PRODUCTS LIABILITY[1] (OTHER THAN EXPRESS WARRANTY[2])--SELLER'S[3] DEFENSE OF SEALED CONTAINER OR LACK OF OPPORTUNITY TO INSPECT PRODUCT. N.C.G.S. § 99B-2(a).[4]

NOTE WELL: Use this instruction only with causes of action arising before January 1, 1996. For causes of action arising on or after January 1, 1996, use N.C.P.I.--Civil 744.05.

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[1]"Product liability action" includes any action "brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling of any product." N.C.G.S. § 99B-1(3) (1994). This exception to a seller's defense applies to all products liability actions, whether they sound in tort or contract.

[2]This defense does not apply where the products liability claim is based on a breach of express warranty. N.C.G.S. § 99B-2(a).

[3]This defense is available only to "Sellers." "Manufacturers" cannot claim the benefits of this defense. "Manufacturer" and "Seller" are defined at N.C.G.S. § 99B-1(2) and (4), respectively.

[4]This defense is not available to sellers where (1) the manufacturer of the product is not subject to the jurisdiction of North Carolina courts, or (2) the manufacturer of the product has been declared insolvent in a judicial proceeding, or (3) "the seller damaged or mishandled the product while in his possession . . ." The first two exceptions would appear to be primarily questions of law. The third is likely to be a question of fact suitable for jury determination. Where a party claims the benefit of an exception in a statute, he has the burden of proof as to whether he comes within that exception. *Moore v. Lambeth*, 207 N.C. 23, 26, 175 S.E. 714, 716 (1934). Thus, if the plaintiff raises the third exception, the jury should be instructed as to its elements and told that the burden of proof is on the plaintiff. *See* N.C.P.I.--Civil 743.06.

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The (*state number*) issue reads:

"Did the defendant acquire and [sell] [lease] [loan for pay][5] [consign][6] the (*describe product*)[7] [in a sealed container] [without reasonable opportunity to inspect it in a way that would have or should have revealed the claimed defect]?

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.[8] This means that the defendant must prove, by the greater weight of the evidence, two things:

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[5]N.C.G.S. § 99B-1(4) specifically includes bailors "engaged in the business" of bailment. It is believed that the intent of this statute was to cover commercial bailments, not casual, non-commercial ones. Furthermore, since jurors are presumed to be unfamiliar with the bailment concept, references to bailment in this instruction are explained as "loaning" products to others for pay. N.C.G.S. § 99B-1(4).

[6]While consignment is not specifically mentioned in N.C.G.S. § 99B-1(4), it is believed that the term "distributor" is broad enough to encompass consignment as well as other non-sale forms of distribution such as "sale or return," N.C.G.S. § 25-2-326(1)(b)(1986), and "sale on approval," N.C.G.S. § 25-2-326(1)(a). When these terms must be used, they should be explained to the jury.

[7]"Product" is arguably a broader term than "goods," as that term is defined in the Uniform Commercial Code. N.C.G.S. § 25-2-105. A house, for example, might be a "product" under N.C.G.S. § 99B.

[8]While this defense is prefaced, "[n]o product liability action . . . shall be commenced or maintained against any seller . . .," it is believed that this section was intended to be an affirmative defense and not a negative element of the plaintiff's cause of action. *Compare* N.C.G.S. § 1-50(5) (Supp. 1994). Proof of an affirmative defense is the defendant's burden. *Salem Realty Co. v. Batson*, 256 N.C. 298, 123 S.E.2d 744 (1962).

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First, that the defendant was [a retailer] [a wholesaler] [a distributor][9] [a lessor engaged in the business of leasing] [a bailor engaged in the business of loaning products to others for pay] [engaged in the business of selling a product for resale, use or consumption];[10] and

Second, that the defendant acquired and [sold] [leased] [loaned for pay] [consigned] the (*describe product*) [in a sealed container] [without having a reasonable opportunity to inspect the (*describe product*) in a way that would have or should have revealed the defect on which the plaintiff is now suing if *he* had exercised reasonable care].

Finally, as to this issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the defendant acquired and [sold] [leased] [loaned for pay] [consigned] the (*describe product*) [in a sealed container] [without a reasonable opportunity to inspect it in a

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[9]*See supra* note 6.

[10]This part of the instruction is designed to obtain a jury determination that the defendant is a "seller." It should be noted that where the defendant is owned "in whole or significant part" by the manufacturer, the defendant is classified as a "manufacturer" and not a "seller," and this defense is unavailable. *See supra* note 3; N.C.G.S. § 99B-1(2). The same result obtains where the defendant owns the manufacturer "in whole or significant part." Where the evidence shows the existence of subsidiaries, joint ventures, affiliates, partnerships, and the like between defendant and manufacturer, the jury should be instructed to determine that "(*name defendant*) was [a retailer]," etc., and "that [(*name defendant*) was not owned in whole or substantial part by (*name manufacturer*)]."

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way that would have or should have revealed the claimed defect if *he* had exercised reasonable care], 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.