1023.6 NEGLIGENCE OF INSURANCE AGENT

An insurance agent, such as (defendant), must use the degree of care, skill, and judgment which is usually exercised under the same or similar circumstances by insurance agents licensed to sell insurance in Wisconsin.

While there is no duty to advise the policy holder of coverages available, the agent must use reasonable skill and diligence to put into effect the insurance coverage requested by his or her policy holder, act in good faith towards that policy holder, and inform him or her of the minimum statutory requirements. A failure on the agent's part to use that skill or diligence constitutes negligence.

[If evidence as to a special relationship is shown, then add the following:

(Plaintiff) contends that a special relationship existed between (him)(her) and (defendant).

If a special relationship did exist, then _____ had the duty to advise _____ about the types of insurance coverages that would be available to (him)(her) and the amount of insurance coverage that would be appropriate for (him)(her).

In determining whether a special relationship existed, you should consider the following factors:

1. Whether (defendant) held (himself)(herself) out to the public as a skilled insurance advisor or consultant;
2. Whether (defendant) took it upon (himself)(herself) to actually advise (plaintiff) on the coverages (plaintiff) should have beyond the usual relationship of agent and policy holder;
3. Whether the policy holder relied on the agent's expertise;

4. Whether an additional fee was paid to the agent for special consultation and advice; and

5. Whether there was a long established relationship of entrustment between the agent and the insured.

If you find that a special relationship existed between (plaintiff) and (defendant), then (defendant) had the duty to advise (plaintiff) about available insurance coverages and recommend the appropriate amount of insurance coverage necessary to protect the insured.]

[If contributory negligence is an issue, then give the following:

An insured, such as (plaintiff), has a duty to use ordinary care when purchasing an insurance policy. Ordinary care is that degree of care that a reasonably prudent person would use under the same or similar circumstances.

When purchasing a policy, an insured must advise his or her agent of the type of insurance wanted, including the limits of the policy to be issued. An insured must read the policy once it is delivered to determine whether it provides the insurance coverage requested. However, an insured is not bound to comprehend every term and condition in the policy. An insured is only required to act as a reasonably prudent person would act under the same or similar circumstances. A failure to exercise ordinary care by the insured constitutes negligence.]

COMMENT

This instruction was approved by the Committee in 1992. The comment was updated in 1995, 2016, and 2021.

The general duty of care of an insurance agent does not include a duty to advise a prospective policy holder regarding the availability or adequacy of certain types of coverages, including underinsured motorist coverage. Nelson v. Davidson, 155 Wis. 2d 674, 680-82, 456 N.W.2d 343 (1990). Only paragraphs 1 and 2 apply to a case premised upon an insurance agent's failure to procure coverage that a client actually requested the agent to procure. See Appleton Chinese Food v. Murken Ins., 185 Wis.2d 791, 519 N.W.2d 674 (1994).

Absent a special relationship, an agent's sole duty is to act in good faith, carry out the insured's instructions, and mention minimum statutory requirements. Nelson, at 681-82, Tackes v. Milwaukee Carpenters Health Fund, 164 Wis.2d 707, 476 N.W.2d 311 (Ct. App. 1991).

To constitute a special relationship between the parties, the agent must have assumed the role of a highly skilled consultant. Nelson, at 683-84.

The agent has no duty to advise a prospective insured regarding the availability of higher uninsured motorist limits than selected by the insured. The policy holder determines whether additional protection is necessary and whether to pay higher premiums for that additional coverage. Meyer v. Norgaard, 160 Wis.2d 794, 467 N.W.2d 141 (Ct. App. 1991), rev. denied.

Negligence; Standard of Care. See the comment to Wis JI-Civil 1005.

Negligence; Causation. In order to establish causation, the plaintiff bears the burden of proving that the defendant's negligence was a substantial factor in causing the plaintiff's harm. See Wis JI-Civil 1500. In a negligent procurement claim, commercial availability of an insurance policy is a necessary condition to a successful claim. However, commercial availability does not fully answer whether the desired policy was available within the meaning of the "substantial factor" test and is therefore insufficient to establish causation. See Camper Corral v. Alderman, 2020 WI 46, ¶36, 391 Wis. 2d 674, 943 N.W.2d 513. In other words, without evidence that an insurer would have written a policy with the requested terms, for that particular insured, "it is not possible to say" that the insurance agent's negligence in procuring the desired coverage was a substantial factor in causing the loss. Id. at ¶36.