

## BURNING INSURED PROPERTY

The defendant is charged with burning insured property in order to defraud its insurer. Section 10 of chapter 266 of our General Laws provides as follows:

“Whoever,  
wilfully and with intent to defraud or injure the insurer,  
(sets fire to) (attempts to set fire to) (causes to be burned) (aids,  
counsels or procures the burning of)  
(a building) (any goods, wares, merchandise or other [personal  
property]),  
belonging to himself or another,  
and which are at the time insured against loss or damage by fire,  
shall be punished . . . .”

In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

*First:* That the defendant (set fire to) (attempted to set fire to) (caused to be burned) (aided, counseled or procured the burning of) (a building) (personal property) belonging to himself (herself) or someone else;

**Second:** That at the time of the alleged incident, the property was insured against loss or damage by fire; and

**Third:** That the defendant acted with the specific intent to injure or defraud the insurer.

See Instruction 3.120 (*Intent*).

If the defendant is charged with attempting to burn insured property, the offense has a fourth element: that the defendant took some overt act toward carrying out such burning, and which came reasonably close to actually carrying it out. See Instruction 4.120 (*Attempt*).

*Commonwealth v. Bader*, 285 Mass. 574, 577, 189 N.E. 590, 591 (1934) (overinsurance and financial distress are relevant factors); *Commonwealth v. Vellucci*, 284 Mass. 443, 445-446, 187 N.E. 909, 910 (1934) (failure to report fire and false statements during investigation are relevant factors); *Commonwealth v. Kaplan*, 238 Mass. 250, 254, 130 N.E. 485, 486 (1921) (whether defendant was insurance beneficiary is relevant, but direct benefit to defendant is not a necessary element of offense); *Commonwealth v. Asherowski*, 196 Mass. 342, 346, 82 N.E. 13, 14 (1907) (relevant factors include that only defendant-owner had key where no forced entry, that store stock stacked at center of blaze, and that insurance claim was exaggerated); *Commonwealth v. Squire*, 1 Metc. 258, 259 (1840) (jury question whether partially completed structure is a “building” or merely a collection of building materials); *Commonwealth v. Shuman*, 17 Mass. App. Ct. 441, 447, 459 N.E.2d 102, 106 (1984) (introduction of insurance policy not mandatory where there is testimony that property insured); *Commonwealth v. Walter*, 10 Mass. App. Ct. 255, 260, 406 N.E.2d 1304, 1308 (1980) (that defendant present near building shortly before fire was relevant factor).

NOTES:

1. **Failure to extinguish fire.** The intent to defraud need not precede the fire. A defendant can be convicted under § 10 who is able to extinguish a fire that has started accidentally, but intentionally fails to do so in order to injure the insurer. However, negligence is insufficient for conviction. *Commonwealth v. Cali*, 247 Mass. 20, 24-25, 141 N.E. 510, 511 (1923).

2. **Lesser included offenses.** Arson of a dwelling (G.L. c. 266, § 1) and burning a building (G.L. c. 266, § 2) are not lesser included offenses of burning a building to defraud an insurer (G.L. c. 266, § 10). *Commonwealth v. Jones*, 59 Mass. App. Ct. 157, 794 N.E.2d 1220 (2003); *Commonwealth v. Anolik*, 27 Mass. App. Ct. 701, 542 N.E.2d 327 (1989).