BENCH MEMO: Acme Fixture Co. v. The Hartford Fire Insurance Co., CA No. 87-744-R; Hartford's Summary Judgment Motion.

ATTORNEYS
Plaintiff: Randolph C. Robertson (Martin, Meyer, et al.)
Defendant: John B. Catlett, Jr. (Sands, Anderson, et al.)

I. Background

Judge, this case comes before you on the defendant Hartford Fire Insurance Company's motion for summary judgment. This case is a dispute about insurance coverage under an inland marine transit policy. The parties have stipulated most important facts in the case, so the record (in my opinion) is ripe for summary disposition. As discussed below, I think you should GRANT the Hartford's motion for summary judgment; if you decide otherwise, then you will try this case without a jury on Friday, May 20.

According to the Stipulation, here are the relevant facts: On June 30, 1986, a trailer load of finished fixtures belonging to Acme Fixture Co., was destroyed by a fire that occurred at Maxwelton Mfg. Co., in Maxwelton, W. Va. (Stipulations, ¶ 1). The fixtures had been fabricated, finished and stored in an area in the Maxwelton building, before loading onto a trailer owned by Acme. As the fixtures became dry, they were loaded on the Acme trailer by Maxwelton employees, and the vast majority of these goods were loaded on the trailer on June 29, 1986. The last of these goods was loaded on the trailer sometime before 8:00 a.m. on the morning of June 30, and the loading process was thereby completed (Stip. ¶ 2).

The fire started some time around noon in the Maxwelton building, doing substantial damage to the interior of that buil-

ding. The heat and fire also destroyed the goods that had been loaded onto the trailer (Stip. ¶ 3).

At the time the fire was discovered, the rear doors to the trailer were open and the trailer was still pulled up adjacent to the building where it had been loaded. The trailer was of the type that would require it to be pulled away from the building, in order to close its doors (Stip. ¶ 4).

Walter Sheets & Sons ("Sheets"), a trucking company hired to haul the finished goods from Maxwelton to Richmond, was called on June 30, 1986, after discovery of the fire, and was requested to come to Maxwelton to pull the trailer away from the building. Sheets' tractor was, at the time of the call, located at Sheets' headquarters in Lewisburg, W.Va., some 14 or 15 miles away from Maxwelton (Stip. ¶ 5). By the time Sheets' driver arrived with his tractor to pull the trailer of goods away from the building, the goods had been totally destroyed (Stip. ¶ 6).

The bill of lading for these goods had not been signed by Sheets at the time the fire broke out and the goods destroyed, but it had been filled out by Maxwelton personnel and placed inside the back of the trailer (Stip. ¶ 7). Russell Bowyer, an employee of Sheets, signed the bill of lading after the goods had been destroyed but prior to taking them to Richmond (Stip. ¶ 8). A copy of the bill of lading, front and back, is attached to Hartford's brief as Exhibit A.

In their damaged condition, the goods were taken to Richmond and to Acme's plant here in town, in the trailer in which they had been located at the time of the fire (Stip. ¶ 9). The goods

destroyed were not salvageable and were valued at $ 82,759.71 (Stip. ¶ 10).

At the time of the fire, there was an insurance policy in force, written by Hartford, bearing the policy number 14 TM RW 3740; the parties agree that this claim is being made under the annual transit (broad form) Endorsement to Acme's inland marine policy (Stip. ¶ 11). A copy of the policy is attached to the Hartford's brief as Exhibit B. Acme has made its claim only on the language of that policy (Stip. ¶ 12).

The parties submit that the issue in the case is whether or not, at the time of the fire, these goods were "in due course of transportation in the custody of ...: (b) any common carrier, motor truckman or transfer company; (c) any motor carrier operating under contractual agreement with the insured." The Court must also determine whether the insured property had left "the initial point of shipment," as contemplated by the language of the policy (Stip. ¶ 14). That captures basically all the stipulated facts, Judge.

Hartford also sets forth facts which it says proves that the action is time-barred. As noted below, this issue is fraught with factual issues and should be avoided on summary judgment; you do not have to reach that issue to dispose of the case.

II. DISCUSSION

A. Acme's Goods Were Not "In the Due Course of Transportation," under the Policy.

The language of the insurance policy Endorsement provides that the policy covers:

> the lawful property of the Insured ... while in due course of transportation in the custody of ...:
>
> (b) Any common carrier, motor truckman or transfer company;
>
> (c) Any motor carrier operating under contractual agreement with the insured;

Endorsement, ¶ 1. In addition, para. 5 of the policy Endorsement provides that:

> This insurance attaches from the time the property insured leaves the initial point of shipment until same is delivered at destination.

Endorsement, ¶ 5. Acme naturally contends that when the goods were destroyed, at the time of the fire, they were "in due course of transportation," in the custody of a carrier, and had "left the initial point of shipment." Acme really has little or no facts to support its contentions and, indeed, all the stipulated facts support the view that the goods were not covered under the terms of the policy. For purposes of this motion, Judge, I will outline only the two issues that are free of genuine factual issues; the "custody of carrier" issue and the time-barred issue are hotly contested on the facts and, for that reason, I think you should avoid them in deciding the case.

The first issue is whether the goods were in the "due course of transportation" at the time of the fire, within the meaning of the policy. I think they clearly were not. Acme concedes that the trailer on which the goods were loaded belonged to Acme, and that the goods were loaded by Maxwelton employees. It has also stipulated that the goods were destroyed before the driver and the tractor showed up at the scene, and before any bill of lading

was issued. On these and other undisputed facts, there clearly was no coverage under the policy.

No case has squarely decided this issue or interpreted this precise language that you are facing. Nonetheless, the language seems clear on its face and its plain meaning would not include Acme's goods. Remember, they were sitting on a trailer, parked adjacent to the warehouse with the doors wide open; the driver had not arrived yet, nor had the trailer even been prepared for hauling when the fire broke out.

Hartford cites a line of very similar cases, interpreting similar language, which hold that such goods are not "in transit" for purposes of insurance coverage. While these decisions are only similar and do not address our precise question, they are sufficiently analogous and persuasive to be of some help here.

In Mayflower Dairy Products v. Fidelity-Phenix Fire Ins. Co., 9 N.Y.S.2d 892 (App.Div. 1938), the insured's loaded truck was stolen from his premises while the truck was being held over night for delivery the next day. The Court defined "in transit" and "transportation" as requiring "continuous action of moving the goods from one point and putting them down in another." On noting that the insured held the loaded vehicle overnight for its own convenience, the court held that the goods were not yet "in transit" or "transportation," but were in storage, and thus were not covered by the inland marine policy. Id., 9 N.Y.S.2d at 893.

The next case, San-Nap-Pack Mfg. Co. v. Firemans Ins. Co., 47 N.Y.S.2d 542 (N.Y.City 1944), involved a policy which not only required that the goods had to be "in transit," but also provided

that the insurance attached only from the time the goods left "the factory at initial point of shipment." The goods were loaded on the insured's trailer, attached to tractors and left in a lot contiguous to the plaintiff's factory on a Saturday, for delivery on the next Monday. The court held that loading of the vehicles did not start their "transit," that the goods were only in storage. Because the goods "had not started on their way," the court denied coverage. Id., 47 N.Y.S.2d at 545-46.

A more recent and similar case is Brammer Corp. v. Holland America Ins. Co., 228 N.Y.S.2d 512 (N.Y.Sup. 1962). The policy in that case also specifically provided that the insurance attached "from the time that the goods leave the warehouse and/or store at the place named in the policy for the commencement of the transit ..." The insured's goods were moved from the manufacturing to the shipping area. Unlike our case, the goods in Brammer were put in the trucker's control and left in the shipping area by the trucker for his own convenience. The court held that the "loading of the trucks within the building does not constitute 'in transit' until there is a movement out of the building." The court also said that the insured "may not extend the policy risk which covers only after the goods leave the warehouse and are in actual movement." Id., 228 N.Y.S.2d at 513-14.

In the case at bar, there is an even clearer case against coverage, since the goods had not yet been accepted by Sheets, the trucker. Thus, there could be no "transportation," and hence no coverage, because the trucker who would transport them had not yet shown up.

A similar case is Kessler Export Corp. v. Reliance Ins. Co., 207 F.Supp. 355 (E.D.N.Y. 1962), in which the trucker had already accepted the cargo, but left the loaded vehicle at the insured's warehouse for the trucker's convenience. The court held that there was no coverage, because the goods had not left the warehouse as required by the policy. Finally, in Den Gre Plastics Co. v. Travelers Indemnity Co., 259 A.2d 485 (N.J.Super. 1969), the goods had been loaded on the vehicles for delivery and had been moved away from the loading platform. They were to be delivered in two days. The court found that neither the loading, nor the movement, had started the goods "in transit." Coverage was thus denied. Id., 259 A.2d at 488-89.

While these cases interpret the terms "in transit" or "transportation," they do support the reading that some actual movement of the goods is required before they are "in the due course of transportation," as required under Hartford's policy. And the plain meaning of the policy language is the same; the words "in the due course..." indicate actually moving the goods in transportation, not simply preparing or loading them for future transport.

As noted above, no Virginia case addresses this kind of question in the context of insurance coverage. However, Acme has uncovered one old Virginia decision which lends some weak support to its argument that "transportation" includes the loading of the goods onto the trailer. In One Chrysler Roadster v. Cmmn'wealth, 152 Va. 508, 147 S.E. 243 (1929), the court considered certain jury instructions refused by the trial judge, in a criminal for-

feiture case. The statute provided that whenever ardent spirits were being illegally transported and then were seized, the officers could also take possession of the automobile and forfeit it to the Commonwealth. The appellants contended that the trial judge erred in refusing to give an instruction stating that "to transport," within the meaning of the law, meant to convey from one place to another, and that the jury must find that the auto on trial was actually in motion while the liquor was in it, before they could find that auto guilty and forfeit it to the state.

The Va. Supreme Court held that refusing to give this instruction was proper, since it was sufficient to show that the vehicle was being used in the process of transporting the liquor. The court said that the transportation begins "when the ardent spirits are loaded into the car for illegal transportation and ends only when they are removed therefrom. The loading and unloading are necessarily a part of the transportation." Id., 147 S.E. at 244; see also Seay v. C'wealth, 146 S.E. 198 (Va. 1929).

Technically, then, the court held that transportation includes the loading, in this context. Still, the court there liberally construed the statute to uphold a criminal forfeiture; it was not construing such a term in an insurance contract. Further, "in due course of transportation" seems to imply more actual movement than does the simple term, "transportation." For these reasons, the Chrysler case does not control and is readily distinguishable from the case at bar. It is also an old, dated case which the Virginia court might well decide differently today.

In summary, Judge, this policy language is for you to interpret according to its plain and unambiguous meaning. No Virginia case really clarifies it, and all cases from other states indicate that these goods were not "in the due course of transportation." For this reason, the loss is not covered and summary judgment should be GRANTED for Hartford.

B. Acme's Goods Had Not "Left the Initial Point of Shipment"

Another reason why there is no coverage: the trailer with the goods on it, was still parked, waiting with its doors open, at the time the fire broke out. Thus, no one can realistically say that the goods had "left the initial point of shipment." The initial point of the shipment, in this case, was the Maxwelton warehouse or loading platform, which was the start of the trip back to Richmond. Again, the trailer and the goods were still sitting there, waiting on a tractor and driver, when they were destroyed by fire. Therefore, for this reason as well, the loss is not covered under the policy, ¶ 5 of the Endorsement.

Acme tries to argue that the "initial point of the shipment" was the loading of the goods onto the trailer. It found a definition of "shipment" in Words and Phrases to mean: "the act of dispatching or shipping, especially the putting of goods and passengers on board for transportation. . ." Thus, it claims the term "shipment" must include the act of loading; since the goods had already been loaded when the fire started, the "initial point" of shipment had already been completed.

Acme cites no authority or case law for this definition, and I think it misconstrues the use of the term. Here, "initial

point of shipment" is meant as a physical place, the place where the goods are first picked up and hauled from. As we have seen, the goods were still sitting in the trailer at the loading platform when the damage occurred, so they clearly hadn't left that starting point. Therefore, for this reason as well, the loss of the goods simply is not covered by the Endorsement policy. I'll leave it at that, Judge.

The two other issues are not ripe for summary judgment, so I will not discuss them at length here. The lawyers may well raise them, they are: (1) were the goods "in the custody of" the motor carrier, Sheets? and (2) is the action time-barred because it was filed over one year after the loss was discovered?

DRW, 5/17/1988