PRODUCTS LIABILITY[1]--CLAIM OF INADEQUATE WARNING OR INSTRUCTION. N.C.G.S. § 99B-5(a).

NOTE WELL: Use this instruction only with causes of action arising on or after January 1, 1996.

The (*state number*) issue reads:

"Did the defendant unreasonably fail to provide an adequate warning or instruction with the (*name product*), proximately causing the plaintiff's [injury] [death] [damage]?"

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, five things:

First, that the defendant was the [manufacturer] [seller] of the (*name product*).

[A "manufacturer" is a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or a component part of a product prior to its sale to a user or consumer.][2]

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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). Thus, this exception to a seller's defense applies to all products liability actions, whether they sound in tort or contract.

[2]N.C.G.S. § 99B-1(2). "Manufacturer" also includes a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part.

PRODUCTS LIABILITY--CLAIM OF INADEQUATE WARNING OR INSTRUCTION. N.C.G.S. § 99B-5(a). (Continued.)

[A "seller" is any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or for consumption.[3] ("Seller" also includes a retailer, wholesaler or distributor.[4]) ("Seller" also includes a lessor engaged in the business of leasing.)[5] ("Seller" also includes a bailor, that is, one engaged in the business of lending products to others for pay.)[6]]

Second, that the defendant failed to provide an adequate warning or instruction.

Third, that the defendant's failure to provide an adequate warning or instruction was unreasonable. Failure to provide an adequate warning or instruction is unreasonable if a reasonable and prudent [manufacturer] [seller], acting under the same or similar circumstances, would have provided an adequate warning or instruction.

Fourth, that

[at the time the (*name product*) left the control of the

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[3]N.C.G.S. § 99B-1(4).

[4]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), and "sale on approval," N.C.G.S. § 25-2-326(1)(a). If these terms are used, they should be explained to the jury.

[5]*Id.*

[6]N.C.G.S. § 99B-1(3) 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 lending products to others for pay.

defendant without an adequate warning or instruction, the (*name product*) created an unreasonably dangerous condition that the defendant knew or, in the exercise of ordinary care should have known, posed a substantial risk of harm to a reasonably foreseeable claimant. Ordinary care means that degree of care which a reasonable and prudent [manufacturer] [seller] would use under the same or similar circumstances to protect others from [injury] [death] [damage][7]].

[after the (*name product*) left the control of the defendant, the defendant became aware of or, in the exercise of ordinary care should have known, that the (*name product*) posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances. Ordinary care means that degree of care which a reasonable and prudent [manufacturer] [seller] would use under the same or similar circumstances to protect others from [injury] death] [damage][8]].

[No manufacturer or seller may be held liable for failing to warn about an open and obvious risk, or a risk that is a matter of common knowledge.[9]]

<u>And Fifth</u>, that the defendant's failure to provide an

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[7]*See* N.C.P.I.--Civil 102.11.

[8]*See id.*

[9]N.C.G.S. § 99B-5(b).

adequate warning or instruction was a proximate cause of the plaintiff's [injury] [death] [damage].[10] Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [death] [damage], and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [death] [damage] or some similar injurious result. There may be more than one proximate cause of [an injury] [a death] [damage]. Therefore, the plaintiff need not prove that the defendant's failure to provide an adequate warning or instruction was the sole proximate cause of the [injury] [death] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that such failure was a proximate cause.

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 unreasonably failed to provide an adequate warning or instruction with (*name product*) and that this failure proximately caused the plaintiff's [injury] [death] [damage], 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.

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[10] *See Evans v. Evans*, 153 N.C. App. 54, 59, 569 S.E.2d 303, 307 (2002), *cert. denied*, 356 N.C. 670, 577 S.E.2d 296 (2003); *see also Dewitt v. Eveready Battery Co.*, 144 N.C. App. 143, 156, 550 S.E.2d 511, 520 (2001) (noting the record contained no evidence that inadequate warning on batteries proximately caused the plaintiff's injuries).