

741.20 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

[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.

1. N.C. Gen. Stat. § 25-2-314(2)(a) (1995).

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

3. N.C. Gen. Stat. § 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).

4. N.C. Gen. Stat. § 25-2-314(2)(d) (1995).

5. N.C. Gen. Stat. § 25-2-314(2)(e) (1995).

6. N.C. Gen. Stat. § 25-2-314(2)(f) (1995).