The Friendly versus Hostile Fire Dichotomy

Robert I. Reis
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I. INTRODUCTION

Laws are made for men of ordinary understanding, and should therefore be construed by the ordinary rules of common sense. Their meaning is not to be sought for in meta-physical subtleties, which may make anything mean everything or nothing, at pleasure.

— Thomas Jefferson

THE STANDARD fire insurance policy clearly and succinctly provides that the insurance company undertakes to compensate the insured "against ALL DIRECT Loss By FIRE..." More simple, straightforward and pervasive language delineating the insurance company's undertaking could not be drafted by the worthiest craftsman in our profession. Neither by this language, nor by the remaining provisions of the standard fire insurance contract, is there any hint of a lesser promise by the insurance company than to compensate the insured for all losses which are the direct result of fire. By judicial construction, however, these seemingly clear words do not mean what they "pretend" to represent to the ordinary insured. The courts have limited the insurance company's liability by introducing into insurance law the subtle and illusive distinction between fires which are "friendly" and fires which are "hostile" in origin. By this distinction, if a fire is intentionally lit and escapes from the place wherein it was intended to be confined, then it is deemed to be a "hostile" fire. If, on the other hand,

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1. Letter From Thomas Jefferson to William Johnson, 1823.

2. The history of the standard form is recalled in Adam, Hostility Toward The "Hostile Fire" Doctrine, 6 S.D.L.Riv. 129, 131-32 (1961):

In 1886 New York took steps toward framing a standard form for all contracts of fire insurance made in that State. The New York Board of Fire Underwriters, collaborating with the committee of the National Board of Fire Underwriters, and with the aid of specialists in insurance law of the New York Bar, drafted a standard fire policy. With various revisions this form became known as the 1918 New York Standard Fire Policy. This policy made more harmonious the rights of parties under contracts issued by the various companies. A revised form was drafted with the aid of the National Convention of Insurance Commissioners and was adopted by New York in 1943. By 1950 there were only four states that had not adopted the revised form. [Massachusetts, Minnesota, New Hampshire and Texas.]

the fire remains in the place where it was intended to be confined, then it is a "friendly" fire. Ergo, the "friendly versus hostile fire dichotomy."

The hypothetical cases of Mary and Jane Jones illustrate this novel dichotomy in operation. The two sisters each purchased a standard fire insurance policy from their broker. Mary's daughter knocked over a cloakrack causing several garments hanging thereon to be thrown into the fireplace and destroyed. Jane's "persian lamb" was badly burned one night when a flaming log accidentally rolled out of her fireplace. Both sisters duly filed their claims with their broker under the impression that their policies covered "all direct loss by fire."

Jane was informed by the insurance company that they would honor her claim because the loss was due to a "hostile" fire within the terms of the insurance contract. Mary, on the other hand, received the surprise of her life when she was informed that her claim was refused because her garments were destroyed by a "friendly" fire. Mary indignantly protested the company's refusal to compensate her by pointing to her policy wherein no distinction was made between a so-called "friendly" and "hostile" fire. The insurance company held firm to its decision. Ultimately, her lawyer advised her there was nothing they could do; contrary to her reasonable expectation that the policy meant what it said, only her sister's loss has been construed by the courts as coming within the meaning of "fire" in an insurance policy.

be that where the insured employs fire ... and the fire is confined to the agencies so employed, and damage ensues, without any actual ignition, to the property insured, the insurance company is not liable."


The question before us concerns itself with what in law is referred to as "friendly fires" and "hostile fires." That is a strange notion, as I look upon it, to the average lay person. To that person a fire is a fire and that is all there is to it. There is nothing in the standard form of policy which denominates a friendly or a hostile fire. Those terms and what they mean come to us from our courts and text writers.

The greatest surprise to the insured comes when the article is actually consumed by the fire. Thus, in Harter v. Phoenix Ins. Co., 257 Mich. 163, 166-67, 241 N.W. 196, 197 (1932), the plaintiff's jewelry was inadvertently thrown into a furnace fire. The majority denied recovery on the basis that it was a friendly fire. The dissent looked to the language of the policy and said:

The policy of defendant issued to the plaintiff is general in its terms. It contains no limitation and exceptions applicable to the facts herein. It insures plaintiffs' jewelry without exception against all direct loss or damage by fire. There being no limitations or exceptions in the language of the policy, we can make none. The loss falls directly within the language of the policy. If the defendant would escape liability, it should by appropriate language exclude such liability by the terms of its contract.

5. This fact has been so often repeated that it has begun to take on the characteristics of a "truism." It might not be unreasonable to suppose that there are brokers who do not consciously recognize this distinction.
By reading this limitation on liability into the insurance contract, the courts have not only created a trap for the unwary, but have disregarded a fundamental rule of contract construction, to wit: Where no express intention of the parties is to be found in the language of the contract, and where it does not appear that they affirmatively thought about this exact occurrence, the language of the instrument should be construed against the party who drafted it. With minor exceptions, this basic principle of construction has been ignored by the courts in their consideration of the "friendly fire" question. In doing this, some courts resort to a second rule of construction and attempt to anticipate what the parties would have done had they contemplated this exact occurrence. It is then noted by the courts that if the insured and insurer had thought about this, they would have made a distinction between "friendly" and "hostile" fires. Other courts have gone even further and said that the parties actually contracted with this distinction in mind. Any presumption that the insured intended to contract with the "friendly" versus "hostile" fire dichotomy in mind is a fiction of the court and not based upon the realities of the situation.

6. In Abbot, The Meaning of Fire in an Insurance Policy Against Loss or Damage by Fire, 24 Harv. L. Rev. 119, 121 (1910), the author said: "[I]nsurance policies are strictly construed against the insurer because he is usually the author of language used therein."


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 this country, that its soundness may not, at this time, be questioned.


It should be remembered that in construing a provision of a contract, the court does not merely go to the dictionary, but in giving effect to the language used by the parties, considers what as reasonable men they intended, or what provision as such reasonable men they would have made for the specific contingency which gave rise to the litigation, if the possibility that it would arise had occurred to them.


11. For general commentary on what the insured intended and presumptions to the effect that the insured intended to cover only friendly fires, see Morrison, Concerning Friendly Fires, 3 B.C. Ind. & Com. L. Rev. 15 (1961); Note, 13 Ala. L. Rev. 233 (1960); Vance, Friendly Fires, 1 Conn. B.J. 284 (1927). Professor Vance conducted his own survey of 10 businessmen to find out whether they thought they were...
As has been suggested by Professor Vance, the courts are imposing an irrebuttable presumption or rule of law upon the parties. By their withdrawal from basic principles of contract the courts have allowed insurers to retreat to the safety of the "standard" policy with little consideration for the desires of the insured in purchasing insurance. In effect, these decisions have permitted the insurers to disclaim any knowledge of or intent to cover this type of risk.

There is some utility to the "friendly" versus "hostile" fire dichotomy in that all losses by fire should not be compensated unless they are losses in a casualty sense. The following questions are pertinent to the limits of liability, however, and must be posed: Should the dichotomy be made to more closely conform to what is in reality a casualty to the insured? Should this gap be permitted to exist in the insurance coverage available to the public? If there is to be non-coverage, can the insured be made aware of this so as to otherwise protect himself from loss? Finally, can the rule be so changed as to retain the necessary and valuable limitations on recovery in the distinction and yet to permit a broader based undertaking by the insured?

Were these questions to arise today, as an original proposition, manifold possibilities would exist toward a solution. They arise, however, in the context of one hundred and fifty years of almost unanimous decisions. The format of this article, therefore, requires a revisitation of the leading case — Austin v. Drewe. Rather than retread the well worn path of traditional Austin analysis, our revisitation in the first section of this article will consider the apparent holding of the case and its underlying philosophical approach. Further, we shall investigate covered or not by the language of the policy. See also Justice Blandin's dissent in Consoli v. Commonwealth Ins. Co., 97 N.H. 224, 227, 84 A.2d 926, 928 (1951):

It is not seriously disputed here that a reasonable man in the position of the insured would understand the policy covered the losses, but in spite of this he is denied recovery, although there is no authority in this state, legislative or judicial for so doing, because courts in other jurisdictions have established a rule which it seems in fairness and reason neither this opinion nor other authorities convincingly defend. I recognize that a doctrine supported by the majority as is the "friendly fire" doctrine should not be lightly overthrown. But even the authorities which uphold it are apologetic, and notwithstanding their number, none of them have come forward with a really good reason for their position — which it appears is a strong indication that none exists.

15. Traditional analysts have emphasized in their critiques the "place" test of Austin v. Drewe. These writers look to the language of that court to ascertain whether it supports this proposition or not.
alternative approaches not ostensibly considered by the court. The succeeding three sections will treat the line of decisions since Austin — a summary analysis; and inquiry into the justification for, and a rejection of, the basic premise of recovery under a “fire” insurance contract — accidental fire versus accidental loss; and, finally, the problems of change.

II. Austin v. Drewe Revisited

Prior to 1816, when Austin v. Drewe was decided, there were few reported cases. Nothing would appear in Park on Insurance to indicate that the problem of “friendly” versus “hostile” fires had ever been considered. In his fifth edition (1802) Park noted that: “The construction to be put on those regulations has but seldom become the subject of judicial enquiry; few instances only having occurred in our researches upon this occasion.”16 Park’s suggested form policy was substantially similar to that of the present standard fire policy, at least as regards the insurance company’s undertaking to compensate the insured for “Loss or Damage by Fire.”17

The opinion of the court in Austin sheds little light, if any, on the state of law prior to 1816. Shepherd, the Solicitor-General, in his motion for a new trial indicates that there should be recovery for (1) direct consumption of an article by fire, and (2) if there was a “fire” within the meaning of the contract, probably for smoke and heat damages.18 Shepherd does not appear to have placed any significance on the fact that the fire was intentionally lighted and apparently felt that it was the fact of loss which warranted recovery. Justices Gibbs and Dallas, speaking for the court, seem to have been disturbed, lest “fire” were construed to include “fires” intentionally set for lawful purposes.

The court was faced with a fundamental question which went to the heart of the insurance contract: What meaning did the parties attribute to the word “fire”? Did they intend to include within the undertaking of the insurance company any and all losses caused by fire, however started and whatever its nature? Or, did they intend to make a distinction between intentional and accidental fires as the risk being insured against? Logically, not all “fires” were intended by the insured to result in a recovery against the insurance company. In

16. PARK, INSURANCE 441 (1802). Park treats the subject of fire insurance in a scant seventeen pages, 441-57.
17. Id. at 464, app. No. IV.
18. 6 Taunt. 436, 438, 128 Eng. Rep. 1104, 1105 (1816). In this report, the opinion has Justice Gibbs answering the juror: “In the present case, I think no loss was sustained by any of the risks in the policy.” Supra at 438-39, 128 Eng. Rep. at 1105.
spite of the intentional lighting, however, the "fire" could result in a loss, properly classified as a fortuitous event against which the insured procured the policy. Somewhere between always and never permitting the insured to recover was the proper construction of what the parties intended. The reports coincide on the factual setting in which the loss occurred:

[T]he evidence was, that the building insured contained eight stories, and in each story, sugar, in a certain state of preparation, was deposited for the purpose of being refined; in order for refining, a certain degree of heat was necessary, and a chimney running up through the whole building formed almost one side of each of the stories, and by means of this chimney heat was communicated to each of the stories. At the top of the chimney, above the 8 stories, was a register, which the Plaintiffs used to shut at night, in order to retain in the chimney and building all the heat they could. They shut it one night, and lighted the fires next day...the register, which always ought to be open whenever the fire was burning, was continued shut down...

The essential difference in the rendition of the case by the various reporters goes to the quality of the fire and the cause of the loss. Thus, although they all agree that the building was full of smoke and sparks, only Campbell reports that there was damage from smoke, as well as heat. Both Taunton and Holt report that heat was the only cause of damage to the sugar.

Bearing in mind both the factual setting in which the "fire" was operative and the immediate cause of the loss, the following colloquy between Justice Gibbs and one of the jurymen serves to crystalize the court's compromise in their "reconstruction" of (a) the limitations which the insurance company intended to inhere on its liability under the contract and (b) the extent to which the insured would be deemed reasonable in his expectations of coverage under the contract:

Juryman. If my servant by negligence sets my house on fire, and it is burnt down, I expect, my Lord, to be paid by the insurance office.

19. Id. at 437, 128 Eng. Rep. at 1104.
20. Campbell said: "The sugars however were very much damaged by the smoke, and still more by the heat." 4 Camp. 360, 361, 171 Eng. Rep. 115 (1815).
21. 6 Taunt. 436, 437, 128 Eng. Rep. 1104 (1816): "There was much smoke, but the only injury done to the sugars proceeded from heat; the smoke would not have hurt them."
22. Holt 126, 171 Eng. Rep. 187 (1816) ("the sugar was damaged by the excess heat... ").
23. At least one writer feels that: "If the facts as reported by Taunton and Holt are taken to be correct, the judgement rendered specifically excluded what the result might have been if the case was one based entirely on smoke damages. If so read, Austin would seem to be of little authority for any subsequent case of smoke damages." Smith, Friendly v. Hostile Fires, 70 Dick. L. Rev. 50, 53 (1965). If the question were thus postulated as "accidental fire" versus "accidental loss," this analysis would probably not bear out.
Gibbs, C.J. And so you would, Sir; but then there would be a
fire, whereas here there has been none. If there is
a fire, it is no answer that it was occasioned by the
negligence or misconduct of servants; but in this
case there was no fire except in the stove and the
flue, as there ought to have been, and the loss was
occasioned by the confinement of heat. Had the
fire been brought out of the flue and anything had
been burnt, the company would have been liable. 24

The test ostensibly arrived at by the court, therefore, was: When a
fire has been intentionally lit, and remains in the place designed to
accommodate it, neither the insured, nor the insurer intended to treat
losses arising therefrom as fortuitous — unexpected in the normal
course of events. Each of the reports emphasizes the location of the
fire: Holt reported: “The fire is where it ought to be. . . .” 25 Taunton
noted: “There was no fire in the building that ought not to be there,
nothing was on fire, that ought not to be on fire, the damage was occa-
sioned by the sparks, heat, and smoke taking a wrong direction.” 26
Campbell wrote: “[T]he fire . . . was always confined within its proper
limits.” 27 Applying this rule to the facts and conclusions above, since
the fire remained in the furnace, the court denied the insured recovery —
ergo, the primary delineation between “fires” included in the con-
tract, and fires not intended to be covered thereby.

Most courts and writers have accepted the *situs* of the fire as the
test laid down by *Austin*. 28 By ending the inquiry at the question of
confinement, 29 however, they fail to perceive the multiple nature of
fires. Keeping fire in place means not only limiting that upon which the
fire is directly acting (the process of consumption) but also containing
the by-products of the fire (heat, light and smoke). The definition of
“a fire contained” should be extended to cover all characteristics of
the combustion process. 30

Brett Col. L. Rev. 373, 377 (1963), where the author criticizes the place test: “This
single and absolute test cannot be justified by *Austin v. Drewe*. Although location is
mentioned in that case, it was by no means the sole criterion. . . . Yet the test of
location has become firmly entrenched in numerous American decisions . . . .” See also
Smith, *Friendly v. Hostile Fires*, 70 Dick. L. Rev. 50, 56-59 (1965), where the author
examines the place test.
29. Attorneys for the insurer in Harris v. Poland, [1941] 1 K.B. 462, 463, said:
“The principle laid down by Gibbs C.J. in *Austin v. Drewe* . . . that where a fire
is in a *place* where fire is intended to be, and the fire has not broken bounds, it is not
a fire within the policy. If so, it is *not* necessary to consider the further question
whether the fire caused damage to the insured property.” (Emphasis added.)
30. Id. at 469: “There are several sources of damage from fire; there are the
flames, the heat generated, the smoke and sparks produced. Some might find it
One characteristic of fire which has received recognition since *Austin* is the size or intensity of the fire. If the size of the fire is greater than anticipated by the insured and if by excess heat causes a loss, then the insured should be compensated therefor. As already noted, all three reports indicate that there was heat damage to the sugar. However, the reports also indicate that the fire had not reached “excess.” At least two cases have subsequently allowed recovery for excess heat under the test articulated in *Austin*. The “excluded fire” therefore becomes one confined in place and limited in heat produced.

Several alternative criteria, other than place and intensity could have been adopted by the court in *Austin* consistent with a rejection of the premise that any fire which causes the insured a loss was a “fire” within the meaning of the insurance contract. The court could have said that heat and smoke loss caused by the negligence of the insured or his servant was a bar to recovery. Negligence was spoken of in all three reports. One might feel that this was an important factor in the decision. In light of the general rule, however, that negligence is not a bar to recovery if a secondary fire results and causes a loss, it is difficult to see how the court was using this, other than as a means of recognizing that some loss did in fact occur.

Because of the insured’s control over the behavior of the fire, the court could have indicated that the fire lacked fortuity. Control could thus have been utilized to show that the insured was responsible for the loss and not the fire. By this view the court could have said that the insured’s assumption of control over the fire took that fire out of

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32. The court apparently rejected this proposition; See text accompanying note 19 supra. In section IV infra, possible solutions if this premise of casualty had been accepted are discussed at length.
34. The court in Harris v. Poland, [1941] 1 K.B. 462, 469, notes that the court in *Austin* spoke in terms of negligence although the general rule is to the contrary. Insurance is an attempt on the part of the insured to re-allocate the burden of a loss, rather than have it remain on his shoulders. Professor Calabresi, in his recent article entitled *Fault, Accidents And The Wonderful World of Bluin and Kalvin*, 75 *Yale L.J.* 216 (1965), notes that a common goal of fault and non-fault recovery in automobile accident cases is to reduce the “secondary” effects of loss on society. Thus premised, what is the purpose of insurance? To reduce the secondary effect of loss on society by making it possible for an insured to protect himself, and indirectly society, from possibly irreparable harm. To hold the insured responsible for his own negligence, then, would seem to defeat the most significant contribution of insurance to society.
the terms of the contract as an unexpected occurrence. If the court had gone into this question, they would have then had to decide whether or not a distinction should be drawn between the differing levels of care and control exercisable by different individuals. A housewife-insured might be held to a different standard of care than that of a commercial-insured.

The insured in Austin was a manufacturer, in other words, a commercial-insured. Two distinctions may be postulated on this point: First, that between commercial parties, where both the insured and the insurer are merchants, they should clearly articulate who assumes the risk for what. As a question of risk bearing and risk distribution, it should be recognized that both parties are agencies of risk distribution. The insured can distribute the risk by reflecting the losses he suffers in the price of his goods and services. Before the burden of effecting a distribution of the risk is shifted from the insured to the insurer, it should affirmatively appear in the instrument under consideration that they intended this result. Second, and somewhat related to the first point, the question would have to be asked whether the commercial-insured undertook to act according to a higher degree of care and management of the fire. That skill which the insured had a duty to exercise would be the extent of risk he retained unto himself. No reliance appears to have been placed on this question by the court.

III. APPLICATION OF THE DOCTRINE

"Fires" may be intentionally used for domestic purposes and yet proceed in an infinite number of ways to cause a "loss" to the insured. There are six basic fact patterns which have come before the courts wherein the question of "friendly" versus "hostile" fires has been deemed controlling. Four of these are classified according to the use and vehicle of the intentionally lit fire; the last two more aptly relate to the manner in which the "loss" was occasioned. Thus, the first four categories are:

1. The furnace cases;
2. The stove cases;
3. The lamp cases; and,
4. The cigarette cases.

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35. "[I]n point of fact there never was more fire than was necessary to carry on the manufacture..." 4 Camp. at 361, 171 Eng. Rep. at 115. (Emphasis added.)
36. But see Fitzgerald v. German-American Ins. Co., 30 Misc. 72, 62 N.Y. Supp. 824, 825 (Oneida County Ct. 1899), where the court said: "The rule seems to be that where the insured employs fire for economic or scientific purposes, and the fire is confined to the agencies so employed, and damage ensues, without any actual ignition, to the property insured, the insurance company is not liable. (Emphasis added.)
The last two recurring fact patterns are:

(5) Articles inadvertently subject to a "friendly" fire; and,
(6) "Fire" preceding an explosion.

In these cases, recovery has been sought under the policy for:

(1) Actual ignition of material outside of the vehicle utilized to contain the fire;
(2) Damage to the container itself;
(3) Heat damage to material outside the vehicle used to contain the fire;
(4) Smoke and soot damage to materials outside the container; and
(5) Actual ignition of an article thrown into the fire.

These cases are here classified according to the vehicle and the product of combustion which causes the loss for the purposes of tentatively constructing a decisional continuum: "friendly" — "hostile" fires.

<table>
<thead>
<tr>
<th>HOSTILE</th>
<th>FRIENDLY</th>
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<tbody>
<tr>
<td>Unintended fire</td>
<td>Consumption of fuel</td>
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<tr>
<td>Excess heat — actual</td>
<td>normal operation of</td>
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<tr>
<td>combustion of outside</td>
<td>vehicle</td>
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<tr>
<td>article</td>
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</tr>
<tr>
<td>Excess heat — escape</td>
<td>Damage to furnace, stove</td>
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<tr>
<td>of fire within vehicle</td>
<td>or lamp, no escape</td>
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<td>Excess heat — outside</td>
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<td>articles not ignited</td>
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<tr>
<td>Articles thrown into</td>
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<tr>
<td>fire</td>
<td></td>
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<tr>
<td>Smoke and soot damage</td>
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<td>to material</td>
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<td>outside the container</td>
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No pretext is made that this portrayal is beyond dispute. The courts do not speak in "degrees of hostility." Its limited purpose is twofold: (a) to attempt to fairly reflect on which side of the "middle line" decisions involving a basic fact pattern have been positioned by the court; (b) to give the reader a reference point by which to put in perspective the fact-decision approach of the courts in this area.
A. The Furnace Cases

Homer Homeowner and his family feel secure in their home, because they have just secured a Standard Fire Policy from the “Always Pay Insurance Company.” But what are they protected against? Suppose the oil burner furnace in their basement was defective and oil seeped through a crack in the container, caught fire, igniting furniture and other articles in the basement? Or, perhaps the thermostat, through no fault of Homer’s, fails to operate properly and the furnace builds up sufficient heat to boil away the water, melt the furnace, and “char” some nearby chairs. What if the chimney became stuffed and threw back huge amounts of soot and smoke causing several hundred dollars worth of damage? Could Homer recover from “Always Pay” for any of these losses?

With the exception of the furniture actually ignited by the flaming oil, the answer would almost invariably be in the negative. Way v. Abington Mut. Fire Ins., Co.,37 the case credited with first having articulated the “friendly” versus “hostile” dichotomy, set forth the rule that, “[I]f the fire burned nothing but that which was intended to be burned for a useful purpose in connection with the occupation of the house, and if it did not pass beyond the limits assigned for it, the insurance company would not be liable. . . .”38

In the Way case, however, the furnace fire had “escaped” its intended place and ignited soot in the chimney. The court permitted the insured to recover against the insurance company for smoke and soot damage:

[W]e find it by no means easy to determine whether the principle should be extended far enough to cover the occasional fire in a chimney incidental to the ordinary use of a stove, or whether such a fire should be held to be one for whose unexpected injurious consequences an insurance company should be liable. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building and a fire which starts from such a fire without human agency in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire 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.39

37. 166 Mass. 67, 43 N.E. 1032 (1896).
38. Id. at 74, 43 N.E. at 1033.
39. Id. at 74-75, 43 N.E. at 1033-34.
Thus, Homer's recovery would be limited to those situations wherein he can show that the fire left its normal confines in the furnace.

Several courts, because of the harshness of the rule, have apparently "stretched" the facts to allow recovery. They have made a functional distinction between the "fire" compartment of the heating unit and the water or air space generally provided. Thus, where the fire breaks into the water unit and causes damage, the fire is considered "hostile" and the damage compensable. 49

Where the fire remains in the furnace but burns excessively so as to cause damage to the furnace itself or to articles nearby, the fire has been deemed "friendly" so as to preclude recovery. In Mitchell v. Globe & Republic Ins. Co., 41 the furnace had been drained of water to effect minor repairs on the unit. An unknown person switched the unit back on and heat damage resulted. No other damage was claimed. The court, in refusing to grant the insured recovery under the insurance contract said:

The principle properly deducible from the cases is that if the fire is confined wholly within the furnace, stove, heater, etc., which was installed for the purpose of having a fire within it, loss or damage which may occur only to the heating appliance or device installed to contain the fire, by over-heating, or lack of water, or other improper handling, is not covered by the insurance policy. 42

The holding of this case has been almost unanimously followed by other courts. 43 The only dissent appears to be in those cases where external damage was done by the excessive heat. Thus, in O'Connor v. Queen Ins. Co.:

The court apparently felt that the expectations of the parties were determinative of the scope of coverage. What type of fire did the parties

42. Id. at 535, 28 A.2d at 804.
contemplate under ordinary circumstances? They felt that the case at bar was distinguishable from Austin:

There the fire was under control, not excessive, and suitable and proper for the purpose intended. It was, in the language of the books, a "friendly" and not a "hostile", fire. In the case before us the fire was extraordinary and unusual, unsuitable for the purpose intended, and in a measure uncontrollable, besides being inherently dangerous because of the unsuitable material used. Such a fire was, we think a "hostile" fire and within the contemplation of the policy.\textsuperscript{45}

The rule in O'Connor has not been followed in the ordinary smoke and soot damage case.\textsuperscript{46} Thus, in Lavitt v. Hartford County Mut. Fire Ins. Co.,\textsuperscript{47} the main damage claimed was from smoke and soot. The court found that the fire had always remained confined within the oil burner and denied recovery under the rule in Austin because the fire itself remained "friendly", since limited to the place where it was intended to be.

In Cannon v. Phoenix Ins. Co.,\textsuperscript{48} a servant of plaintiff dislodged a furnace pipe. The only damage was due to the smoke and soot trapped in the building. The court said: "This fire did not spread from where it was built and intended to remain. It was, therefore, all the time during the alleged injury and damage to the goods, what is termed in the books a 'friendly' and not a 'hostile' fire."\textsuperscript{49}

With the exception of O'Connor and its limited following, the only damage recoverable is where a furnace either malfunctions or is improperly operated and results in actual ignition or a secondary fire.

B. The Stove Cases

Harriet Homeowner, Homer's wife, received an electric kitchen range. Every innovation on the market had been incorporated into this modern stove, the most appealing of which was a fully automatic timer designed to both turn the stove on and shut it off.

On the day in question, Harriet placed the family's dinner in the oven, and, relying on the timer to tend to her cooking, spent the afternoon shopping. Suppose the timer failed to shut the oven off at the proper time and the dinner burned. Could she recover for this or for

\textsuperscript{45} 140 Wis. 388, 394-95, 122 N.W. 1038, 1041. (Emphasis added.)
\textsuperscript{46} See, however, its extension in the store cases. L. L. Freeberg Pie Co. v. St. Paul Mut. Ins. Co., 257 Minn. 244, 100 N.W.2d 753 (1960).
\textsuperscript{47} 105 Conn. 729, 136 Atl. 572 (1927).
\textsuperscript{48} 110 Ga. 563, 35 S.E. 775 (1900).
\textsuperscript{49} Id. at 567, 35 S.E. at 776.
smoke damage caused by the charred turkey? What if the heat of the oven melted plastic dishes on the counter next to the stove? Or, suppose the stove was “ruined” from the heat, the coils having melted and fused together? What if the intense heat ignited several wooden bowls on the counter and they were actually in flame when she came in?

In Fire Ass’n of Philadelphia v. Nelson, the insured set her chicken on the stove to cook. Several hours later, when she returned, the chicken was burned to a crisp, and the house was filled with smoke. The court reasoned that if the fire had remained confined to the stove, then no recovery would be allowed for either the chicken or the smoke damage. If, however, the fire escaped from the stove, then it would be “hostile.” The lower court found that the fire had spread to the walls and floor around the stove. Since the fire was “hostile”, recovery was allowed.

In Pappadakis v. Netherlands Fire & Life Ins. Co., the fire escaped through a crack in a bakery oven and activated a sprinkler-bed located on the ceiling. The court stretched the facts to find that the fire escaped, labeled it “hostile”, and allowed the insured to recover for the water damages as the proximate result of a “hostile” fire.

If no actual ignition took place outside of the stove, and the metal on the stove warped and cracked, the fire would be deemed “friendly” under the rule in Consoli v. Commonwealth Ins. Co. The court in L. L. Freeberg Pie Co. v. St. Paul Mut. Ins. Co., however, allowed the insured to recover under the “excess” heat test laid down by the O’Connor case relating to furnaces.

A “hostile” fire for recovery in the oven cases must be one that escapes the confines of the stove. Only the Freeberg case appears to have allowed recovery for damages done by “excess” heat.

C. The Lamp Cases

When Mrs. O’Leary’s cow kicked over an oil lamp in a Chicago barn (prelude to the “Chicago fire”), the apex of loss or damage from oil lamps was reached. Since that time, oil lamp fires have become an almost non-existent problem. The leading case delineating the “friendly” versus “hostile” fire dichotomy in lamp cases is Fitzgerald v. German-American Ins. Co. Patrick Fitzgerald left a lamp lit in his office (apparently overnight). There was no fire outside of the lamp

50. 90 Colo. 524, 10 P.2d 943 (1932).
51. 137 Wash. 430, 242 Pac. 641 (1926).
52. 97 N.H. 224, 84 A.2d 926 (1951).
53. 257 Minn. 244, 100 N.W.2d 753 (1960). The court did not have to go this far, however, as there was a “fire” out of place under the traditional rule.
54. 30 Misc. 72, 62 N.Y. Supp. 824 (Oneida County Ct. 1899).
FRIENDLY V. HOSTILE FIRE DICHTOMY

itself. His office suffered general smoke damage and his curtains were actually destroyed by smoke and soot. The court said:

My attention has not been called to any case where the courts have held that an insurance company was liable for damages caused by a smoking lamp . . . . The rule seems to be that where . . . the fire is confined to the agencies so employed, the damage ensues, without any actual ignition, to the property insured, the insurance company is not liable . . . . I do not think the parties to the contract of insurance contemplated that the policy would cover damages arising from a smoking lamp. I do not think a lighted lamp is a "fire," within the meaning of this insurance policy.55

No cases have been found wherein the insured attempted to recover for "charred", but not "ignited" articles, nor for the loss of the lamp itself.

D. The Cigarette Case

Prior to Swerling v. Connecticut Fire Ins. Co.,56 the issue of cigarette burns does not appear to have been before the courts.57 Ackerman in his article, What is a "fire"—An Insurance Definition,58 relates that the companies generally paid out on small cigarette claims until the late twenties or early thirties. Due to a marked increase in claims during this period, the companies directed their agents to refuse payment. Swerling was apparently the subject of such a policy because he brought an action to recover for a mere thirty-six dollars worth of damage to his carpeting when his cigarette fell from the ash tray. The court gave little consolation to the insurance companies, when purporting to follow the place rule of Austin v. Drewe, they held:

It is not sufficient to say that the only fire was in the cigarette and hence where it was intended to be. The cigarette was not the container of the fire. It was composed of tobacco and container, and both were burning. It was the fire itself. The whole cigarette was as much the matter to be consumed as the coal or oil in a furnace. A person desiring to smoke a cigarette lights one intending that both the tobacco and wrapper shall be con-

56. 55 R.I. 252, 180 Atl. 343 (1935).
57. Neither my research, nor that of the Law Review commentators of that time show any such cases. In fact Rosen, in his comment on the Swerling case in 16 B.U.L. Rev. 219, 220 (1936), notes the absence of similar cases: "The problem, on its facts, is novel as it has never before arisen, to the writer's knowledge, in any court of last resort." Neither commentator in either 34 Mich. L. Rev. 135 (1935), nor 24 Geo. L.J. 750 (1936), makes any references to the existing or non-existence of such cases.
58. 2 U. NEWARK L. Rev. 111 (1937). This practice was also noted in 34 Mich. L. Rev. 135, 137 (1935).
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sumed, or partly so, in the act of smoking. The fire can be confined at such a time only by the holding of the cigarette under the physical control of the person himself. That is the only sense in which it can be said to be confined or contained. If while the cigarette is lighted the person desires to put it aside temporarily, or to discard it, he may put it in an ash tray or some other suitable receptacle. The burning cigarette is then confined in a place where it is intended to be. As long as the cigarette remains there, the fire in the cigarette is a friendly fire and, for any damage it might cause while in its proper place, there can be no recovery. But, if through accident the cigarette gets on the floor and causes damage to a rug by charring or scorching it, the fire in the cigarette is no longer a friendly fire but is a hostile one, because it is then in an improper place, and, therefore is doing harm.59

It must have appeared clear to the insurance companies that the courts came perilously close to saying that anywhere the cigarette caused damage, it would be considered “hostile”, except perhaps in the ash-tray itself, for no subsequent cases appeared to have been decided in a higher court of record. Rather than chance such a decision, the insurance companies apparently pay “cigarette” claims.60

E. Articles Inadvertently Consumed By An Otherwise “Friendly” Fire

Whether an object inadvertently consumed by a domestic fire is a loss due to “fire” within the meaning of insurance policies remains the most lively area of contention in the “friendly” versus “hostile” fire dichotomy. The leading cases are split five to three, with one abstention. Five cases deny recovery on the ground that a fire in a furnace, fireplace, or incinerator is “friendly”;61 three cases allow recovery because the loss was the direct result of “fire”;62 one case denies recovery,

59. 55 R.I. at 255-56, 180 Atl. at 344.
60. Cf. 16 B.U.L. Riv. 219, 229 (1936):

The decision will undoubtedly give rise to much litigation and cause the insurance companies great trouble in the very near future; and, the one bad practical feature of the decision is that it will lead to many such claims, most of which will be small, and many, undoubtedly false.

In conclusion, it is submitted that, although the decision has and will have its practical drawbacks in subjecting the insurance companies to many small claims, it is theoretically and legally correct, and from a review and analysis of the cases, the writer believes that the Rhode Island court has correctly applied the principles of law on the subject matter to the facts presented to them and has properly allowed the plaintiff to recover.

not explicitly because the fire was “friendly”, but because the fire policy did not expressly include intentionally lit domestic fires.\textsuperscript{63} YOUSE v. Employers Fire Ins. Co.,\textsuperscript{64} illustrates the factual setting for most of these cases:

[T]he wife of insured was carrying her ring wrapped in a handkerchief in her purse. Upon arriving at her house she placed the handkerchief, together with some paper cleansing tissues (Kleenex), on the dresser in her bedroom. Later her maid, in cleaning the room, inadvertently picked up the handkerchief containing the ring, together with the cleansing tissues, and threw them into a wastebasket. Still later, another servant emptied the contents of the wastebasket, along with other trash, into a trash burner at the rear of the premises and proceeded to burn the trash so deposited. The trash burner was intended for that purpose, the fire was intentionally lighted by the servant, and was confined to the trash burner. About a week later the ring was found in the trash burner. It had been damaged to the extent of $900.\textsuperscript{65}

Despite the strongly argued contention of the insured “that he purchased and paid for fire-insurance — not just for fire insurance to cover losses resulting from so-called ‘hostile’ fires,”\textsuperscript{66} the court held:

In our opinion there can be no question but that the fire which damaged or destroyed the sapphire ring was what in law is known as a “friendly” fire. It was intentionally lighted, was for the usual and ordinary purpose of burning trash, and was at all times confined to the place where it was intended, and did not escape.\textsuperscript{67}

In Salomon v. Concordia Fire Ins. Co.,\textsuperscript{68} the only American case which allows recovery, the insured’s bracelet was inadvertently consumed by a trash burner located in her yard. The court rejected that line of cases which makes a distinction between “friendly” and “hostile” fires as the delineation of the insurer’s undertaking to recompense the insured for “fire” damage. They said:

We are unable to see the difference between an accidental loss resulting from a “friendly” fire and an accidental loss caused by

\begin{itemize}
\item other jewelry inadvertently put in stove
\item 172 Kan. 111, 238 P.2d 472 (1951).
\item Id. at 112, 238 P.2d at 473.
\item Id. at 113, 238 P.2d at 474.
\item Id. at 118, 238 P.2d at 477.
\item 161 So. 340 (La. App. 1935).
\end{itemize}
by a hostile fire. In both instances the loss is the direct result of fire against which the insurer agreed to indemnify the insured. The fact that in one case the fire is ignited intentionally, and in the other adventitiously, is a distinction without a difference.⁶⁹

Both Harris v. Poland⁷⁰ and Countess Fitz-James v. The Union Fire Ins. Co.,⁷¹ concentrate on the accidental loss, rather than the accidental nature of the fire. Thus, in Countess Fitz-James, the court said: "[T]he word fire in matters of assurance applied to every accident . . . so long as it is caused by the action of fire."⁷² While the court in Harris appears to have accepted the language of Welford and Otter Barry on Fire Insurance,

[T]he question then arises what is the position where property is accidently burned in an ordinary fire, such as a domestic fire: the fire never breaks its bounds, but something which was never intended to be burned falls or is thrown by accident into the grate and is burned. In this case, equally with the case where the fire breaks its bounds, there is an accident and something is burned which ought not to have been burned. The only distinction between them is that in the one case it is the fire which escapes out of its proper place and comes into contact with the property destroyed whereas in the other case it is the property which gets out of its proper place and comes into contact with the fire. This distinction does not appear to be sufficient to make any difference in the result. The object of the contract is to indemnify the assured against accidental loss by fire, and so long as the property is accidentally burnt, the precise nature of the accident seems to be immaterial. It may be therefore concluded that the loss in both cases falls equally within the contract.⁷⁸

Although the minority has been articulate,⁷⁴ the majority rule remains that no recovery will be permitted if the fire is "friendly" under the place test of Austin.

F. The Explosion Cases

The standard fire insurance policy specifically excludes losses resulting from explosion.⁷⁶ "The term 'explosion' as used in such provisions has been defined as a violent bursting or expansion, following the sudden production of great pressure, or a sudden release of pres-

⁶⁹. Id. at 343.
⁷⁰. [1941] 1 K.B. 462.
⁷². Ibid.
Before the advent of the standard policy, unless the insurer specifically noted that explosions were not covered by the policy, the courts would find that fires and explosions were analogous. Thus, the court in *Furbush v. Consolidated Patrons' of the Farmers' Mut. Ins. Co.*, said: “A fire may be both a burning by slow, and a burning by rapid combustion, and if the insurance company makes no distinction between them in its policy, either is covered by a stipulation for indemnity for loss by fire.”

Under the standard policy, explosions being excluded, the court must find that a “fire” preexisted the explosion, which in the natural course of things would have destroyed the subject of the insurance. It is in the finding of such a “fire” that the courts have utilized the distinction between “friendly” and “hostile” fires. The dichotomy was aptly applied by the court in *New Hampshire Fire Ins. Co. v. Rupard*.

[A.] [hostile] fire in the insured property, followed by an explosion during the progress of the fire, as an incident of or caused by the fire, is held to be the proximate cause of the damages from the explosion as well as the fire, and within the risks insured against by the contract, although the contract excepts liability for loss by explosion. Such a fire is distinguished from the flame of a lighted match, a lighted lamp, gas jet, cigar or a fire within a furnace or stove where it is intended to be. The former kinds of fire are usually denominated hostile in the nomenclature of the law, while the latter kinds are denominated innocent fires, and when an explosion is caused by an explosive substance coming into contact with an innocent fire, alone, the effects of the explosion are attributed to the explosion as the proximate cause and not the fire, and hence, damages, from such an explosion are within the exceptions in the contract.

As with most rules, the dichotomy in this area manifests its uncertainties in the fact finding arena — was there or was there not a “hostile” fire.

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77. 140 Iowa 240, 118 N.W. 371 (1908).
80. 187 Ky. 671, 220 S.W. 538 (1920). But see *Scripture v. Lowell Mut. Fire Ins. Co.*, 64 Mass. (10 Cush.) 356, 57 Am. Dec. 111 (1852), where the court so construed the place test of *Austin v. Drew* as to allow recovery where the insured’s son lit a match to gunpowder in the attic.
82. See, e.g., *German-American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27 (1908) (no evidence to show what touched off explosion); *Springfield Fire & Marine Ins. Co. v. Oliphant*, 150 Okla. 1, 300 Pac. 711 (1931) (the court strained to find that
IV. JUSTIFICATION AND REJECTION OF THE BASIC PREMISE

There is an apparent inequity in this denial of coverage for the losses of the insured. The greatest "injustice," however, lies not in the denial of recovery for a particular loss before the court, but in the prior lack of knowledge of non-coverage by the insured. If the insured had knowledge that his present policy did not cover losses due to "friendly" fires, he could follow one of two courses of action to protect himself: (1) acquire additional coverage, if available, with his insurance carrier; or (2) take extraordinary precautions in the protection of his property. Both of these alternatives are denied the insured. 83

Lack of knowledge means that few, if any, requests have been made for additional coverage. Because of this, even if the insured in a particular case knows that he is not covered, it is unlikely that he will be able to procure other insurance at a reasonable rate. The company would probably have to attach a special rider, if they have the power (or inclination) to do so, which would reflect the expense of designing a special standard of risk computation for an individual policy holder. Other forms of property insurance (non-fire) might be available, but their interpretation and expense make this an alternative of dubious value. 84

The protracted articulation of this rule and its seeming impregnability have led some courts to make subtle, often illusive factual distinctions in order to permit recovery in the hard but deserving case. Because of this, it is often difficult to determine whether the court is limiting the rule, or accepting it with a novel interpretation of the facts. 85

83. As was said by Justice Atkinson in Harris v. Poland, [1941] 1 K.B. 462, 467: "There certainly ought to be some clear understanding as to the meaning of these apparently simple words so that persons insuring may know where they stand, and . . . not continue in a fool's paradise, believing that they have a protection which, in fact, they have not."

84. The Uniform Standard New England Dwelling Property Form has an extended coverage endorsement applicable to smoke damage. Therein, "the term, 'smoke' . . . means only smoke due to a sudden, unusual and faulty operation of any heating of cooking unit, only when such unit is connected to a chimney by a smoke pipe or vent pipe . . . ."

The Standard Homeowners Policy — Broad Form, provision 16, applies to "sudden and accidental tearing asunder, cracking, burning, or bulging of appliances for heating water for domestic consumption."

No provision has been found to cover articles consumed by these fires directly. This coverage is probably only available through insurance of each and every article of property individually, or collectively through a personal property floater policy. 85

85. The courts, for example, are prone to find that a fire existed outside of the furnace or stove. Thus, the court in Fire Ass'n of Philadelphia v. Nelson, 90 Colo. 524, 10 P.2d 943 (1932) accepted a rather dubious finding that the fire actually spread to the walls and floor around the stove. The most tenuous and strained findings of "escape" are in the cases where the court segregates the compartments of the furnace.
Some courts have justified their hesitancy to modify the "friendly fire" doctrine because of the insurer's reliance upon past decisions.\textsuperscript{86} "Reliance," if recognized, should be subordinated to the public interest. Thus, although insurance companies may be justified in relying on past decisions, the "right" to rely should be made dependent upon preventing the depletion of existing reserve funds. If there is no foreseeable depletion or threat to the insurance companies, other than a minimal lessening of profits for the stockholders or shareholders, then the insurance companies should be presently bound by the language of the policy as it conforms to the understanding of the lay public.

Other courts have suggested that their refusal to change the rule is based upon the possibility of opening "Pandora's Box." It is feared that the insurance companies would be inundated with claims. The court in \textit{Reliance Ins. Co. v. Naman},\textsuperscript{87} said:

> If the fire in the furnace was such a fire as the company insured against, then it would be liable for any direct loss or damage therefrom, and it would follow the insured could recover his damage for loss occasioned by the cracking of the plaster in the furnace basement from the heat of the furnace, for the cracking of the paper on the walls from the heat of the grate, and for damage to the decoration and draperies through smoke and soot from the furnace or chimney place, and even for the replacement of furnace, grate, and range oven when burned out, for those clearly would be losses directly due to the respective fires. Those are not extreme illustrations, but liability in each instance would follow if the fire in this case be held to be within the policy.\textsuperscript{88}

By refusing to move beyond the narrow limits attributed to \textit{Austin}, the courts have facilitated the perpetuation of this inequity. Their decisions have failed to recognize that insurance companies are regulated and operated in the public interest. Insurance companies, as an

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\item[\textsuperscript{86}] Lavitt v. Hartford County Mut. Fire Ins. Co., supra note 82.
\item[\textsuperscript{87}] 118 Tex. 21, 6 S.W.2d 743 (1928).
\item[\textsuperscript{88}] Id. at 27, 6 S.W.2d at 743.
\end{itemize}
\end{footnotesize}
operative segment of the economy, are concerned with a matter as important as that of capital acquisition and expansion — the distribution of risk to prevent a substantial loss befalling an active member of the operative and productive society. As such, they have an affirmative obligation to extend their services to needed areas. Further, the insurance companies have a positive duty to refrain from misleading the public with which they deal. Certainly these companies know and indeed rely upon this judicially (not contractually) imposed distinction between friendly and hostile fires. They also know that the public, or at least the average member of the public — whether he be a businessman, a homeowner, or the owner of an expensive chattel — is unaware of this distinction. The fact remains that the insurance policy contains the word “fire” which means one thing to the insurance companies and conveys an entirely different meaning to the policy holder. Surely words mean what they are reasonably understood to mean by the average person. For the insurance companies, therefore, to knowingly use a word which has a dual meaning, one of common parlance and the other of “technical” import, borders on a violation of the trust and power which is reposed in these companies by the public.

The insurance industry, although not a monopoly in the true sense of the word, has “monopolistic attributes” by force of state regulation and preclusion from the field. Only those companies which can meet the qualifications set forth by statute and the insurance commissioner are permitted to participate in the writing of insurance. If companies allowed to participate deny coverage where it should be given and prey upon the ignorance of technical terms by the lay public, advantage is being taken of a favored position to the corresponding detriment of the public interest by inadequately providing for all risks within their sphere of obligation.

The insurance companies have been literally freed from coverage of “friendly” fire losses because they have never been forced to articulate the true limits of their undertaking. If the legislature or the court directs such a confrontation, then coverage could be effected either: (a) under the standard policy, unless explicitly excluded, or (b) under riders for extended coverage available to the general public.

A number of arguments, however, may be advanced by the insurance companies for the retention of the rule. Most answer themselves. One contention is that an expansion of the scope of coverage will result in an increase of premiums. If the insurance companies want to avoid this, they can delineate the scope of their undertaking to exclude “friendly” fires, and include only “hostile” fires. If no additional coverage is offered, then at least there will be a true representa-
tion to the insured of the company's undertaking. If there is sufficient demand for further coverage from direct loss by fire, riders or extended coverage clauses could be offered with a premium charge made commensurate with the additional risk assumed.

A second argument relates to existing policies and payments which might have to be made thereon. However, the term for which most policies are written is short — one to three years. Moreover, the rule might be announced prospectively,\(^8^9\) whether the change comes about through legislative or judicial action, it could be made applicable to future policies and thus avoid this question. Even if the rule is applied presently, it is unlikely that the insurance companies would be substantially affected.

A final argument employed by the insurance companies for retention of the rule pertains to the “moral hazard” question. The insurance companies have a justifiable fear that additional claims will result from intentional incendiarism. However, insurance companies have never been required to compensate intentionally caused losses\(^9^0\) and have proven capable of detecting incendiarism in other cases. Difficulty of proof and the possibly increased liability of insurance companies should be reflected in premium charges, not in a denial of coverage.

There is little doubt but that a rejection of the basic premise of cases purporting to follow *Austin v. Drewe*, requiring an *accidental fire*, as opposed to *accidental loss*, would result in a broader undertaking by the insurance companies and a commensurately larger number of insured recoveries under a policy. The question whether to remain with this premise should be resolved in favor of granting recovery for accidental loss,\(^9^1\) whatever might be the origin of the fire, because the insured believes he is being protected against *any* loss by “fire.”

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89. In Mosser v. Darrow, 341 U.S. 267, 276 (1961), Justice Black advocates the prospective application of a rule: “Admittedly the most that can be said against respondent is that he made an honest mistake which before today would not have subjected him to the heavy financial penalty. Under these circumstances, if the new rule is to be announced by the Court, I think it should be given prospective application only.”


91. But see Abbot, *The Meaning of Fire in an Insurance Policy Against Loss or Damage by Fire*, 24 Harvard L. Rev. 119, 135-36 (1910): In a word, fire, as used in an ordinary fire policy, means fire which is accidental with respect to the insured. Moreover, the accidental quality must attach
The loss, whether it is from an intentional or unintentional fire, satisfies the most fundamental requirement of insurance — that there must be a "risk" and a "casualty." The legion of cases arising from "friendly" fire losses bear witness to the fact that there is a "risk" involved whenever one domesticates fire. As was said in the Harris case:

Unless there is spontaneous combustion, and apart from fires caused by electricity or lightning, the unintentional burning of insured property must, I suppose, always be caused directly or indirectly by fire created intentionally of matter intended to be consumed. . . . Of course, one does not insure against the happening of such intended fires. One insures against the risk of insured property getting burned by unintended contact with some such fire or with fire started by some such fire. A householder has of necessity to make use of fire in his house for heating and lighting. He knows that fire is a source of danger, not merely from escape of fire from its legitimate place, but also from things coming in contact with it in its legitimate place. . . .

Once the element of "risk" has been found, some element of fortuitousness must appear.

There are, of course, limits to "all risks." They are risks and risks insured against. Accordingly, the expression does not cover inherent vice or mere wear and tear. . . . It covers a risk, not a certainty; it is something, which happens to the subject matter from without, not the natural behaviour of that subject-matter. . . .

Inherent in these basic principles are the guide lines or limitations on recovery by an insured under any form of fire insurance. They provide the proper scope of inquiry for the courts. The question which should be asked is not whether the fire was accidental, but whether the loss suffered by the insured is unintended, accidental, and out of the ordinary course of things. In other words, a "casualty." A clear line is drawn under these principles between things intended to be consumed in the combustion process (i.e., the coal, oil, cigarette, candle, as well as the normal wear and tear on the container of the fire from continuous exposure to the heat and flames) and the

to the fire itself. An intentional fire plus accidental damage do not constitute accidental fire. In such a case the accidental quality attaches to the loss alone and is no part of the flame which caused the loss. But it is the cause of the loss, not the occurrence of loss, which determines whether there may be recovery. A fire kindled by the insured in a place provided therefor is an intentional fire. It cannot acquire the necessary accidental quality because smoke or heat evolved thereby does damage. The lack of this essential accidental quality in the fire itself is fatal to recovery.


95. See generally, Abbot, supra note 92.
unintended consumption or destruction of an article coming into contact with the fire or its by-products, as well as the sudden, unexpected destruction of the container itself.

Applying these guidelines to the cases, it becomes obvious that no recovery should be allowed for the consumption of fuel, nor for the eventual wearing out of a furnace, stove, or trash burner. Recovery should also be denied where the normal amount of soot and smoke ultimately takes its toll on an article. Recovery should be allowed, however, where through mechanical failure, or inadvertence of the insured, imperfect combustion or blockage of the chimney caused extraordinary smoke or soot damage,\textsuperscript{96} cracked the furnace,\textsuperscript{97} melted the stove,\textsuperscript{98} or charred nearby articles.\textsuperscript{99}

Each of these situations wherein recovery would be allowed under the suggested rule can be predicted by the insurance companies with a reasonable degree of accuracy. The fact that in initial years the information upon which they base their premium computations would be incomplete should be no reason not to undertake this coverage. Presumptively, as accurate a prediction might be made here as in any other area of “risk” computation.

If this approach were taken, the insured would be covered as he thought he was, and not, as Justice Atkinson so aptly phrased it, “continue in a fool’s paradise,” thinking he was protected, when in fact he was not. Certainly there would be fewer irate policy holders.\textsuperscript{100}

\section{V. Conclusion: Problems of Change}

The age-old question as to “change” is where does it start and how and who should take the initiative. After nearly one hundred and fifty years of apparent satisfaction with the “friendly” versus “hostile” fire dichotomy, it is unlikely that the insurance companies are going to advocate, \textit{ex parte}, a change of the rule. Despite the view of the court

\textsuperscript{96} Thus, in Cannon v. Phoenix Ins. Co., 110 Ga. 563, 35 S.E. 775 (1900) (discussed \textit{infra} section III-A), this rule would have allowed the insured to recover for smoke damage from a dislocated pipe.

\textsuperscript{97} See, \textit{e.g.}, the test of “excessive” heat in O’Connor v. Queen Ins. Co., 140 Wis. 388, 122 N.W. 1038 (1909) (discussed \textit{infra} section II-A). Mitchell v. Globe & Republic Ins. Co., 150 Pa. Super. 531, 28 A.2d 803 (1942) also discussed in the furnace section would be reversed.

\textsuperscript{98} The result would be reversed in Consoli v. Commonwealth Ins. Co., 97 N.H. 224, 44 A.2d 926 (1951), where the oil stove warped and cracked. This would be an extraordinary event and compensable under the proposed test. See also Progress Laundry & Cleaning Co. v. Reciprocal Exch., 109 S.W.2d 226 (Tex. Civ. App. 1937), where the court stretched the place test to reach an equitable result when a large boiler melted.

\textsuperscript{99} See Consoli v. Commonwealth Ins. Co., \textit{supra} note 98 and O’Connor v. Queen Ins. Co., \textit{supra} note 97, for typical heat damage and a reversal under this test.

\textsuperscript{100} See 21 \textit{CORNELL L.Q.} 318, 325 (1936), where the author notes: “The insurance companies are quite perplexed as to what they are going to do with these claims. They too, are not satisfied with the ‘friendly’ fire doctrine, for since it is not expressed in the policy, it often leads to bad feeling on the part of the policy holder.” See also MacIntyre, \textit{Hostile and Friendly Fires in Canadian Insurance Law}, 2 \textit{U. BRITISH COL. LEGAL NOTES} 373 (1953).
in Consoli v. Commonwealth Ins. Co.\textsuperscript{101} that change must come about by legislative action and legislative initiative, it is the courts which must be persuaded to act in the present and not await legislative action which may never come. No longer satisfied with the status quo, if the courts so act, the insurance companies will have a reason to seek a uniform legislative declaration of their policies and practices.

If the courts reverse their prior holdings, and find that accidental loss, not accidental fire was the risk intended by the parties to be insured against, then the insurance companies will either have to accept the broader risk and raise their premium charges, or modify their existing policies to \textit{explicitly exclude} fires intentionally ignited which remain in their intended place and do not become excessive — the rule of \textit{Austin v. Drewe}. Legislative approval will probably have to be sought to effect this exclusionary coverage.\textsuperscript{102} If so, the legislature may see fit to require that the insurance companies offer extended coverage endorsements to provide for this risk.

The courts should undertake to clarify this situation and not allow the insurance companies to continue to profit by the ambiguity in the present standard fire insurance policy. Assumption of a broader based liability should not seriously affect the insurance companies during the transitional stage, that is, until they have their premium charges calculated properly.\textsuperscript{103} In light of the emerging role of insurance as an instrument of grave social and economic significance, such an expansion seems the only consistent course of action available. Once this risk is assumed by the insurance companies, perhaps the courts can once again achieve equity by construing fire insurance contracts “by the ordinary rules of common sense.”\textsuperscript{104}

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\textsuperscript{101} 97 N.H. 224, 226, 84 A.2d 926, 927 (1951).
\textsuperscript{102} Some doubt exists whether the companies can limit their policies without legislative approval. The court in Wausau Tel. Co. v. United Fireman's Ins. Co., 123 Wis. 535, 536-37, 101 N.W. 1100, 1101 (1905) said:

The standard policy, which is also a statute, provides in its opening clause that the insurance company “does insure . . . against all direct loss or damage by fire except as hereinafter provided.” . . . it would seem to follow that an exception covering a fire loss caused by an electric current cannot be added to the policy, because the policy specifically contains its own exceptions, and forbids any additional conditions inconsistent therewith.

\textsuperscript{103} For a general discussion of risk computation, see Dennenberg et al., Risk and Insurance 379-408 (1964).

\textsuperscript{104} Judge Frank captures, for the author, the feeling one gets when he comes across a line of decisions akin to those involving the friendly versus hostile fire doctrine as follows:

Once trapped by the belief that the announced rules are the paramount thing in the law, and that uniformity and certainty are of major importance . . . a judge is likely to be affected, in determining what is fair to the parties in the unique situation before him, by consideration of the possible, yet scarcely imaginable, bad effect of a just opinion in the instant case on possible unlike cases which may later be brought into court. He then refuses to do justice in the case on trial because he fears that "hard cases make bad laws." And thus arises what may aptly be called "injustice according to law." Frank, Law and the Modern Mind 154 (1935).
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