

WARRANTIES IN SALES OF GOODS--ISSUE OF SELLER'S DEFENSE OF  
EXCLUSION OF IMPLIED WARRANTY OF MERCHANTABILITY.

The (*state number*) issue reads:

"Did the defendant exclude the implied warranty of merchantability from the sale of the (*name good*) to the plaintiff?"

You will answer this issue 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 that the defendant must prove, by the greater weight of the evidence, that the defendant excluded the implied warranty of merchantability from the sale of the (*name good*) to the plaintiff.

A seller excludes<sup>1</sup> the implied warranty of merchantability by [stating that the (*name good*) is being sold "as is" or "with all faults" or similar words]<sup>2</sup>

[calling to the buyer's attention that warranties are being excluded and making plain to the buyer that there is no implied

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<sup>1</sup>There may be statutory limitations on a warrantor's ability to exclude implied warranties in certain instances. For example, as to consumer goods within the ambit of the Magnusen-Moss Warranty Act of 1975, 15 U.S.C. §2301 et seq., a seller who gives an express written warranty cannot necessarily exclude state law implied warranties (but he can specify the remedies for their breach).

<sup>2</sup>N.C.G.S. §25-2-316(3) (a) (1995).

WARRANTIES IN SALES OF GOODS--ISSUE OF SELLER'S DEFENSE OF  
EXCLUSION OF IMPLIED WARRANTY OF MERCHANTABILITY. (Continued).

warranty of merchantability]<sup>3</sup>

[making a disclaimer<sup>4</sup> of the implied warranty of merchant-  
ability in which the word "merchantability"<sup>5</sup> is actually used].

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 excluded the implied  
warranty of merchantability from the sale of the (*name good*) to  
the plaintiff, 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.

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<sup>3</sup>*Id.*

<sup>4</sup>N.C.G.S. §25-2-316(2) (1995). Note that where the seller's disclaimer  
is in writing, it must be conspicuous. Whether the disclaimer is "conspicuous"  
is a question of law for the court. N.C.G.S. §25-1-201(10) (1995).  
"Conspicuous" means that the term or clause is "so written that a reasonable  
person against whom it is to operate ought to have noticed it." *Id.* If the  
disclaimer is in a form writing, to be "conspicuous" it must be in larger or  
other contrasting type or color. *Id.* In a telegram, however, any stated term  
is "conspicuous." *Id.* If the court determines that the written disclaimer was  
not "conspicuous," this part of the instruction should not be given to the  
jury.

<sup>5</sup>In addition, implied warranties may also be excluded by course of  
dealing (N.C.G.S. §25-1-205(1) (1995)), course of performance (N.C.G.S. §25-2-  
208(1) (1995)) or usage of trade (N.C.G.S. §25-1-205(2) (1995)). N.C.G.S. §25-  
2-316(3)(c) (1995).