

FAILURE TO PROCURE INSURANCE--BREACH OF CONTRACT ISSUE.¹

The (*state number*) issue reads:²

"Did the defendant breach *his* contract to procure insurance for the plaintiff?"³

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, that the defendant breached the contract by failing to [use reasonable care to procure the agreed-upon insurance] [give timely notice to the plaintiff that he was unable to procure the agreed-upon insurance].

A breach of contract is a violation or nonfulfillment of the obligations, agreements or duties imposed by the contract. A breach occurs when a party without legal excuse fails to perform any duty which is all or part of the contract.

¹Where an insurance broker or agent becomes liable to his customer for failure to procure insurance, the latter may sue for breach of contract or for negligent default. 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 negligence issue, see N.C.P.I.--Civil 870.00. Because there is little discussion in North Carolina cases about the breach of contract issue, the language in this instruction has been adapted largely from cases involving negligent failure to procure insurance.

²If a dispute exists as to whether or not there was a contract to procure the insurance, then a preliminary issue to determine that question should be submitted to the jury. See N.C.P.I.--Civil 501.01

³See *Olvera v. Charles Z. Flack Agency, Inc.*, 106 N.C. App. 193, 197, 415 S.E.2d 760, 763 (1992) (finding sufficient evidence of a contract where the agency agreed to transfer the policy to the plaintiff's name and accepted payment as consideration for the policy); see also *Johnson*, 13 N.C. App. 375, 185 S.E.2d 732 (affirming directed verdict based on insufficient evidence to establish a contract).

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(Continued.)

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

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 breached the contract to procure insurance by failing to [use reasonable care to procure the agreed-upon insurance] [give timely notice to the plaintiff that *he* was unable to procure the agreed-upon insurance], 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.