

3105 INSURANCE CONTRACT: FAILURE OF CONDITION OR BREACH OF PROMISSORY WARRANTY

The policy issued by the insurance company provides (recite the condition or promissory warranty contained in the policy). The first question of the verdict merely inquires whether there was (a failure of this condition or breach of this promissory warranty) that existed at the time of the loss in question, and in this case specifically whether there was (a failure to have a night watchman on the premises, there were inflammables stored on the premises) at the time the (fire occurred) (loss was sustained).

If you have answered the first question finding a failure of this condition of the policy in existence at the time of the loss, then you will answer the second question which I have just read to you. The word "risk" refers to the risks the company insured against in its policy. Risk is increased whenever the chance of loss is increased by a failure of the condition or breach of promissory warranty.

If you have answered the first question finding a failure of this condition of the policy, then you will answer this second question which I have just read to you. "To contribute to the loss" means simply whether the (use of the premises for storage of inflammables) was a factor contributing to the loss. This does not mean that (the prohibited storage of inflammables) has to be the sole cause of the fire or even a cause of the fire itself. Any contribution whether great or small to the loss or the extent of the loss that (the storage of inflammables) had is sufficient.

COMMENT

This instruction and comment were approved by the Committee in 1980. Editorial changes were made in 1994. No substantive changes were made to the instruction.

Wis. Stat. § 631.11(3) (1977). The burden of proof is upon the insurance company as to all questions and it is the middle burden. See Wis JI-Civil 210.

Warranties are of two kinds, affirmative and promissory. Failures of condition and breach of promissory warranty are closely related and for most purposes can be treated as synonymous. Promissory warranties are those that require that something shall or shall not be done after the policy takes effect. Therefore, the above instruction is framed in terms of failure to have a night watchman on the premises and storage of inflammables so as to give examples of what breach of promissory warranty or condition might give rise to the "increase in risk" and "contribution to the loss" the statute speaks of.

This instruction is patterned after Wis. Stat. § 631.11(3) and in part on Polar Mfg. Co. v. Integrity Mut. Ins. Co., 7 Wis.2d 443, 96 N.W.2d 822 (1959).