

A businesswoman decided to destroy an old warehouse that she owned because the taxes on the structure exceeded the income that she could receive from it. She crept into the building in the middle of the night with a can of gasoline and a fuse and set the fuse timer for 30 minutes. She then left the building. The fuse failed to ignite, and the building was not harmed.

Arson is defined in this jurisdiction as "the intentional burning of any building or structure of another, without the consent of the owner." The businesswoman believed, however, that burning one's own building was arson, having been so advised by her lawyer.

Has the businesswoman committed attempted arson?

- A. No, because even if her actions had every consequence she intended, they would not have constituted arson.
- B. No, because her mistake negated a necessary mental state.
- C. Yes, because a mistake of law even on the advice of an attorney is no defense.
- D. Yes, because factual impossibility is no defense.

Explanation:

Defenses to attempt

- Impossibility** Legal – intended act would not be criminal if completed
 Factual (no defense) – unknown condition prevents completion of intended crime
- Abandonment** Majority/common law (no defense) – attempt complete once overt act committed
 Minority/MPC – voluntary & complete withdrawal from crime

MPC = Model Penal Code.

Attempt occurs when a person:

has the specific intent to commit a crime

performs an **act** in furtherance of the intended crime *but*

does not complete it.

Legal impossibility is a **defense to attempt** if the intended act would **not be criminal even if completed**. That is because it is no crime to commit an act that is not a crime.

Here, the businesswoman decided to burn down her warehouse (specific intent). She crept into the warehouse with a can of gasoline and a fuse, then set a fuse timer (acts). However, the fuse did not ignite (incomplete crime). But even if she had successfully burned *her* warehouse, this jurisdiction limits arson to the intentional burning of *another's* building. Therefore, her attempted act would not have been criminal even if completed (legal impossibility).

(Choice B) A defendant's honest but mistaken belief is a defense to specific intent crimes (eg, attempt) when that belief negates the specific intent (ie, **mistake of fact**). But since the businesswoman's mistaken belief did not prevent her from forming the specific intent to burn down her warehouse, it is not a defense here.

(Choice C) Mistake or ignorance of the law is **almost never** a defense to criminal liability—even when a person relies on the advice of an attorney. But the businesswoman did not commit attempted arson because her intended act (even if completed) would not amount to arson in this jurisdiction.

(Choice D) Factual impossibility arises when an unknown fact or circumstance prevents the defendant from completing the intended crime (eg, the malfunctioning fuse) and is *never* a defense to attempt. But legal impossibility (eg, burning one's building) is *always* a defense to attempt.

Educational objective:

Legal impossibility is a defense to attempt when a person's intended act would not constitute a crime if completed.

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