TRADE REGULATION--VIOLATION--ISSUE OF CONDITION NOT TO DEAL IN GOODS OF COMPETITOR.[1] N.C.G.S. § 75-5(b)(2).

NOTE WELL: Use this instruction only with claims for relief arising before October 1, 1996. Session Laws 1995 (Regular Session 1996), c. 550, s. 2 repealed N.C.G.S. § 75-5 effective October 1, 1996.

The (*state number*) issue reads:

"Did the defendant[2] [sell] [have a contract to sell] any goods in this State upon condition that the purchaser of the goods not deal in the goods of a competitor of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, three things:

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[1]G.S. § 75-5(b)(2) is primarily designed to prevent a seller of goods (e.g., a railroad tie producer) from requiring that the purchaser of the goods (e.g., a railroad company) not purchase the goods of a competitor of the seller (e.g., a different producer of railroad ties) as a condition of the sale of the goods to the purchaser. *Lewis v. Archbell*, 199 N.C. 205, 154 S.E. 11 (1930).

The reasonableness or unreasonableness of the agreement is immaterial because the condition is conclusively presumed to be unreasonable. *Florsheim Shoe Co. v. Leader Dept. Store, Inc.*, 212 N.C. 75, 193 S.E. 9 (1937).

In a treble damages action this instruction should be given in conjunction with N.C.P.I.--Civil 813.70 ("Issue of Proximate Cause") and N.C.P.I.--Civil 813.80 ("Issue of Damages").

[2]Under the statute defendant must be a "person." "Person includes any person, partnership, association or corporation." G.S. § 75-5(a)(1).

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First, that the defendant [sold] [had a contract to sell][3] (*name goods*) in this State to (*name purchaser*).[4]

Second, that, as a condition of that sale, the defendant required that (*name purchaser*) not deal in the goods of (*name alleged competitor*).

(A condition not to deal in the goods of another can be either express or implied. An express condition is one where the arrangement is explicitly declared, either orally or in writing. An implied condition is one where the arrangement is not declared by the seller, but is implied by the facts and circumstances. "Implied" refers to a situation where the condition is not shown by explicit and direct words, but is inferred or deduced from the circumstances, or from the general language or conduct of the seller.)

Third, that (*name alleged competitor*) and the defendant were

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[3]G.S. 75-5(b) makes it unlawful to "have any contract express or knowingly implied" to violate § 75-5. If this is at issue, then it may be necessary to define contract. See N.C.P.I.--Civil 500.00 et. seq.

[4]See footnote 2.

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competitors.[5] Competitors sell or attempt to sell the same or similar goods to the same type of purchasers or customers[6] in the same geographic area.

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that defendant [sold] [had a contract to sell] (*name goods*) in this State upon condition that (*name purchaser*) not deal in the goods of a competitor of the defendant then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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[5]In many cases this may not be an issue, so a peremptory instruction may be appropriate. The following form is recommended: "All of the evidence presented in this case indicates that the defendant and (*name alleged competitor*) were competitors."

[6]See, *Rice v. Asheville Ice Co.*, 204 N.C. 768, 196 S.E. 707 (1933), where the Court held that defendant ice wholesalers were not competitors of plaintiff ice retailer with respect to their refusal to sell ice wholesale to the plaintiff.