

TRADE REGULATION--VIOLATION--ISSUE OF PREDATORY PRICING.<sup>1</sup>  
N.C.G.S. § 75-5(b)(4).

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 Session Laws 1995 (Regular Session 1996), c. 550, s. 2 repealed N.C.G.S. § 75-5 effective October 1, 1996.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 only in cases involving predatory pricing conduct aimed at injuring a competitor's business. For cases involving other types of predatory conduct aimed at driving competitors out of business so that the person engaging in the predatory conduct can then fix prices, see N.C.P.I.--Civil 813.25.<sup>2</sup>

The (state number) issue reads:

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1G.S. § 75-5(b)(4) is primarily designed to prevent a business from engaging in unreasonable pricing practices aimed at driving competitors out of business so that the defendant can then increase its profitability in the less competitive market. The statute applies to the person who unreasonably raises the price of goods purchased in order to drive other purchasers out of business, and to the person who unreasonably lowers the price of goods sold in order to drive other sellers out of business.

The statute is not designed to punish efficient business or to protect 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>There may be some situations in which these two instructions overlap.

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N.C.G.S. § 75-5(b)(4). (Continued.)

"Did the defendant,<sup>3</sup> while engaged in buying or selling any goods within the State, [injure or destroy] [undertake to injure or destroy] [contract to injure or destroy] the business of any competitor by unreasonably [raising the price of any goods bought] [lowering the price of any goods sold] with the purpose of increasing the profit of *his* business after [such competitor was driven out of business] [such competitor's business was injured]?"

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, five things:

First, that the defendant was engaged in [buying] [selling] (*name goods*)<sup>4</sup> within this State. A [person] [corporation] [partnership] [(*name other business association*)] is engaged in buying or selling goods within this State if [he] [it] buys or sells the goods through [himself] [itself], or together with or through any allied, subsidiary or dependent person<sup>5</sup> in North Carolina.

Second, that the defendant (entered into a contract which)<sup>6</sup>

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

<sup>4</sup>"Goods" include goods, wares, merchandise, articles or other things of value. G.S. § 75-5(a)(2).

<sup>5</sup>This is the wording of the statute. See G.S. § 75-5(b)(4).

<sup>6</sup>G.S. § 75-5(b) makes it unlawful to "have any contract express or knowingly implied," to violate § 75-5. If this is an issue, then it may be necessary to define contract. See N.C.P.I.--Civil 500.00 et. seq.

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unreasonably [raised the price of any goods bought] [lowered the price of any goods sold]. This means that you must find that the defendant (entered into a contract which) [raised the price of goods bought] [lowered the price of goods sold], and also that defendant's conduct (in entering into the contract (would have)) unreasonably [raised] [lowered] the price of the goods. To determine whether the defendant's conduct was unreasonable, you should take into consideration

(1) the nature of the trade or industry in which the prices were [raised] [lowered];

(2) the condition of that trade or industry before and after the prices were [raised] [lowered];

(3) the cost structure of the defendant's business, including the cost of the goods or direct expenses, and the overhead or indirect expenses;

(4) the nature and magnitude of the defendant's conduct;

(5) *(name other relevant factors supported by the evidence)*.

Third, that the defendant, by *his* unreasonable conduct, [injured or destroyed] [undertook to injure or destroy] [contracted to injure or destroy] *(name business)*.

Fourth, that *(name business)* was a competitor of the defendant.<sup>7</sup> Competitors sell or attempt to sell the same or

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<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."

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similar goods to the same type of purchasers or customers<sup>8</sup> in the same geographic area.

Fifth, that the defendant acted with the purpose of increasing the profit on *his* business after [such competitor was driven out of business] [such competitor's business was injured].

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, while engaged in buying or selling goods within this State, the defendant [injured or destroyed] [undertook to injure or destroy] [contracted to injure or destroy] the business of a competitor by unreasonably [raising the price of any goods bought] [lowering the price of any goods sold] with the purpose of increasing the profit of *his* business after [such competitor was driven out of business] [such competitor's business was injured], 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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<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.