attorney General to bringing only actions involving state proprietary or quasi-sovereign interests, and instead held that the Texas Code authorized the Attorney General to bring title III actions on behalf of the state.[63] After noting that the Texas Code was very similar to the statutes at issue in *Mid-Atlantic Toyota*,[64] the *Scott & Fetzer* court adopted the *Mid-Atlantic Toyota* court's rationale, reasoning that the similarity of the statutes involved in the two cases rendered the *Mid-Atlantic Toyota* rationale entirely applicable to *Scott & Fetzer*.[65] In particular, the Fifth Circuit agreed with the *Mid-Atlantic Toyota* court that states bring title III actions on behalf of the state even though the state is enforcing the claims of individual citizens.[66]

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61. *See* TEX. BUS. & COM. CODE ANN. § 15.40(a) (Vernon Supp. 1982) (Texas Attorney General may recover damages for violations of federal antitrust laws on behalf of state, state subdivision or tax-supported institutions).

62. 709 F.2d at 1024-25.

63. *Id.* at 1025-28.

64. *Id.* at 1026-27.; *see* TEX. BUS. & COM. CODE ANN. § 1540(a) (Vernon Supp. 1982) (Texas Attorney General has authority to bring actions on behalf of state to recover damages for violations of federal antitrust laws); *supra* note 35 and accompanying text (Attorneys General involved in *Mid-Atlantic Toyota* have statutory and constitutional authority to bring suits on behalf of their respective jurisdiction's interests).

65. *See* 709 F.2d at 1026-27 (*Scott & Fetzer* court quoted extensively from *Mid-Atlantic Toyota* opinion).

66. *See* 709 F.2d at 1027. In claiming that the Texas Code did not authorize the Texas Attorney General to bring a title III *parens patriae* suit, the dissent in *Scott & Fetzer* rejected the court's adoption of the *Mid-Atlantic Toyota* holding. *Id.* at 1028-29 (Jolly, J., dissenting). The dissent argued that states bring title III *parens patriae* suits for the benefit of consumers. *Id.* Consequently, the dissent contended that title III actions are not on behalf of the state but on behalf of consumers. *Id.* The dissent also argued that a state's interest in protecting the state's economy does not transform title III actions into actions on behalf of the state because a state bringing a title III action is not suing directly for harm to the state's general economy but for financial harm to individual consumers. *Id.* at 1030. Consequently, the dissent maintained that Texas' Attorney General could not bring a title III action without express authorization from the Texas legislature to seek recovery of damages for individuals. *Id.* at 1030-31. By maintaining that the Texas Attorney General must have specific legislative authorization to proceed with a title III action, the *Scott & Fetzer* dissent effectively rejected the *Mid-Atlantic Toyota* court's rationale that an attorney general may bring title III actions pursuant to his authority to represent his state's interests in litigation. *See id.* at 1030 (dissent argued that *Mid-Atlantic Toyota* mistakenly held that actions on behalf of state include *parens patriae* actions). The dissent, however, failed to recognize that title III actions are not subject to the common law restriction of *parens patriae* actions, namely that *parens patriae* suits must involve a quasi-sovereign interest. *See supra* note 10 and accompanying text (title III permits states to sue as *parens patriae* although no quasi-sovereign interests are at issue); *cf.* 709 F.2d at 1030 (*Scott & Fetzer* dissent argued that majority holding erases historical basis for *parens patriae* actions). Since title III actions do not involve state quasi-sovereign interests, a state does not have to show a state interest apart from the claims of individual citizens, or direct injury to the state's economy. *See In re* Montgomery County Real Estate Antitrust Litig., 452 F. Supp. 54, 60 (D. Md. 1978) (states need not allege injury to general economy to bring title III actions because Congress intended to permit states to sue

The Fifth Circuit stated that Texas' title III action was on behalf of the state because the Texas Attorney General brought the action on behalf of all Texans injured through Scott and Fetzer's restraint of trade.[67] The Fifth Circuit then remanded the case to the district court for trial on the merits.[68]

In addition to the Fourth and Fifth Circuits, two federal district courts and one state court have upheld the authority of state attorneys general to bring title III actions.[69] Like the constitutional and statutory authority at issue

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for injured consumers regardless of injury to general economy). Consequently, the *Scott & Fetzer* dissent erred in concluding that since title III actions do not involve state interests independent of the interests of state citizens the Texas Attorney General lacks authority to bring the actions. *Cf. id.* at 58-60 (*In re Montgomery County* court rejected defendants argument that title III incorporated historical concept and interpretation of common law *parens patriae*).

67. 709 F.2d at 1027.

68. *Id.* at 1028.

69. *See* Iowa v. Scott & Fetzer Co., 1982-2 Trade Cas. (CCH) ¶ 64,873, at 72,359 (S.D. Iowa 1982) (Iowa Attorney General has authority under Iowa law to prosecute title III actions); New Mexico v. Scott & Fetzer Co., 1981-2 Trade Cas. (CCH) ¶ 64,439, at 75,149 (D.N.M. 1981) (New Mexico Attorney General has authority under New Mexico law to prosecute title III actions); Clark Oil and Refining Corp. v. Ashcroft, 639 S.W.2d 594, 597 (Mo. 1982) (en banc) (Missouri Attorney General has authority under Missouri law to prosecute title III actions).

In *Iowa v. Scott & Fetzer Co.*, the Iowa Attorney General brought a title III *parens patriae* action against the defendant Scott & Fetzer. 1982-2 Trade Cas. (CCH) ¶ 64,873, at 72,358-59. Scott & Fetzer moved to dismiss the action, claiming that the Iowa Attorney General lacked authority under Iowa law to bring *parens patriae* actions upon the claims of individual Iowa citizens. *Id.* The Iowa Code provides that the Iowa Attorney General may bring all suits if the state may be a party to, or have an interest in the action. IOWA CODE § 13.2(2) (1982 Supp.). The district court denied Scott and Fetzer's motion to dismiss, holding that since the state is a party to a title III action the Attorney General may bring the action under the Iowa Code. 1982-2 Trade Cas. (CCH) ¶ 64,873, at 72,358-60. In addition, the district court held that the Iowa Attorney General could bring the title III action pursuant to the Attorney General's broad discretionary authority to bring suits in the interests of the state. *Id.* at 72,359.

Similarly, in *New Mexico v. Scott & Fetzer Co.*, the New Mexico Attorney General brought a title III *parens patriae* action against the defendant Scott & Fetzer. 1981-2 Trade Cas. (CCH) ¶ 64,439, at 75,148. Scott & Fetzer moved to dismiss the action, claiming that the New Mexico Attorney General did not have the authority under New Mexico law to prosecute title III actions. *Id.* The district court stated that the New Mexico Attorney General had the authority to bring actions on behalf of the state when the attorney general believed that the action was in the interests of New Mexico. *Id.* at 75,149; *see* N.M. STAT. ANN. § 8-5-2 (1978) (New Mexico Attorney General has authority to bring action if state may be party to or interested in action and if in Attorney General's judgment state interests require such action). The district court stated that the Attorney General brought the title III action in the name of New Mexico for the benefit of state citizens. 1981-2 Trade Cas. (CCH) ¶ 64,439, at 75,149. The district court further stated that New Mexico had a legitimate interest in protecting state citizens from violations of antitrust laws. *Id.* Consequently, the court denied Scott & Fetzer's motion to dismiss, holding that the New Mexico Attorney General may bring title III actions pursuant to the Attorney General's authority to bring an action on behalf of the state to protect an interest of the state. *Id.*

Additionally, in *Clark Oil & Refining Co. v. Ashcroft*, the Missouri Attorney General originally brought a title III *parens patriae* action against Clark Oil in federal district court. 639 S.W.2d at 595. In the federal district court, Clark Oil argued that the Missouri Attorney General lacked authority to bring title III actions and moved to dismiss the action. *Id.* The district court denied the motion to dismiss, holding that the Missouri Attorney General could prosecute title III actions as a matter of federal law. *Id.* at 595-96. Clark Oil made an interlocutory appeal to the

in *Mid-Atlantic* Toyota, the legislative grants of authority to the attorneys general in the lower court cases generally empowered a state's attorney general to bring actions on behalf of the state, or to bring actions in which the state may be a party or have an interest.[70] Accordingly, each court that has allowed a state attorney general to bring a title III action has adopted essentially the same rationale that the Fourth Circuit used in *Mid-Atlantic Toyota*.[71] Like the Fourth Circuit in *Mid-Atlantic Toyota*, the lower courts uniformly have held that a state can bring title III actions on behalf of a state even though the state is a representative party for the claims of individual citizens.[72] Fur-

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Eighth Circuit but the Eighth Circuit turned down the appeal. *Id.* at 595; *see* 28 U.S.C. § 1292(b) (1976) (litigants may immediately appeal orders regarding controlling issues in case subject to discretion of court). Consequently, Clark Oil sought declaratory relief in the Missouri Circuit Court of Cole County. 639 S.W.2d at 595. The Circuit Court entered a declaratory judgment for Clark Oil, ruling that Missouri law did not authorize specifically the Missouri Attorney General to bring title III actions. *Id.* at 594. The Missouri Attorney General then appealed to the Missouri Supreme Court. *Id.* On appeal, Clark Oil argued that the Attorney General could not bring a title III *parens patriae* action because the action involved the claims of individual citizens rather than state interests. *Id.* at 596. The Missouri Supreme Court, however, determined that state law authorized the Attorney General to bring actions on behalf of the interests of the state. *Id.* see MO. REV. STAT. § 27.060 (1969) (Missouri Attorney General may bring suits in name of and on behalf of state to protect interests of state); MO. REV. STAT. § 416.061 (1979) (Missouri Attorney General may represent state in actions under any federal antitrust statute). The Missouri court stated that title III actions are actions on behalf of the state because the Attorney General is enforcing the rights of all Missouri citizens injured by antitrust violations. 639 S.W.2d at 596. The court also stated that title III actions enforce the public right to an economy free from antitrust violations. *Id.* at 597. Consequently, the *Clark* court reversed the circuit court, holding that the Missouri Attorney General may bring title III actions pursuant to his authority to bring actions to protect the interests of the state. *Id.*

70. *See* D.D.C. CODE ANN. § 1-361 (1981) (Corporation Counsel for District of Columbia may represent all law business of district); DEL. CODE ANN. tit. 6, § 2105 (Supp. 1983) (Delaware Attorney General may prosecute violations of state and federal antitrust laws on behalf of state and state institutions); IOWA CODE § 13.2(2) (1967) (Iowa Attorney General may bring action if state may be party to such action or if interests of state require such action); MD. CONST. art V., § 3(a)(2) (Maryland Attorney General may bring actions on part of or in interests of state); MO. REV. STAT. § 27.060 (1969) (Missouri Attorney General may bring suits in name of state to protect interests of state); MO. REV. STAT. § 416.061 (1979) (Missouri Attorney General may represent state in actions under any federal antitrust law); N.M. STAT. ANN. § 8-5-2 (1978) (New Mexico Attorney General may bring action if state may be party to or interested in action or if action involves state public interests); PA. STAT. ANN. tit. 71 § 732-204(c) (Purdon Supp. 1982) (Pennsylvania Attorney General shall represent state and state citizens in federal antitrust suits).

71. *See supra* note 69 and accompanying text (federal district and state courts have held that state attorney general brings title III actions on behalf of state and to protect state public interests in securing economy free from antitrust violations); *see also* Pennsylvania v. Mid-Atlantic Toyota, 704 F.2d 125, 130-32 (4th Cir. 1983) (Attorneys General involved in *Mid-Atlantic Toyota* brought title III actions pursuant to authority to bring actions either on behalf of state or in protection of public interests).

72. *See* Iowa v. Scott & Fetzer Co., 1982-2 Trade Cas. (CCH) ¶ 64,873 at 72,359 (S.D. Iowa 1982) (state is designated as real party in interest in title III actions); New Mexico v. Scott & Fetzer Co., 1981-2 Trade Cas. (CCH) ¶ 64,439, at 75,149 (D.N.M. 1981) (New Mexico Attorney General may bring title III actions even though title III actions primarily benefit consumers because title III action is in name of state); Clark Oil & Refining Corp. v. Ashcroft, 639 S.W.2d 594, 596 (Mo. 1982) (en banc) (title III action is not merely on behalf of individual

thermore, the lower courts have determined, as did the *Mid-Atlantic Toyota* court, that the states have a legitimate interest in protecting state citizens and the state economy from antitrust violations.[73] The lower court holdings, therefore, are consistent with the *Mid-Atlantic Toyota* court's holding that state attorneys general may bring title III actions pursuant to the attorneys general's authority to represent their state's interests by bringing actions on behalf of the state or by protecting state public interests.[74]

In addition to the other courts' decisions which agreed with the *Mid-Atlantic Toyota* holding that the Attorneys General may bring title III actions, the generally favorable reaction of the legislatures to title III actions supports the *Mid-Atlantic Toyota* court's holding.[75] The attitude of a state legislature toward a title III action is of probative value when determining whether the state legislature intended its attorney general to have the authority to bring title III actions.[76] Although none of the states involved in *Mid-Atlantic Toyota* had granted express authority to their respective attorneys general to bring title III actions,[77] none of the states indicated disapproval of title III actions.[78] Congress placed an opt-out provision in title III which

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consumers but on behalf of state protecting all Missouri citizens injured by antitrust violations); *see also supra* note 69 (discussion of lower court decisions that are consistent with *Mid-Atlantic Toyota* holding that state attorneys general bring title III actions in name of state even though state is representative party in title III actions); *supra* note 39 and accompanying text (*Mid-Atlantic Toyota* court's holding that state attorneys general bring title III actions on behalf of state).

73. *See* Iowa v. Scott & Fetzer Co., 1982-2 Trade Cas. (CCH) ¶ 64,873, at 72,359 (S.D. Iowa 1982) (Iowa Attorney General may prosecute title III actions pursuant to his broad discretionary authority to represent state public interests); New Mexico v. Scott & Fetzer Co., 1981-2 Trade Cas. (CCH) ¶ 64,439, at 75,150 (D.N.M. 1982) (title III actions involve legitimate state interest in securing economy free from antitrust violations); Clark Oil & Refining Co. v. Ashcroft, 639 S.W.2d 594, 598 (Mo. 1982) (en banc) (title III actions protect public right to economy free from antitrust violations); *see also supra* note 69 (discussion of lower court decisions that are consistent with *Mid-Atlantic Toyota* court's rationale that attorneys general bring title III actions to protect state public interests).

74. *See supra* notes 71-73 (lower courts use essentially same rationale to uphold authority of attorneys general to bring title III actions as Fourth Circuit used in *Mid-Atlantic Toyota*).

75. *See* Pennsylvania v. Mid-Atlantic Toyota, 704 F.2d 125, 130 (4th Cir. 1983) (state legislative grants of authority to Attorneys General authorize Attorneys General to bring title III actions); *infra* notes 77-81 and accompanying text (legislatures of states involved in *Mid-Atlantic Toyota* generally approve of title III *parens patriae* actions).

76. *See* New Mexico v. Scott & Fetzer Co., 1981-2 Trade Cas. (CCH) ¶ 64,439 at 75, 149 (D.N.M. 1981) (court cited New Mexico legislature's lack of objection to title III actions as support for holding that Attorney General may bring title III action); Clark Oil & Refining Co. v. Ashcroft, 639 S.W.2d 594, 597 (Md. 1982) (en banc) (court refers to Missouri legislature's aquiescence to title III actions as support for holding that Attorney General may bring title III actions); *cf.* Iowa v. Scott & Fetzer Co., 1982-2 Trade Cas. (CCH) ¶ 64,873 at 72,359 (S.D. Iowa 1982) (court cited legislative intent to grant Iowa Attorney General broad power to represent public interests as support for holding that Attorney General may bring title III actions).

77. 704 F.2d at 129 n.7.

78. *Cf. id.* at 132 (*Mid-Atlantic Toyota* court stated that state legislatures undoubtedly have authorized their attorneys general to bring title III actions that permit recovery of monetary damages for deposit in state treasuries). Two states have enacted legislation authorizing the states' attorneys general to bring title III *parens patriae* actions for violations of state antitrust laws.

provided that title III applied in all states except states expressly rejecting title III.[79] In general, courts have inferred from a state legislature's failure to opt-out of title III that the state legislature had no objection to the state's attorney general bringing title III actions.[80] Moreover, the District of Columbia and Delaware supplemented title III by passing legislation authorizing their respective attorneys general to bring *parens patriae* suits for violation of state antitrust laws.[81] The state legislature's inaction towards title III despite the opt-out provision, and state legislative expansion of the title III *parens patriae* concept to cover state antitrust laws, therefore, indicates that state legislatures generally approve of their respective state's attorney general bringing *parens patriae* actions under title III.[82]

Since the legislatures of the states involved in the *Mid-Atlantic Toyota* litigation had not objected to title III actions, the *Mid-Atlantic Toyota* holding that the Attorneys General could bring the actions is the most rational holding because a holding for the defendants would unnecessarily restrict the authority of the Attorneys General to protect the public interests.[83] Generally, courts recognize that attorneys general have broad discretionary powers in determining public interests.[84] Courts, therefore, are hesitant to restrict an attorney

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See CONN. GEN. STAT. ANN. § 35-32 (West 1981); W. VA. CODE § 47-18-17(a) (1980). Eleven other states have passed legislation complementing title III by allowing the states' attorneys general to sue as *parens patriae* for violations of state antitrust laws. *See* CAL. BUS. & PROF. CODE § 16760 (West Supp. 1983); DEL. CODE ANN. tit. 6, § 2108 (Supp. 1983); D.C. CODE ANN. § 28-4507 (1981); FLA. STAT. ANN. § 542-22 (West 1983); HAW. REV. STAT. § 480-14 (Supp. 1982); MASS. ANN. LAWS ch. 93, § 9 (Michie/Law Coop (Supp. 1983)); NEV. REV. STAT. 598A.160 (1981); OR. REV. STAT. § 646.775 (1981); R.I. GEN. LAWS § 6-36-12 (Supp. 1983); S.D. COMP. LAWS ANN. § 37-1-23 to -32 (1983); VA. CODE § 59.1-9.15 (1983).

79. *See* 15 U.S.C. § 15(h) (1976 & Supp. V 1981) (title III applies in all states which do not reject title III).

80. *See* New Mexico v. Scott & Fetzer Co., 1981-2 Trade Cas. (CCH) ¶ 64,439, at 75,149 (D.N.M. 1981) (court stated that legislature had no objection to attorney general maintaining title III actions since legislature did not opt-out of title III); Clark Oil & Refining Corp. v. Ashcroft, 639 S.W.2d 594, 597 (Mo. 1982) (en banc) (court assumed legislature's failure to opt-out of title III indicated legislative support for title III actions even though legislature did not expressly authorize attorney general to bring title III actions).

81. *See* D.C. CODE ANN. § 28-4507 (1981) (Corporation Counsel for District of Columbia has authority to bring *parens patriae* actions for violations of District of Columbia's antitrust laws); DEL. CODE ANN. tit. 6, § 2108 (Supp. 1980) (Delaware's Attorney General may bring *parens patriae* actions for violations of Delaware's antitrust laws).

82. *See supra* text accompanying note 80 (courts generally hold that absence of state statutes forbidding attorneys general from maintaining *parens patriae* actions under title III indicates that states have no objection to states' attorneys general bring title III actions); *see also* D.C. CODE ANN. § 28-4507 (1981) (Corporation Counsel for District of Columbia may bring *parens patriae* actions for violations of District of Columbia's antitrust laws); DEL. CODE ANN. tit. 6, § 2108 (Supp. 1983) (Delaware's Attorney General has authority to bring *parens patriae* actions for violations of Delaware's antitrust laws).

83. *See infra* notes 84-88 and accompanying text (holding for defendants in *Mid-Atlantic Toyota* would be wrongful restriction of attorneys general's broad discretion to protect state public interests).

84. *See* Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 268-69 (5th Cir. 1976) (attorneys general generally have as much authority as necessary to represent the public interest);

general's determination that a particular suit is necessary to protect the public interest unless the suit is clearly not in the public interest.[85] Accordingly, Congress chose a state's attorney general as the proper state official to bring title III actions because of the attorney general's traditionally broad powers to protect the public interest.[86] The lack of a negative response to title III actions by the state legislatures suggests that an attorney general is not abusing his discretionary powers when bringing a title III action.[87] A ruling for Mid-Atlantic Toyota, however, would restrict the Attorneys General's broad authority to protect the public interest by requiring each state to pass specific legislation authorizing its attorney general to proceed under title III before the attorney general could bring title III actions.[88] Since title III actions further the public interest,[89] a holding for the defendants in *Mid-Atlantic Toyota* would conflict with Congress' intent in title III that state attorneys general could bring title III actions to protect public interests.[90]

The Fourth Circuit's holding in *Mid-Atlantic Toyota* that the Attorneys General may bring title III actions pursuant to their authority to bring actions on behalf of the state and in protection of state public interests effectuates the congressional purpose in enacting title III of enhancing consumer protection under the antitrust laws.[91] Congress intended title III to create for the

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see also Iowa v. Scott & Fetzer Co., 1982-2 Trade Cas. (CCH) ¶ 64,873, at 72,359 (S.D. Iowa 1982) (Iowa Attorney General has broad discretionary power to bring actions to protect public interests).

85. *See* New Mexico v. Scott & Fetzer Co., 1981-2 Trade Cas. (CCH) ¶ 64,439, at 75,149 (D.N.M. 1982) (court would not challenge attorney general's discretion in deciding that title III actions involve state public interests); Michigan State Chiropractice Ass'n v. Kelley, 79 Mich. App. 789, ____, 262 N.W.2d 676, 677 (Mich. Ct. App. 1978) (court should not disturb attorney general's discretionary decision to bring actions concerning public interest unless action is clearly not in public interest).

86. *See* S. REP. No. 803, 94th Cong., 2d Sess. 39 n.1. The Senate determined that a state attorney general is the best representative for consumers in antitrust cases because a state attorney general is usually an elected official whose primary duty is to protect the health and welfare of state citizens. *Id.; see In Re* Ampicillin Antitrust Litig., 1972 Trade Cas. (CCH) ¶ 73,966, at 92,033 (D.D.C. 1972) (state attorney general is best representative of retail consumers because historically attorney general had common law authority to act on behalf of general welfare of populace).

87. *See supra* text accompanying note 80 (legislative inaction regarding title III despite opt-out provision implies that state legislatures have no objection to title III).

88. *Cf.* 704 F.2d at 128 (*Mid-Atlantic Toyota* court rejected defendants' argument that states must specifically grant authority to attorneys general to proceed under title III before attorneys general may bring title III actions).

89. *See* Texas v. Scott & Fetzer Co., 709 F.2d 1024, 1027 (5th Cir. 1983) (Texas Attorney General vindicates rights of Texas citizens by bringing title III action); New Mexico v. Scott & Fetzer Co., 1981-2 Trade Cas. (CCH) ¶ 64,439, at 75,149 (D.N.M. 1981) (title III actions protect public interest in securing economy free from antitrust violations).

90. *See supra* text accompanying note 86 (Congress intended for attorney general to bring title III actions because Attorneys General have broad authority to represent public interests).

91. *See supra* text accompanying notes 50-54 (*Mid-Atlantic Toyota* holding that Attorneys General may bring title III actions furthers congressional intent for title III to provide consumers with effective remedy under antitrust laws); *see also* 704 F.2d at 130-32 (*Mid-Atlantic Toyota* court held that Attorneys General may bring title III actions pursuant to their authority to repre-

states a new cause of action in the federal courts.[92] Accordingly, the *Mid-Atlantic Toyota* court interpreted title III as a procedural device giving states a right of action for consumers and permitting state attorneys general to bring title III *parens patriae* actions without meeting the common law requirements for *parens patriae* actions.[93] Furthermore, by ruling that the state grants of authority to the Attorneys General included the authority to bring title III actions, the *Mid-Atlantic Toyota* opinion complimented state legislative approval of title III actions and did not restrict the broad discretionary powers of state attorneys general.[94] Moreover, like *Mid-Atlantic Toyota*, each court that has considered the issue whether a state attorney general has authority to bring a title III action has upheld the authority of the attorney general to prosecute title III actions.[95] The Fourth Circuit's holding in *Mid-Atlantic Toyota* therefore, permits state attorneys general to continue using the Hart-Scott-Rodino Antitrust Improvements Act to provide consumers with an effective remedy under the antitrust laws.[96]

JOHN CALHOUN MORROW

B. *Recovery of Treble Damages Under the North Carolina Unfair Trade Practices Act: The Importance of Pleading*

Section 5 of the Federal Trade Commission Act (FTC Act)[1] prohibits unfair methods of competition and unfair or deceptive acts or practices in

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sent jurisdictions' interests in litigation); *supra* note 3 and accompanying text (Congress enacted title III to provide consumers with effective remedy under antitrust laws).

92. *See supra* notes 50-53 and accompanying text (title III was legislative reaction to cases preventing states from suing as *parens patriae* for consumers injured by antitrust violations); *see also* H.R. REP. No. 499, 94th Cong., 2d Sess. 8-9, *reprinted in* 1976 U.S. CODE AND CONG. AD. NEWS 2572, 2578 (Congress designed title III to give states right of action to sue for consumers injured by antitrust violations).

93. *See supra* notes 39-46 and accompanying text (*Mid-Atlantic Toyota* court held that Attorneys General may bring title III actions even though no state quasi-sovereign interests were at issue); *see also* 704 F.2d at 127 (*Mid-Atlantic Toyota* court interpreted title III as procedural device creating for states right of action in federal court).

94. *See supra* note 79 and accompanying text (state legislatures have evidenced no objection to their respective attorney general prosecuting title III actions).

95. *See supra* notes 65, 69 and accompanying text (courts using essentially same rationale as *Mid-Atlantic Toyota* court for holding state attorney general may prosecute title III action).

96. *Cf. supra* note 88 and accompanying text (holding for defendants in *Mid-Atlantic Toyota* would require states to pass specific legislation authorizing attorneys general to bring title III actions before attorneys general could proceed under title III).

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1. Federal Trade Commission Act §§ 1-18, 15 U.S.C. §§ 41-58 (1982). Congress enacted the Federal Trade Commission Act (FTC Act) following the Supreme Court's decision in *Standard Oil Co. v. United States*. 221 U.S. 1 (1910). In *Standard Oil*, the United States charged the defendants with conspiring to restrain trade and commerce in the petroleum industry in violation of § 1 of the Sherman Act. *Id.* at 30, 31; *see* Sherman Act § 1, 15 U.S.C. § 1 (1982). Section

commerce.[2] Congress originally enacted the FTC Act in 1914 as part of the over-all scheme of antitrust laws.[3] Section 5 of the FTC Act granted the newly created Federal Trade Commission (Commission)[4] considerable latitude to strike down commercial anticompetitive practices.[5] In 1938, Congress amended the FTC Act to allow the Commission to protect consumers from unfair or misleading practices.[6] In addition to the equitable prospective relief afforded

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1 provides that every contract, combination, or conspiracy that restrains interstate commerce is a felony. *See* Sherman Act § 1, 15 U.S.C. § 1. Although § 1 of the Sherman Act contained no requirement that a court find a restraint of trade or commerce unreasonable, the *Standard Oil* Court held that the Sherman Act should be read "in the light of reason." 221 U.S. at 64-65; *see* Sherman Act § 1, 15 U.S.C. § 1. Congress feared that the *Standard Oil* rule of reason would weaken antitrust enforcement by entrusting adjudication of alleged antitrust law violations to the subjective standards of individual court members. *See* S. REP. No. 1326, 63d Cong., 3rd Sess. 10 (1913), *reprinted in* 5 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES, 3736 (1978) (rule of reason allows individual court members to make rather than administer law). Congress therefore enacted the FTC Act, which broadened the federal government's antitrust enforcement powers by allowing the Federal Trade Commission to enjoin unfair methods of competition before such methods resulted in restraint of trade. *See* Federal Trade Commission Act § 5(a), 15 U.S.C. § 45a (1982); FTC v. Raladam Co. 283 U.S. 643, 647 (1931) (FTC Act's objective is to stop unfair methods of competition in their incipiency).

2. Federal Trade Commission Act § 5(a), 15 U.S.C. § 45a (1982). Section 5 of the original FTC Act prohibited only unfair methods of competition. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 45a (1982)). Congress explicitly declined to define "unfair" by enumerating particular practices that would constitute unfair methods of competition. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-40 (1971). Congress believed that no definition of unfair could incorporate all of the practices Congress intended to proscribe. *See* S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914) (unfair practices in commerce are too numerous and too variable to define); H.R. REP. No. 1142, 63d Cong., 2d Sess. 19 (1914) (impossible to frame definitions that encompass all unfair practices).

3. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-77 (1982)). The Sherman Act prohibits monopolies and contracts, combinations, or conspiracies that restrain interstate commerce. *See* Sherman Act §§ 1-7, 15 U.S.C. §§ 1-7 (original version at ch. 647, §§ 1-7, 26 Stat. 209, 209-10 (1890)). The Clayton Act regulates price discrimination, exclusive dealing, and mergers. *See* Clayton Act §§ 1-8, 10-16, 26, 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1982), 29 U.S.C. §§ 52-53 (1982) (original version at ch. 323, §§ 1-26, 38 Stat. 730, 730-40 (1914)). The Sherman Act, the FTC Act, and the Clayton Act comprise the core of federal antitrust policy. *See* M. HOWARD, ANTITRUST AND TRADE REGULATIONS 49 (1983).

4. *See* 15 U.S.C. § 41 (1982). The Federal Trade Commission (Commission) is an independent regulatory agency whose five members are appointed by the president for staggered seven-year terms. Federal Trade Commission Act § 1, 15 U.S.C. § 41 (1982). Congress established the Commission as an expert body to obtain information from businesses, make investigations and issue reports, and issue cease and desist orders to prevent unfair methods of competition in commerce. M. HOWARD, *supra* note 3, at 25.

5. *See* Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719-20 (1914) (current version at 15 U.S.C. § 45 (1982)); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (Commission may consider public values in determining whether practice is unfair); FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966) (Commission has broad powers to declare trade practices unfair); FTC v. R.F. Keppel & Bros., Inc., 291 U.S. 304, 310 (1934) (Commission's power to issue cease and desist orders is not restricted to methods of competition forbidden at common law or potential Sherman Act violations).

6. Wheeler-Lea Amendment, Pub. L. No. 447, §§ 1-5, 52 Stat. 111 (1938). The Wheeler-Lea Amendment repudiated the Supreme Court's decision in *FTC v. Raladam Co.*, in which

by section 5 of the FTC Act,[7] the Federal Trade Commission Improvement Act of 1975[8] authorizes the Commission to bring civil actions to redress consumer injury.[9] Neither statute, however, provides a cause of action to private parties.[10] Consumers and commercial entities therefore must look to state statutes to determine what private rights of action exist for deceptive acts or practices in commerce.[11]

North Carolina is one of forty-two states that have enacted deceptive trade practices statutes which expressly grant private rights of action to consumers.[12]

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the Commission had attempted to enjoin deceptive advertising practices without specifically finding that the advertising harmed competitors. *See* 283 U.S. 643, 646 (1931). The *Raladam* Court held that unfair trade methods did not constitute per se unfair methods of competition. *Id.* at 649. The *Raladam* Court denied enforcement of the Commission's order because neither the order nor evidence showed injury to competition. *Id.* at 652-53.

7. *See* Federal Trade Commission Act § 5(b), 15 U.S.C. § 45b (1982). Section 5(b) of the FTC Act sets forth a procedure by which the Commission issues and serves a complaint upon any person, partnership, or corporation whom the Commission believes has violated the provisions of § 5(a). *See id.* The Commission then conducts a hearing, after which the Commission may issue a cease and desist order if the Commission finds that the act or practice in question violated the provisions of the FTC Act. *Id.*

8. Federal Trade Commission Improvement Act of 1975, 15 U.S.C. §§ 57-58 (1982). The Federal Trade Commission Improvement Act of 1975 authorizes the Commission to issue interpretive rulings and regulations prohibiting specific acts or practices in commerce. *Id.* § 57.

9. *Id.* § 57. The Federal Trade Commission Improvement Act of 1975 empowers the Commission to sue in a district court or a state court of competent jurisdiction for relief, which includes contract rescission or reformation, money refunds, return of property, and actual damages. *Id.* § 57b(a)-(b) (1982).

10. *See* Federal Trade Commission Act § 5, 15 U.S.C. § 45(b) (1982) (Commission may issue cease and desist order against whomever Commission has reason to believe has violated § 5); Federal Trade Commission Act § 5(m), 15 U.S.C. § 45m (1982) (Commission may commence civil action to recover civil penalty); Federal Trade Commission Act § 20, 15 U.S.C. § 57b(a) (1982) (Commission may commence civil action against persons who violate rules respecting unfair or deceptive acts or practices that are promulgated under FTC Act); *see also* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 991 (D.C. Cir. 1973) (legislative history and underlying policy of FTC Act mandates public enforcement of FTC Act).

11. *See* FTC v. Bunte Bros., 312 U.S. 349, 351 (1941) (applicability of § 5 of the FTC Act limited to acts in interstate commerce). Forty-nine states, the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands have enacted deceptive trade practices statutes that provide means to combat unfair trade practices or acts. Laeffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 531 (1980) (citing FEDERAL TRADE COMMISSION, FACT SHEET, STATE LEGISLATION TO COMBAT UNFAIR TRADE PRACTICES 1 (rev. Nov. 1979)). The state deceptive trade practices statutes reflect great diversity with respect to proper enforcement authority, regulation-issuing bodies, private actions, minimum damages, multiple damages, punitive damages, equitable relief, class actions, and attorneys' fees. *See id.* at 560-64 app. Because states traditionally are the principal authority for exercising police power to protect public interests, state deceptive trade practices statutes most efficiently address unfair trade acts or practices at the local level. *See* COUNCIL OF STATE GOVERNMENTS, CONSUMER PROTECTION IN THE STATES 29 (1970) (combined national and state action appropriately can deal with all consumer problems and interests).

12. *See* Laeffer & Lipson, *supra* note 11, at 531 app.; N.C. GEN. STAT. 75-16 (1977). Arizona and Delaware courts have construed their respective statutes, which do not provide expressly for private actions, to grant implied rights of action. *See* Selinger v. Freeway Mobile Home Sales, Inc., 110 Ariz. 573, 576, 521 P.2d 1119, 1122 (1974) (court believes statute inferentially supplies

In addition to granting private rights of action to consumers, the North Carolina Unfair Trade Practices Act (UTP Act)[13] mandates that injured parties received treble damages.[14] Furthermore, the UTP Act provides relief to commercial entities as well as to consumers.[15] The panoply of relief provided by the UTP Act, however, has produced some anomolous results. Specifically, because of an apparent aversion to the treble damages remedy as a replacement for traditional common-law contract and tort remedies, courts have been reluctant to recognize violations of the UTP Act with respect to private actions brought in a commercial context.[16] In *Atlantic Purchasers, Inc. v. Aircraft*

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private right of action to mobile home purchaser against seller); Young v. Joyce, 351 A.2d 857, 859 (Del. 1975) (reason and logic dictate that house purchaser may bring action under statute that should be construed liberally).

13. N.C. GEN. STAT. §§ 75-1 to -56 (1977). The North Carolina legislature enacted the UTP Act in 1969, incorporating the FTC Act's broad proscription against "unfair or deceptive acts or practices." *See* N.C. GEN. STAT. § 75-1.1 (1977) (North Carolina proscription against unfair or deceptive acts or practices); Marshall v. Miller, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981) (background and history of UTP Act).

14. N.C. GEN. STAT. § 75-16 (1977). The North Carolina legislature intended to provide an effective private cause of action for injured consumers because common-law remedies often had proved ineffective. Marshall v. Miller, 302 N.C. at ____, 276 S.E.2d at 400.

15. *See* N.C. GEN. STAT. § 75-1.1(b) (1977). The original statute stated that the purpose of the legislation was to declare and provide the means to maintain ethical standards of dealing between businesses as well as between businesses and consumers. *See* N.C. GEN. STAT. § 75-1.1(b) (1969) (repealed 1977). The North Carolina legislature subsequently replaced § 75-1.1(b) with a general statutory definition of commerce. N.C. GEN. STAT. § 75-1.1(b) (1977). North Carolina courts apply the § 75-1.1(a) prohibition against unfair and deceptive practices in commercial, as well as consumer actions. *See* Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 261-62, 266 S.E.2d 610, 620 (1980) (shopping center developer's action for unfair and deceptive acts with respect to commercial loan commitment is within purview of § 75-1.1).

16. *See* Santana, Inc. v. Levi Strauss and Co., 674 F.2d 269, 275 (4th Cir. 1982). The *Santana* court affirmed the district court's decision on a common-law fraud issue, but refused to address the statutory unfair trade practice claim. *Id.* Although both causes of action arose from the same transaction, the *Santana* court held that North Carolina law did not apply to the statutory unfair trade practice claim. *Id.* at 271, 275; *see* United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 992 (4th Cir.) (breach of contract neither unfair nor deceptive absent proof of unfairness or deception at time of contract formation), *cert. denied*, 454 U.S. 1054 (1981); Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, ____, 266 S.E.2d 610, 622-23 (1980) (mortgage broker's failure to notify shopping center developers of intent to repudiate loan was neither unfair nor deceptive); *see also* Comment, *The Trouble with Trebles: What Violates G.S.* § 75-1.1, 5 CAMPBELL L. REV. 119, 153 (1982) (lack of consciousness of commercial role of statute creates ambiguity, vagueness, and fear of treble damages remedy among courts) [hereinafter cited as *Trebles*]. The North Carolina courts' characterization of the UTP Act as consumer protection legislation explains the North Carolina courts' willingness to apply the UTP Act provisions to actions brought by consumers. *See* Marshall v. Miller, 302 N.C. 539, ____, 276 S.E.2d 397, 403 (1981). In *Marshall v. Miller*, the North Carolina Supreme Court stated that the effect of a defendant's conduct on a consumer is the relevant factor in determining whether an act or practice is unfair or deceptive. *Id.* The *Marshall* court expressly described the UTP Act as consumer protection legislation. *Id.* at ____, 276 S.E.2d at 400. The *Marshall* court further stated that the North Carolina legislature enacted the UTP Act to provide an effective cause of action for aggrieved consumers. *Id.* at ____, 276 S.E.2d at 400. *See generally* Note, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C. L. REV. 896 (1970) (discussion of UTP Act background and purposes) [hereinafter cited as *1969 Legislation*].

Sales, Inc.,[17] the Fourth Circuit held that the treble damages mandate of the UTP Act did not apply to a commercial aircraft buyer who had been awarded actual and punitive damages on common-law fraud and breach of express warranty claims.[18]

In *Atlantic Purchasers*, Stella Maris Inn, Ltd. and its wholly owned subsidiary, Atlantic Purchasers, Inc., brought a diversity action in federal district court against Aircraft Sales, Inc. and its sole stockholder for fraud and breach of express warranty.[19] Stella Maris' allegations of fraud and breach of express warranty arose out of Aircraft Sales' sale of an airplane to Atlantic Purchasers pursuant to a lease purchase agreement.[20] Following trial at which Stella Maris presented evidence[21] the jury returned a special verdict.[22] The jury found that the defendants had knowingly and willfully misrepresented the condition of the airplane with the intent to induce Stella Maris' reliance on the misrepresentations.[23] Consequently, the jury found that Stella Maris sustained $31,000 in actual damages.[24] The jury further found that the fraudulent nature of the defendants' representations entitled Stella Maris to recover $15,000 in punitive damages.[25] When the district court instructed Stella Maris to submit a damages claim pursuant to the verdict, Stella Maris invoked the UTP Act,[26] claiming treble damages pursuant to sections 75-1.1[27] and

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17. 705 F.2d 712 (4th Cir.), *cert. denied*, 104 S.Ct. 155 (1983).

18. *Id.* at 718.

19. *Id.* at 714. In a federal court diversity action, state law governs disposition of substantive matters, but federal law governs procedural issues. Hanna v. Plumer, 380 U.S. 460, 470-71 (1965).

20. 705 F.2d at 714.

21. *Id.* In *Atlantic Purchasers*, Stella Maris presented evidence which indicated that the defendants had operated the airplane's engines for many more hours than the defendants represented and that the defendants had not performed the necessary airworthiness inspections prior to sale. *Id.* Furthermore, Stella Maris presented evidence that the defendants had altered the log books to substantiate their misrepresentations. *Id.* The defendants neither took the stand as witnesses nor denied under oath Stella Maris' allegations of misrepresentation. *Id.* at 719.

22. *Id.* at 718-19.

23. *Id.* at 719.

24. *Id.*

25. *Id.* Under North Carolina law, a plaintiff who demonstrates actionable fraud may receive punitive damages. Newton v. Standard Fire Ins. Co., 291 N.C. 105, 113-14, 229 S.E.2d 297, 302 (1976). *But see* Hardy v. Toler, 288 N.C. 303, ____, 218 S.E.2d 342, 344 (1975) (general rule in North Carolina is that plaintiff ordinarily may not recover punitive damages in action for fraud). *Newton* did not expressly overrule *Hardy*, but *Newton* stands as the North Carolina Supreme Court's more recent decision on whether a plaintiff who demonstrates actionable fraud may receive punitive damages. *See Newton*, 291 N.C. at 113-14, 229 S.E.2d at 302.

26. 705 F.2d at 714-15; N.C. GEN. STAT. §§ 75-1.1, -16 (1977). The Fourth Circuit noted in *Atlantic Purchasers* that Stella Maris neither used nor referred to the UTP Act prior to the district court's instruction to submit a damages claim. 705 F.2d at 715 n.2. In the dissent, Senior Circuit Judge Bryan stated that the defendants had received repeated notice of their treble damage accountability before and after the jury's verdict. *Id.* at 720 (Bryan, J., dissenting). Judge Bryan, however, did not clarify whether the defendants had received explicit notice of their potential liability under the UTP Act, or whether the existence of the statute and various North Carolina Supreme Court decisions provided notice of potential liability under the UTP Act. *See id.*

27. *See* 705 F.2d at 714-15; N.C. GEN. STAT. § 75-1.1 (1977). The predecessor to § 75-1.1,

75-16.[28] The district court denied Stella Maris' motion to amend its complaint pursuant to rule 15(a) of the Federal Rules of Civil Procedure[29] and refused to award treble damages.[30] The district court then entered judgment for the amount awarded by the jury.[31] The Fourth Circuit Court of Appeals affirmed the district court's decision.[32]

The Fourth Circuit held that the district court's refusal to treble the damages did not constitute an abuse of discretion under rule 54(c) of the Federal Rules of Civil Procedure.[33] Rule 54(c) provides that the prevailing party receive the relief to which he is entitled whether or not the prevailing party requested the relief in his pleadings.[34] The Fourth Circuit agreed with Stella Maris that the jury's special verdict would have supported a finding that Aircraft Sales had violated section 75-1.1 of the UTP Act,[35] which would have entitled Stella Maris to treble damages pursuant to section 75-16 of the UTP Act.[36] The Fourth Circuit denied recovery of treble damages, however, on the grounds that Stella Maris' failure to notify Aircraft Sales of the possible liability for treble damages prejudiced Aircraft Sales.[37] Because the Fourth Circuit believed that rule 54(c)

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which was in effect when the defendants in *Atlantic Purchasers* alleged that the fraud and breach of express warranty occurred, declared unlawful unfair or deceptive acts or practices in trade or commerce. N.C. GEN. STAT. § 75-1.1(a) (1969) (amended 1977).

28. *See* 705 F.2d at 714-15; N.C. GEN. STAT. § 75-16 (1977). Section 75-16 mandates the award of treble damages to parties injured in violation of the UTP Act. *See id.*

29. *See* 705 F.2d at 715; FED. R. CIV. P. 15(a). Rule 15(a) permits parties to amend a complaint at the court's discretion. *See id.* Rule 15(a) directs the court to allow amendment when justice requires. *See id.*

30. 705 F.2d at 715. In addition to denying Stella Maris' motion to amend its complaint, the *Atlantic Purchasers* district court denied the defendants' motions to set aside the verdict and to grant a new trial. *Id.*

31. *Id.* Before entering judgment, the *Atlantic Purchasers* district court asked Stella Maris and the defendants if they would agree to a new trial with supplemental pleading and preparation. *Id.* Stella Maris and the defendants could not agree on the terms for a new trial. *Id.*

32. *Id.* at 714.

33. *Id.* at 717; *see* FED. R. CIV. P. 54(c).

34. FED. R. CIV. P. 54(c). The Fourth Circuit limited its review of the *Atlantic Purchasers* district court decision to consideration of whether the district court abused its discretion in refusing to grant treble damage relief pursuant to rule 54(c) of the Federal Rules of Civil Procedure. 705 F.2d at 717. In support of its limited scope of review, the *Atlantic Purchasers* court cited *Albemarle Paper Co. v. Moody*, which held that a reviewing court may reverse a district court's decision pursuant to rule 54(c) only for abuse of discretion. *Id.; see* Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975).

35. 705 F.2d at 716. In *Atlantic Purchasers*, the Fourth Circuit stated that the jury's specific findings regarding Aircraft Sales' representations about the airplane's condition and Stella Maris' reliance on the misrepresentations encompassed the elements of fraud. *Id.; see* Newton v. Standard Fire Ins. Co., 291 N.C. 105, ____, 229 S.E.2d 297, 302 (1976) (finding of fraud results from finding of willful intent to deceive). The Fourth Circuit noted that the commission of fraud, as found by the jury, constituted a violation of § 75-1.1 of the UTP Act as a matter of law. 705 F.2d at 716; *see* Hardy v. Toler, 288 N.C. 303, ____, 218 S.E.2d 342, 346 (1975) (proof of fraud necessarily constitutes violation of § 75-1.1).

36. 705 F.2d at 716; *see supra* note 28 (violations of UTP Act entitles injured parties to treble damages).

37. 705 F.2d at 717. The *Atlantic Purchasers* court noted that courts normally liberally construe Rule 54(c). *Id* at 716; *see* Robinson v. Lorillard Corp., 444 F.2d 791, 803 (4th Cir.)

did not entitle Stella Maris to treble damages, the Fourth Circuit held that the district court did not abuse its discretion by refusing to allow Stella Maris to amend its complaint pursuant to Rule 15(a) to include a treble damage claim.[38]

Prior to the *Atlantic Purchasers* decision, the Fourth Circuit had utilized its discretion under the Federal Rules of Civil Procedure to deny statutory claims for damages under state substantive law. For example, in *McLeod v. Stevens*,[39] the Fourth Circuit held that the propriety of an amendment adding a claim for statutory damages to a complaint requesting only equitable relief depended on whether the defendants had received actual prior notice of the plaintiff's claim for statutory damages.[40] *McLeod* was a diversity action governed by South Carolina law.[41] In *McLeod*, the plaintiff minority shareholder sought an injunction to restrain transfer of defendants' stock and cancellation of stock allegedly issued illegally.[42] At the conclusion of trial on the request for equitable relief, the plaintiff orally moved to amend her complaint to request compensatory and punitive damages pursuant to South Carolina statutory law.[43] The district court allowed the amendment pursuant to rule 15(b) which allows a party to amend his pleadings to conform to the evidence.[44] The Fourth Circuit vacated the subsequent award of compensatory and punitive damages on the ground that the defendants had not received

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(rule 54(c) presumes that court will award appropriate relief on basis of facts proved at trial), *cert. dismissed*, 404 U.S. 1006 (1971). The *Atlantic Purchasers* court, however, asserted that rule 54(c) does not entitle a prevailing party to relief which would so prejudice the opposing party that injustice would result. 705 F.2d at 716; *see* United States v. Marin, 651 F.2d 24, 31 (1st Cir. 1981) (failure to request particular relief may unjustly prejudice opposing party); Robinson v. Lorillard Corp., 444 F.2d at 803 (substantial prejudice to opposing party limits grant of relief pursuant to rule 54(c)). Specifically, the *Atlantic Purchasers* court stated that fundamental fairness required a plaintiff to notify the opposing party of the possibility of unusual statutory relief prior to the plaintiff's damages claim pursuant to a verdict. 705 F.2d at 717.

38. 705 F.2d at 717.

39. 617 F.2d 1038 (4th Cir. 1980).

40. *Id.* at 1040.

41. *Id.* at 1039.

42. *Id.* at 1040.

43. *Id.; see* S.C. CODE ANN. §§ 33-9-90, -11-210, -21-150, -21-160, -21-170 (Law Co-op. 1976) (statutory provisions for shareholders' rights).

44. 617 F.2d at 1040; *see* FED. R. CIV. P. 15(b). Rule 15(b) expressly provides that a party may move to amend his pleadings to conform to the evidence even after judgment. *See* FED. R. CIV. P. 15(b). Additionally, rule 15(b) provides that the opposing party may object at trial to evidence that would prejudice him. *See* FED. R. CIV. P. 15(b); *McLeod*, 617 F.2d at 1040-41. In *Atlantic Purchasers*, Stella Maris sought only to amend its complaint pursuant to Rule 15(a). 705 F.2d at 715. If Stella Maris also had sought to amend its complaint pursuant to rule 15(b), the district court could have addressed the issue of post-judgment amendment in the context of the express provision for such late amendment in rule 15(b). *See* FED. R. CIV. P. 15(b). Under rule 15(b), the district court further could have considered whether Stella Maris' evidence would have allowed the defendants to object to Stella Maris' evidence as outside the pleadings. *See id.* By attempting to amend the complaint pursuant to rule 15(a) rather than rule 15(b), Stella Maris therefore forfeited an opportunity to have the district court examine more closely the merits of the UTP Act claim.

actual prior notice of the plaintiff's damages claims.[45] The Fourth Circuit rejected the plaintiff's contention that the evidence supporting the plaintiff's equitable claim necessarily supported an award of statutory damages pursuant to rule 54(c).[46] As in *Atlantic Purchasers*, the Fourth Circuit in *McLeod* determined that an award of statutory damages following trial on a different cause of action would unfairly prejudice the defendants.[47] The *McLeod* court also concluded that the admission of evidence supporting the original cause of action could not be treated as implied consent to a trial on the statutory damages issue merely because the evidence also happened to provide evidence of the statutory violation.[48]

The Fourth Circuit's reasoning in *Atlantic Purchasers* follows the *McLeod* court's decision.[49] Both the plaintiff in *McLeod* and the plaintiff in *Atlantic Purchasers* sought recovery on a legitimate cause of action and won the relief requested.[50] The Fourth Circuit refused additional relief to the respective plaintiffs in *Atlantic Purchasers* and *McLeod* because the timing of the plaintiff's reliance on an express statutory provision that would increase the defendant's liability precluded the defendants from directly defending themselves on the possible increase in liability.[51]

While the majority in *Atlantic Purchasers* based its decision on the prejudice to the defendants that would result from a post-verdict amendment to the original complaint, the dissent examined court decisions construing the applicability of the UTP Act provisions.[52] The dissent focused on the North

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45. 617 F.2d at 1041.

46. *Id.* at 1040.

47. *Id.* at 1041; *see Atlantic Purchasers*, 705 F.2d at 716-17. In *McLeod*, the Fourth Circuit stated that the plaintiff's failure to amend her complaint to include a claim for statutory damages prior to the conclusion of trial amounted to an election of an equitable remedy. 617 F.2d at 1041.

48. 617 F.2d at 1040-41. The *McLeod* court conceded that the opposing party's failure to object to evidence with respect to the proposed amended complaint amounted to an indication of implied consent to try the issue of statutory damages. *Id.* (citing 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1493 (1971)). Both the *McLeod* court and the *Atlantic Purchasers* court, however, held that the defendants did not actually consent explicitly or implicitly to evidence of statutory damages even though the evidence of the plaintiff's original claim also constituted evidence of the statutory claim. *See Atlantic Purchasers*, 705 F.2d at 716; *McLeod*, 617 F.2d at 1040.

49. *See supra* notes 42-45 and accompanying text (discussion of *McLeod*).

50. *See Atlantic Purchasers*, 705 F.2d at 715-16; *McLeod*, 617 F.2d at 1040; *cf.* Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 65 (1978) (federal court should not dismiss meritorious constitutional claim because complaint seeks one remedy rather than another plainly appropriate remedy). In *Atlantic Purchasers*, Stella Maris sought treble damages in addition to its common-law claims. 705 F.2d at 714-15. The jury's special verdict and judgment in Stella Maris' favor indicated that Stella Maris' common-law claims were plainly appropriate. *See id.* at 715-16.

51. *See* 705 F.2d at 716-17; *cf.* Monod v. Futura, Inc., 415 F.2d 1170, 1173-74 (10th Cir. 1969) (court described post-trial motion to conform pleadings to evidence as afterthought not entitling plaintiffs to relief under rule 54(c)).

52. 705 F.2d at 719-20 (Bryan, J., dissenting). *See* Marshall v. Miller, 302 N.C. 539, 540-41, 276 S.E.2d 397, 399 (1981) (trial judge determines whether jury's findings of fact constitute violation of § 75-1.1 as matter of law); State *ex rel.* Edmisten v. J.C. Penney Co., 292 N.C. 311, 319, 233 S.E.2d 895, 900 (1977) (§ 75-16 damages are remedial and punitive); Hardy v. Toler,

Carolina Supreme Court's decision in *Hardy v. Toler*,[53] in which the plaintiff requested actual and punitive damages, as well as treble damages under section 75-16 of the UTP Act, in his initial complaint.[54] The *Hardy* court stated that the plaintiff's evidence and the parties' stipulations warranted recovery based on fraud.[55] Although the *Hardy* court held that the defendant's fraud was not sufficiently outrageous to entitle the plaintiff to punitive damages,[56] the court held that proof of fraud necessarily constituted a violation of the UTP Act and therefore entitled the plaintiff to treble damages.[57] In *Atlantic Purchasers*, the dissent noted that the jury's findings with respect to the defendants' misrepresentations established the existence of the elements of fraud.[58] The dissent concluded that the finding of fraud therefore entitled Stella Maris to treble damages as a matter of law regardless of the insufficiency of the pleadings.[59] The dissent further maintained that the defendants had received ample notice of possible substantial liability through Stella Maris' allegation of fraud in the pleadings,[60] which repudiated their claims of prejudice resulting from a treble damage award.[61]

The *Atlantic Purchasers* decision reveals the continuing trepidation with which the Fourth Circuit approaches the far reaching provisions of the UTP Act.[62] The broad nature of the proscription against unfair or deceptive acts or practices in section 75-1.1 may account for the Fourth Circuit's reluctance to grant treble damages relief in the absence of state court construction of section 75-1.1.[63] The North Carolina courts, however, have established specific definitions of the terms "unfair" and "deceptive" on which the *Atlantic Purchasers* court could have relied to determine that the defendants' actions con-

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288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975) (proof of fraud necessarily establishes violation of § 75-1.1).

53. 288 N.C. 303, 218 S.E.2d 342 (1975).

54. *See* 705 F.2d at 718 (Bryan, J., dissenting); 288 N.C. at ____, 218 S.E.2d at 343.

55. 288 N.C. at ____, 218 S.E.2d at 344.

56. *Id.*

57. 288 N.C. at ____, 218 S.E.2d at 346. The *Hardy* court held that proof of the defendant's fraud based on the facts stipulated by the parties established a violation of § 75-1.1 as a matter of law. *Id.* at ____, 218 S.E.2d at 347. The *Hardy* court consequently granted the plaintiff's request for § 75-16 treble damages pursuant to the defendant's violation of § 75-1.1. *Id.* at ____, 218 S.E.2d at 347.

58. 705 F.2d at 719 (Bryan, J., dissenting).

59. *Id.* The dissent in *Atlantic Purchasers* noted that the jury's function in assessing violations of § 75-1.1 consists of finding the facts that establish whether a defendant has violated § 75-1.1 *Id.* The court then determines whether the jury's findings establish a violation of § 75-1.1 as a matter of law. *Id.* The dissent further noted that once a violation of § 75-1.1 has been established, § 75-16 mandates an award of treble damages. *Id.; see* N.C. GEN. STAT. § 75-16, *supra* note 28 (violation of UTP Act mandates award of treble damages).

60. 705 F.2d at 720, 721 (Bryan, J., dissenting).

61. 705 F.2d at 721 (Bryan, J., dissenting).

62. *See supra* note 16 (Fourth Circuit's reluctance to recognize violations of UTP Act in commercial context).

63. *See N.C. Gen. Stat.* § 75-1.1 (1977); *see* Aycock, *North Carolina Law on Antitrust and Consumer Protection*, 60 N.C. L. REV. 205, 223 (1982) (North Carolina court decisions gradually will define equitable concept of unfair and deceptive trade practices).

stituted a violation of the UTP Act.[64] Furthermore, the North Carolina Supreme Court expressly has held that proof of fraud constitutes a violation of section 75-1.1 and warrants an award of treble damages.[65] As the *Atlantic Purchasers* dissent noted, Stella Maris pleaded the circumstances constituting fraud with particularity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure and provided proof of fraud, which the defendants failed to deny during the trial.[66] Thus, despite the absence of express notice to the defendants of possible treble damage liability, the defendants were apprised of the substantial accusations against them.[67] In considering the defendants' claim of prejudice resulting from an award of treble damages, however, the *Atlantic Purchasers* court neither held the defendants responsible for knowledge of North Carolina court decisions specifically stating that proof of fraud constitutes a violation of the UTP Act, nor considered whether notice of possible treble damages liability was substantially different from notice of possible punitive damages.[68]

The *Atlantic Purchasers* jury's special verdict fairly met the requirements of the North Carolina decisions regarding unfair and deceptive acts and fraud.[69] Although the North Carolina courts have not specifically required that a plaintiff claim a violation of section 75-1.1 in his complaint, the North Carolina Supreme Court has established that a trial court must award treble damages pursuant to section 75-16 once a jury finds that a defendant has violated the UTP Act.[70] Because Stella Maris pleaded fraud in the complaint[71] and the *Atlantic Purchasers* jury found that the defendants had in fact committed fraud,[72] the district court should have awarded Stella Maris treble damages pursuant to the mandate of section 75-16.[73] In fact, the *Atlantic Purchasers* court conceded that the defendants' actions would have constituted a viola-

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64. Marshall v. Miller, 203 N.C. 539, ____, 276 S.E.2d 397, 403 (1981). According to the North Carolina Supreme Court, a practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Id.* (citing Johnson v. Insurance Co., 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980)). A practice is deceptive if the practice has the capacity to deceive. *Id.* Proof of a deceptive practice does not require proof of actual deception. *Id.*

65. Hardy v. Toler, 288 N.C. 303, 309, ____, 218 S.E.2d 342, 346, 347 (1975); *see supra* notes 53-57 and accompanying text (*Hardy* held that proof of fraud establishes violation of § 75-1.1). North Carolina courts and federal courts construing North Carolina law customarily cite *Hardy* for the proposition that proof of fraudulent acts or practices establishes a violation of § 75-1.1.*See* United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049, 1059 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir.), *cert. denied* 454 U.S. 1054 (1981); Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, ____, 261 S.E.2d 135, 144 (1979), *rev'd on other grounds*, 300 N.C. 247, 266 S.E.2d 610 (1980).

66. *See* 705 F.2d 719 (Bryan, J., dissenting).

67. *See id.*

68. *See id.* at 717.

69. *See id.; supra* note 64 (North Carolina Supreme Court's construction of unfair and deceptive acts and practices).

70. *See* Marshall v. Miller, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981).

71. *See* 705 F.2d at 714.

72. *See id* at 716.

73. *See* N.C. GEN. STAT. § 75-16 (1977); *supra* note 19 (state law governs disposition of substantive matters in federal court diversity action).

tion of section 75-1.1, thus entitling Stella Maris to treble damages under section 75-16 if the Fourth Circuit had been willing to apply the statute.[74]

In refusing to apply North Carolina court decisions construing section 75-1.1, the Fourth Circuit apparently relied on the failure of North Carolina courts to require a trial judge to apply the UTP Act provisions at any stage of the proceedings once the facts establish a violation of section 75-1.1.[75] The *Atlantic Purchasers* court viewed Stella Maris' treble damages claim as prejudicial to the defendants.[76] By focusing on the timing of the treble damage request rather than the facts that established a violation of the UTP Act, the Fourth Circuit utilized the Federal Rules of Civil Procedure to demonstrate disapproval of Stella Maris' post-verdict treble damages request.[77] Although federal courts customarily liberally construe the Federal Rules of Civil Procedure,[78] the Fourth Circuit held that the prejudice to the defendants which would result from trebling Stella Maris' damage award following a full trial and verdict on the common-law fraud and breach of express warranty issues

74. 705 F.2d at 716.

75. *See id.; Trebles, supra* note 16, at 119-61 (discussion of implementation of § 75-1.1). In *Atlantic Purchasers*, the Fourth Circuit determined that the timing rather than the substance of Stella Maris' claim for treble damages resolved the issue of § 75-1.1 applicability. *See* 705 F.2d at 716-17. The *Atlantic Purchasers* court held that Stella Maris' failure to request statutory treble damages prior to the jury's verdict unfairly prejudiced the defendants. *Id.* The Fourth Circuit therefore agreed with Stella Maris' contention that the application of the Federal Rules of Civil Procedure resolved the treble damages issue. *Id.* at 716; *see supra* note 19 (Federal Rules of Civil Procedure govern procedural issues in federal court diversity actions).

76. 705 F.2d at 717.

77. *Id.* at 716-17. The *Atlantic Purchasers* court refused to apply rule 54(c) because Stella Maris' failure to request statutory treble damages until after the jury verdict so prejudiced the defendants that granting treble damages would amount to an injustice. *See id.* at 716 (citing United States v. Marin, 651 F.2d 24, 31 (1st Cir. 1981)). In *Marin*, the First Circuit affirmed the district court's award of damages even though the plaintiff's complaint requested only declaratory relief. 651 F.2d at 31. The plaintiffs in *Marin* sought invalidation of the defendant's interest in a lease. *Id.* at 24. The First Circuit held that evidence of the defendants' bad faith and knowledge of lease irregularities entitled the plaintiffs to damages pursuant to rule 54(c) as well as to invalidation of the lease. *Id.* at 31. The *Marin* court upheld the discretionary nature of the district court's decision to award relief pursuant to rule 54(c). *See id.* The decisions in *Atlantic Purchasers* and *Marin* provide evidence that circuit courts are reluctant to find that district courts abused their discretion in granting or denying post-judgment relief pursuant to the Federal Rules of Civil Procedure. *See* Monod v. Futura, Inc., 415 F.2d 1170, 1174 (10th Cir. 1969) (affirming district court's denial of plaintiff's motion to conform pleadings to evidence pursuant to rule 15(b) and motion to amend and alter judgment pursuant to rule 59(e)); Northern Oil Co. v. Socony Mobil Oil Co., 347 F.2d 81, 83-84 (2d Cir. 1965) (affirming district court's grant of plaintiff's motion to conform pleadings to evidence pursuant to rule 15(b)); Rental Corp. of America v. Lavery, 304 F.2d 839, 842 (9th Cir. 1962) (affirming district court's cancellation of lease pursuant to rule 54(c) in addition to plaintiff's request for damages for breach of lease). *But see* Strauss v. Douglas Aircraft Co., 404 F.2d 1152, 1156 (2d Cir. 1968) (district court abused discretion in granting defendant's motion because defendant's delay in successfully moving for amendment of pleadings pursuant to rule 15(a) effectively foreclosed plaintiff's options for relief).

78. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 803 (4th Cir. 1971) (court has duty to grant appropriate relief on the basis of facts proved at trial), *cert. dismissed*, 404 U.S. 1006 (197).

outweighed Stella Maris' interest in a post-verdict award of treble damages pursuant to rule 54(c).[79] Thus, while both acknowledging its obligation to apply substantive North Carolina law and recognizing that the defendants' acts violated section 75-1.1,[80] the *Atlantic Purchasers* court declined to follow North Carolina decisions specifically construing the UTP Act.[81] The Fourth Circuit essentially rejected the UTP Act's broad provisions by applying a strict exception to the liberal promises of rule 54(c).[82]

In *Atlantic Purchasers*, the majority's characterization of the nature of treble damage relief further signifies the Fourth Circuit's reluctance to grant treble damages.[83] The majority summarily dismissed the contention that section 75-16 entitled Stella Maris to a trebling of both actual and punitive damages awarded by the district court jury.[84] Relying on North Carolina court decisions characterizing the UTP Act's treble damages provision as punitive in nature,[85] the Fourth Circuit stated that an award of both punitive damages on the common-law fraud claim and treble damages pursuant to the UTP Act would constitute overlapping remedies.[86] Essentially, the majority implied that the North Carolina legislature intended the provisions of the UTP Act to replace or provide an alternative to common-law causes of action.[87] Under the majority's reasoning, therefore, a plaintiff may claim either punitive

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79. *See* 705 F.2d at 717; *supra* note 77 (Stella Maris not entitled to rule 54(c) relief that would prejudice defendants).

80. 705 F.2d at 716.

81. *See* Marshall v. Miller, 302 N.C. 539, ____, 276 S.E.2d 397, 403 (1981) (defining "unfair" and "deceptive" practices); Hardy v. Toler, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975) (fraud constituted violation of § 75-1.1).

82. *See* 705 F.2d at 716-17.

83. *See* 705 F.2d at 716 n.4.

84. *Id.* In *Marshall v. Miller*, the North Carolina Court of Appeals held that when one course of conduct gave rise to a common-law cause of action as well as a cause of action for violation of § 75-1.1, plaintiff could not recover damages for both causes of action. 47 N.C. App. 530, ____, 268 S.E.2d 97, 103 (1980), *modified on other grounds*, 302 N.C. 539, 276 S.E.2d 397 (1981).

85. *See* Marshall v. Miller, 302 N.C. 539, ____, 276 S.E.2d 397, 402 (1981) (§ 75-16 is partially punitive in nature because treble damages deter future violations of UTP Act); *accord* State *ex rel.* Edmisten v. J.C. Penney Co., 292 N.C. 311, 319, 233 S.E.2d 895, 900 (1977).

86. 705 F.2d 716 n.4 (citing *In re* "Dalkon Shield" Litigation, 526 F. Supp. 887, 899 (N.D. Cal. 1981)). In *Dalkon Shield*, the district court held that a defendant's right to protection against multiple punishment in the form of overlapping damages awards for the same act comported with due process. 526 F. Supp. at 899. The *Atlantic Purchasers* decision may rely on the *Dalkon Shield* court's assertion that common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act. *See id.* at 900; Marshall v. Miller, 47 N.C. App. 530, 268 S.E.2d 97, 103 (1980) (error for trial judge to award treble damages for UTP Act violation and actual damages for breach of contract because quadruple damages result), *modified on other grounds*, 302 N.C. 539, 276 S.E.2d 397 (1981).

87. *See* 705 F.2d at 716 n.4 (plaintiff is not entitled to damages on both common-law and statutory causes of action); *1969 Legislation*, *supra* note 6, at 898 (North Carolina legislature enacted § 75-1.1 to remedy previously ineffective methods of dealing with deceptive trade practices under North Carolina law).

damages on a common-law cause of action or section 75-16 treble damages, which incorporate common-law punitive damages.[88]

The *Atlantic Purchasers* dissent, however, characterized the provisions of the UTP Act as a statement of public policy against unfair or deceptive acts or practices.[89] The dissent reasoned that the legislature intended to enforce public policy against unfair or deceptive acts or practices whether or not relief was available under the more restrictive common-law causes of action.[90] The dissent supported its assessment of legislative intent by relying on a North Carolina decision which held that the North Carolina legislature did not intend for treble damages to operate as a penalty for purposes of bringing a UTP Act claim within the statute of limitations.[91]

In *Atlantic Purchasers*, the Fourth Circuit's characterization of treble damages under the UTP Act as at least partially punitive is similar to the Fourth Circuit's previous characterization of treble damages in *United Roasters v. Colgate-Palmolive Co.*[92] In *United Roasters*, the United States District Court for the Eastern District of North Carolina ruled that treble damages under the UTP Act are punitive in nature.[93] The Fourth Circuit upheld the district

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88. *See* 705 F.2d at 716 & 716 n.4.

89. *Id.* at 719 (Bryan, J., dissenting).

90. *Id.* at 719-20 n.3 (Bryan, J., dissenting). In *Atlantic Purchasers*, the dissent noted that a plaintiff need not prove intentional wrongdoing on the part of the defendant to recover under §§ 75-1.1 and 75-16. *Id.* at 720 n.3. The dissent noted, however, that a defendant must prove intentional wrongdoing to recover punitive damages. *Id.* The dissent therefore reasoned that the two remedies are not mutually exclusive. *Id.*

91. *Id.* at 720; *see* Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 237, 259 S.E.2d 1, 6, *petition for discretionary review denied*, 298 N.C. 806, 261 S.E.2d 919 (1979). In *Holley*, the North Carolina Court of Appeals addressed a conflict between the one-year statute of limitations for actions that may subject a defendant to a penalty and the four-year statute of limitations for UTP Act actions. 43 N.C. App. at 237, 259 S.E.2d at 6; *compare* N.C. GEN. STAT. § 1-54(2) (1977) (actions that may subject defendant to penalty must be brought within one year) *with* N.C. GEN. STAT. § 75-16.2 (1979) (civil actions under UTP Act must be brought within four years). In *Holley*, the trial court had granted the defendant's motion for summary judgement, in part because the plaintiff had not brought his action for actual, punitive, and treble damages within the § 1-54(2) one-year statute of limitations. *See* N.C. App. at ____, 259 S.E.2d at 3; N.C. GEN. STAT. § 1-54(2) (1977). The North Carolina legislature, however, may have enacted the four-year statute of limitations for UTP Act actions in order to encourage private enforcement without considering the punitive aspects of § 75-16. *See* Marshall v. Miller, 302 N.C. 539, ____, 276 S.E.2d 297, 403-404 (1981) (§ 75-16 encourages private enforcement of UTP Act violations by making actions more economically feasible).

92. 705 F.2d at 716 n.4; *see* United Roasters v. Colgate-Palmolive Co., 649 F.2d 985, 987 n.1 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981); *supra* text accompanying notes 83-88 (discussion of North Carolina courts' characterization of nature of treble damages).

93. 485 F. Supp. 1049, 1059 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054 (1981). In *United Roasters*, plaintiff brought a § 75-1.1 claim against the defendant based on defendant's alleged breach of contract. *Id.* at 1052. The jury found that the defendant breached an implied contractual obligation, but that the defendant had not intentionally injured the plaintiff. *Id.* at 1058. The *United Roasters* court noted that North Carolina law does not permit punitive damages for breach of contract absent intentional wrongdoing. *Id.* at 1059. The *United Roasters* court stated that because § 75-16 is punitive in nature, a jury must find intentional wrongdoing before the court can conclude that defendants have violated § 75-1.1 *Id.*

court's decision in *United Roasters*,[94] further characterizing the plaintiff's claim for breach of contract and contract termination in violation of section 75-1.1 as alternative theories of recovery.[95] The *Atlantic Purchasers* decision follows the *United Roasters* holding that a plaintiff may recover damages either on a common-law breach of contract cause of action or pursuant to the provisions of the UTP Act, but not on both common-law and statutory claims.[96] The *Atlantic Purchasers* decision is also consistent with recent decisions in the Second, Fifth, Sixth, Seventh, and Eighth Circuits, which have declined to apply statutory treble damages as an additional award of damages concurrent with common-law recovery.[97] Because the North Carolina legislature enacted the UTP Act to remedy previously ineffective methods of dealing with deceptive trade practices under North Carolina law, the treble damages provision consistently would encompass the punitive damages awards previously available under North Carolina common law.[98]

Atlantic Purchasers was a diversity action in which existing North Carolina law governed the disposition of substantive issues. Therefore, the Fourth Circuit's decision has no binding effect in construing the parameters of the UTP Act.[99] The Atlantic Purchasers decision, however, signifies that the Fourth Circuit will not apply the UTP Act beyond what North Carolina courts clearly have dictated.[100] Thus, to insure recovery under the UTP Act, plaintiffs in the Fourth Circuit must present statutory claims expressly in their complaints or prior to the conclusion of trial.[101] The Fourth Circuit appears unwilling otherwise to apply the treble damages mandate of the UTP Act.

LOUISE J. BROWNER

94. 649 F.2d 985 (4th Cir.), *cert. denied* 454 U.S. 1054 (1981). In affirming the *United Roasters* district court's decision, the Fourth Circuit did not consider the district court's determination that § 75-16 is punitive in nature. *See id.* at 987 n.1.

95. *Id.* at 990.

96. *See Atlantic Purchasers*, 705 F.2d at 716 n.4; *United Roasters*, 649 F.2d at 990; *supra* note 84 (recovery on both common-law and statutory actions proscribed under North Carolina law).

97. *See* Superturf, Inc. v. Monsanto Co., 660 F.2d 1275, 1283 (8th Cir. 1981) (trial court cannot award both treble and punitive damages for Sherman Act claim and concurrent state law claim for tortious interference with business relations); Bailey Employment System, Inc. v. Hahn, 655 F.2d 473, 478 (2d Cir. 1981) (trial court must determine whether defendant's admissions and trial court's findings of fact warrant application of damages under unfair trade practice statute); City of Marshall, Tex. v. Bryant Air Conditioning, 650 F.2d 724, 725 (5th Cir. 1981) (claims for breach of warranty and violations of Deceptive Trade Practices Act represent alternative grounds of recovery); Royal Business Machines v. Lorraine Corp., 633 F.2d 34, 49 (7th Cir. 1980) (treble damages are punitive in nature and additional punitive damages award constitutes double punishment); Edwards v. Travelers Ins. of Hartford, Conn., 563 F.2d 105, 123 (6th Cir. 1977) (plaintiff not entitled to statutory treble damages when recovery based on common-law action for inducement to breach contract).

98. *See supra* notes 85 & 87.

99. 705 F.2d at 714, 716; *see* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (federal courts do not have power to declare law of states).

100. *See supra* notes 62-75 and accompanying text (*Atlantic Purchasers* court's reluctance to apply UTP Act.).

101. *See supra* notes 80-82 and accompanying text (consequences of Stella Maris' failure to mention UTP Act prior to jury verdict).