

**3100 INSURANCE CONTRACT: MISREPRESENTATION OR BREACH OF AFFIRMATIVE WARRANTY BY THE INSURED**

The first question in the verdict calls upon you, the jury, to determine whether the statement made and inquired about in the question was false. (A representation) (An affirmative warranty) is a statement of fact made in connection with the negotiation or procurement of an insurance policy. Such (representations) (affirmative warranties) must be true.

[If you answer the first question "yes," and thus find that the representation was false, the second question calls upon you to determine if (name of the person making the statement) knew or should have known that the representation was false.

[The (third) question requires you to determine if (insurer) had knowledge of the true or correct fact regarding (summarize false statement made in negotiating or procuring the insurance policy) at the time it issued the policy. Knowledge of an agent of the company constitutes knowledge in the company of the true or correct fact. [Caution - See Wis. Stat. § 631.11(4)(a) - knowledge of agent is not constructive knowledge to company if application is in insured's handwriting.] You will, therefore, determine whether an agent or the company had knowledge of the true fact, whether obtained from the applicant for insurance or from other sources at the time the policy was issued.]

The (fourth) question asks you to determine if the fact that was allegedly (misrepresented) (falsely warranted) contributed to the loss that was incurred.

The (fifth) question asks whether (the insurer) relied upon the statement made by (insured) in negotiating or procuring the insurance policy. An insurer relies upon the statement when the insurer acts on a statement believing it to be true.

The (sixth) question asks whether the statement made is material to a determination to issue a policy and insure a risk such as those at issue here. A statement is material when it has a significant bearing upon an insurer's decision to insure the risks the policy is to cover.

The (seventh) question asks whether there was "intent to deceive." The word "intent" has been defined as a mental attitude made known by acts and, also, as a state of mind which precedes or accompanies an act. To "intend" means a present intention to do something. To "deceive" means to ensnare or mislead; to cause to believe the false or disbelieve the truth.

**SPECIAL VERDICT (UNDER WIS. STAT. § 631.11(2))**

Question 1: Did (plaintiff) make a false (representation) (affirmative warranty) to the effect that (recite alleged representation or warranty made) in negotiating for or procuring the insurance policy?

Answer: \_\_\_\_\_

Yes or No

[Include the next question only in actions commenced after May 6, 1996, and only if the statement involved is a representation and not an affirmative warranty. See Comment below.]

Question 2: If you have answered question 1 "yes," then answer this question: Did (plaintiff) know, or should (plaintiff) have known, that this representation was false?

Answer: \_\_\_\_\_

Yes or No

**[Committe Note: Include the next question only in actions involving the insurer's knowledge of the true facts. See Comment below.]**

Question 3: If you have answered (Question 1) (Questions 1 and 2) "yes," then answer this question: Did (insurer) have knowledge of the true fact regarding (recite the representation or affirmative warranty made) at the time it issued the policy?

Answer: \_\_\_\_\_

Yes or No

Question 4: If you have answered (Question 3 "no" and) (Question 1) (Questions 1 and 2) "yes," then answer this question: Did the true fact regarding (recite the representation or affirmative warranty made) contribute to the loss sustained?

Answer: \_\_\_\_\_

Yes or No

Question 5: If you have answered (Question 3 "no" and) (Question 1) (Questions 1 and 2) "yes," then answer this question: Did the (insurer) rely upon the (representation) (affirmative warranty) made by (plaintiff)?

Answer: \_\_\_\_\_

Yes or No

Question 6: If you have answered question 5 "yes," then answer this question: Was the (representation) (affirmative warranty) material to the determination by (insurer) to issue coverage such as that offered by the policy?

Answer: \_\_\_\_\_

Yes or No

Question 7: If you have answered question 5 "yes," then answer this question: Was such (representation) (affirmative warranty) made by (plaintiff) with intent to deceive (insurer)?

Answer: \_\_\_\_\_

Yes or No

#### COMMENT

This instruction and comment were revised in 1998. The revisions constitute a revamping of the old Civil JI-3100, approved in 1980.

Wis. Stat. § 631.11(1) relieves an insurance company of its obligations under an insurance policy if information supplied by the insured during the negotiation or procurement of the policy (1) appears in the stated format, (2) constitutes a misrepresentation or breach of an affirmative warranty, and (3) has the specified effect.

**The Format.** Wis. Stat. § 631.11(1)(a) states that representations or warranties made in negotiating or procuring an insurance policy may not be used by the insurer to escape its obligations under the policy unless they are stated in the policy, in the application for the policy (and the application is attached to the policy), or in a written communication provided by the insurer to the insured within 60 days after the effective date of the policy.

**Misrepresentation or Breach of an Affirmative Warranty.** Wis. Stat. § 631.11(1)(b) states that only a misrepresentation or a breach of an affirmative warranty made by a person other than the insurer or an agent of the insurer will affect the insurer's obligations under the policy; however, for actions commenced after May 6, 1996, a misrepresentation qualifies only if the person knew or should have known that the representation was false. Generally, the determination as to whether a statement is a representation or affirmative warranty is a matter of law to be determined by the trial judge.

A representation is a statement that precedes the contract of insurance (and is not part of the contract unless otherwise stipulated) and that relates to the facts needed by the insurer to decide whether it will accept the risk, and at what premium. Lee R. Russ and Thomas F. Segalla, *Couch on Insurance* 3d, 81:5 (1996). An affirmative warranty, on the other hand, is a statement of fact that appears in the insurance contract and is a condition precedent to the validity of that contract. *Id.* at 81:13. If there is some doubt as to the nature of a

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statement, and if the contract itself does not make a designation, the statement should be construed as a representation. *Id.* at 81:28. In terms of the formats allowed by Wis. Stat. § 631.11(1)(a), it could be said that representations will generally appear in the application for the policy or in a written communication provided by the insurer to the insured within 60 days after the effective date of the policy and affirmative warranties will generally appear in the policy itself.

In the event the issue is raised that the company gained knowledge of the misrepresentation or breach of an affirmative warranty, then the trial judge must ask the jury when the company learned of the misrepresentation or breach of an affirmative warranty. Under Wis. Stat. § 631.11(4)(a), the false statement does not affect the insurer's obligations if, at the time the policy is issued, the insurer has knowledge of the true facts. Wis. Stat. § 631.11(4)(b) provides that if, after issuance of a policy, the company acquires knowledge of sufficient facts to rescind or constitute a general defense to all claims under the policy, the defenses are not available unless the company notifies the insured within 60 days after acquiring such knowledge of its intention to defend against a claim if one should arise (or within 120 days if it is deemed necessary by the insurer to secure additional medical information). Under Wis. Stat. §§ 631.09(1) and 631.11(4)(a), an insurer is deemed to know any material fact that is known by an agent of the insurer who is involved with the transaction unless the application is in the handwriting of the applicant.

Note also two related situations to which Wis. Stat. § 631.11(1) does not apply. Where the misrepresentation relates to the information contained in the "proof of loss," as opposed to the application, see *Tempelis v. Aetna Casualty & Surety Co.*, 164 Wis.2d 17, 27, 473 N.W.2d 549 (Ct. App. 1991), in which the Third District Court of Appeals held that the language of § 631.11(2) [renumbered § 631.11(1)(b)] ". . . applies a reliance requirement only to misrepresentations made in the negotiation or application for insurance." Also, breach of a promissory warranty is governed by Wis. Stat. § 631.11(3). See Wis JI-Civil 3105. A promissory warranty is an obligation that remains in effect for the duration of the policy.

**The Effect.** To relieve an insurer of its obligations under the policy, the fact that is falsely stated must (1) contribute to the loss, or (2) be relied upon by the company, and must be either (a) material, or (b) made with intent to deceive. Thus, if the insured's misrepresentation or false affirmative warranty during the negotiation or procurement of the policy is made with "intent to deceive," and it is relied upon by the company, there need be neither materiality of the misrepresentation or false affirmative warranty nor contribution to the loss by the fact misrepresented or falsely warranted to relieve the company of its obligations under the contract. Likewise, if the fact misrepresented or falsely warranted contributes to the loss (for example, the loss is a fire and the insured had falsely claimed to have a sprinkler system), there need be neither materiality nor intent to deceive.

**Verdict.** A verdict should be prepared to cover: (1) whether there was a misrepresentation or breach of affirmative warranty; (2) whether, if there was a misrepresentation, it was known or should have been known by the applicant for actions commenced after May 6, 1996; (3) whether, if there was a relevant false statement, the insurer knew the true facts; whether, if there was a relevant false statement and the insurer did not know the true facts; (4) the fact misrepresented or falsely warranted contributed to the loss, or (5) the company relied on the misrepresentation or affirmative warranty; and whether the relied upon misrepresentation or affirmative warranty was (6) material to the company's decision to issue the policy or (7) made with intent to deceive. As indicated above, to relieve an insurer of its obligations under the policy, the jury must answer "yes" to question 1 and any question 2, and must answer "no" to any question 3, at which point it is sufficient for the jury to:

Answer "yes" to question 4,

or

Answer "yes" to question 5 and answer "yes" to either question 6 or question 7.

Thus, the verdict could be structured so that the jury need answer no further questions if the insurer prevails on either question 4 or questions 5 to 7. However, the Committee decided that the jury should answer all questions in the interest of judicial economy in case any part of the verdict is challenged.

Also note that not all cases will require inquiry into all statutory elements, so the verdict questions should relate only to the issues disclosed by the evidence, and only those portions of the above instructions that relate to the questions that are ultimately in the verdict should be used.

**Burden of Proof.** The burden of proof as to all questions covered by the instruction is upon the insurance company and is the middle burden. See Wis JI-Civil 210.