

PRODUCTS LIABILITY¹ (OTHER THAN EXPRESS WARRANTY²)--SELLER'S³
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 on or after January 1, 1996. For causes of
action arising before January 1, 1996, use N.C.P.I.--Civil
743.05.

The (state number) issue reads:

"Did the defendant acquire and [sell] [lease] [loan for

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.

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

³This 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.

⁴This 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 744.06.

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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:

First, that the defendant was [a retailer] [a wholesaler] [a

⁵N.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).

⁶While 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.

⁸While 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 defendant's burden. *Salem Realty
Co. v. Batson*, 256 N.C. 298, 123 S.E.2d 744 (1962).

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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
way that would have or should have revealed the claimed defect if

⁹See *supra* note 6.

¹⁰This 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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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.