The Hostile Fire Exception to the Pollution Exclusion: Good News for Policyholders?

by Meredith McCardle

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I. Introduction

In 1986, the "hostile fire exception" was added to the absolute pollution exclusion of the standard CGL policy. Brief comments of state insurance commissioners and insurance officials during that time indicate that the purpose of the exception is to afford coverage for smoke damage. Despite the exception's inclusion in many policies for the past eighteen years, there is a surprising lack of interpretive case law. Nevertheless, the few courts that have examined the scope of the exception tend to read it broadly, extending coverage to polluting events so long as there is some connection to a hostile fire. This article examines the interpretation of the hostile fire exception.

II. Preliminary Issues

A. The Drafting History of the Absolute Pollution Exclusion and the Hostile Fire Exception

The first iteration of a pollution exclusion made its appearance in 1970. A decade later, both the states and the federal government began enacting legislation subjecting individuals and corporations to liability for their pollution-causing activities. By far, the most extensive of these regulations is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which has affected over 40,000 sites nationwide, costing approximately $1.2 million per site in remediation costs.[1] Understandably, many of these parties turned to their insurers to help shoulder the burden of paying for these massive clean-up efforts. The insurance industry, in turn, responded by introducing the "absolute pollution exclusion" in 1985. The absolute pollution exclusion purported to disclaim coverage for clean-up costs and further eliminated the "sudden and accidental" exception that had already spawned a surfeit of cases to date.

The absolute pollution exclusion was introduced by and through the Insurance Services Office (ISO), an industry organization responsible for drafting standard-form liability policies and endorsements. In subsequent assurances made to state regulators, the ISO reiterated its position that while the exclusion might be named an "absolute pollution exclusion," it was not, in fact, "absolute:"

> In the aftermath of the elimination of the sudden and accidental qualification, the new exclusion has been at times mislabeled as absolute. This is an unfortunate misnomer. Given the coverage exceptions I mentioned earlier, this is not an absolute pollution exclusion.[2]

Noticeably absent from the majority of treatises on the history of the absolute pollution exclusion is any information explaining the addition of the hostile fire exception. Included in the scant information available is a timeline of the exception, chronicled in *Grow Group, Inc. v. North River Ins. Co.*[3] In February of 1986, the ISO General Liability Committee met and voted to add the hostile fire exception. One month later, the language of the exception was adopted. In May, the ISO issued a circular announcing its addition and clarifying its scope. While *Grow Group* does not offer any insight into the precise contents of the circular, the case does cite to a leading treatise for the proposition that "a careful reading of the exclusion makes clear that it is not intended to apply to smoke from fires."[4]

Another helpful example regarding the hostile fire exception is an explanatory memorandum submitted by the ISO to the Washington State Insurance Commissioner:

> BACKGROUND The new Commercial General Liability Policy contains a revised pollution exclusion. That exclusion applies, without distinction between sudden and gradual emissions, to pollution emanating from the insured's premises or a waste disposal or treatment facility. Also, clean-up costs are specifically excluded.
>
> . . . . . .
>
> Concern has arisen that a literal interpretation of the

new exclusion might preclude coverage for liability not ordinarily considered pollution, namely bodily injury or property damage caused by smoke from a hostile fire.

PURPOSE OF THIS FILING To address this situation, we are addressing Amendment of Pollution Exclusion Endorsements CG 00 41 (Ed. 5-86) and CG 28 40 (Ed. 5-86). These endorsements state that the pollution exclusion does not apply to bodily injury or property damage caused by heat, smoke or fumes from a hostile fire on the insured's premises or job location.[5]

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III. Discussion of the Hostile Fire Exception

A. Construing the Hostile Fire Exception: Three Arguments for Coverage Based on Settled Rules of Construction

The standard pollution exclusion provides:

> Coverage does not apply to "bodily injury" and "property damage" arising out the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.
>
> . . .
>
> "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including *smoke*, vapor, soot, *fumes*, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, reclaimed or disposed of.
>
> . . .
>
> This exclusion does not apply to bodily injury or property damage arising out of heat, smoke or fumes from a hostile fire.
>
> . . .
>
> "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

Based solely on the language of the exclusion, and combined with the rules of construction, there are three arguments available to a policyholder that would support a finding that the hostile fire exception will not preclude coverage.

First, the hostile fire exception is written in general terms.[6] Its scope covers pollutants released as a result of a hostile fire, but the exception does not apply solely to bodily injury or property damage occurring as a result of heat, smoke or fumes. So much is evident by a cursory perusal of the leading hostile fire cases. Several of them have granted coverage under the exception where the underlying injuries were not caused by heat, smoke or fumes from a hostile fire.[7]

Second, both the pollution exclusion and the hostile fire exception use terms of art. The definition of "pollutants" includes a laundry list of various terms, including both smoke and fumes. Thus, coverage is precluded for injuries arising out of the release of smoke or fumes. The hostile fire exception, however, provides that the exclusion does not apply (and thus coverage is afforded) to injuries arising out of smoke, fumes or heat from a hostile fire. To begin with, many would argue that excluding coverage for smoke and fumes from one source while extending coverage to smoke and fumes from another is nothing short of an exercise in splitting hairs. Adopting an unyieldingly strict view of the pollution exclusion, therefore, could render the hostile fire exception meaningless.[8]

Last, the words used in the hostile fire exception – heat, smoke and fumes – are words that describe the principal attributes of a fire. This is the reading that a layperson would attribute to the exception.[9]

All three of the above arguments are strengthened by the inherent ambiguities that arise when the pollution exclusion and the hostile fire exception are read together. Many courts have noted this paired ambiguity:

> We conclude that the language of the pollution exclusion when read with the hostile fire exception thereto is fairly susceptible to differing reasonable interpretations by an average person . . . In the absence of evidence showing an understanding that coverage was intended to be excluded, we will construe the policy to provide coverage.[10]

Such a conclusion is consistent with Florida rules of policy interpretation mandating that ambiguous provisions be construed in favor of the policyholder.[11]

B. Construing the Hostile Fire Exception: Florida Law Interpreting the Scope of Exceptions to the Pollution Exclusion

Thus far, there have been no Florida cases to interpret the scope of the hostile fire exception and only one such case in the United States, although the opinion has since been limited to its facts, and

its discussion of the exception is readily categorized as dicta.[12] There has, however, been one recent case applying Florida law giving a broad reading to an exception to the pollution exclusion.

In *Admiral Ins. Co. v. Feit Management Co.*,[13] the dispositive issue involved an exception to the pollution exclusion for "injury or damage sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat that building."[14] The case involved carbon monoxide fumes originating from a faulty hot water heater in an apartment complex that caused injury to persons when the fumes traveled into individual apartments through the air handlers. The Eleventh Circuit was called on to determine whether carbon monoxide fumes entering individual apartments came from each apartment's air handler (in which case coverage would be afforded) or from the hot water heater (in which case coverage would be denied). In finding the exception to the pollution exclusion did not apply, the court turned to both rules of construction and the plain language of the policy.

The court first noted that the policy excluded coverage for injuries arising out of the discharge or dispersal of pollutants *unless* the pollutants were from equipment used to heat the building. The court then concluded that because the pollutants were discharged or dispersed from the hot water heater, which was not used to heat the building, the exception did not apply and there was thus no coverage.

> ***"Should pollution occur as a direct result of heat, smoke or fumes from a hostile fire, such as by heat forcing a chemical vat to rupture for instance, Feit counsels the existence of coverage for the loss."***

The *Feit* court's analysis supports a finding of coverage for a policyholder with a comparable factual situation. *Feit* concluded that the cause of the plaintiffs' injuries were too remote to be covered by the policy. In other words, the injury stemmed from the heater itself: but for the faulty heater (a device clearly excluded by the policy), the injuries would not have occurred. Should pollution occur as a direct result of heat, smoke or fumes from a hostile fire, such as by heat forcing a chemical vat to rupture for instance, *Feit* counsels the existence of coverage for the loss.

C. Construing the Hostile Fire Exception: Other Cases Interpreting its Scope

Furthermore, while no court has yet to effect such an interpretation of the hostile fire exception, nearly all courts that have interpreted the exception have given it a very broad reading.[15] These cases can be broken down into two subcategories, those involving damage caused by smoke and those involving damage not caused by smoke.

1. Hostile Fire Cases in Which the Claimed Loss Arose out of Smoke Damage

American Star Ins. Co. v. Grice[16] involved a corporation that began using a piece of property as a dumping ground for a variety of waste materials, including creosoted lumber. Some fifteen years later, a fire started on the property, releasing toxic smoke onto the property of neighboring residents, and the sole issue in the case was whether coverage for the smoke damage was precluded by the pollution exclusion. In holding for the insured, the Washington Supreme Court held that the pollution exclusion, when read together with the hostile fire exception, was ambiguous under the facts presented.[17] Importantly, certain state Supreme Courts have declared the pollution exclusion to be unambiguous,[18] but these courts have never construed the status of the exclusion when read with the hostile fire exception. In *Grice*, the court read the exception very broadly and held that the hostile fire exception applied to the entire pollution exclusion and not just the portions that would allow for a hostile fire from sites owned or occupied by the insured.

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Many courts have given the term "hostile fire" an exceptionally broad reading, seeming to find coverage in spite of the pollution exclusion. In *Maffei v. Northern Ins. Co. of New York*,[19] the Ninth Circuit read the exception broadly to encompass "*any* unintended fire in an unintended location."[20] The case arose when neighbors discovered smoke emanating from a chemical drum at a nearby dry-cleaning plant. The drum later exploded, producing a sulfur-dioxide cloud, and the issue in the case was whether the original smoke had been the product of a hostile fire. The court first held it was error to exclude testimony of expert witnesses as to whether the occurrence constituted a "fire" and then turned to the issue of whether the fire was "hostile." Despite the fact that the fire, if there even was one, was contained within the drum, the court nevertheless found that it was an unintended fire in an unintended location, so the hostile fire exception applied.

Likewise, in *Mid-Continental Casualty Co. v. Safe Tire Disposal Corp.*,[21] a Texas appellate court held

that the exception was not limited to purely hostile fires but also applied to friendly fires that later became hostile. The case involved a fire that broke out at a tire processing plant, resulting in injury to nearby residents as a result of smoke inhalation. The court construed the exception against the insurer, citing the interpretative principle that exclusions are read narrowly. Thus, the court interpreted the word "hostile" broadly and found coverage.[22]

At least one court has focused its inquiry on the end result of the hostile fire. In *Associated Wholesale Grocers, Inc. v. Americold Corp.*,[23] the Kansas Supreme Court denied an insurer's attempt to draw a distinction between smoke and toxic materials contained in smoke. The case involved a fire that broke out at a former limestone quarry, causing toxic smoke to disperse and cause property damage. The insured argued the toxic smoke damage was covered by the hostile fire exception, while the insurer argued the hostile fire exception applied only to "heat, smoke or fumes" and was not broad enough to cover damages from pollutants released in a hostile fire. The court swiftly rejected the insurer's argument, instead giving a broad reading to the exception and positing:

> Why would anyone seeking general liability insurance for commercial property knowingly purchase a policy (with a pollution exclusion) that covered liability for hostile fire damage but excluded smoke damage from the fire?[24]

The court did, however, find the pollution exclusion itself ambiguous, and therefore applied the reasonable expectations doctrine, a holding with which certain state Supreme Courts plainly disagree.

2. Hostile Fire Cases in Which the Claimed Loss Did Not Arise out of Smoke Damage

There have been a handful of cases to determine the precise meaning of "hostile fire" in cases not involving smoke damage. Most often, the cases not involving smoke damage concern carbon monoxide or other such emissions. In *Schmid v. Fireman's Fund Ins. Co.*,[25] a Minnesota district court considered a case in which a bar employee died as a result of carbon monoxide poisoning. It was determined that the death was caused by a faulty water heater involving a "flame rollout," in which a fire briefly rolled out from under the heater's combustion chamber and onto the outside shell, approximately three inches from where it was supposed to be. The sole issue for the court to determine was whether this event constituted a hostile fire so as to allow coverage. The decision centered on the policy's definition of "hostile fire" as "one which becomes uncontrollable or breaks out from where it is intended to be." The court determined, given this definition, that the event was indeed a hostile fire:

> The placement of "or" in the language "uncontrollable or breaks out from where it was intended to be" means that a fire could be *either* uncontrollable (whether within its intended location or elsewhere) *or* broken out from where it was intended to burn (whether controllable or uncontrollable) and still fall within the hostile fire exception . . . The fire in the case at bar does not fall under the "uncontrollable" prong of the definition because the flame was capable of being turned off. A fire burning three inches from its intended location in the combustion chamber does, however, fit the definition of "breaks out from where it was intended to be."[26]

Other cases involving carbon monoxide from faulty heating equipment have not been as generous as *Schmid* in finding coverage, although in those cases, the evidence offered was not as strong. In *Owners Ins. Co. v. Singh*,[27] an Ohio appellate court refused to hold the hostile fire exception applied. Unlike in *Schmid*, however, in *Singh* there was no evidence that a fire had even occurred, much less broken out and caused the dispersal of carbon monoxide fumes. Nevertheless, the court's rationale supported a broad reading of the exception:

> [T]he existence of carbon monoxide in a place and in amounts inconsistent with a properly operating gas-fired furnace is *not* per se evidence that the carbon monoxide resulted from a hostile fire. The insurance policyholder must set forth *some* proof that a hostile fire caused the carbon monoxide fumes to be in a place and in amounts inconsistent with normal gas-fired furnace operation.[28]

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The *Singh* court's willingness to generally apply the hostile fire exception to carbon monoxide poisoning has found support in several other jurisdictions as well.[29]

Finally, in *Regional Bank of Colorado v. St. Paul Fire & Marine Ins. Co.*,[30] the Tenth Circuit refused to apply the pollution exclusion to a claim of injury from carbon monoxide poisoning caused by a faulty heater. The court noted it would be unreasonable to interpret a policy in such a way as would provide coverage for injury caused by fire from the faulty heater but deny coverage for injury caused by carbon monoxide emissions from the same heater.

IV. Conclusion

While there has been a great deal of litigation on

the pollution exclusion in general, there is a noticeable lack of case law interpreting the hostile fire exception. Along the same lines, while there is a plethora of information on the drafting history of the absolute pollution exclusion, there is a parallel lack of such information regarding the hostile fire exception. Nevertheless, courts have overwhelmingly supported a broad reading of the exception, finding coverage in cases with highly speculative fact patterns.

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[1] These facts were obtained from "The Facts Speak for Themselves: A Fundamentally Different Superfund Program," available at www.epa.gov/superfund/whatissf/sf_fact4.pdf.

[2] Statement of Robert Miller, ISO Regional Vice President for the Southern Region, to the Louisiana Insurance Commissioner, Sept. 6, 1995, Tr. at 57, *available in* Ellison and Lewis, "Recent Developments in the Law Regarding the 'Absolute' and 'Total' Pollution Exclusions, the 'Sudden and Accidental' Pollution Exclusion and Treatment of the 'Occurrence' Definition," SH090 ALI-ABA 1, 22 (2003).

[3] No. C92-2328 (N.D. Cal. 1992).

[4] *Grow Group, supra,* at *4, citing Gibson and McLendon, *Commercial Liability Insurance*, Vol. I, § 5, "Annotated CGL Policy," p. V.E.6 (1988).

[5] ISO Memorandum, *available in* American Star Ins. Co. v. Grice, 121 Wash.2d 869, 854 P.2d 622 (Wash. 1993).

[6] *See* Perkins Hardwood Lumber Co. v. Bituminous Cas. Corp., 190 Ga. App. 231, 378 S.E.2d 407 (Ct. App. Ga. 1989); American Star Ins. Co. v. Grice, 121 Wash.2d 869, 878 854 P.2d 622, 627 (Wash. 1993); *Grow Group, supra.*

[7] *See* Scranton Dunlop, Inc. v. St. Paul Fire and Marine Ins. Co., 2000 U.S. Dist. LEXIS 11010 (E.D. Pa. 2000); *Schmid v. Fireman's Fund Ins. Co.*, 97 F. Supp. 2d 967 (D. Minn. 2000). *See also* Owners Ins. Co. v. Singh, 1999 Ohio App. LEXIS 4734 (Ohio App. 1999).

[8] *See Grice, supra;* Mid-Continental Casualty Co. v. Safe Tire Disposal Corp., 16 S.W.3d 418 (Tex. Ct. App. 2000).

[9] *See Hrynkiw, supra,* at 741; *Schmid, supra; Grice, supra* ("[t]he question then is whether an average person would have understood that the pollution exclusion clauses in the insurance policies unambiguously denied coverage for damages caused by a hostile fire on land owned by the insureds and used for waste disposal").

[10] *Grice, supra,* at 878. *See also Scranton Dunlop, supra.*

[11] *See Weldon, supra,* at 914–15; *Container Corp., supra,* at 736; *CTC Dev. Corp., supra,* at 1076.

[12] E & L Chipping Co., Inc. v. Hanover Ins. Co., 962 S.W.2d 272 (Tex. App. 1998). This case involved a fire occurring in a wood chip pile on the insured's property. In extinguishing the fire, the insured allegedly caused a run-off of contaminated water into a nearby stream, polluting a lake. The insured attempted to argue coverage should be afforded under the hostile fire exception, an argument the court dismissed in dicta:

> [T]he alleged cause of the property damage . . . was liquid pollution, not damage caused by smoke, fumes or heat from a hostile fire; therefore, it is clear that the policy, relating to property damage caused by "heat, smoke or fumes from a hostile fire," is inapplicable. (The) petition does not assert any property damage from heat, smoke, or fumes but instead claims damage from contaminated water; this falls within the unambiguous language of the absolute pollution exclusion.

E&L Chipping, supra, at 277–78. *E & L Chipping* has subsequently been limited as only applying to the narrow issue of repeated instances of property damage occurring as a result of continual exposure to environmental contamination. *See* Scottsdale Ins. Co. v. James L. Gardner Trust, 2002 U.S. App. LEXIS 26514 (10th Cir. (Kan.) 2002); Pilgrim Enterprises, Inc. v. Maryland Cas. Co., 24 S.W.3d 488, 498 (Tex. App. 2000).

[13] 321 F.3d 1326 (11th Cir. (Fla.) 2003).

[14] *Feit, supra,* at 1328.

[15] Astonishingly enough, there is very little case law on this issue, with only one case in Florida even mentioning the hostile fire exception. That case, Florida Farm Bureau Ins. Co. v. Ins. Co. of North America, 763 So.2d 429 (Fla. 5th DCA 2000), found that the allegations of a complaint regarding a fire were enough to defeat an insurer's motion to dismiss based on the pollution exclusion. The complaint had alleged that the pollutant at issue was smoke created as a result of an improper extinguishment of an open fire. The smoke had spilled onto a highway, impairing visibility, and, as a result, a tractor-trailer veered off the roadway and hit and killed a pedestrian. The court reversed a motion to dismiss, declaring there were remaining factual issues to be cleared up as to whether the fire was uncontrollable or broke free from where it was supposed to be, definitions which would bring the occurrence within the ambit of the hostile fire exception.

[16] 121 Wash.2d 869, 854 P.2d 622 (Wash. 1993).

[17] *See also Scranton Dunlop, supra.* The *Scranton Dunlop* decision notes that there is a split of authority on this issue. Cases such as Mid-Continent Casualty Co. v. Safe Tire Disposal Corp., 16 S.W.3d 418 (Tex. App. 2000) hold that all of the provisions in the pollution exclusion are independent and that if a claim falls within one of the subsections that is not subject to the hostile fire exception, coverage is precluded, even if the exception is applicable to another subsection. Cases such as American Star Ins. Co. v. Grice, 854 P.2d 622, 625 (Wash. 1993), however, hold that the separate provisions of the pollution exclusion are a single entity, modified in their entirety by the hostile fire exception.

[18] *See e.g.* Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135, 1138 (Fla. 1998).

[19] 12 F.3d 892 (9th Cir. 1993).

[20] *Maffei, supra,* at 898 (emphasis added).

[21] 16 S.W.3d 418 (Tex. Ct. App. 2000).

[22] *See also* Preferred Mutual Ins. Co. v. Travelers Co., 955 F. Supp. 9, 13 (D. Mass. 1997) ("a fire need only burn outside its intended confines to be "hostile"). *But see* Perkins Hardwood Lumber Co. v. Bituminous Cas. Corp., 190 Ga. App. 231, 378 S.E.2d 407 (Ct. App. Ga. 1989) (narrowly construing the meaning of "hostile fire" to exclude friendly fires).

[23] 261 Kan. 806, 934 P.2d 65 (Kan. 1997).

[24] *Associated Wholesale Grocers, supra,* at 823, 934 P.2d at 77.

[25] 97 F. Supp. 2d 967 (D. Minn. 2000).

[26] *Schmid, supra,* at 972–73 (emphasis in original). *See also* Indiana Lumbermens Mut. Ins. Co. v. West Oregon Wood Products, Inc., 268 F.3d 639 (9th Cir. 2001) (noting that the definition of "hostile fire" encompasses an either-or test).

[27] *Singh, supra.*

[28] *Singh, supra,* at *5 (first emphasis in original; second emphasis added).

[29] *See e.g.* Bernhardt v. Hartford Fire Ins. Co., 102 Md. App. 45, 648 A.2d 1047 (Md. App. 1994); Assicurazioni Generali v. Neil, 160 F.3d (4th Cir. 1998) (holding the exception applies to carbon monoxide poisoning and is not limited to accidents occurring outdoors or resulting from traditional environmental pollution). *But see* Richardson v. Nationwide Mutual Ins. Co., 826 A.2d 310 (D.C. 2003) (limiting the hostile fire exception to cases of traditional environmental pollution).

[30] 35 F.3d 494, 498 (10th Cir. 1994).