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Hostile Fire Doctrine - Barcalo Mfg. Co. v. Firemen's Mutual Ins. Co

Comments and Casenotes

Hostile Fire Doctrine

Barcalo Mfg. Co. v. Firemen's Mutual Ins. Co.[1]

An automatic temperature control instrument on plaintiff's gas-fired furnace failed to operate properly, causing the furnace to overheat, thereby ruining the furnace and some metal tool forgings which were in it at the time.[2] The New York Court held that the fire was "hostile" and allowed plaintiff manufacturing company to recover on its fire insurance contract.

Fire insurance contracts define neither "fire" nor "loss due to fire," thus leaving the meaning of these terms to the courts. Fire is defined by *Webster's* as "the principle of combustion as manifested in light, especially flame."[3] The courts agree with this definition and have held that, in addition to heat and smoke, there must be a visible light or flame for fire to exist.[4] In the principal case, in which there was no doubt that a fire existed, the question was whether the damage was covered by the insurance contract.

The difficult problem arises in determining what is contemplated by the words "loss due to fire" as contained in the standard fire insurance contract. It was as an attempted aid in this determination that the friendly-hostile fire doctrine was developed. The dichotomy had its beginnings in the 1815 English case of *Austin v. Drew*[5] which, while not using the terms "friendly" or "hostile," laid the theoretical foundation[6] from which these terms were derived in *Way v. Abington Mutual Fire Ins. Co.*[7]

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1. 24 App. Div. 2d 55, 263 N.Y.S.2d 806 (1965).

2. The furnace was designed for operation between 1000 and 1750°F. The damage was caused by the failure of an automatic control to shut the furnace down after one hour at 1350°F — a failure which caused the furnace to continue operating for longer than eight hours at a temperature exceeding 1750°F. *Id.* at 808.

3. WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1955).

4. See, *e.g.*, Western Woolen Mill Co. v. Northern Assur. Co. of London, 139 Fed. 637 (8th Cir. 1905).

5. 4 Camp. 360, Holt. N.P. 126, 171 Eng. Rep. 115, 171 Eng. Rep. 187, 6 Taunt. 436, 2 Marsh 130, 128 Eng. Rep. 1104 (1815).

6. *Austin v. Drew* dealt with fire damage caused by smoke and sparks emanating from a chimney in a warehouse storing sugar. The various English reports which cover the case, see note 5 *supra,* disagree as to whether or not the fire escaped and as to the extent of damage to the sugar. This makes it nearly impossible, as was noted in the principal case by Justice Bastow, 24 App. Div. 2d at 57, 263 N.Y.S.2d at 808 (1965), to determine the exact holding in the case. In 1941, *Austin v. Drew* was carefully examined and severely retricted in *Harris v. Poland,* [1941] 1 K.B. 462, 468–72. The court in *Harris v. Poland* decided that the fire in *Austin v. Drew* had remained within its bounds and at its intended intensity. Such a reading of the facts would not bar recovery for a fire which became excessive but remained within its container. This restricted reading came too late to seriously affect the decisions in this country which are based on other interpretations of the decision.

7. 166 Mass. 67, 42 N.E. 1032 (1896). Justice Knowlton, in dealing with a loss resulting from the ignition of soot in a chimney, stated at 43 N.E. 1033–34: "A fire

The modern trend would seem to define a "friendly" fire as one which is ". . . a fire lighted and contained in a usual place for fire, such as a furnace, stove, incinerator and the like, and used for the purposes of heating, cooking, manufacturing, or other common and usual everyday purposes."[8] A "hostile" fire is defined as ". . . a fire unexpected, unintended, not anticipated, in a place not intended for it to be and where fire is not ordinarily maintained, or as one which has 'escaped'. . . ."[9]

This differentiation between friendly and hostile fires is a judicial invention which the courts have engrafted to the insurance agreement as a limitation to recovery. Although no such restriction appears on the face of the contract, courts adopting this restriction require that for recovery to be granted, the fire must have been hostile.[10]

Fires which escape their intended containers present no problem: recovery is always allowed. The problems have arisen in the cases involving fires which have not escaped their intended container. These can be grouped in terms of the type of damage caused, and the location of the damaged articles in relation to the fire: damage outside the container caused by side effects of a fire;[11] loss of articles accidentally thrown into or left in the container;[12] damage to articles intentionally placed in or over the fire or in the container;[13] and damages to the container itself.[14]

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in a chimney should be considered rather a hostile fire than a friendly fire; and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance."

8. 29A AM. JUR. *Insurance* § 1287 (1960), citing Youse v. Employers Fire Ins. Co., 172 Kan. 111, 238 P.2d 472 (1951). See also Progress Laundry & Cleaning Co. v. Reciprocal Exchange, 109 S.W.2d 226 (Tex. Civ. App. 1937); Lavitt v. Hartford County Mutual Fire Ins. Co., 105 Conn. 729, 136 Atl. 572 (1927). See generally 5 APPLEMAN, INSURANCE § 3082 (1941); VANCE, INSURANCE 869 (3d ed. 1951). Professor Vance restudied *Austin v. Drew* and added the criterion for a friendly fire that it not be excessive, that is, that the energy released should not be substantially greater than what was intended. Vance, *Friendly Fires,* 1 CONN. BAR J. 289 (1927).

9. 29A AM. JUR. *Insurance, op. cit. supra* note 8.

10. See, *e.g.,* Hartford Fire Ins. Co. v. Armstrong, 219 Ala. 208, 122 So. 23 (1929); Lavitt v. Hartford Mut. Fire Ins. Co., 105 Conn. 729, 136 Atl. 572 (1927); Way v. Abington Mutual Fire Ins. Co., 166 Mass. 67, 43 N.E. 1032 (1896).

11. *E.g.,* O'Connor v. Queen Ins. Co. of America, 140 Wis. 388, 122 N.W. 1038 (1909) (recovery allowed for smoke and soot damage); Gibbons v. German Insurance and Savings Institution, 30 Ill. App. 263 (1889) (recovery denied and damage caused by escaped steam).

12. *E.g.,* Youse v. Employers Fire Ins. Co., 172 Kan. 111, 238 P.2d 472 (1951) (no recovery); Harter v. Phoenix Ins. Co. of Hartford, Conn., 257 Mich. 163, 241 N.W. 196 (1932) (no recovery); Weiner v. St. Paul Fire and Marine Ins. Co., 124 Misc. 153, 207 N.Y.S. 279 (1924), *aff'd,* 214 App. Div. 784, 210 N.Y.S. 935 (1925) (no recovery); Harris v. Poland, [1941] 1 K.B. 462 (recovery allowed). See also Salmon v. Concordia Fire Ins. Co. of Milwaukee, 161 So. 340 (La. App. 1935), which allowed recovery under Louisiana's civil code.

13. *E.g.,* Barcalo Mfg. Co. v. Firemen's Mutual Ins. Co., 24 App. Div. 2d 55, 263 N.Y.S.2d 807 (1965).

14. *E.g.,* Spare v. Glens Falls Ins. Co., 137 Conn. 105, 75 A.2d 64 (1950) (no recovery); American Towing Co. v. German Fire Ins. Co., 74 Md. 25, 21 Atl. 553 (1891) (no recovery); Barcalo Mfg. Co. v. Firemen's Mutual Ins. Co., 24 App. Div. 2d 55, 263 N.Y.S.2d 807 (1965) (recovery permitted); Fiorito v. California Ins. Co., 262 Minn. 340, 114 N.W.2d 661 (1962) (recovery permitted); L. L. Freeberg Pie Co. v. St. Paul Mut. Ins. Co., 257 Minn. 244, 100 N.W.2d 753 (1960) (recovery permitted).

The majority of the decisions seem based on the "container" theory[15] or spatial test:[16] that is, if the fire was originally set by the insured, and if it never escaped its original locus, then the fire was "friendly" and damages caused by heat, soot or smoke were not recoverable.[17] Most of the cases have held that even if a fire became excessive, so long as it did not escape its original container, there could be no recovery.[18] Where it is law, the container theory seems to be strictly applied, and has been used, in the case of a fire which damaged the container and then escaped, to bar recovery for the container itself, while allowing recovery for damage caused after the fire had escaped.[19] Such literal application of the principle seems unwarranted. But apparently the courts have been seduced by the easiness of the application of the test.

The principal case adopted the view expounded by Professor Vance[20] that a fire which causes damage by becoming excessive, that is, a fire which becomes substantially hotter than was planned or burns for too long a period of time, is hostile even though it remains in its original container.[21] This decision, in allowing recovery for damage to the container, finds New York joining but two other American jurisdictions, Minnesota[22] and Wisconsin,[23] in so limiting the strictness of the "container" or spatial test.

The Maryland Court of Appeals has never decided a case using the "friendly-hostile fire" language, but the distinction was applied in an early case, *American Towing Co. v. German Fire Ins. Co.*[24] In that case, a steam-driven tugboat was damaged by a fire caused by the boiler overheating due to insufficient water. The Court allowed recovery for damage to the boat, apparently caused by the escaped fire,

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15. See PATTERSON, ESSENTIALS OF INSURANCE LAW 246–47 (2d ed. 1957). See also Progress Laundry & Cleaning Co. v. Reciprocal Exchange, 109 S.W.2d 226 (Tex. Civ. App. 1937), where the court stated, at 227: "We think the overwhelming weight of authorities is that, so long as a fire burns in a place where it was intended . . . , such fire is a 'friendly fire' and insurers are not liable for damages flowing therefrom. . . ."

16. See Morrison, *Concerning Friendly Fires,* 3 B.C. IND. & COMM. L. REV. 15 (1961).

17. See cases cited in VANCE, INSURANCE, *op. cit. supra* note 8, at 869–71; 5 APPLEMAN, *op. cit. supra* note 8.

18. See, *e.g.,* Hartford Fire Ins. Co. v. Armstrong, 219 Ala. 208, 122 So. 23 (1929); Hansen v. Le Mars Mut. Ins. Ass'n, 193 Iowa 1, 186 N.W. 468 (1922); First Christian Church v. Hartford Mut. Ins. Co., 38 Tenn. App. 482, 276 S.W.2d 502 (1954).

19. American Towing Co. v. German Fire Ins. Co., 74 Md. 25, 21 Atl. 553 (1891). This case did not use the terms "friendly" or "hostile," but the decision was based upon the same criteria. For a further discussion of this case, see note 24 *infra* and accompanying text.

20. Vance, *Friendly Fires, supra* note 8.

21. Barcalo Mfg. Co. v. Firemen's Mut. Ins. Co., 24 App. Div. 2d 55, 263 N.Y.S.2d 807 (1965).

22. Fiorito v. California Ins. Co., 262 Minn. 340, 114 N.W.2d 661 (1962); L. L. Freeberg Pie Co. v. St. Paul Mut. Ins. Co., 257 Minn. 244, 100 N.W.2d 753 (1960).

23. O'Connor v. Queen Ins. Co. of America, 140 Wis. 388, 122 N.W. 1038 (1909). For a discussion of the English position on this question, see note 6 *supra.*

24. 74 Md. 25, 21 Atl. 553 (1891). This case was, of course, decided prior to Way v. Abington Mut. Fire Ins. Co., 166 Mass. 67, 43 N.E. 1032 (1896), where the terms "hostile fire" and "friendly fire" were first used. Curiously, *American Towing* has only been cited once, in Baltimore Gas & Electric Co. v. U.S.F.&G. Co., 166 F. Supp. 703, 709 (D. Md. 1958), in which it was cited as an example of a "friendly fire" case.

but not for the damage to the boiler itself which was caused by the contained fire. This decision would seem to be in accord with the now traditional "container" or spatial theory. However, it appears that the fire in question was not excessive, and that the damage to the boiler was caused by a lack of water.[25] Thus it would seem that the applicability of the excessive test in Maryland remains an open question.

Much has been written recently about the hostile-friendly fire doctrine, favoring either the abolition of the rule[26] or an expansion of the rule to include tests other than spatial.[27] In addition to the spatial test, it has been suggested that a potential test[28] be employed which would allow recovery when a substantially greater amount of energy is released than was intended when the fire was originally ignited and when this excessiveness is the cause of the damage.[29] Another additional test suggested is a temporal test.[30] Using this test, if the insured expects a fire to burn for a certain limited time and then cease, but the fire continues beyond this time period, recovery would be allowed.

After so many years of existence, it seems unlikely that this doctrine will be wholly abandoned;[31] yet a need clearly exists for some means of avoiding the restrictiveness of the doctrine as it now stands in most jurisdictions. The spatial or container test, which permits recovery only if the fire escaped its original container, is too limited. In order to broaden the scope of compensable damages, the excessive test,[32] including both the temporal[33] and potential[34] tests within it, should be included in the definition of "hostile fire." While it has been said that the test for a fire insurance contract is the reasonable purpose and expectation of the ordinary business man when executing an ordinary business contract,[35] few people who buy fire insurance are aware that the words in the contract, "loss due to fire," really mean "loss due to a hostile fire"; and fewer still would define "hostile fire"

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25. *Id.* at 31, 21 Atl. at 553, where the Court adopts the testimony of the expert witnesses: ". . . [F]rom all the apparent indications, the injury to the interior of the boiler was caused by the fire in the furnace in contact with the boiler, the latter being without water to protect it; 'that the inside of the boiler was injured entirely by being overheated, occasioned by the absence of water necessary to protect it.' "

26. See, *e.g.*, Note, 6 S.D.L. REV. 129 (1961).

27. See Morrison, note 16 *supra*, where it was suggested that two other tests, potential and temporal, be added to the definition of a "hostile fire." For a further discussion of these terms, see notes 29–31 *infra* and accompanying text. The principal case has carved an exception to the limited spatial test by applying the potential, or excessive, test. Notes 29 and 30 *infra* and accompanying text. *Accord,* L. L. Freeberg Pie Co. v. St. Paul Mut. Ins. Co., 257 Minn. 244, 100 N.W.2d 753 (1960); O'Connor v. Queen Ins. Co. of America, 140 Wis. 388, 122 N.W. 1038 (1909).

28. Morrison, *supra* note 16.

29. This is what Vance in his article, *Friendly Fires, supra* note 8, called "excessive."

30. Morrison, *supra* note 16.

31. See, *e.g.*, Lavitt v. Hartford County Mut. Fire Ins. Co., 105 Conn. 729, 736, 136 Atl. 572, 575 (1927): "Though the present distinction may seem arbitrary, yet it is of long standing, makes for certainty in the ascertainment of rights, and has been acted upon in the writing of so vast a number of insurance contracts throughout the country that its soundness may not, at this time, be questioned."

32. Note 20 *supra.*

33. Note 16 *supra.*

34. *Ibid.*

35. See, *e.g.*, Automobile Ins. Co. v. Thomas, 153 Md. 253, 138 Atl. 33 (1927); Bird v. St. Paul F.&M. Ins. Co., 224 N.Y. 47, 120 N.E. 86 (1918).

in the limited terms of the "container" theory. The addition of the excessive test would meet the expectations of coverage that most purchasers of fire insurance have.

Nothing would be gained by abolishing the "friendly-hostile" fire dichotomy instead of enlarging the definition of "hostile fire"; on the other hand, new complications might arise. The English court in *Austin v. Drew*[36] and the Massachusetts court in *Way v. Abington Mutual Fire Ins. Co.*[37] shared the concern voiced by the Maryland court in *American Towing Company v. German Fire Ins. Co.:*

> The subject of the policy is a steam-tug, her boiler and other machinery. Of necessity, fire was to be maintained in the furnace, and in contact with the boiler, . . . and it [the fire] was placed there to act upon the boiler, which, in course of time, would be burnt out or warped, . . . by the continued action of fire thereon.[38]

Clearly, the court was concerned with the normal wear and tear on the boiler and furnace, since such damage is not within the scope of a fire insurance policy. The addition of the excessive test would not result in the fire insurer having to pay for the normal wear incident to the usage of a boiler, furnace or other fire container.[39] Similarly, an insured who hid her jewelry in the stove and later inadvertently lit a fire should perhaps not recover[40] for the damage to the jewelry. But it is submitted that loss from excessive but contained fires are within the contemplation of the average insured[41] and should, therefore, be compensable.[42]

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36. 4 Camp. 360, Holt. N.P. 126, 171 Eng. Rep. 115, 171 Eng. Rep. 187, 6 Taunt. 436, 2 Marsh 130, 128 Eng. Rep. 1104 (1815).
37. 166 Mass. 67, 43 N.E. 1032 (1896).
38. 74 Md. 25, 33, 21 Atl. 553, 554 (1891).
39. Insurance companies have had little difficulty in computing the rate of depreciation on other types of property, and there is no reason why this principle could not be applied to fire containers.
40. See Weiner v. St. Paul Fire and Marine Ins. Co., 124 Misc. 153, 207 N.Y.S. 279 (Sup. Ct. 1924), *aff'd,* 214 App. Div. 784, 210 N.Y.S. 935 (Sup. Ct. 1925).
41. See note 37 *supra* and accompanying text.
42. The clear case for no recovery, damage to the container by a non-excessive, non-escaping fire, would still not be compensable under the excessive test.