

870.00 FAILURE TO PROCURE INSURANCE - NEGLIGENCE ISSUE.¹

The (*state number*) issue reads:

"Did the plaintiff suffer loss as a result of the defendant's negligent failure to procure insurance for 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 defendant [agent] [broker] undertook to procure insurance against a designated risk for the plaintiff.

Second, that the defendant failed to [use reasonable care to procure the requested insurance] [give timely notice to the plaintiff that *he* was unable to procure the requested insurance].

And Third, that the plaintiff suffered loss as a proximate result of the defendant's failure to procure the requested insurance.²

When an insurance [agent] [broker] undertakes to procure insurance for a customer to afford protection against a designated risk, the law imposes upon the [broker] [agent] a duty to use reasonable care to procure such insurance.³ If the [agent] [broker] is unable to procure the insurance *he* has undertaken to obtain, then *he* has a duty to give timely notice to *his* customer, the proposed insured, so that the customer may secure the insurance elsewhere or take other steps to protect *his* interests.⁴

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 [agent] [broker] undertook to procure insurance

against a designated risk for the plaintiff, and that the defendant failed to [use reasonable care to procure such insurance] [give timely notice to the plaintiff that *he* was unable to procure the requested insurance]; and that the plaintiff suffered loss as a proximate result of the defendant's failure to procure insurance for *him*, 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. In cases dealing with failure to procure insurance, plaintiff may sue on a negligence or breach of contract theory. See, e.g., *Johnson v. George Tenuta & Co.*, 13 N.C. App. 375, 379, 185 S.E.2d 732, 739 (1972) (citing *Bank v. Bryan*, 240 N.C. 610, 612, 83 S.E.2d 485, 487 (1954)); *Wiles v. Mullinax*, 267 N.C. 392, 395, 148 S.E.2d 229, 232 (1966); *Olvera v. Charles Z. Flack Agency, Inc.*, 106 N.C. App. 193, 196, 415 S.E.2d 760, 762 (1992). For breach of contract, see N.C.P.I.-Civil 870.10.

2. See *Mayo v. American Fire & Casualty Co.*, 282 N.C. 346, 192 S.E.2d 828 (1972); *Wiles*, 267 N.C. 392, 148 S.E.2d 229. "In determining whether an agent has undertaken to procure a policy of insurance, a court must look to the conduct of the parties and the communications between them, and more specifically to the extent to which they indicate that the agent has acknowledged an obligation to secure a policy." *Olvera*, 106 N.C. App. at 196, 415 S.E.2d at 762 (1992) (quoting *Alford v. Tudor Hall & Assoc.*, 75 N.C. App. 279, 330 S.E.2d 830, *disc. review denied*, 315 N.C. 182, 337 S.E.2d 855 (1985)). For instructions on issues of negligence and proximate cause, see N.C.P.I.-Civil 102.11 and 102.19, respectively.

3. See *Mayo*, 282 N.C. at 353, 192 S.E.2d at 832; *Wiles*, 267 N.C. at 395, 148 S.E.2d at 232; *Baldwin v. Lititz Mut. Ins. Co.*, 99 N.C. App. 559, 561, 393 S.E.2d 306, 307 (1990). For a discussion of the boundaries of the duty of reasonable care in the insurance procurement context, see *Cobb v. Penn. Life Ins. Co.*, ___ N.C. App. ___, 715 S.E.2d 541 (2011). "[T]he law imposes on [the insurance agent] the duty to use reasonable skill, care and diligence to procure . . . insurance." *Id.* at ___, 715 S.E.2d at 548 (quoting *White v. Consol. Planning Inc.*, 166 N.C. App. 283, 301, 603 S.E.2d 147, 160 (2004)). However, the insurance agent "does not have a duty to advise the individual of other types of insurance coverage for which he is eligible, if that information is not requested." *Id.* (quoting *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 255, 552 S.E.2d 186, 191 (2001)). Nor does he have a duty "to inquire and inform the policyholder of all aspects of his policy," or "to explain the meaning of every provision in a policy." *Id.* (citing *Bentley v. N.C. Ins. Guar. Ass'n*, 107 N.C. App. 1, 14, 418 S.E.2d 705, 712 (1992)).

However, an insurance agent does have "a limited fiduciary duty to the insured" that consists of "correctly nam[ing] the insured in the policy and correctly advis[ing] the insured of the nature and extent of his coverage under the policy." *Id.* (citing *Phillips v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 (1998)). To show that

N.C.P.I.-Civil. 870.00
FAILURE TO PROCURE INSURANCE - NEGLIGENCE ISSUE.
GENERAL CIVIL VOLUME
JUNE 2013

the agent had an implied affirmative duty to advise, the insured must show that "(1) the agent received consideration beyond mere payment of the premium; (2) the insured made a clear request for advice; or (3) there is a course of dealings over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice [was] being sought and relied on." *Id.* (quoting *Bigger v. Vista Sales and Mktg., Inc.*, 131 N.C. App. 101, 104, 505 S.E.2d 891, 893 (1998)).

4. *Baldwin*, 99 N.C. App. at 561, 393 S.E.2d at 307 (1990); see *Wiles*, 267 N.C. at 395, 148 S.E.2d at 232; *Olvera*, 106 N.C. App. at 195, 415 S.E.2d at 762.