

TRADE REGULATION--VIOLATION--ISSUE OF TERRITORIAL MARKET
ALLOCATION.¹ N.C.G.S. § 75-5(b)(6).

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 Session Laws 1995 (Regular Session 1996), c. 550, s. 2 repealed N.C.G.S. § 75-5 effective October 1, 1996.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 while [buying] [selling] goods in this State, have an agreement or understanding with another [person] [corporation] [partnership] [(name other business association)] not to [buy] [sell] such goods within certain territorial limits

¹G.S. § 75-5(b)(6) is primarily designed to prevent two or more persons from dividing up geographic areas and agreeing not to compete among themselves in their respective territories. Such conduct reduces competition in the affected territories, and thus results in monopolistic conditions, such as price fixing, which harm the public.

A situation that is not prohibited by this statute involves the sale of a business by a seller who agrees not to compete with the new owner of the business. N.C.G.S. § 75-5(d). The purpose of the covenant not to compete is to allow the new owner to establish himself in the business and take advantage of the good will he is purchasing from the seller. The North Carolina Supreme Court has held that such covenants are valid as long as they are reasonable with respect to the time span of the agreement and the size of the territory. *Waldron Buick Co. v. General Motors Corp.*, 254 N.C. 117, 126, 118 S.E.2d 559, 566 (1961); *Mar-Hof Co. v. Rosenbacker*, 176 N.C. 330, 332, 97 S.E. 169, 170 (1918). Such an agreement must be in writing and signed by the party agreeing not to compete. N.C.G.S. § 75-4; N.C.G.S. § 75-5(d).

Note that the reasons for validating these covenants not to compete in connection with the sale of a business only exist when the seller agrees not to compete with the purchaser. An agreement by the purchaser not to compete with the seller in another territory does not serve to protect any legitimate proprietary interests, such as newly acquired good will, in the seller. Only the purchaser of a new business needs reasonable protection from competition from the person which sells him the business. See, *Shute v. Shute*, 176 N.C. 462, 463-4, 97 S.E. 392, 392-3 (1918).

²Under 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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within the State with the intention [of preventing competition in buying] [of preventing competition in selling] [to fix the price of] such goods within these territorial limits?"

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 [bought] [sold] (*name goods*)³ within this State.

Second, that the defendant had an agreement or understanding, either express or implied, with at least one other [person] [corporation] [partnership] [(*name other business association*)] not to [buy] [sell] (*name goods*) within certain territorial limits within the State. "Territorial limits" means a specific geographic area in North Carolina.

Before there can be an agreement or understanding, there must be more than one [person] [corporation] [partnership] [(*name other business association*)] involved. An express agreement or understanding is one explicitly declared by the parties, either orally or in writing. An implied agreement or understanding is one not explicitly declared by the parties, but is implied by facts and circumstances showing a mutual intent to agree or reach an understanding.

³"Goods include goods, wares, merchandise, articles or other things of value." G.S. § 75-5(a)(2).

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Third, that the defendant entered into the agreement or understanding with the intention [of preventing competition in buying] [of preventing competition in selling] [to fix the price of] (*name goods*) within the territorial limits.

["Preventing competition in buying" means limiting the number of buyers available to purchase a particular kind of goods in a certain geographic area.]

["Preventing competition in selling" means limiting the number of sellers available to sell a particular kind of goods in a certain geographic area.]

[To fix the price of goods, [a seller raises the price of goods he sells, or stabilizes that price to prevent it from decreasing] [a buyer lowers the price of goods he buys, or stabilizes that price to prevent it 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, while [buying] [selling] (*name goods*) in this State, the defendant had an agreement or understanding with another [person] [corporation] [partnership] [(*name other business association*)] not to [buy] [sell] such goods within certain territorial limits within the State with the intention [of preventing competition in buying] [of preventing competition in selling] [to fix the price of] (*name goods*) within these territorial limits, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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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.