910.20 FIRE INSURANCE - HAZARD INCREASED BY INSURED.

> *NOTE WELL: This instruction may be used in any case where the insurance company has alleged and offered evidence that the hazard of fire was materially increased by means within the control of the insured, including cases where the evidence tends to show that the insured intentionally burned his own property. However, if the company has actually alleged intentional burning, N.C.P.I.-Civil 910.25 is recommended.*

The (*state number*) issue reads:

"Did the burning of the [plaintiff('s)(s')] [defendant('s)(s')][1] (*specify property*) occur while the hazard of fire was materially increased by means within the control or knowledge of the [plaintiff(s)] [defendant(s)]?"[2]

The policy of insurance in this case contains the following provision: "[t]his Company shall not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the insured."[3]

On this issue, the burden of proof is on the [plaintiff] [defendant] insurance company.[4] This means that the [plaintiff] [defendant] insurance company must prove, by the greater weight of the evidence, two things:

First, that the damage by fire occurred at a time when the hazard of fire[5] had been materially increased.[6]

The law provides that an increase in the hazard occurs when a new use or condition, or a physical change, not existing when the policy was issued, substantially and materially increases the chance that the property will be destroyed or damaged by fire.

And Second, that this new use or condition or physical change which increased the hazard of fire was within the control or knowledge of the [plaintiff(s)][defendant(s)].

The law provides that a showing of mere negligence, or lack of ordinary care, on the part of the [plaintiff(s)] [defendant(s)] would not be sufficient to relieve the [plaintiff] [defendant] insurance company of its obligation to pay under the policy.[7] A person may properly purchase insurance to protect *himself* even against *his* own negligence.[8] If, however, (1) there was a physical change from the time the policy became effective, and (2) that change was within the [plaintiff('s)(s')] [defendant('s)(s')] knowledge or control, and (3) such change so materially increased the hazard of fire as to make it readily apparent to a person of ordinary intelligence that the chance of loss by fire was thereby increased, then the [plaintiff(s)] [defendant(s)] would not be entitled to recover on the insurance policy for any loss that occurred while such condition existed.[9]

(*If a charge on circumstantial evidence is desired, use N.C.P.I.-Civil 101.45.*)

Finally, as to the (*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 burning of the [plaintiff('s)(s')] [defendant('s)(s')] (*describe property*) occurred while the hazard of fire was materially increased by means within the control or knowledge of the [plaintiff(s)] [defendant(s)], 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 to so find, then it would be your duty to answer this issue "No" in favor of the [plaintiff(s)] [defendant(s)].

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

2. As to the right of an innocent insured to recover after another insured has increased the hazard, *see Lovell v. Insurance Co.*, 302 N.C. 150, 155, 274 S.E.2d 170, 173 (1981).

3. *See* N.C. Gen. Stat. § 58-44-16(c) (standard fire insurance policy form approved by the General Assembly).

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

5. The hazard of fire referred to is, of course, the hazard of a "hostile" fire. For a discussion of the difference between a "hostile" fire and a "friendly" fire, *see Bowes v. Insurance Co.*, 26 N.C. App. 234, 237-38, 215 S.E.2d 855, 858 (1975) ("[I]f a fire remains spatially confined to its intended place, situs, it is friendly. [However, even though spatially confined to its intended place,] if it is extraordinary, or excessive, and unsuitable for the purpose intended, and is in a measure uncontrollable, then the fire is "hostile . . . .").

6. *See Webster Enterprises, Inc. v. Selective Ins. Co.*, 125 N.C. App. 36, 44, 479 S.E.2d 243, 248 (1997) ("The phrase 'increase of hazard' "denotes a change in the circumstances existing at the inception of the policy . . . ." More specifically, "increase of hazard" provisions encompass only new uses "which would increase the risk or hazard insured against, and not a continuation of, a former or customary use, or a change in risk without increase of hazard. It contemplates an alteration ... which would materially and substantially enhance the hazard . . . ." (quoting 44 Am. Jur. 2d *Insurance* § 1200 (1982)). Both the literal language of the standard fire insurance policy and case law in other jurisdictions appear to support the following language, which may be read to the jury in an appropriate case: "It is not necessary that the increased risk caused the loss; it is only necessary that the condition increasing the hazard still existed at the time of the loss." *Martin v. Capital Ins. Co.*, 85 Iowa 643, 651, 52 N.W. 534, 537, (1892); *see also Public Fire Ins. Co. v. Crumpton*, 110 Fla. 151, 156, 148 So. 537, 539 (1933); *Traverna v. Palatine Ins. Co.*, 238 N.Y.S. 389, 390, 228 A.D. 33, 34 (App. Div. 1930); *but see Northern Assurance Co. of America v. Spencer*, 246 F.Supp. 730, 734 (W.D.N.C. 1965) (applying North Carolina law) ("Where all the evidence tends to show that the increased hazard neither contributed to nor caused the fire, it seems harsh indeed to permit the company to assert forfeiture under a literal reading of the suspension clause . . . . Where the risk bears no causal relationship to the fire and there is no deception on the part of the policyholder, it seems that the company would be fully protected by giving it the right to collect additional premiums to cover the additional risk rather than giving it the extreme remedy of declaring the policy forfeited.")

7. *Durham v. Quincy Mut. Fire Ins. Co.*, 311 N.C. 361, 369, 317 S.E.2d 372, 378 (1984) (quoting *Whitehurst v. Fayetteville Mut. Ins. Co.*, 51 N.C.352, 355 (1859)) ("Negligence by an owner is not an increase of the hazard within the meaning of the policy.").

8. *Id*.

9. 44 Am. Jur. 2d *Insurance* § 1198 (2005) ("An act or change that avoids insurance coverage due to increase of hazard contemplates that the alteration is material and

substantial as would be viewed by a person of ordinary intelligence, care, and diligence. The increase in risk for the insurer must be one that he or she could not reasonably have been presumed to assume contractually.").