

MISREPRESENTATION IN APPLICATION FOR INSURANCE--ISSUE OF FALSITY
OF REPRESENTATION.

The (*state number*) issue reads:

"Was the representation false?"

On this issue the burden of proof is on the [plaintiff]
[defendant]¹ insurance company. This means that it must prove,
by the greater weight of the evidence, that the representation
was false.

The law² provides that a representation in an application
for a policy of insurance will [prevent a recovery on the policy]
[entitle the insurance company to rescind the policy] if it is
false and material.³ If you find that the representation was
false, you must separately consider in Issue No. ____ whether the
false representation was material.⁴

¹A misrepresentation issue may come up as a defense by an insurance
company to an action brought on the policy or as a basis on which to support
an affirmative action brought by the company to rescind the policy. In either
case, the misrepresentation issue must be raised before any applicable
incontestable period has elapsed. Also, in either case, the burden of proof
is on the insurance company.

²N.C.G.S. § 58-3-10.

³N.C.G.S. § 58-3-10 provides that the misrepresentation must be either
"material or fraudulent". Since proof of fraud ordinarily would seem more
difficult than proof of materiality, this instruction is framed purely in
terms of materiality. If, however, the contention is that the representation
was fraudulent, this issue should be rewritten to substitute the word
"fraudulent" for the word "material". Although the question does not appear
to have been resolved in North Carolina, it seems doubtful that a fraudulent
but immaterial misrepresentation is actually contemplated by the statute.
See, e.g., 12A-264 Appleman on Insurance § 7255 (explaining that a policy may
be avoided where the misrepresentation is material to the risk, particularly
when it is both material and fraudulent); *Johnson v. Nat'l Life Ins. Co.*, 144
N.W. 218 (Minn. 1913).

⁴For an instruction on materiality, see N.C.P.I.--Civil 880.20.

MISREPRESENTATION IN APPLICATION FOR INSURANCE--ISSUE OF FALSITY
OF REPRESENTATION. (Continued.)

A representation is false if it is untrue. However, the law does not require that a representation be literally true and accurate in every respect. A representation is not considered under the law to be false if it is substantially true.

In determining whether a representation is false, you may consider the nature of the question asked in the application. Questions are to be interpreted from the perspective of a reasonable person. Whether answers to those questions should be considered false should also be considered from the perspective of a reasonable person. The law imposes the duties of fair dealing and good faith in answering questions on an application. But it does not require that applicants have expert knowledge or skill to answer every question in such a way that the insurance company will have all the facts it might want to have.

NOTE WELL: *Following are some examples of how answers to questions frequently litigated might be considered in a*

MISREPRESENTATION IN APPLICATION FOR INSURANCE--ISSUE OF FALSITY
OF REPRESENTATION. (Continued.)

charge on this issue.⁵ Each example is based on a different type of question. The charge should, of course, be tailored to the specific questions and answers in controversy.

(1) (Opinion) Where a question reasonably may be interpreted to call for an expression of opinion or belief of the applicant, the representation made in response to the question will be considered false only upon a showing that the applicant did not have that opinion or belief at the time the representation was made. In this situation, it is not sufficient to show that the applicant's opinion was wrong in order to establish that *his* representation was false; it is necessary to show that the applicant did not have that opinion, that is, that *he* was untruthful about *his* opinion or belief. In determining whether or not an applicant has expressed *his* true opinion or belief, you may consider all of the circumstances and the information available to the applicant at the time and whether the applicant was acting in good faith. If the applicant honestly believed

⁵See also *Goodwin v. Investors Life Ins. Co.*, 322 N.C. 326, 419 S.E.2d 766 (1992) (finding the insured made false representations about his driving record on the application for life insurance); *Tharrington v. Sturdivant Life Ins. Co.*, 115 N.C. App. 123, 443 S.E.2d 797 (1994) (involving failure of the applicant to disclose a lung condition); *Williams v. Randolph*, 94 N.C. App. 413, 380 S.E.2d 553 (1989) (noting insurance company originally denied liability under the policy due to decedent's failure to disclose that she had used narcotics); *Pittman v. First Protection Life Ins. Co.*, 72 N.C. App. 428, 325 S.E.2d 287 (1985) (involving application filled out by agent and signed by insured that misrepresented a previous history of heart disease and high blood pressure). See generally 1A-11 Appleman on Insurance § 211 & Supplement (discussing insurance application questions about an applicant's use of alcohol, tobacco, marijuana, barbiturates, amphetamines, hallucinatory drugs and narcotics generally).

MISREPRESENTATION IN APPLICATION FOR INSURANCE--ISSUE OF FALSITY
OF REPRESENTATION. (Continued.)

that *his* expression of opinion or belief was true and *he* made the answer in good faith, then the representation was not false. If, however, the applicant did not honestly believe that the expression of *his* opinion or belief was true and *he* did not act in good faith, then the representation was false.⁶

(2) (Use of Alcohol) Questions relating to the use of alcohol should be interpreted reasonably as referring to a customary or habitual use and not to an incidental use. Thus, a negative answer to a question as to whether the applicant uses alcohol is not false when the applicant used alcohol only occasionally and temperately. Likewise, a representation by the applicant that *he* is sober and temperate is not false if *his* use of alcohol is moderate and not excessive. Occasional use does not mean intemperate use, and even occasional excessive use would not be considered intemperate use.⁷

(3) (Stated Time Period) Where the question relates to a specific time period, the representation is not necessarily false if it does not fall literally within that period. Two years may be understood by a reasonable person to mean approximately two

⁶See generally 1A-14 Appleman on Insurance § 246 (discussing knowledge and intent of the insured); *Jeffress v. New York Life Ins. Co.*, 74 F.2d 874 (4th Cir. 1935) (applying North Carolina law.)

⁷See *Flintall v. Charlotte Liberty Mut. Ins. Co.*, 259 N.C. 666, 669, 131 S.E.2d 312, 314 (1963) (quoting 44 Am. Jur. 2d Insurance § 1090).

MISREPRESENTATION IN APPLICATION FOR INSURANCE--ISSUE OF FALSITY
OF REPRESENTATION. (Continued.)

years.⁸ If the representation is true for such an approximate period, then it is not false.

(4) (Good or Sound Health) A representation that the applicant was of good or sound health is not to be considered false simply because the applicant suffered some degree of infirmity or had some ailments. In common understanding, no person enjoys perfect health. Therefore, in order for a representation of good or sound health of the applicant to be found false, the applicant must have known of such a serious departure from good or sound health that a reasonable person who knew the facts would not have made that representation.⁹

(5) (Medical Consultation) A representation that the applicant has not had medical or surgical advice or treatment is not necessarily to be considered false simply because the applicant did in fact consult a doctor or have some treatment. Failure to disclose consultations or treatments for common

⁸See *Hill v. Federal Life & Cas. Co.*, 252 N.C. 649, 653, 114 S.E.2d 648, 652 (1960).

⁹See *Hines v. New England Casualty Co.*, 172 N.C. 225, 227, 90 S.E. 131, 132 (1916); see also *Anthony v. Teachers' Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934) (noting the plaintiff had no departure from good health for a period of five years).

MISREPRESENTATION IN APPLICATION FOR INSURANCE--ISSUE OF FALSITY OF REPRESENTATION. (Continued.)

temporary ailments does not make such a representation false.¹⁰

In determining whether the representation was false, you should consider whether the matters not disclosed were of sufficient importance that a reasonable person acting fairly and in good faith would consider that they should be disclosed. If a reasonable person acting fairly and in good faith would consider the matters important enough to be disclosed, then the representation was false. If, however, a reasonable person acting fairly and in good faith would not consider the matters important enough to be disclosed, then the representation was not false.¹¹

(6) (Disease) A representation referring to matters as to which reasonable persons cannot be expected to have precise knowledge may be construed as an opinion of the applicant as to those matters. Thus, where an applicant is asked whether *he* has a specific disease, *he* is not expected to be able to make an accurate self-diagnosis. In determining whether *his* represen-

¹⁰See *Anthony v. Teachers' Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934) (finding the plaintiff's failure to disclose treatment for a "temporary indisposition" of negligible significance); see also 1A-14 Appleman on Insurance § 252 (discussing slight or temporary disorders); *Cockerham v. Pilot Life Ins. Co.*, 92 N.C. App. 218, 374 S.E.2d 174 (1988) (determining insured's failure to inform insurer about consultations with a doctor for cold-type symptoms would not necessarily have been calculated to influence the action of the insurance company).

¹¹See *Jeffress v. New York Life Ins. Co.*, 74 F.2d 874 (4th Cir. 1935). Applying North Carolina law, the court explained that a prescription given by a physician in response to a casual inquiry or a consultation for a mild, temporary ailment ordinarily does not amount to treatment by a physician within the meaning of an insurance application. See *id.*

MISREPRESENTATION IN APPLICATION FOR INSURANCE--ISSUE OF FALSITY
OF REPRESENTATION. (Continued.)

tation as to such matters is substantially true, you should consider all of the circumstances and the information available to the applicant at the time and whether the applicant was acting in good faith. After such consideration, if you find that the applicant honestly believed that *his* representation was true and that *he* made the representation in good faith, then it was not false. If, however, you find that the applicant did not honestly believe that the representation was true and that *he* did not act in good faith, then the representation was false.¹²

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 representation of the [plaintiff] [defendant] that (*describe representation*) was false, then it would be your duty to answer this issue "Yes" in favor of (*name insurance company*). 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] [defendant].

¹²See *Wells v. Jefferson Standard Life Ins. Co.*, 211 N.C. 427, 190 S.E. 744 (1937); 1A-14 Appleman on Insurance § 246.

