

814.85 FRAUDULENT TRANSFER - PRESENT CREDITORS - TRANSFER TO
INSIDER WHILE INSOLVENT - DEFENSE OF TRANSFER IN THE ORDINARY
COURSE.

The (*state number*) issue reads:

"Did the defendant acquire the (*name asset*) in the ordinary course of business or financial affairs of the defendant and (*name debtor*)?"

You will answer this issue¹ only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant. This means the defendant must prove, by the greater weight of the evidence, that the defendant acquired the (*name asset*) in the ordinary course of business or financial affairs of the defendant and (*name debtor*).²

Finally, as to this (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the defendant acquired the (*name asset*) in the ordinary course of business or financial affairs of the defendant and (*name debtor*), then it would be your duty to answer this issue "Yes" in favor of the defendant.

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 plaintiff.

¹ This defense is limited to "insiders" who have received transfers voidable under N.C. Gen. Stat. § 39-23.5(b). See N.C.P.I.-Civil 814.75.

² The "ordinary course of business" includes "those matters that are incidental to the business in which the [entity] is engaged" *Burlington Industries Inc. v. Foil*, 284 N.C. 740, 758, 202 S.E.2d 591, 603 (1974). "[W]hether a particular matter is within the ordinary course of business is not governed by any inflexible rule." Russell M. Robinson, *Robinson on North Carolina Corporate Law* § 16.04 (7th Ed. 2014) (citing *Brimmer v. M.H. Brimmer Co.*, 174 N.C. 435, 93 S.E.984 (1917)). "Whether a transfer was in the 'ordinary

N.C.P.I.-Civil. 814.85

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GENERAL CIVIL VOLUME

JUNE 2015

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course' requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged" Uniform Fraudulent Transfer Act § 8(f)(2) cmt. (6) (1984).