

N.C.P.I.-Civil. 910.26
FIRE INSURANCE POLICY - WILLFUL MISREPRESENTATION IN
APPLICATION.
GENERAL CIVIL VOLUME
MAY 2006

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NOTE WELL: There is a conflict in appellate decisions regarding whether N.C. Gen. Stat. § 58-3-10 or N.C. Gen. Stat. § 58-44-16 governs misrepresentations in fire insurance policy applications. The former, governing misrepresentations in insurance applications generally, provides that a representation "in any application for a policy of insurance" shall "not prevent a recovery on the policy" unless (it is false¹ and) "material or fraudulent."² The latter, which sets forth the standard policy provisions for all policies and contracts of fire insurance, except contracts of automobile fire, theft, comprehensive and collision, marine and inland marine insurance,³ contains the additional element that the misrepresentation be "willful."⁴

Appellate decisions have conflicted on whether N.C. Gen. Stat. § 58-3-10 governs all insurance policy applications, including applications for policies of fire insurance, or whether the language of N.C. Gen. Stat. § 58-44-16 governs fire insurance policy applications as well as subsequent claims and filing of proof of loss forms under policies of fire insurance.⁵

The current instruction includes the "willful" language from N.C. Gen. Stat. § 58-44-16. To instruct under N.C. Gen. Stat. § 58-3-10, use N.C.P.I.-Civil 880.14, 880.15 and 880.20 as appropriate. For cases involving post-application misrepresentations, use N.C.P.I.-Civil 910.27.

The (state number) issue reads:

"Did the [plaintiff(s)] [defendant(s)]⁶ in applying for the insurance policy willfully misrepresent that (*describe alleged misrepresentation*)?"

On this issue the burden of proof is on the [plaintiff] [defendant] insurance company.⁷ This means that the insurance company must prove,

by the greater weight of the evidence, that the [plaintiff(s)] [defendant(s)] willfully misrepresented (*describe alleged misrepresentation*).

The law provides that a representation made by an applicant in applying for a policy of fire insurance will [prevent a recovery on the policy][entitle the insurance company to rescind the policy] if it is false and material and was made willfully by the applicant.⁸

The law does not require that representations in an application be literally true and accurate in every respect. A representation is not considered under the law to be false if it is substantially true. Thus, if you find that the representation was substantially true, you should answer this issue "No."

If you find that the representation was false, you must then consider whether it was made willfully. A statement is made willfully if it is made deliberately and intentionally⁹, while knowing it to be false.¹⁰ An honest mistake does not amount to a willful misrepresentation even if it is negligently made. A false statement made by the insured does not [prevent a recovery on the policy] [entitle the insurance company to rescind the policy] unless it was made willfully.

If you find that the [plaintiff(s)] [defendant(s)] willfully made a false representation, you must separately consider in Issue No. ____ whether that false representation was material.¹¹

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(s)] [defendant(s)] willfully misrepresented that (*describe alleged misrepresentation*), then it

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would be your duty to answer this issue "Yes" in favor of the [plaintiff] [defendant] insurance company and proceed to consider Issue No. ____.¹²

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 [plaintiff(s)] [defendant(s)].

1. This element, while not specifically set forth in the statute, is necessarily implied.

2. N.C. Gen. Stat. § 58-3-10. See also N.C.P.I.-Civil 880.14 (Misrepresentation in Application for Insurance-Factual Dispute), 880.15 (Misrepresentation in Application for Insurance-Issue of Falsity of Representation), and 880.20 (Materiality of Misrepresentation in Application for Insurance).

3. See N.C. Gen. Stat. § 58-44-16(b).

4. N.C. Gen. Stat. § 58-44-16 requires the following provision as standard in a policy of fire insurance:

"This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material facts or circumstances concerning this insurance or the subject thereof, or the interest of the insured therein, or in any case of fraud or false swearing by the insured relating thereto."

5. The North Carolina Supreme Court "left undisturbed and *stand[ing]* without precedential value" a North Carolina Court of Appeals decision which had held that misrepresentations in fire insurance policy applications were governed by N.C. Gen. Stat. § 58-44-15. *Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 609, 572 S.E.2d 781, 781 (emphasis added)(citing 147 N.C. App. 455, 458, 556 S.E.2d 30, 33 (2001)). In its decision, the Court of Appeals acknowledged a prior decision of that Court holding that N.C. Gen. Stat. § 58-3-10 governed fire insurance policy applications, see *Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 799, 487 S.E.2d 157, 159-60 (1997), but stated it was required to defer to an even earlier N.C. Supreme Court decision in *Hayes v. United States Fire Ins. Co.*, 132 N.C. 702, 703-04, 44 S.E. 404, 404 (1903) which it construed as conflicting with *Metropolitan*, see *Crawford*, 147 N.C. App. at 458-59, 556 S.E.2d at 33. However, the dissent in *Crawford* disagreed on both points, maintaining the "issue ha[d] never been squarely addressed by the Supreme Court and that [*Metropolitan*] [wa]s the law in North Carolina." *Id.* at 462-63, 556 S.E.2d at 35.

6. The part(y)(ies) referenced here (is) (are) the insured whether in the capacity of plaintiff(s) or defendant(s).

7. In this context, the burden of proof will always be on the insurer, whether in the capacity of plaintiff or defendant.

8. See *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 370, 329 S.E.2d 333, 338 (1985) (explaining that the insurance company must prove the insureds' statements

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were: (1) false, (2) material, and (3) knowingly and willfully made); *Pittman v. Nationwide Mut. Fire Ins. Co.*, 79 N.C. App. 431, 433, 339 S.E.2d 441, 443 (1986).

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

10. See *Bryant*, 313 N.C. at 374, 329 S.E.2d at 341 (citing 12A-266 Appleman on Insurance § 7300).

11. Use N.C.P.I.-Civil 880.20.

12. See *supra* note 11.