

WARRANTIES IN SALES OF GOODS--ISSUE OF BREACH OF IMPLIED WARRANTY
OF MERCHANTABILITY.

The (*state number*) issue reads:

"Did the defendant breach the implied warranty of merchant-
ability made 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 plaintiff. This
means that the plaintiff must prove, by the greater weight of the
evidence, that the defendant breached the implied warranty of
merchantability made to the plaintiff.

A breach of the implied warranty of merchantability occurs if
the (*name good*)

[does not pass without objection in the trade under the
contract description]¹

[is not of fair average quality within the description]²

[is not fit for the ordinary purposes for which such
merchandise is used]³

¹N.C.G.S. §25-2-314(2) (a) (1995).

²N.C.G.S. §25-2-314(2) (b) (1995). NOTE WELL: Give this component only
if the merchandise involved is fungible.

³N.C.G.S. §25-2-314(2) (c) (1995). In a products liability action based
on tort or warranty, a product defect may be inferred from evidence of the
product's malfunction if there is evidence the product had been put to its
ordinary use. *Red Hill Hosiery Mill, Inc., v. Magnetek, Inc.*, 138 N.C. App.
70, 530 S.E.2d 321 (2000), *disc. rev. denied*, 353 N.C. 268, 546 S.E.2d 112
(2000).

The plaintiff is not required to prove a specific defect. The plaintiff
may prove a defect by producing adequate circumstantial evidence. *DeWitt v.*
Eveready Battery Co., 355 N.C. 672, 565 S.E.2d 142 (2002).

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OF MERCHANTABILITY. (Continued).

[does not run of even kind, quality and quantity within each unit and among units involved within the variations permitted by the agreement]⁴

[is not adequately contained, packaged and labeled as the agreement may require]⁵

[does not conform to the promises or representations of fact made on the container or label, if any].⁶

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant breached the implied warranty of merchantability made to the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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 defendant.

⁴N.C.G.S. §25-2-314(2)(d) (1995).

⁵N.C.G.S. §25-2-314(2)(e) (1995).

⁶N.C.G.S. §25-2-314(2)(f) (1995).