

503.01 CONTRACTS - ISSUE OF COMMON LAW REMEDY - RESCISSION -
MEASURE OF RESTITUTION.

The (*state number*) issue reads:

"What restitution is the plaintiff entitled to recover from the
defendant after electing to cancel the contract?"¹

If you have answered the (*state number*) issue "Yes" in favor of the
plaintiff, the plaintiff is entitled to recover a nominal sum even without
proof of an actual restitution amount. A nominal sum consists of some
trivial amount such as one dollar in recognition of the technical rights of
the plaintiff.

The plaintiff may also be entitled to recover restitution in the form
of (money) (property). 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, the actual amount of restitution due from the defendant.

The plaintiff's actual restitution equals

[the amount of money paid by the plaintiff to the defendant
pursuant to the contract]²

(plus)

[the amount of money paid by the plaintiff to any third person as a
direct and foreseeable consequence of entering into the contract]³

(plus)

[any property which the plaintiff [delivered] [conveyed] to the
defendant pursuant to the contract (if it is still in the possession of the
defendant) (plus an amount equal to the fair rental value⁴ of such
property while in the defendant's possession) (plus an amount for any
damage to such property while in the defendant's possession)]

(or)

[the fair market value⁵ as of the date of the contract of the (*name property*) delivered by the plaintiff to the defendant pursuant to the contract]

(less)

(any credits to which the defendant is entitled. The defendant is entitled to a credit against the sum owed to the plaintiff for

[the fair rental value of the (*describe property*) while it was in the possession of the plaintiff]⁶

[an amount for any damage to the (*describe property*) while it was in the possession of the plaintiff]⁷

[the amount of depreciation to the (*describe property*) caused by the plaintiff's use]⁸

[the fair market value of any services rendered by the defendant to the plaintiff and retained by the plaintiff]

[the fair market value as of the date of the contract of any property (or portion of any property) which the plaintiff with reasonable justification cannot now return to the defendant]].

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence the actual restitution owed by the defendant to the plaintiff, then it would be your duty to write that [amount] [property description]⁹ in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as "One Dollar" in the blank space provided.

1 NOTE WELL: Restitution is an appropriate remedy following discharge of a contract by the defenses of either frustration of purpose or impossibility. *Holmes v. Solon Automated Servs.*, __ N.C. App. __, 752 S.E.2d 179, 182 (2013), citing *Restatement (Second) of Contracts* § 377 (1981) ("A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-

occurrence of a condition or disclaimer of a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance."). Where the defendant asserts impossibility or frustration of purpose as a defense to a breach of contract claim, see N.C.P.I.-Civil 502.25, 502.30 and 502.35, the Court still may instruct the jury on restitution as a proper remedy for the plaintiff. See *id.* at ___, 752 S.E.2d at 183.

2 For example, the purchase price paid by a buyer to a seller, *Brannock v. Fletcher*, 271 N.C. 65, 75, 155 S.E.2d 532, 542 (1967), or the proceeds of a loan, *Melton v. Family First Mortg. Corp.*, 156 N.C. App. 129, 136, 576 S.E.2d 365, 371 (2003).

3 For example, where a plaintiff has elected to rescind the purchase of a home, in addition to recovering the purchase price paid to the defendant, the plaintiff would also be entitled to recover "principal and interest, assessments, and ad valorem taxes." *Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 65, 344 S.E.2d 68, 74 (1986).

4 The court may supplement this portion of the instruction if necessary: "Fair rental value is the amount which would be agreed upon as a fair rent by an owner who wishes to lease, but is not compelled to do so, and a tenant who wishes to lease, but is not compelled to do so." See *Huff v. Thornton*, 287 N.C. 1, 12, 213 S.E.2d 198, 206 (1975) (court found no error in similar instruction addressing fair market value).

5 The court may supplement this portion of the instruction if necessary: "Fair market value is the amount which would be agreed upon as a fair price by a seller who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so." See *Huff*, 287 N.C. at 12, 213 S.E.2d at 206.

6 The seller is entitled to a reasonable rent for the buyer's use and occupation of the property. *Brannock*, 271 N.C. at 75, 155 S.E.2d at 542; *Lumsden v. Lawing*, 117 N.C. App. 514, 520, 451 S.E.2d 659, 663 (1995).

7 The seller is entitled to recoup any damages (whether from commission or omission) arising from the buyers use and occupation of the property, including any depreciation caused by the buyer. *Brannock*, 271 N.C. at 75, 155 S.E.2d at 542.

8 *Id.*

9 The Court should take precautions to protect any party who, as a result of the jury verdict, has a right to receive a return of property in conjunction with a rescission. The Court should specifically decree the terms of the exchange and impose safeguards in the event property to be delivered pursuant to the judgment has become damaged, mortgaged or subjected to waste.