N.C.P.I.-Civil. 744.06
PRODUCTS LIABILITY - EXCEPTION TO SELLER'S DEFENSE OF SEALED CONTAINER OR LACK OF OPPORTUNITY TO INSPECT PRODUCT.
GENERAL CIVIL VOLUME
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N.C. Gen. Stat. § 99B-2(a)

744.06 PRODUCTS LIABILITY[1] - EXCEPTION[2] TO SELLER'S[3] DEFENSE OF SEALED CONTAINER OR LACK OF OPPORTUNITY TO INSPECT PRODUCT.

> *NOTE WELL: Use this instruction only with causes of action arising on or after January 1, 1996. For causes of action arising before January 1, 1996, use N.C.P.I.-Civil 743.06.*

The (*state number*) issue reads:

"Was the damaging or mishandling of the (*name product*) by the defendant while it was in *his* possession a cause of the plaintiff's [injury] [death] [damage]?"

You will answer this issue only if you have answered the issue concerning the defense of [sealed container] [lack of opportunity to inspect product] "Yes" in favor of the defendant.

On this issue the burden of proof is on the plaintiff.[4] This means that the plaintiff must prove, by the greater weight of the evidence, four things:

First, that the defendant was a seller. A "seller" is a retailer, wholesaler or distributor.[5] ("Seller" also includes any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or for consumption.)[6] ("Seller" also includes a lessor engaged in the business of leasing.)[7] ("Seller" also includes a bailor engaged in the business of loaning products to others for pay.)[8]

Second, that the defendant[9] damaged or mishandled the (*name product*).

Third, that the damage or mishandling occurred while the product

was in the defendant's possession. A person is in possession of a product when (either by *himself* or together with others) *he* has actual physical custody of it or has the power and intent[10] to control its disposition or use.

And Fourth, that such damage to or mishandling of the (*name product*) was a cause of the plaintiff's [injury] [death] [damage]. Cause is a real cause- a cause which in a natural and continuous sequence produces a person's [injury] [death] [damage]. There may be more than one cause of [an injury] [a death] [damage]. Therefore, the plaintiff need not prove that the damage to or mishandling of the (*name product*) was the sole cause of the [injury] [death] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the damage or mishandling was a cause.

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the damaging or mishandling of the (*name product*) by the defendant while it was in *his* possession was a cause of the plaintiff's [injury] [death] [damage], 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. "Product liability action" includes any action "brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling of any product." N.C. Gen. Stat. § 99B-1(3)(1994). Thus, this exception to a seller's defense applies to all products liability actions, whether they sound in tort or contract.

2. N.C. Gen. Stat. § 99B-2(a) also mentions three other exceptions to the seller's defense of sealed container or lack of opportunity to inspect the product. These include (1) where the claim is based on an express warranty, (2) where the manufacturer of the product is not subject to the jurisdiction of the courts of North Carolina, and (3) where the manufacturer has been judicially declared insolvent. Because the applicability of these exceptions to a given case will most likely be determined as a matter of law, no separate jury instructions are included. For jurisdiction statutes, *see* N.C. Gen. Stat. § 1-75.1 *et seq.*, including N.C. Gen. Stat. § 1-75.4 (general personal jurisdiction, including "long arm" provision) & N.C. Gen. Stat. § 1-75.8 (*in rem* jurisdiction). N.C. Gen. Stat. § 99B-2(a) is unclear, however, as to whether *in rem* jurisdiction alone over the manufacturer would render this exception useless.

3. This defense is available only to "Sellers." "Manufacturers" cannot claim its benefits. "Manufacturer" and "Seller" are defined at N.C. Gen. Stat. § 99B-1(2) and (4), respectively.

4. Where a party claims the benefit of an exception in a statute, he has the burden of proof as to whether he comes within that exception. *Moore v. Lambeth*, 207 N.C. 23, 26, 175 S.E. 714, 716 (1934).

5. While consignment is not specifically mentioned in N.C. Gen. Stat. § 99B-1(4), it is believed that the term "distributor" is broad enough to encompass consignment as well as other non-sale forms of distribution such as "sale or return," N.C. Gen. Stat. § 25-2-326(1)(b), and "sale on approval," N.C. Gen. Stat. § 25-2-326(1)(a). If these terms are used, they should be explained to the jury.

6. N.C. Gen. Stat. § 99B-1(4).

7. *Id*.

8. N.C. Gen. Stat. § 99B-1(4) specifically includes bailors "engaged in the business" of bailment. It is believed that the intent of this statute was to cover commercial bailments, not casual, non-commercial ones. Furthermore, since jurors are presumed to be unfamiliar with the bailment concept, references to bailment in this instruction are explained as "loaning" products to others for pay.

9. *See* N.C.P.I.-Civil 103.10 *et seq*. if a subissue here is one of agency.