N.C.P.I.—Civil 645.20
COVENANTS NOT TO COMPETE—ISSUE OF THE EXISTENCE OF THE COVENANT.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015

645.20 COVENANTS NOT TO COMPETE—ISSUE OF THE EXISTENCE OF THE COVENANT.

NOTE WELL: The existence of the covenant is a question for the jury but the court must decide whether or not the terms of the covenant are reasonable, valid and not against public policy.[1]

This issue reads:

"Did (*name plaintiff*) and (*name defendant*) enter into a written contract that (*here state alleged covenant*)?"

The burden of proof on this issue is on (*name party seeking to enforce covenant*) to satisfy you by the greater weight of the evidence that *he* and (*name other party*) entered into a written contract that (*here state alleged covenant*).

For a contract limiting the rights of a person to do business anywhere in North Carolina to be enforceable: (*Here use one or more of the following statements as the evidence justifies*).[2]

[There must be at least two parties to the contract (there may be any greater number).]

[There must be mutual assent by the parties, that is, a meeting of the minds.]

[There must be sufficient consideration, that is, something of legal value must be furnished, [in return for the other party's promise] [to support the agreement], by the party seeking to enforce the contract.]

[The party against whom enforcement is sought must have had legal capacity to make the promise.]

The contract must be in writing and signed by (*name defendant*).[3]

Finally, as to this issue, if you find, by the greater weight of the evidence, that (*name plaintiff*) and (*name defendant*) entered into a written contract that (*here state alleged covenant*), then you will answer this issue "Yes."

On the other hand, if you fail to so find, then you will answer this issue "No."

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1. *See Kadis v. Britt*, 224 N.C. 154, 158, 29 S.E.2d 543, 545 (1944) (holding the reasonableness and validity of a restrictive covenant not to compete is a question for the court); *see also Calhoun v. WHA Medical Clinic, PLLC*, 178 N.C. App. 585, 632 S.E.2d 563 (2006). Restrictive covenants not to compete in employment contracts are scrutinized more vigorously than similar covenants incident to the sale of a business and the burden is on the plaintiff to establish the reasonableness of the contract. *Harwell Enterprises, Inc. v. Heim*, 6 N.C. App. 548, 552, 170 S.E.2d 540, 543 (1969), *aff'd in part, rev'd in part on other grounds*, 276 N.C. 475, 173 S.E.2d. 316 (1970). The restriction must be reasonable in time and in area in light of the protection needed by the employer. *Comfort Spring Corp. v. Burroughs*, 217 N.C. 658, 661, 9 S.E.2d 473, 475 (1940). In *Orkin Exterminating Co. v. Griffin*, 258 N.C. 179, 128 S.E.2d 139 (1962) the court stated that in cases in which the employees have acquired knowledge which would give them an advantage over their employer equity will enforce a covenant not to compete if it is: "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy." 258 N.C. at 181, 128 S.E.2d at 140-41. *Cf. Outdoor Lighting Perspectives Franchising, Inc. v. Harders*, __ N.C. App. __, __, 747 S.E.2d 256, 263 (2013) (concluding that non-compete covenants in the franchisor-franchisee context are a hybrid situation and the court should use elements of the tests used in both the employer-employee context and the business sale context to evaluate the reasonableness and validity of the covenant); *Horner Int'l Co. v. McKoy*, __ N.C. App. __, 754 S.E.2d 852 (2014) (discussing the factors the court considers in determining whether a covenant not to compete is valid and enforceable and whether it may be properly enforced by means of a preliminary injunction).

2. This portion of this instruction contains all of the tests of enforceability of a contract. In any case, one or more of the issues may not be present and a judge may either omit entirely those sentences dealing with the tests not in issue (capacity, for instance) or he might read the paragraph in its entirety and then comment that "in this particular litigation, no question has been raised as to the capacity of the parties; both are capable of entering into a contract," or some like statement. On the other hand insert instructions from N.C.P.I.-Civil 501.01 to 503.54 on tests that are in issue.

3. Required by N.C. Gen. Stat. § 75-4.