

TRADE REGULATION--VIOLATION--ISSUE OF PREDATORY ACTS WITH DESIGN  
OF PRICE FIXING.<sup>1</sup> N.C.G.S. § 75-5(b)(3).

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 Session Laws 1995 (Regular Session 1996), c. 550, s. 2 repealed N.C.G.S. § 75-5 effective October 1, 1996.

NOTE WELL: This instruction should be used in cases involving predatory conduct engaged in with the purpose of fixing prices after competition is removed. The proscribed conduct may include pricing or non-pricing predatory practices. For cases involving predatory pricing conduct aimed at injuring a competitor's business, see N.C.P.I.--Civil 813.26.<sup>2</sup>

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<sup>1</sup>G.S. § 75-5(b)(3) is primarily designed to prevent a business from engaging in unilateral predatory conduct aimed at driving a competitor out of business so that the defendant can then fix prices. It is not necessary for the plaintiff to prove that the acts of the defendant are themselves illegal; it is only necessary for the plaintiff to show that defendant's acts were purposely designed to drive the competitor out of business and that, after the competition was removed the defendant intended to fix prices.

The purpose of the statute is not to penalize the efficiencies, superior capacities or natural advantages of a successful business, nor to protect a poorly managed or inefficient business; rather it is designed to prevent unreasonable pricing behavior engaged in with the purpose of obtaining monopoly power and accompanying profits. One example of such behavior might be a large conglomerate with significant economic resources which lowers the price in order to drive other smaller producers out of the market. The reasonableness of the pricing policy and the defendant's motive or intent are questions of fact for the jury.

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."

<sup>2</sup>N.C.P.I.--Civil 813.26 only applies to situations where there is predatory pricing conduct. There may be some situations in which these two instructions overlap.

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The (*state number*) issue reads:

"Did the defendant<sup>3</sup> willfully [destroy or injure] [undertake to destroy or injure] [contract to destroy or injure] the business of a competitor in this State with the purpose of attempting to fix the price of any goods when the competition was removed?"

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:

First, that the defendant willfully [destroyed or injured] [undertook to destroy or injure] [contracted to destroy or injure]<sup>4</sup> (*name business*).<sup>5</sup> "Willfully" means the doing of an act purposely and deliberately.

(A [person] [corporation] [partnership] [(*name other business association*)] is entitled to conduct [his] [its] business as efficiently as [he] [it] can, and is entitled to

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<sup>3</sup>Under the statute the defendant must be a "person." "Person includes any person, partnership, association or corporation." G.S. § 75-5(a)(1).

<sup>4</sup>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.

<sup>5</sup>See, e.g., *State v. Atlantic Ice Co.*, 210 N.C. 742, 188 S.E. 412 (1936), where defendant engaged in predatory pricing designed to drive other coal dealers in Winston-Salem out of business. The defendant was also charged with violating the predecessor to G.S. § 75-5(b)(4) and G.S. § 75-5(b)(5), but the Supreme Court declined to consider the application of these statutes and affirmed the conviction on the basis of G.S. § 75-5(b)(3). This fact situation shows that there is some degree of overlap among the various antitrust provisions of Chapter 75.

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benefit from business policies that are the consequence of [his] [its] superior capacities or natural advantages. However, when a [person] [corporation] [partnership] [(name other business association)] acts in a manner purposely and deliberately designed to ruin or hurt another business, [he] [it] has willfully [destroyed or injured] [undertaken to destroy or injure] [contracted to destroy or injure] that business. This is true even if the acts of the [person] [corporation] [partnership] [(name other business association)] would otherwise be legal. The acts become unlawful when they are not essential to a well run business, and are purposely and deliberately designed to destroy or injure the other business.<sup>6)</sup>

Second, that (name business) was a competitor of the defendant in the State of North Carolina.<sup>7</sup> Competitors sell or attempt to sell the same or similar goods to the same type of purchasers or customers<sup>8</sup> in the same geographic area.

Third, that the defendant had the purpose of attempting to fix the price of (name goods) after (name business) was removed

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<sup>6</sup>See, *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 344-5 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-6 (1951).

<sup>7</sup>In many cases this may not be an issue, so a peremptory instruction will 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."

<sup>8</sup>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.

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as a competitor. To fix the price of goods, a [person]  
[corporation] [partnership] [(name other business association)]  
(either): [[raises the price of goods [he] [it] sells] (or)  
[stabilizes the price of goods to prevent the price of goods [he]  
[it] sells from decreasing]] [[lowers the price of goods [he]  
[it] buys] (or) [stabilizes the price of goods to prevent the  
price of goods [he] [it] buys from increasing.]]

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 the defendant willfully [destroyed or injured]  
[undertook to destroy or injure] [contracted to destroy or  
injure] the business of a competitor in this State with the  
purpose of attempting to fix the price of any goods when the  
competition was removed, 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.