

880.26 CONCEALMENT IN APPLICATION FOR NON-MARINE INSURANCE.<sup>1</sup>

The (*state number*) issue reads:

"Did the [plaintiff] [defendant] intentionally conceal a material fact in applying for the policy of insurance?"

On this issue the burden of proof is on the [plaintiff] [defendant] insurance company. This means that the insurance company must prove, by the greater weight of the evidence, that the [plaintiff] [defendant] intentionally concealed a material fact in applying for the policy of insurance.

The law provides that the concealment of a fact from an insurance company will [prevent a recovery on the policy] [entitle the insurance company to rescind the policy] if the fact is material and the concealment of that fact was intentional. A fact is material if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the insurance company either in making the insurance contract, in estimating the degree and character of the risk, or in establishing the premium.<sup>2</sup> A concealment is intentional<sup>3</sup> if the applicant knew that the fact concealed was material and concealed it with the purpose of deceiving the insurance company. Where an applicant believes in good faith that the information does not have to be disclosed or believes in good faith that it is not material, *he* has not intentionally concealed a material fact.

Finally, as to this (*state number*) issue on which the [plaintiff] [defendant] insurance company has the burden of proof, if you find, by the greater weight of the evidence, that the [plaintiff] [defendant] intentionally concealed a material fact in applying for the policy of insurance, then it would be your duty to answer this issue "Yes" in favor

of the [plaintiff] [defendant] insurance company. If, on the other hand, you fail so to find,

then it would be your duty to answer this issue "No" in favor of the [plaintiff] [defendant].

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1. Although a few North Carolina cases make passing reference to concealment together with misrepresentations, concealment specifically relates to the intentional withholding of any fact material to the risk which the insured in good faith should communicate to the insurer. See generally 12A-265 Appleman on Insurance § 7271 (explaining what constitutes concealment). Very few North Carolina cases make express reference to the doctrine. *But cf. Royal Exch. Assurance v. Fraylon*, 228 F.2d 351, 353 (4th Cir. 1955) (discussing concealment of a material fact and applying North Carolina law). American common law, however, is well settled that *scienter* must be shown in concealment cases (as set forth in this instruction) involving non-marine insurance policies. See generally 12A-265 Appleman on Insurance § 7274 (stating the general rule). Concealment in marine insurance cases does not require a showing of *scienter*, only of materiality. See 12A-265 Appleman on Insurance § 7271 (distinguishing contracts of marine insurance).

Where the applicant is himself an expert, the threshold of disclosure is lower. See, e.g., *Keeton, Insurance Law* at § 327.

2. See, e.g., *Tolbert v. Mutual Ben. Life Ins. Co.*, 236 N.C. 416, 418, 72 S.E.2d 915, 917 (1952); *Carroll v. Carolina Cas. Ins. Co.*, 227 N.C. 456, 458, 42 S.E.2d 607, 608 (1947); *Wells v. Jefferson Standard Life Ins. Co.*, 211 N.C. 427, 429, 190 S.E. 744, 745 (1937); *Cockerham v. Pilot Life Ins. Co.*, 92 N.C. App. 218, 221, 374 S.E.2d 174, 177 (1988). See generally 12A-265 Appleman on Insurance § 7273 (discussing materiality of concealment).

3. For an instruction on intent, see N.C.P.I.-Civil 101.46.