

741.66 IMPLIED WARRANTIES¹ - THIRD PARTY RIGHTS OF ACTION
(HORIZONTAL)² AGAINST MANUFACTURERS.³

NOTE WELL: This instruction should be used where the plaintiff's right to sue is being challenged on the ground of lack of privity with the defendant.

The *(state number)* issue reads:

"Did the defendant's [implied warranty of merchantability] [implied warranty of fitness for a particular purpose] [implied warranty created by [course of dealing] [usage of trade]] extend⁴ 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, four things:

First, that the defendant is a manufacturer. A manufacturer is a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer. ("Manufacturer" includes a seller owned in whole or significant part by the manufacturer, or a seller owning the manufacturer in whole or significant part.)⁵

Second, that the defendant manufactured the *(state product)*.⁶

Third, that *(name buyer)* bought the *(state product)*.⁷

Fourth, that at the time of the [injury] [death] [damage to property], the plaintiff must have been [a member of *(name buyer)*'s

family] [a guest

of a member of (*name buyer*)'s family] [a guest of (*name buyer*)] [(*name buyer*)'s employee].

[A person is a member of a family if he or she is a (*describe family relationship*).⁸]

[A person is a guest of a member of a family if (*name family member*) is the buyer's (*describe family relationship*)⁹ and such person is (present in the home)¹⁰ (on the premises)¹¹ (in the automobile)¹² (*describe other situation*)¹³ with (*name family member*)'s express or implied consent.¹⁴]

[A person is a guest of a buyer if such person is (present in the home)¹⁵ (on the premises)¹⁶ (in the automobile)¹⁷ (*describe other situation*)¹⁸ with the buyer's express or implied consent, and such person has the right to be there.¹⁹]

[A person is a buyer's employee if *he* is engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written (including aliens, whether lawfully or unlawfully employed) (including minors, whether lawfully or unlawfully employed) (including (*here describe other classes of statutory employees under N.C. Gen. Stat. § 97-2(2)*)).²⁰ A person is a buyer's employee if the buyer has the right to control the manner or method in which such person does the work. As long as the buyer has this right of control, it does not matter whether the buyer actually exercises it.²¹]

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's [implied warranty of merchantability] [implied warranty of fitness for a particular purpose] [implied warranty created by [course of dealing] [usage of trade]] extends 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. This instruction should only be used in connection with implied warranty claims. N.C. Gen. Stat. § 99B-2(b) does not apply to express warranties.

2. "Horizontal" rights of action by third parties typically refer to circumstances where a seller has sold a defective product to a buyer, and that product has caused injury to someone other than the buyer (or the buyer's vendee). Seller and buyer are in "vertical" privity. The term comes from the fact that seller and buyer are in the "vertical" chain of distribution of products. The injured party, however, is not in the vertical chain since he is not a buyer. Thus, he is described as a third party who is "horizontally" related to the buyer. While outside the vertical chain, the third party does, in some cases, have a sufficient "horizontal" relationship with someone in the vertical chain to permit a right of action. This instruction should be used to determine which relationships are sufficient and which are not.

3. This instruction does not apply to third party rights against "sellers." Those rights are set out in N.C. Gen. Stat. § 25-2-318. A "seller" is a "retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or consumption." N.C. Gen. Stat. § 99B-1(3). Whether "seller" and "manufacturer" are mutually exclusive categories is an open question. The language of N.C. Gen. Stat. § 99B-1(2) (which defines "manufacturer") does not indicate whether a "manufacturer" who retails, wholesale or distributes its own products is a "seller" for purposes of N.C. Gen. Stat. § 25-2-318, a "manufacturer" for purposes of N.C. Gen. Stat. § 99B-2(b), or both.

4. N.C. Gen. Stat. § 99B-2(b) provides: "A claimant . . . who is a member or a guest of a member of the family of the buyer, a guest of the buyer, or an employee of the buyer may bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty. . . ." This provision excuses the "horizontal privity" requirement in certain limited circumstances. Thus, it is proper to ask whether the manufacturer's implied warranty "extends" to someone outside of the vertical chain of distribution, *i.e.*, to someone in the buyer's family, to a guest of a member of the buyer's family, to a guest of the buyer or to the buyer's employee. Before this issue can be answered, however, it must be determined that the manufacturer has given an implied warranty.

5. N.C. Gen. Stat. § 99B-1(2).

6. N.C. Gen. Stat. § 99B-2(b) specifies that the plaintiff has the right to bring a product liability action "against the manufacturer of the product involved. . . ."

7. A person is the buyer of a product when he buys or contracts to buy the product. N.C. Gen. Stat. § 25-2-103(1)(a). The product must be a good. N.C. Gen. Stat. § 25-2-105.

8. "Family" is not defined in the Products Liability Act or the Uniform Commercial Code. Under the Code, "family" has been construed liberally to include sons and daughters, stepchildren, parents, spouses, nieces and nephews, and even mother-in-laws. For a citation of authorities, see N.C.P.I.-Civil 741.65 (Express and Implied Warranties-Third Party Rights of Action Against Buyer's Seller), note 6.

9. See *supra* note 12.

10. The typical guest is present in the family member's home. This is consistent with N.C. Gen. Stat. § 25-2-318 and the cases decided under it. See the authorities cited at N.C.P.I.-Civil 741.65 (Express and Implied Warranties-Third Party Rights of Action Against Buyer's Seller), note 11.

11. Consistent with the concept of "guest" is one who is present not in buyer's home but on the immediate premises. *Handrigan v. Apex Warwick, Inc.*, 108 R.I. 319, 325, 275 A.2d 262, 266 (1971) (quoting N.C. Gen. Stat. § 25-2-318 note 3 of the Uniform Commercial Code).

12. Many cases have arisen where the plaintiff was a guest in the buyer's automobile. Under N.C. Gen. Stat. § 25-2-318, the injured guest would have no right to sue directly because he was not a "household guest." N.C. Gen. Stat. § 99B-2(b) has no such limitation and would seem to require a different result than that which occurred in *Williams v. General Motors Corp.*, 19 N.C. App. 337, 198 S.E.2d 766, *cert. den.*, 284 N.C. 258, 200 S.E.2d 659 (1973), at least as to manufacturers.

13. Since a third party's rights are not tied to the "household guest" requirements of N.C. Gen. Stat. § 25-2-318, there may be many other situations where the plaintiff would be a "guest" under N.C. Gen. Stat. § 99B-2(b). For example, a guest in the home of an emancipated son or daughter who received the product as a gift from the buyer would appear to have a direct right of action against the manufacturer. Compare *Wolovitz v. Falco Products Co.*, 1 U.C.C. Rep. 135 (Pa. Ct. Com. Pl., 1963) (held under N.C. Gen. Stat. § 25-2-318 that a warranty does not extend to a guest in the home of the buyer's donee).

14. "Guest" is not defined in the Products Liability Act of 1979 or the Uniform Commercial Code. The definition used above assumes that a liberal interpretation was intended by the General Assembly, for it is broad enough to cover all lawful guests. See *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998).

15. See *supra* note 14.

N.C.P.I.-Civil. 741.66
IMPLIED WARRANTIES - THIRD PARTY RIGHTS OF ACTION (HORIZONTAL)
AGAINST MANUFACTURERS.
GENERAL CIVIL VOLUME
MAY 2006
N.C. Gen. Stat. § 99B-2(b)

16. *See supra* note 15.

17. *See supra* note 16.

18. *See supra* note 17.

19. *See supra* note 18.

20. N.C. Gen. Stat. § 97-2(2).

21. *Scott v. Waccamaw Lumber Co.*, 232 N.C. 162, 165-66, 59 S.E.2d 425, 426-27 (1950).