

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

The (*state number*) issue reads:

"Did the defendant modify the implied warranty of
merchantability in 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 modified the implied warranty of
merchantability in the sale of the (*name good*) to the plaintiff.

A seller modifies¹ the implied warranty of merchantability by

¹There may be statutory limitations on a warrantor's ability to modify 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 modify state law implied warranties (but he can specify the remedies for their breach).

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making a change² to it in which the word "merchantability"³ 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 modified the implied
warranty of merchantability in 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.

²N.C.G.S. §25-2-316(2) (1995). Note that where the seller's modification
is in writing, it must be conspicuous. Whether the modification is
"conspicuous" is a question of law for the court. N.C.G.S. §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 modification 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
modification was not "conspicuous," this part of the instruction should not be
given to the jury.

³In addition, implied warranties may also be modified by course of
dealing (N.C.G.S. §25-1-205(1) (1995)), course of performance (N.C.G.S. §25-2-
208(1) (1995)) or usage of trade (N.C.G.S. §25-1-205(2) (1995)). N.C.G.S. §25-
2-316(3)(c) (1995).