

741.16 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
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.

1. 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).

2. N.C. Gen. Stat. § 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. Gen. Stat. § 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.

3. In addition, implied warranties may also be modified by course of dealing (N.C. Gen. Stat. § 25-1-303(b)), course of performance (N.C. Gen. Stat. § 25-1-303(d)) or usage of trade (N.C. Gen. Stat. § 25-1-303(c)). For detail on exclusion or modification of warranties see N.C. Gen. Stat. § 25-2-316.