

741.15 WARRANTIES IN SALES OF GOODS - ISSUE OF EXISTENCE OF  
IMPLIED WARRANTY OF MERCHANTABILITY.

The (*state number*) issue reads:

"Did the defendant impliedly warrant to the plaintiff that the (*name good*) was merchantable?"<sup>1</sup>

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 when the defendant sold the (*name good*) to the plaintiff, the defendant was a merchant with respect to merchandise like the (*name good*).<sup>2</sup>

A "merchant" deals in merchandise of the kind sold, or holds *himself* out by *his* occupation as having knowledge or skill peculiar to the practices or merchandise involved in the transaction.<sup>3</sup> A merchant impliedly warrants the merchandise *he* sells is merchantable, that is, such merchandise

[is sufficient to pass without objection in the trade under the contract description]<sup>4</sup>

[is of fair average quality within the description]<sup>5</sup>

[is fit for the ordinary purposes for which such merchandise is used]<sup>6</sup>

[runs of even kind, quality and quantity within each unit and among units involved within variations permitted by the agreement]<sup>7</sup>

[is adequately contained, packaged and labeled as the agreement may require]<sup>8</sup>

[conforms to the promises or representations of fact made on the container or label, if any].<sup>9</sup>

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 impliedly warranted to the plaintiff that the (*name good*) was merchantable, 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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1. N.C. Gen. Stat. § 25-2-314 (2011).

2. N.C. Gen. Stat. § 25-2-314(1) (2011). The N.C. Court of Appeals has applied merchantability analysis to at least one contaminated food case. See *Williams v. O'Charley's, Inc.*, \_\_ N.C. App. \_\_, \_\_, 728 S.E.2d 19, 21-22 (2012) (analyzing case law in other jurisdictions on food poisoning and holding that spoiled, contaminated or other deleterious conditions of food suffers from a "defect" in the merchantability sense).

3. N.C. Gen. Stat. § 25-2-104(1) (2011). Persons or entities serving food or drink for value (whether such food or drink is consumed on or off premises) are merchants with respect to goods of that kind. *Id.*; see also *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 10, 423 S.E.2d 444, 448 (1992).

4. N.C. Gen. Stat. § 25-2-314(2)(a) (2011).

5. N.C. Gen. Stat. § 25-2-314(2)(b) (2011). (*NOTE WELL: Give this component only if the merchandise involved is fungible.*)

6. N.C. Gen. Stat. § 25-2-314(2)(c) (2011).

7. N.C. Gen. Stat. § 25-2-314(2)(d) (2011).

8. N.C. Gen. Stat. § 25-2-314(2)(e) (2011).

9. N.C. Gen. Stat. § 25-2-314(2)(f) (2011).