

WARRANTIES IN SALES OF GOODS--ISSUE OF SELLER'S DEFENSE OF  
MODIFICATION OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR  
PURPOSE.

The (*state number*) issue reads:

"Did the defendant modify the implied warranty of fitness for  
a particular purpose 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  
fitness for a particular purpose in the sale of the (*name good*) to  
the plaintiff.

A seller modifies<sup>1</sup> the implied warranty of fitness for a

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<sup>1</sup>There 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).

WARRANTIES IN SALES OF GOODS--ISSUE OF SELLER'S DEFENSE OF  
MODIFICATION OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR  
PURPOSE. (Continued).

particular purpose by making a written change<sup>2</sup> to it.<sup>3</sup>

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 fitness for a particular purpose 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.

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<sup>2</sup>N.C.G.S. §25-2-316(2) (1995). Note that the seller's modification must be in writing and 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.

<sup>3</sup>In 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).