

WARRANTIES IN SALES OF GOODS--ISSUE OF SELLER'S DEFENSE OF EXCLUSION¹ OF IMPLIED WARRANTY CREATED BY COURSE OF DEALING OR BY USAGE OF TRADE.

The (*state number*) issue reads:

"Did the defendant exclude the implied warranty created by [course of dealing] [usage of trade] 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 created by [course of dealing] [usage of trade] from the sale of the (*name good*) to the plaintiff.

¹Instructions related to the seller's defense of modification have been included for the implied warranty of merchantability (N.C.P.I.--Civil 741.16) and the implied warranty of fitness for a particular purpose (N.C.P.I.--Civil 741.26). However, no analogous defense has been included for the implied warranty created by course of dealing or usage of trade. The statute creating course of dealing and usage of trade implied warranties also provides they can be excluded or *modified* under N.C.G.S. §25-2-316. However, the modification section of N.C.G.S. §25-2-316 (subsection 2) specifically deals only with implied warranties of merchantability and fitness for a particular purpose. N.C.G.S. §25-2-316(3)(c) does provide, however, that any implied warranty may also be modified by course of dealing, course of performance or by usage of trade. Thus, an implied warranty created by course of dealing or usage of trade can be modified only by analogy to N.C.G.S. §25-2-316(2) or by course of dealing, course of performance or usage of trade. The Pattern Jury Committee determined that such instances would be so rare that a separate pattern instruction was not justified.

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A seller excludes² the implied warranty created by [course of
dealing] [usage of trade] by

[stating that the (*name good*) is being sold "as is" or "with
all faults" or similar words]³

[calling to the buyer's attention that warranties are being
excluded and making plain to the buyer that there is no implied
warranty]⁴

Finally,⁵ 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 created by [course of dealing] [usage of trade] 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.

²There 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).

³N.C.G.S. §25-2-316(3)(a) (1995).

⁴*Id.*

⁵In 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).

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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.

