

PRODUCTS LIABILITY<sup>1</sup>--SELLER'S<sup>2</sup> AND MANUFACTURER'S<sup>3</sup> DEFENSE OF  
PRODUCT ALTERATION OR MODIFICATION. N.C.G.S. § 99B-3(a).

NOTE WELL: Use this instruction only with causes of action arising before January 1, 1996. For causes of action arising on or after January 1, 1996, use N.C.P.I.--Civil 744.07.

The (state number) issue reads:

"Was the plaintiff's [injury] [death] [damage] proximately caused by an alteration or modification made to the (name product) by someone other than the defendant after it left the defendant's control and [without the defendant's express consent] [not in accordance with the defendant's instructions or specifications]?"

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the

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<sup>1</sup>"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.G.S. § 99B-1(3) (1994). Thus, this defense applies to all product liability actions, whether they sound in contract or in tort.

<sup>2</sup>"Seller" includes "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. 'Seller' also includes a lessor or bailor engaged in the business of leasing or bailment of a product." N.C.G.S. § 99B-1(4). "Seller" may also include consignors and consignees. See N.C.P.I.--Civil 743.05, n. 6.

<sup>3</sup>"Manufacturer" means "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, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part." N.C.G.S. § 99B-1(2).

PRODUCTS LIABILITY--SELLER'S AND MANUFACTURER'S DEFENSE OF  
PRODUCT ALTERATION OR MODIFICATION. N.C.G.S. § 99B-3(a).  
(Continued.)

evidence, four things:

First, that the (*name product*) was altered or modified. A product has been altered or modified if there has been a change in its [design] [function] [formula] [use from that originally designed, tested or intended by the manufacturer] [(*state any other alleged alteration or modification*)]. (An alteration or modification can also occur as a result of someone's failure to observe routine care and maintenance. However, a product is not altered or modified as the result of ordinary wear and tear.)<sup>4</sup>

Second, that someone other than the defendant made the alteration or modification after the (*name product*) left the control of the defendant.<sup>5</sup>

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<sup>4</sup>N.C.G.S. § 99B-3(b).

<sup>5</sup>Whether physical custody over a product has been relinquished may involve issues of agency. If the product remains in the physical custody of an employee or servant or "captive agent," it has not been relinquished. However, if the product has been put into the custody of an independent agent, such as an independent contractor, custody has been relinquished. See N.C.P.I.--Civil 103.10 *et seq.* for instructions in agency.

PRODUCTS LIABILITY--SELLER'S AND MANUFACTURER'S DEFENSE OF  
PRODUCT ALTERATION OR MODIFICATION. N.C.G.S. § 99B-3(a).  
(Continued.)

Third, [that the defendant did not expressly consent<sup>6</sup> to such alteration or modification] [that such alteration or modification was not in accordance with the defendant's instructions and specifications].

Fourth, that such alteration or modification was a proximate cause of the plaintiff's [injury] [death] [damage]. Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [death] [damage], and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [death] [damage] or some similar injurious result. There may be more than one proximate cause of [an injury] [a death] [damage]. Therefore, the defendant need not prove that the alteration or modification was the sole proximate cause of the [injury] [death] [damage]. The defendant must prove, by the greater weight of the evidence, only that the alteration or modification was a proximate cause.

Finally, as to this issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the plaintiff's [injury] [death] [damage] was proximately caused by an alteration or modification made to the (*name product*) by someone other than the defendant after it left

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<sup>6</sup>Silence is not ordinarily a manifestation of express consent. See Restatement (Second) of Contracts § 72 (1981).

PRODUCTS LIABILITY--SELLER'S AND MANUFACTURER'S DEFENSE OF  
PRODUCT ALTERATION OR MODIFICATION. N.C.G.S. § 99B-3(a).  
(Continued.)

the defendant's control and [without the defendant's express  
consent] [not in accordance with the defendant's instructions or  
specifications], 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.