

741.17 WARRANTIES IN SALES OF GOODS - ISSUE OF SELLER'S DEFENSE
OF EXCLUSION OF IMPLIED WARRANTY OF MERCHANTABILITY.

The (*state number*) issue reads:

"Did the defendant exclude the implied warranty of merchant-ability 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 of merchantability from the sale of the (*name good*) to the plaintiff.

A seller excludes¹ the implied warranty of merchantability by

[stating that the (*name good*) is being sold "as is" or "with all faults" or similar words]²

[calling to the buyer's attention that warranties are being excluded and making plain to the buyer that there is no implied warranty of merchantability]³

[making a disclaimer⁴ of the implied warranty of merchant-ability in which the word "merchantability"⁵ is actually used].

Finally, 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 of merchantability 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.

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.

1. There 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).

2. N.C. Gen. Stat. § 25-2-316(3)(a) (1995).

3. *Id.*

4. N.C. Gen. Stat. § 25-2-316(2) (1995). Note that where the seller's disclaimer is in writing, it must be conspicuous. Whether the disclaimer is "conspicuous" is a question of law for the court. N.C. Gen. Stat. § 25-1-201(10) (1995). "Conspicuous" means that the term or clause is "so written that a reasonable person against whom it is to operate ought to have noticed it." *Id.* If the disclaimer is in a form writing, to be "conspicuous" it must be in larger or other contrasting type or color. *Id.* In a telegram, however, any stated term is "conspicuous." *Id.* If the court determines that the written disclaimer was not "conspicuous," this part of the instruction should not be given to the jury.

5. In addition, implied warranties may also be excluded by course of dealing (N.C. Gen. Stat. § 25-1-303(b)), course of performance (N.C. Gen. Stat. § 25-1-303(d)) or usage of trade (N.C. Gen. Stat. § 25-1-303(c)). For detail on exclusion or modification of warranties see N.C. Gen. Stat. § 25-2-316.