

741.32 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.

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.

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. Instructions 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. Gen. Stat. § 25-2-316. However, the modification section of N.C. Gen. Stat. § 25-2-316 (subsection 2) specifically deals only with implied warranties of merchantability and fitness for a particular purpose. N.C. Gen. Stat. § 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. Gen. Stat. § 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.

2. 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).

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

4. *Id.*

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.