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Erratum
On page 467, line 14 which read: friendly first Should have read: friendly fire. On page 468, line 7; page 469, footnote 51; page 470, footnote 54 which read: *Barcolo* Should have read: *Barcalo*.

tions cannot be found outside the home. In light of the fact that few people object, and that most inspections are made in blighted areas where probable cause could be found,[58] it is doubtful that this result will destroy the effectiveness and efficiency of health and welfare inspection programs.[59]

The right to privacy has been described by Justice Brandeis as "the right to be let alone- the most comprehensive of rights and the right most valued by civilized men."[60] But the critical question is whether the right to privacy, encompassing within it the privilege to deny entry to any governmental official without a warrant, is a right or "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[61] The *Frank* and *Eaton* decisions held that it was not such a principle and therefore not incorporated within the fourteenth amendment. However, recent decisions of the Supreme Court incorporating sections of the Bill of Rights into the fourteenth amendment,[62] combined with the Court's willingness "to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers . . . ,"[63] indicates that the *Frank* decision may not withstand another constitutional challenge.

GEORGE WALLACH

INSURANCE LAW—NON-ESCAPING FIRE HELD TO CONSTITUTE HOSTILE FIRE

When the automatic temperature control device of plaintiff's gas fired annealing furnace inexplicably failed to operate, the furnace became "almost white hot" so that furnace and forgings therein were totally ruined. Plaintiff, a manufacturer of hand tools, claimed recovery under a standard New York fire insurance policy which covered all direct loss by fire.[1] On submission of the controversy on an agreed statement of facts,[2] *held*, for plaintiff. In view of modern heating devices and equipment, when an uncontrolled fire produces excessive heat causing damage, it is a hostile fire and within the coverage of the policy even

58. Note, *Municipal Housing Codes*, 69 Harv. L. Rev. 1115 (1956).

59. *Supra* note 58, at 1125. *But see* Guandolo, *Housing Codes in Urban Renewal*, 25 Geo. Wash. L. Rev. 1 (1956).

60. Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

61. Palko v. Connecticut, 302 U.S. 319, 325 (1937), quoting in part, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

62. Griswold v. Connecticut, 381 U.S. 479 (1965); Griffin v. California, 380 U.S. 609 (1965); Pointer v. Texas, 380 U.S. 400 (1965); Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

63. Malloy v. Hogan, 378 U.S. 1, 5 (1964).

1. N.Y. Ins. Law § 168.

2. N.Y. CPLR R. 3222.

though the fire did not escape from its container. *Barcalo Manufacturing Co. v. Firemen's Mutual Insurance Co.*, 24 A.D.2d 55, 263 N.Y.S.2d 807 (4th Dep't 1965).

Although the standard fire insurance policy in terms covers "all direct loss by fire," courts seldom give effect to the literal meaning of these words.[3] A successful plaintiff must not only show the existence of a fire in the ordinary sense of combustion accompanied by some light or glow,[4] but also must prove a "hostile" fire as distinguished from a "friendly" fire.[5] A friendly fire is generally defined as a fire intentionally lighted and contained in the usual place for the fire, such as a furnace, stove, or incinerator; and used for the purposes of heating, cooking, manufacturing, or other common and usual everyday purposes.[6] On the other hand, a hostile fire is a fire "unexpected, unintended, not anticipated, in a place not intended for it to be and where fire is not ordinarily maintained. . . ."[7] A fire, originally friendly, may "escape" and thereby become hostile.[8] The friendly fire doctrine has been called the "container rule" since courts look to the origin and locus of the burning in determining whether or not fire has escaped.[9] Courts will usually require an external secondary ignition[10] although some courts have found a hostile fire where flame escaped through a crack in an oven[11] or where hot coals were thrown out of a furnace by an explosion.[12] Where damage is caused both by a friendly and a hostile fire, the burden is on the plaintiff to prove the portion of damage caused by the hostile fire.[13] The insurer will be liable for all the proximate results beyond ignition of a

3. Courts have assumed the necessity of judicial construction of the phrase, presumably, on the theory that public expectations of coverage do not include every direct loss by fire. See Reliance Ins. Co. v. Naman, 118 Tex. 21, 6 S.W.2d 743 (1928); Way v. Abington Mut. Fire Ins. Co., 166 Mass. 67, 43 N.E. 1032 (1896).

4. Western Woolen Mill Co. v. Northern Assur. Co., 139 Fed. 637 (8th Cir.), *cert. denied*, 199 U.S. 608 (1905).

5. Way v. Abington Mut. Fire Ins. Co., 166 Mass. 67, 43 N.E. 1032 (1896). It should be further noted that plaintiff's ordinary negligence is not a bar while gross negligence or recklessness may foreclose recovery. See Todd v. Traders' & Mechanics' Ins. Co., 230 Mass. 595, 120 N.E. 142 (1918). In New York the standard policy expressly provides that the company is not liable for damages caused by "neglect . . . to use all reasonable means to save and preserve property after loss or when the property is endangered by fire in neighboring premises." N.Y. Ins. Law § 168.

6. 10 Couch, Insurance, § 42:3 (2d ed. 1962).

7. 29A Am. Jur. *Insurance*, § 1287 (1960).

8. *E.g.*, Pappadakis v. Netherlands Fire & Life Ins. Co., 137 Wash. 430, 242 Pac. 641, 49 A.L.R. 402 (1926) (fire escaped through crack in oven and heated automatic sprinkler control).

9. Patterson, Essentials of Insurance Law 246-47 (2d ed. 1957).

10. Sigourney Produce Co. v. Milwaukee Mechanics' Ins. Co., 211 Iowa 1203, 235 N.W. 284 (1931) (no secondary ignition); Coryell v. Old Colony Ins. Co., 118 Neb. 312, 229 N.W. 326, 68 A.L.R. 222 (1930) (secondary ignition); Solomon v. United States Fire Ins. Co., 53 R.I. 154, 165 Atl. 214 (1933) (no secondary ignition).

11. Pappadakis v. Netherlands Fire & Life Ins. Co., 137 Wash. 430, 242 Pac. 641, 49 A.L.R. 402 (1926). See Annot., 49 A.L.R. 406.

12. Cabbell v. Milwaukee Mechanics' Ins. Co., 218 Mo. App. 31, 260 S.W. 490 (1924).

13. Mutual Fire Ins. Agency v. Slater & Gilroy, Inc., 265 S.W. 2d 788 (Ky. 1954); Progress Laundry & Cleaning Co. v. Reciprocal Exchange, 109 S.W.2d 226 (Tex. Civ. App. 1937).

hostile fire such as heat,[14] smoke,[15] theft,[16] water[17] and building collapse.[18] But similar damage, if caused by merely excessive fire, will not be covered if the fire remained within its container.[19]

In most jurisdictions, claims for smoke and/or heat damage caused by "non-escaping" fires have been judicially denied in cases where a vent was left closed in an exhaust flue,[20] where a wick oil lamp was turned too high,[21] and where a pipe connecting a stove became disengaged at an upper floor.[22] In cases involving furnaces or stoves, recovery for smoke and soot damage was denied when a confined fire burned excessively[23] even though in addition, the fire was seen for a short time outside the agency used to contain it.[24] However, one early case allowed recovery when plaintiff's servant used an unsuitable burning material in a furnace causing a furious fire to develop in a few moments, thus filling the house with volumes of smoke and excess heat.[25] The court held that a fire may be hostile when it is "extraordinary and unusual, unsuitable for the purpose intended, and in a measure uncontrollable, besides being inherently dangerous because of the unsuitable material used."[26] Suits for damage to the heating instrument itself have not usually been upheld. Thus, when the water supply in a boiler became insufficient due to some mismanagement or mechanical accident so that fire operating normally caused cracking and overheating, the insured

14. Austin v. Drew, 4 Campb. 360, 171 Eng. Rep. 115, Holt 126, 171 Eng. Rep. 187 (C.P. 1815); 6 Taunt. 436, 128 Eng. Rep. 1104, 2 Marsh 130 (C.P. 1816) (dictum); Case v. Hartford Fire Ins. Co., 13 Ill. 676 (1852) (damage by heat caused by fire in adjoining building).

15. *E.g.*, Way v. Abington Mut. Fire Ins. Co., 166 Mass. 67, 43 N.E. 1032 (1896). (soot ignited in chimney).

16. *E.g.*, Newmark v. Liverpool & London Fire & Life Ins. Co., 30 Mo. 160, 77 Am. Dec. 608 (1860).

17. Cummings v. Pennsylvania Fire Ins. Co., 153 Iowa 579, 134 N.W. 79 (1912) (damage caused by water used to extinguish fire).

18. Western Assur. Co. v. Hann, 201 Ala. 376, 78 So. 232 (1917) (plaintiff recovered although fire-ravaged wall stood four months before falling).

19. *E.g.*, Lavitt v. Hartford County Mut. Fire Ins. Co., 105 Conn. 729, 136 Atl. 572 (1927) (smoke and soot damage caused by excessive fire in a home furnace held not recoverable); see Vance, *Friendly Fires*, 1 Conn. Bar J. 284 (1927).

20. Austin v. Drew, 4 Campb. 360, 171 Eng. Rep. 115, Holt 126, 171 Eng. Rep. 187 (C.P. 1815); 6 Taunt. 436, 128 Eng. Rep. 1104, 2 Marsh 130 (C.P. 1816).

21. Fitzgerald v. German-American Ins. Co., 30 Misc. 72, 62 N.Y. Supp. 824 (Oneida County Ct. 1899); Samuels v. Continental Ins. Co., 2 Pa. Dist. 379 (1892); See also Hartford Fire Ins. Co. v. Armstrong, 219 Ala. 208, 122 So. 23 (1929) (oil heater in kitchen became all aflame, recovery allowed); Fire Ass'n of Philadelphia v. Nelson, 90 Colo. 524, 10 P.2d 943 (1932) (electric range set at "high" burned food, recovery allowed); Hansen v. Le Mars Mut. Ins. Ass'n, 193 Iowa 1, 186 N.W. 468, 20 A.L.R. 964 (1922) (burner set too high under kitchen boiler used to heat wash water, no recovery); Sigourney Produce Co. v. Milwaukee Mechanics' Ins. Co., 211 Iowa 1203, 235 N.W. 284 (1931) (wick turned too high on stove used to heat eggs stored in room, no recovery); Collins v. Delaware Ins. Co., 9 Pa. Super. 576 (1899) (oil supplied to stove caught fire in feeding tank, recovery allowed).

22. Cannon v. Phoenix Ins. Co., 110 Ga. 563, 35 S.E. 775 (1900).

23. Lavitt v. Hartford County Mut. Fire Ins. Co., 105 Conn. 729, 136 Atl. 572 (1927).

24. Pacific Fire Ins. Co. v. C. C. Anderson Co., 47 F. Supp. 90 (S.D. Idaho 1942); Solomon v. United States Fire Ins. Co., 53 R.I. 154, 165 Atl. 214 (1933).

25. O'Connor v. Queens Ins. Co. of America, 140 Wis. 388, 122 N.W. 1038 (1909).

26. *Id.* at 395, 122 N.W. at 1041.

was not liable.[27] Recovery was similarly denied in a case where a stove operating on "high" in a restaurant inexplicably became overheated, causing interior metal plates to buckle and other damage to foodstuffs on a nearby shelf.[28] On facts like those of the instant case, but in the context of a private home, a safety shutoff controlling a fire in a furnace failed to operate. Plaintiff could not recover for certain portions of his furnace which had become overheated and fused, nor for the ornamental outside surface which had shrivelled and flaked.[29] However, prior to the instant case, two recent Minnesota cases granted recovery where an excessive and uncontrolled flame resulted, respectively, in the loss of a commercial baking oven[30] and a furnace used to heat a building.[31] Although, in both cases, the court noted the presence of outside burning,[32] it clearly indicated that the excessive nature of the fire was an essential element which can make a confined fire hostile.[33]

In New York, the distinction between hostile and friendly first has long been recognized.[34] More recently, fires have been found to be friendly where jewelry was cached in a fireplace and inadvertently burned,[35] or where a fire causing smoke damage was seen only briefly outside the furnace.[36] On the other hand, recovery for smoke damage was allowed when a gas flame heater used in

27. McGraw v. Home Ins. Co., 93 Kan. 482, 144 Pac. 821 (1914); Wasserman v. Caledonian-American Ins. Co., 326 Mass. 518, 95 N.E.2d 547 (1950); Similarly, plaintiff could not recover when his boiler was drained for repairs and a thermostat was left on, thereby starting a fire which damaged boiler. Mitchell v. Globe & Republic Ins. Co. of America, 150 Pa. Super. 531, 28 A.2d 803 (1942). However, if the fire spread into another compartment of the furnace where it was not intended to burn, recovery for damage to furnace has been upheld. Frings v. Farm Bureau Mut. Fire Ins. Co. 99 Ohio App. 293, 133 N.E.2d 407 (1955); Progress Laundry & Cleaning Co. v. Reciprocal Exchange, 109 S.W.2d 226 (Tex. Civ. App. 1937). In an early case, recovery was denied for damage to a ship boiler caused by a fire in the course of escaping. American Towing Co. v. German Fire Ins. Co., 74 Md. 25, 21 Atl. 553 (1891).

28. Consoli v. Commonwealth Ins. Co., 97 N.H. 224, 84 A.2d 926 (1951); see also First Christian Church v. Hartford Mut. Ins. Co., 38 Tenn. App. 482, 276 S.W.2d 502 (1954) (coal generated too much heat under boiler).

29. Spare v. Glens Falls Ins. Co., 137 Conn. 105, 75 A.2d 64 (1950); Note, 32 Ore. L. Rev. 69 (1952).

30. L. L. Freeberg Pie Co. v. St. Paul Mut. Ins. Co., 257 Minn. 249, 100 N.W.2d 753 (1960); Note, *Hostility Toward the 'Hostile Fire' Doctrine*, 6 S.D.L. Rev. 129 (1961).

31. Fiorito v. California Ins. Co., 262 Minn. 340, 114 N.W.2d 661 (1962).

32. In *Freeberg*, the court noted that thirty square feet of floor owned by plaintiff's landlord charred and burned, 257 Minn. at 249, 100 N.W.2d at 753. In *Fiorito*, a cardboard box burned on top of the furnace, but plaintiff did not claim damage for this item, 262 Minn. at 344, 114 N.W.2d at 664.

33. Fiorito v. California Ins. Co., 262 Minn. 340, 344, 114 N.W.2d 661, 664 (1962); L. L. Freeberg Pie Co. v. St. Paul Mut. Ins. Co., 257 Minn. 249, 253, 100 N.W.2d 753, 755 (1960).

34. Briggs v. North American and Mercantile Ins. Co., 53 N.Y. 446 (1873) (explosion of gases by wick lamp not covered by policy which excepted explosions); Fitzgerald v. German-American Ins. Co., 30 Misc. 72, 62 N.Y. Supp. 824 (Oneida County Ct. 1899) (no recovery for smoke from faulty oil-burning lamp left lighted in plaintiff's office).

35. Wiener v. St. Paul Fire & Marine Ins. Co., 124 Misc. 153, 207 N.Y. Supp. 279 (App. T. 1st Dep't 1924), *aff'd*, 214 App. Div. 784, 210 N.Y. Supp. 935 (1st Dep't 1925).

36. Davis v. Law Union & Rock Ins. Co., 166 Misc. 75, 1 N.Y.S.2d 344 (Munic. Ct. N.Y.C. 1937), *aff'd*, 194 Misc. 176, 88 N.Y.S.2d 110 (App. T.2d Dep't 1938). The lower court stated, "The flame out of the chimney was an extension of the flame in the furnace," 166 Misc. at 76, 1 N.Y.S.2d at 345.

the processing of furs, was left on all night allegedly causing kindling of a workbench.[37] A jury verdict for plaintiff was set aside by the trial judge who found the testimony as to the existence of the outside fire "incredible."[38] The Appellate Term reinstated the verdict, holding the jury finding not to be against the weight of credible evidence.[39] While no Court of Appeals case has adopted the container rule, it would appear that the test has been applied by the lower appellate courts. The fact situation in *Barcolo*,[40] where the plaintiff-manufacturer recovered, on an excessive fire theory, for damages to his *commercial furnace* caused by a *confined* fire, is one of first impression.

Recognizing the necessity of judicially defining the word "fire" in the absence of definition in the standard fire policy itself, the court, in the instant case, noted the widespread adoption of the "somewhat unsatisfactory distinction between a 'hostile' fire and a 'friendly fire.' "[41] The court pointed out the strong judicial reliance on the authority of *Austin v. Drew*[42] in drawing the distinction. Since the rationale in the *Drew* case, as variously reported, was ambiguous the court viewed the question as open and seemingly embraced the interpretation of Professor Vance in his article "*Friendly Fires*."[43] Professor Vance there argued that *Austin v. Drew* established three elements in defining fires not covered by fire policies. Quoting Vance, the court cited the three elements—intentional kindling, burning in a designated place, and non-excessive burning. The court observed that while there are "several jurisdictions" holding that "although a fire contained in a furnace becomes excessively hot due to the malfunctioning of a thermostat or other cause, it continues to be a friendly fire," there was an "absence of controlling authority" in New York.[44] The court, therefore, saw itself free to follow the principles expressed in Wisconsin[45] and in recent Minnesota cases.[46] The holding adopted by the court relied heavily on an ambiguous statement in the *Fiorito*[47] case that in light of "the nature of present-day heating devices and equipment . . . . an excessive or uncontrolled fire, sufficient to melt

37. Reckler v. British American Assur. Co., 197 Misc. 409, 95 N.Y.S.2d 822 (App. T.1st Dep't), *reversing* 194 Misc. 108, 85 N.Y.S.2d 183 (Munic. Ct. N.Y.C. 1949). Note the dictum in the lower court, 194 Misc. 110, 85 N.Y.S.2d 186, to the effect that fire which does not operate in the manner intended or on the contrary destroys the vessel in which it is intended to burn is still a friendly fire. For another container rule case allowing recovery for damage caused by secondary ignition, see Giambalvo v. Phoenix Ins. Co., 178 Misc. 887, 36 N.Y.S.2d 598 (City Ct., N.Y.C. 1942) (leakage of oil which ignited outside burner).

38. Reckler v. British American Assur. Co., 194 Misc. 108, 111, 85 N.Y.S.2d 183, 186 (Munic. Ct. N.Y.C. 1949).

39. Reckler v. British American Assur. Co., 197 Misc. 409, 410, 95 N.Y.S.2d 822, 823 (App. T.1st Dep't 1949).

40. Instant case at 56, 263 N.Y.S.2d at 808.

41. Instant case at 56, 263 N.Y.S.2d at 809.

42. 4 Campb. 360, 171 Eng. Rep. 115, Holt 126, 171 Eng. Rep. 187 (C.P. 1815); 6 Taunt. 436, 128 Eng. Rep. 1104, 2 Marsh 130 (C.P. 1816).

43. *Op. cit. supra* note 19.

44. Instant case at 57, 58, 263 N.Y.S.2d at 809, 810.

45. O'Connor v. Queens Ins. Co. of America, 140 Wis. 388, 122 N.W. 1038 (1909).

46. 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. 249, 100 N.W.2d 753 (1960).

47. Fiorito v. California Ins. Co., *supra* note 46.

parts of a furnace, surely is included in the intended meaning of the words 'loss or damage by fire.' "[48] Thus the court recognized that container fire damage in a modern industrial context required bringing the rule into harmony with the expectation of the insured.

In attempting to avoid the harshness of the container theory by ruling that the fire within a container may be nevertheless hostile, the Fourth Department joins but two other jurisdictions.[49] While the court's liberal approach in questioning an old and illogical rule may be commended, it is not clear from the opinion how far the present decision will reach. The material facts stressed in the opinion were that an unspecified automatic temperature control failed to operate and the furnace and forgings within were destroyed by excessive heat. Since the court did not specify if the faulty temperature control operated directly on the fire,[50] it may be that the insurer will be liable whenever fire-produced heat is improperly regulated by a mechanical device, even if the fire itself operates at its normal intensity.[51] Nor is it clear how the court would limit the excessive fire test. It would seem that the rule, in its rigidity, would apply to every case where heat at a higher level than desired caused damage. An attempt to limit the test by measuring the extent of damage would not be satisfactory since recovery would thus ultimately depend on an arbitrary drawing of a line.

48. *Id.* at 344, 114 N.W.2d at 664 (1962). The ambiguity arises in the court's phrase "excessive *or* uncontrolled" (emphasis added). Is an excessive fire if controlled sufficient to constitute a hostile fire when, for example, a worker accidentally applies a welding torch too long causing damage or a baker overbakes bread? Or, can a fire be hostile if uncontrolled but not excessive when, for example, a thermostat regulates a flame at too low a temperature spoiling goods?

49. The court follows Minnesota and Wisconsin. One lower appellate court has refused to recognize the traditional distinction between friendly and hostile fires. Salmon v. Concordia Fire Ins. Co. of Milwaukee, 161 So. 340 (La. App. 1935) (plaintiff recovered for bracelet inadvertently placed in trash burner); Note, 21 Cornell L.Q. 318 (1936); Note, 49 Harv. L. Rev. 485 (1936).

50. According to the stipulation of facts made on submission of the controversy, Barcolo's temperature control worked as follows: A valve supplying gas to the furnace was opened to maximum in order to reach the annealing temperature quickly. Once the desired temperature was reached, an automatic control limited the supply of gas to keep a steady temperature. A separate timing device stopped the supply of gas completely one hour after the annealing temperature had been reached. Apparently, in the present case, the supply of gas was not properly reduced, and the temperature continued to build thus destroying the timing device.

51. The opinion in the instant case criticizes several decisions applying the majority rule. In one case, a thermonstat, working properly, started and regulated a fire but caused damage because plaintiff negligently failed to turn the control off after he had drained his boiler for repairs. The court rejected the plaintiff's argument as to lack of intent to set a fire on the ground that the existence of automatic controls made the question of intent irrelevant, and that, in any case, the fire was confined to the furnace and was, therefore, a friendly fire. The opinion stated that "the principle properly deducible from the cases is that if the fire is confined wholly within the furnace, stove, heater, etc., which was installed wholly for the purpose of having a fire within it, loss or damage to the heating appliance by overheating, lack of water or other improper handling is not covered by the policy" Mitchell v. Globe & Republic Ins. Co. of America, 150 Pa. Super 531, 535, 28 A.2d 803, 804 (1942). Query, whether the failure in *Barcolo* to distinguish the *Mitchell* fact situation means that recovery will be allowed when, for example, negligent handling or mechnical failure results in maintenance of insufficient supply of water in a boiler causing overheating and cracking?

A more fundamental objection cutting across the instant case goes to the assumptions underlying traditional analyses of the words "loss by fire" in a fire insurance policy. Definitions of hostile fire in terms of locus, control, or excessiveness are concerned primarily with the kind of fire implied in the phrase "loss by fire" in the standard policy. The meaning of the phrase taken as a whole is not given effect although it truly expresses the expectation of the insured.[52] It is submitted that what is meant by the phrase and what, in fact, is insured against is accidental loss by *any type of fire,* not merely losses resulting from *accidental fires.* The difference in approach is that the latter looks to the flame as if the accidental kind of fire (*e.g.,* outside, excessive) will always reveal whether the loss was intended to be covered.[53] This emphasis leads to anomalous results when the damage involving the heat and smoke effects of fire is essentially the same.[54] If extensive smoke damage accidentally produced by any fire was assumed to be covered it is no answer that the insured could have bought a smoke endorsement. The insured may not be aware of the need unless brought to his attention. But broad smoke and heat coverage is of increasing importance in view of the extensive use of automatic mechanisms to control the effects of fire utilized in manufacturing situations. As automation proceeds, it may be predicted that courts will have to deal more and more with the effects of non-escaping fires.

The shortcomings of inquiries into the kind of fire insured against are especially evident in a case where, hypothetically, valuables accidently fall into a fireplace[55] or where, as actually occurred, valuables are mistakenly placed in a trash burner and later burned.[56] Surely here the insured expects such loss to be covered when accidently caused by ignition. Since the distinction between a hostile and friendly fire is based upon an illogical analysis of expected coverage,

52. Since the terms of the standard fire insurance policy are not "bargained for," the typical contract test of intention of the parties is not appropriate. Instead, courts will usually look to the expectations of the parties. See Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86 (1918); but in a more recent case, Mode Ltd., v. Fireman's Fund Ins. Co., 62 Idaho 270, 110 P.2d 840, 133 A.L.R. 791 (1941), the court said that the distinction between hostile and friendly fire was of such long standing that the parties were presumed to have it in mind.

53. See Abbot, *The Meaning of Fire in an Insurance Policy Against Loss or Damage by Fire,* 24 Harv. L. Rev. 119 (1910).

54. Suppose, for example, an uncontrolled excessive fire which remains confined causes extensive internal heat damage. *Barcolo* would allow recovery. However, if the same fire-produced heat damage occurs by failure of an automatic heat vent to open properly, any analysis of the character of the fire will foreclose liability. Again, if an automatic regulator improperly enriched the fuel mixture of a fire causing smoke damage, what is the difference to the insured, in terms of kind of damage contemplated, that the damage was caused by, *e.g.,* a disengaged exhaust pipe?

55. While no American case has held on these facts, in France, recovery was granted in *Countess Fitz-James v. Union Fire Ins. Co.,* 23 Ir. L. T. & Sol. J. 169 (1889). The terms friendly fire and hostile fire were not used in the case.

56. *E.g.,* Youse v. Employers Fire Ins. Co., 172 Kan. 111, 238 P.2d 472 (1951); Note, 30 N.C.L. Rev. 431 (1952) (majority rule); *but see* Salmon v. Concordia Fire Ins. Co. of Milwaukee, 161 So. 340 (La. App. 1935); Harris v. Poland, [1941] 1 K.B. 462. For discussion, *inter alia,* of the *Harris* case, see Note, *Hostile and Friendly Fires in Canadian Insurance Law,* 2 U.B.C. Legal Notes 373 (1956).

one can only conclude that it should be judicially discarded.[57] The rule suggested here, permitting recovery for all proximate accidental loss by fire, would seem an appropriate rule of construction for judicial adoption. Of course the touchstone will always be the expectations of the parties, and that may vary in view of the kind of property insured or the nature of the business.[58]

ROBERT M. KORNREICH

57. Administrative regulations or legislation overruling the "container" decisions may be helpful in altering the judicial approach in interpreting the standard fire policy, but it cannot assure proper judicial construction in terms of the expectations of parties in particular fact situations.

58. It has been suggested that "irregularities in the process of production" may be reflected in price as part of the cost of production and, hence, not part of the expected coverage. For example, a baker who overbakes bread must have known that an occasional batch would be lost. See Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 Colum. L. Rev. 335, 338 (1924).