

TRADE REGULATION--VIOLATION--ISSUE OF PRICE FIXING.<sup>1</sup> N.C.G.S. §  
75-5(b) (7).

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 Session Laws 1995 (Regular Session 1996), c. 550, s. 2 repealed N.C.G.S. § 75-5 effective October 1, 1996.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,<sup>2</sup> while [buying] [selling] any goods in this State, [make] [enter into] [execute] [carry out] a [contract] [obligation] [agreement] with another [person] [corporation] [partnership] [(name other business association)] [not to sell or dispose of any goods below a common standard figure, or fixed value] [to establish or settle the price of any goods between themselves (and others) at a fixed or graduated figure] to preclude free and unrestricted competition in the sale of such goods?"

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, four things:

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<sup>1</sup>N.C.G.S. § 75-5(b) (7) is primarily designed to prohibit price fixing. The statute is drawn broadly enough to prohibit both "horizontal" price fixing (i.e., price fixing among direct competitors) and "vertical" price fixing (i.e., price fixing in a chain of distribution, also called "resale price maintenance"). One example of the type of conduct which the statute prohibits is "bid rigging" by road construction firms. See generally, Aycock, North Carolina Law on Antitrust and Consumer Protection, 60 N.C. L.Rev. 207 (1982).

<sup>2</sup>Under the statute a defendant must be a "person." "Person includes any person, partnership, association or corporation." G.S. § 75-5(a) (2).

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First, that the defendant [bought] [sold] goods in this State. "Goods" include any goods, wares, merchandise, articles of trade, use or consumption,<sup>3</sup> or other things of value [bought] [sold] in this State.<sup>4</sup>

Second, that the defendant [made] [entered into] [executed] [carried out] a [contract] [obligation] [agreement] with at least one other [person] [corporation] [partnership] [(name other business association)].<sup>5</sup>

[For the definition of a contract as needed, see N.C.P.I.--Civil 501.10 et seq.]

[An obligation is an understanding between the defendant and at least one other [person] [corporation] [partnership] [(name other business association)] which binds both to engage in a specific type of conduct.]

[An agreement may be express or implied. 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.]

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<sup>3</sup>G.S. § 75-5(b)(7).

<sup>4</sup>G.S. § 75-5(a)(2).

<sup>5</sup>The statute states that "any kind" of agreement is sufficient. G.S. § 75-5(b)(7).

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Third, that, under the terms of any such [contract] [obligation] [agreement], the defendant and (*identify other party to the alleged agreement*) [agreed not to sell or dispose of any goods below a common standard figure, or fixed value] [established or settled the price of any goods between themselves (and others) at a fixed or graduated figure].<sup>6</sup>

(In other words, that defendant and (*identify other party*) agreed to fix a minimum value or price for the goods, and further agreed not to sell the goods below the minimum figure.)

Fourth, that such [contract] [obligation] [agreement] directly or indirectly precluded free and unrestricted competition in the sale of such goods.

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] (*describe goods*) in this State, defendant [made] [entered into] [executed] [carried out] a [contract] [obligation] [agreement] with another [person] [corporation] [partnership] [(*name other business association*)] [not to sell or dispose of (*describe goods*) below a common standard figure, or fixed value] [to establish or settle the

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<sup>6</sup>Prior to 1975 certain types of resale maintenance contracts were allowed under the North Carolina Fair Trade laws. N.C.G.S. § 66. These contracts were specifically exempted from the provisions of N.C.G.S. § 75-5(b)(7). However, the Fair Trade laws were repealed by the General Assembly in 1975; these resale maintenance contracts are now prohibited by § 75-5(b)(7).



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price of (*describe goods*) between themselves (and others) at a  
fixed or graduated figure] to preclude free and unrestricted  
competition in the sale of (*describe goods*), then it would be  
your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you do not so find, then it would be  
your duty to answer this issue "No" in favor of the defendant.