

741.67 IMPLIED WARRANTIES¹ - THIRD PARTY RIGHTS OF ACTION
(VERTICAL)² AGAINST MANUFACTURERS.³

NOTE WELL: This instruction should be used where the plaintiff's right to sue is being challenged on the ground of lack of privity with the defendant.

The (*state number*) issue reads:

"Did the defendant's [implied warranty of merchantability] [implied warranty of fitness for a particular purpose] [implied warranty created by [course of dealing] [usage of trade]] extend⁴ 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 plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, three things:

First, that the plaintiff bought the (*name good*).⁵

Second, that the defendant is a manufacturer. A manufacturer is 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. ("Manufacturer" includes a seller owned in whole or significant part by the manufacturer, or a seller owning the manufacturer in whole or significant part.)⁶

Third, that the defendant manufactured the (*name good*).⁷

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that

the defendant's [implied warranty of merchantability] [implied warranty of fitness for a particular purpose] [implied warranty created by [course of dealing] [usage of trade]] extends to the plaintiff, 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.

1. This instruction should only be used in connection with implied warranty claims. N.C. Gen. Stat. § 99B-2(b) does not apply to express warranties.

2. "Vertical" rights of action by third parties typically refer to circumstances where, for example, a manufacturer sells a product to a retailer who, in turn, sells it to a consumer. The retailer and consumer are in vertical privity of contract since they dealt with each other. The manufacturer and consumer are, however, "strangers." While the manufacturer and consumer are not in vertical privity, they are both members of the vertical chain of distribution for the product. Under some circumstances, the law makes such third party strangers the beneficiaries of contracts between manufacturers and their vendees. This instruction should be used to determine which circumstances create such third party rights and which do not.

3. This instruction does not apply to third party rights against "sellers." Existing law covers the situation where the plaintiff buyer seeks to sue his immediate seller. However, where the plaintiff buyer seeks relief from his immediate seller's vendor (a wholesaler, perhaps), there is a lack of vertical privity and a contract-oriented cause of action will fail. N.C. Gen. Stat. § 99B-2(b) eliminates the vertical privity requirement only where the defendant is a "manufacturer" as opposed to a "seller." A "seller" is 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. N.C. Gen. Stat. § 99B-1(3).

4. N.C. Gen. Stat. § 99B-2(b) provides that "A claimant who is a buyer, as defined in the Uniform Commercial Code, of the product involved . . . may bring a product liability action against the manufacturer of the product involved for breach of implied warranty. . . ." This provision excuses the "vertical privity" requirement in certain limited circumstances. Thus, it is proper to ask whether the manufacturer's implied warranty "extends" to someone beyond his immediate vendor. Before this issue can be determined, however, it must be resolved whether the manufacturer has given an implied warranty.

5. A person is the buyer of a product when he buys or contracts to buy the product. N.C. Gen. Stat. § 25-2-103(1)(a). The product must be a good. N.C. Gen. Stat. § 25-2-105.

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N.C. Gen. Stat. § 99B-2(b)

6. N.C. Gen. Stat. § 99B-1(2).

7. N.C. Gen. Stat. § 99B-2(6) specifies that the plaintiff has the right to bring a product liability action "against the manufacturer of the product involved. . .".