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*Subscription price \$4.50 per year*

*80 cents per number*

*Canadian subscription price \$5.00 per year; Foreign, \$5.25 per year*

*Yale Law Journal Company, Inc., Box 401A, Yale Station, New Haven, Conn.*

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## WAR DAMAGE INSURANCE

FORMERLY, where private property sustained damage as a result of war, compensation was a "matter of bounty rather than of strict legal right".<sup>1</sup> However, the impact of modern warfare on civilian morale and its consequent effect upon the conduct of war has made it necessary for many nations,<sup>2</sup>

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1. Presidential message accompanying the veto of a bill providing compensation for the burning of property to prevent its use by the Confederacy. CONG. GLOBE, 42d Cong., 2d Sess. (1872) Pt. 5, p. 4155. For a general discussion of the liability for damage caused by war, see *United States v. Pacific R. R.*, 120 U. S. 227 (1887); *Respublica v. Sparhawk*, 1 Dall. 357 (Sup. Ct. Pa. 1788). BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1916) §§ 98, 99; Duguit, *Compensation For Losses of War* (1919) 13 *ILL. L. REV.* 357.

2. United States: The War Damage Act, Pub. L. No. 506, 77th Cong., 2d Sess. (March 27, 1942); Great Britain: War Damage Act, 1941, 4 & 5 Geo. VI, c. 12 (March 26, 1941); New Zealand: 5 Geo. VI, No. 17 (Oct. 13, 1941); Union of South Africa: War Damage Insurance Act, 1941, Act No. 21 (April 10, 1941). A discussion of the Australian Insurance scheme may be found in (1942) 66 *AUSTRALASIAN INS. & BANKING*

including the United States, to assume at least part of this risk; this, in the absence of adequate private underwriting facilities.<sup>3</sup> Such provision has as its basic philosophy the premise that the war is a national undertaking, and resultant damage should be borne by the nation, not the individual.<sup>4</sup>

In the last war Britain made use of a war damage insurance scheme<sup>5</sup> in which indemnity was to be given by the Government only when the individual had taken insurance with the Government.<sup>6</sup> This plan did not lead to comprehensive coverage in the face of an almost universal belief by the people in one district that the damage would be visited upon some other sector of the nation.<sup>7</sup> As a result of widespread damage to uninsured property the British were impelled to provide free indemnification to a limited amount,<sup>8</sup> thus effecting universal coverage.

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REC. 25, and of the Irish scheme in (Jan. 17, 1942) 76 IR. L. T. 21. Canada: A quasi-insurance scheme for damage caused by the R. C. A. F. is authorized by Order-in-Council, P. C. 46/3017 (April 15, 1942) in 1 Emergency Laws, Orders, and Regulations of Canada, § 8, Pt. 11. The continental view may be seen in Duguit, *supra* note 1 at 361 (the French law of Dec. 26, 1914); BLADEL, *RÉPARATION DES DOMMAGES MATÉRIELS* (1922) (concerning the Belgian law of May 10, 1919, the author said, at p. 134: "*La substitution de la notion du droit à l'indemnité à celle du simple secours est une acquisition de la guerre mondiale qui vient de se terminer.*").

3. SEN. REP. No. 1012, 77th Cong., 2d Sess. (1942) 2 (accompanying S. 2193). War damage insurance could have been obtained from a few companies (General Insurance Company of America, the Rhode Island Insurance Company) even subsequent to Pearl Harbor. Rates were based upon the geographical location of the risk, unlike the Government arrangement. Similarly the extent of coinsurance upon the property was a rate determinant (see note 50 *infra*). N. Y. Times, Feb. 27, 1942, p. 29, col. 7. For reaction of Lloyd's of London to the war, see N. Y. Times, Dec. 23, 1941, p. 19, col. 2. See generally note 30 *infra*.

4. SEN. REP. No. 1012, 77th Cong., 2d Sess. (1942) 3 (accompanying S. 2193); memorandum submitted by Earl D. Mallery, Executive Director, American Municipal Association in *Hearings before Senate Committee on Banking and Currency on S. 2193*, 77th Cong., 2d Sess. (1942) 36, 39 (for British view as given in §§ 3(a), (b) of WIEB, *REPORT ON WAR DAMAGE TO PROPERTY*, Oct., 1939).

5. By Executive Order, July 19, 1915; see 73 H. C. DEB. (4th ser. 1915) 512; REPORT OF THE AIRCRAFT INSURANCE COMMISSION, 1914-16, XXXVII (cmd. 7997) 487.

6. The Board of Trade announced that "now that a public scheme has been established, no liability can be accepted by the Government and no claim can be entertained, in respect of damage to property by aircraft or bombardment unless the property has been insured under the scheme." The Times, July 19, 1915, p. 5, col. e; see (1915) 139 L. T. 416.

7. (1917) COMMITTEE ON WAR DAMAGE PUBLICATIONS 14. See Committee's publications culminating with Record No. 7, July 10, 1919, generally, for the philosophy of war damage insurance, the results of a voluntary insurance scheme. See (1916) 140 L. T. 2.

8. Sept. 1, 1917. The right to free indemnification to \$2,500 was "subject to the restriction that if at the time of any loss the total value of all the individual's property exceeded \$2,500 the amount recoverable would be limited to  $\frac{\$2,500}{\text{total value}}$  of any loss." Thus the right of recovery on the more valuable property was proportionately less. PRESTON AND SICH, *Fire Insurance During the War* in WAR AND INSURANCE (Carnegie Peace Foundation Study, 1927) 72.

The still greater needs engendered by the present war, resulting from the tremendous development of aerial warfare, have resulted in the adoption by the British of a scheme<sup>9</sup> which features compulsory insurance.<sup>10</sup> With some few exceptions, insurance must be secured on land,<sup>11</sup> defined so as to include buildings and other immovable property,<sup>12</sup> movable plant and machinery,<sup>13</sup> and goods used in commerce.<sup>14</sup> They have, however, retained

9. British War Damage Act, 1941, 4 & 5 GEO. VI, c. 12 (hereinafter cited by section number only). A good summary of some of the main features of the Act can be found in the (Aug., 1941) 53 MONTHLY LABOR REV. 371. See annotations, SLACK, *THE WAR DAMAGE ACT, 1941* (1941); 2 KRUSIN AND ROGERS, *THE SOLICITORS' HANDBOOK OF WAR LEGISLATION* (1942); 4 Butterworth, *Emergency Legislation Serv.* (1941) § 45.

10. As of October, 1939, it was felt that an *insurance* scheme should not be adopted, that the British Government should merely indicate its acceptance of the responsibility for compensation of war damage, committing itself to no "as-of-right" payment. The whole scope of compensation was to be scaled to the ability of the Government to bear the expense after the conflict. WIER, *REPORT ON WAR DAMAGE TO PROPERTY*, October, 1939, *op. cit. supra* note 4, at § 16. See SLACK, *op. cit. supra* note 9, at 2, 4-6. The abandonment, overt, at least, of this policy by Sept. 5, 1940, is seen in announcements by the Prime Minister to the House of Commons, 365 H. C. DEB. (5th ser. 1940) 42, and Oct. 8, 1940, 365 H. C. DEB. (5th ser. 1940) 294.

11. Sections 18, 19, 20. The development of the period during which the Government would be liable is a further indication of its willingness to place the burden of war loss upon the nation. Contributions under the original Act were due July 1 in each of the years from 1941 to 1945, §§ 20(1) and (2). The number and amount of installments could be increased by Treasury Order if approved by resolution of the House of Commons, § 22. For these contributions the risk period was from September 3, 1939, to Aug. 31, 1941, § 95(1), extended by the War Damage (Extension of Risk Period) Act, 1941, 4 & 5 GEO. VI, c. 37 (July 29, 1941) to August 31, 1942. However the contributions to be levied under this extension were left for future determination. Under the War Damage (Amendment) Bill, 5 & 6 GEO. VI, Bill No. 22—ordered printed April 22, 1942, a single risk period of indefinite length is provided with no additions to be made in the contributions payable under the original Act. Yet the power of the Treasury under § 22 to increase the number or the amount of contributions was retained. 379 H. C. DEB. (5th ser. 1942) 1111-13. As before, a diminution of the number and amount of payments would require additional legislation. (See attempts to ascertain the extent of surplus under this scheme, 379 H. C. DEB. (5th ser. 1942) 1123-4). An important consequence of the Bill would be to make certain that "the burden will be shared equally between the contributors and the Exchequer." It was indicated that under the Act the contributors were responsible for the first \$1,000,000,000. For the rest of the risk period the Exchequer would meet the needed contributions to an equal sum, thereafter additional requirements to be jointly met. Under the Bill the contributors "will be called for no more, however long the risk period lasts, until the Exchequer has met a further \$1,000,000,000." 379 H. C. DEB. 5th ser. 1942) 1113.

12. Section 95(1).

13. Under the Business Scheme, § 62(1), when valued over \$5,000, S. R. & O. 1941 No. 450, § 6(1). (The Statutory Rules and Orders (S. R. & O.) cited herein may be found in Butterworth, *Emergency Legislation Serv.* (1941), many in 2 KRUSIN AND ROGERS, *op. cit. supra* note 9).

14. When valued over \$5,000; under the authorization of § 9 of the War Risks Insurance Act, 1939, 2 & 3 GEO. VI, c. 57; see S. R. & O. 1940 No. 785; S. R. & O. 1940 No. 1143 (foodstuffs, if valued over \$1,000).

the free insurance principle, in part, by providing free indemnification to a limited amount for damage to personal chattels.<sup>15</sup> Where insurance is not compulsory and the property is not covered by free insurance, the owner has the option to insure.<sup>16</sup> And the uses to which disbursements are put are controlled so that they fit into an integrated pattern of the war effort and postwar employment of the facilities of the nation.<sup>17</sup>

Shortly after the United States became involved in the present war, the President created, by executive order, the War Damage Corporation.<sup>18</sup> Subsequently, Congressional action was taken leading to passage of the War Damage Act.<sup>19</sup> Broad powers were delegated to the Corporation which is authorized to construe the Act's definition of war damage, to establish the measure of compensation, to select techniques for administering the Act, and to set the premium base.<sup>20</sup> Yet even though the granted powers are most broadly exercised, the basic objectives of a plan of war damage insurance may not be attained.

Since compensation is provided only for those who voluntarily insure, the Act will probably cover but a limited number of the losses. This was the British experience in the last war. Yet the basic principles involved in war damage insurance require universal coverage.<sup>21</sup> Two techniques capable of

15. Section 68(a); S. R. & O. 1941 No. 787; for particulars, see SLACK, *op. cit. supra* note 9, at 185; (1941) 91 L. J. 189.

16. Goods ordinarily under the business scheme, § 62(3), S. R. & O. 1941, No. 450, § 11; private chattels, § 59(1)(b), to \$50,000, § 65(a), condition (2) of policy prescribed by S. R. & O. 1941 No. 451; commodities, see SLACK, *op. cit. supra* note 9 at 193, annotation to § 76(1).

17. Section 7. See note 69 *infra*.

18. On Dec. 13, 1941, under § 5d of the Reconstruction Finance Act, 47 STAT. 5 (1932), 15 U. S. C. § 601 (1940), as amended by § 4(b)(3)(g), Pub. L. No. 103, 77th Cong., 1st Sess. (June 10, 1941) (capital \$100,000,000). Reasonable protection was provided for losses on continental United States. On Dec. 22 protection was extended to Alaska, Hawaii, Puerto Rico, and the Virgin and Philippine Islands. SEN. REP. NO. 1012, 77th Cong., 2d Sess. (1942) 2, 3 (accompanying S. 2198).

19. The War Damage Act, Pub. L. No. 506, 77th Cong., 2d Sess. (March 27, 1942).

20. The Corporation shall provide, "through insurance, reinsurance, or otherwise, *reasonable* protection against loss of or damage to property, real and personal, which may result from enemy attack (including any action taken by the military, naval, or air forces, of the United States in resisting enemy attack), with such *general exceptions*" as it, the Secretary of Commerce consenting, deems advisable. This, "upon the payment of such premium or other charge, and subject to such *terms and condition* as [it] with the approval of the Secretary of Commerce, may establish . . ." The rates, however, are to be calculated without regard for the geographical risk factor. The Corporation *may* "suspend, restrict, or *otherwise limit* such protection in any area" of which the United States has lost control. The Corporation *may* provide free indemnification to property damaged from Dec. 6, 1941, to the date this scheme shall come into operation, and such damage "*may* be adjusted as if a policy covering such property was in fact in force at the time of such loss . . ." (*italics added*) War Damage Act, Pub. L. No. 506, 77th Cong., 2d Sess. (March 27, 1942).

21. See forward-looking state legislation such as N. Y. Laws 1942, c. 578 (amending N. Y. Laws 1942, c. 445) which provides "war emergency aid" through local public

effectuating such universal coverage are available — free indemnification and compulsory insurance, the former being more suitable to the needs of the United States. Use of compulsory insurance in the United States overlooks the obvious fact that there is only a remote probability of damage to large sections of the country.<sup>22</sup> Administrative difficulty is as well involved. If compulsory insurance is adopted, the differing degrees of proprietary interests in property, must, in all equity, be taken into account in the premium payment device. This gives rise to complexities. Thus, under the British War Damage Act, one having a proprietary interest in the property, defined as fee simple ownership or tenancy for more than seven years,<sup>23</sup> is deemed to be a direct contributor,<sup>24</sup> responsible to the Government for insurance which must be obtained upon designated properties<sup>25</sup> in accordance with the "period of tenancy still to run" and "the proportion of rent to value."<sup>26</sup> It is the mortgagor-mortgagee relationship, not the landlord-tenant, which most clearly demonstrates the inequities which can so easily follow upon such arrangements. By providing the mortgagor a private right over against the mortgagee only upon the existence of a limited number of fact situations,<sup>27</sup> and measuring that right, even where it has been given, in a way which disregards the true ratio of interest in the property,<sup>28</sup> the English compulsory insurance plan has loosed a storm of criticism<sup>29</sup> directed against the ex-

welfare officials "out of funds made available by the federal government or out of funds made available for home relief or otherwise, . . . to the persons found in his territory in need thereof who are not receiving assistance from any other source." § 56(1). Municipalities are authorized to issue bonds for this purpose. § 56(2)(a). Provision is also made for grants in aid to the extent of 40 per cent by the state (§ 58), as well as for the acceptance of federal monetary assistance. It is clear that a limited federal war damage scheme would strain the resources and facilities of states and municipalities.

22. See *Hearings before Senate Committee on Banking and Currency on S. 2198*, 77th Cong., 2d Sess. (1942) 7 (testimony of Mr. Jesse Jones).

23. Section 95(1).

24. Section 23.

25. Denominated as contributory properties. § 19(1).

26. As determined by the Fourth Schedule of the Act; the larger the proportion of rent to value, the greater the right over; an increase in the period of tenancy still to run diminishes the right over.

27. Only where the property was mortgaged upon its acquisition, or construction or improvement upon it, to at least one third of the price of acquisition; where the property is for residential or agricultural use; and where the contributory value of the property does not exceed \$750 for residential properties or \$2,500 for agricultural. § 25. See Annotation, SLACK, *op. cit. supra* note 9, at 102-6.

28. Thus, if the mortgage is for more than one third but not more than one half of the price of acquisition, the right over equals only one sixth of the net liability of the mortgagor, § 25(1)(a); for more than one half but less than two thirds of such price the right over equals only one third of his net liability, § 25(1)(b); for more than two thirds but less than three quarters, only one half the net liability, § 25(1)(c); where the "said amount exceeds three quarters of the said price," only two thirds of the net liability, § 25(1)(d).

29. During and following upon the passage of the War Damage Act, March 26, 1941 (see discussion in (1941) 91 L. J. 75; *Finer, War Damage Act, 1941* (1941)

tremely favored position in which these adjustments place the mortgagee. Free insurance, on the other hand, meets the demands of political expediency,<sup>30</sup> avoids these complexities, and makes such inequitable arrangements less likely. At the same time free insurance properly places the financial burden on the nation as a whole, since the cost of operating the scheme is met by taxation.<sup>31</sup> It therefore appears desirable that the principle present in the Act's earlier drafts<sup>32</sup> of free coverage to a certain amount be reintroduced through amendment. This change apart, the War Damage Corporation can institute under the terms of the Act virtually all of the other mechanisms necessary to achieve the basic policy of universal responsibility.

The Act defines war damage as real or personal property loss resulting from enemy attack or any action taken by our armed forces in resistance to it.<sup>33</sup> In the interpretation of these terms the Corporation can delimit the

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5 MOD. L. REV. 54, 57-9) continuing through the debates upon the War Damage (Amendment) Bill (5 & 6 GEO. VI, Bill No. 22—ordered printed, April 21, 1942; see brief description in (1942) 92 L. J. 148) which leaves, at the time of this writing, the basic features of the mortgagor-mortgagee relationship intact, 379 H. C. DEN. (5th ser. 1942) 1152-55.

30. Since free insurance probably would be available only to a limited amount, provision would be made for voluntary insurance beyond that. Then there would be a problem concerned with covenants entered into between lessor and lessee, or mortgagor and mortgagee to insure against fire. Most policies specifically exclude coverage of war risk. Revised New York Standard Policy, as amended, Legislative Record, Nat. Bd. of Fire Underwriters, April 22, 1942, p. 107; *Drinkwater v. London Assurance Co.*, 2 Wils. 363 (1767); *Rogers, Ltd. v. Whittaker*, 86 L. J. K. B. (n.s.) 790 (1917). The argument that the covenanting words "loss or damage by fire" must be construed in a strict and primary sense so that there is a further obligation to insure against a risk not in the contemplation of the contracting parties is demonstrated in *Enlayde, Ltd. v. Roberts* (1917) 86 L. J. Ch. 149. The other, more equitable view is taken in *Upjohn v. Hitchens*, 87 L. J. K. B. (n.s.) 1205 (1918). Of course under the present Act which involves voluntary insurance only, the problem has even greater relevance.

31. *Hearings before Senate Committee on Banking and Currency on S. 2198*, 77th Cong., 2d Sess. (1942) 16-17 (Comments of Senator Maloney).

32. S. 2198, as amended, limited free protection to "an amount not greater than \$15,000." 88 CONG. REC., Feb. 3, 1942, at 986. Subsequently, provision for free insurance was deleted. 88 CONG. REC., March 2, 1942, at 1913. See *Hearings before House Committee on Banking and Currency on H. R. 6382*, 77th Cong., 2d Sess. (1942) 82-3. Note amendments offered by Representatives Dewey (a damage payment to each person suffering personal property loss upon affidavit of two disinterested persons) and Nichols (limiting free indemnification to \$3,000 for damage "as defined by regulations prescribed by the War Damage Corporation.") Both were rejected. 88 CONG. REC., March 2, 1942, at 1917-18. The argument that property owners should not get free compensation when servicemen must make premium payments for their insurance (88 CONG. REC., March 2, 1942, at 1912) loses its force in the light of the bill offered by Representative Anderson providing "issuance of National Service Life Insurance in the amount of \$5,000, premium to be paid by the Government during active war service." H. R. 6512. 88 CONG. REC., June 8, 1942, at 5203. See 88 CONG. REC., March 2, 1942, at 1908.

33. Specific provision that damage caused by our own forces was to be covered was made by House Committee Amendment. 88 CONG. REC., March 2, 1942, at 1913.

whole scope of the Act. If "attack" is taken to refer merely to actual contact or combat, damage resulting from preventive or preparatory operations undertaken by our armed forces, such as patrol flights,<sup>34</sup> would not be compensated. Since such damage is no less burdensome than damage sustained during an air raid, nor less a result of the war, it seems advisable that "attack" be construed in the broadest possible sense, *i.e.*, we are under constant attack, and while engaged in interim operations, such as patrol flights, our armed forces are resisting enemy attack. These preliminary operations necessary in resisting attack should perhaps include even training manoeuvres<sup>35</sup> or actions resulting from a "scorched earth" policy.<sup>36</sup> The recent declaration by the Corporation that damage caused by capture, seizure, pillage, and looting would not be compensated<sup>37</sup> does not preclude indemnification for damage caused by our own forces in the attempt to prevent such actions by the enemy. By stating that damage due to blackouts is not within the scope of the Act,<sup>38</sup> the Corporation has unfortunately set forth a limitation which will operate against fulfillment of the premise of war damage insurance. The important consequences of this step are readily understood in view of the amount of damage which would be the proximate result of blackouts which in this country may be the most important single factor leading to war damage. More justifiable, given the administrative difficulties which a contrary ruling would involve, is the statement that damage caused by sabotage would not be covered by the Act.<sup>39</sup>

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34. Section 80(2) makes specific direction that damage arising from this source be compensated.

35. Section 80(1)(c) provides compensation for "accidental damage," a direct result of "precautionary or preparatory measures taken under proper authority in any way in anticipation of enemy action, being, in either case, measures involving a substantial degree of risk to property." But this does not include damage caused by "measures taken for training purposes."

36. Before the House, Representative Steagall stated that the Act would cover damage caused by the "scorched earth" policy. 88 CONG. REC., March 2, 1942, at 1915. Mr. Jesse Jones had said that such damage would not be indemnified; but this was before the adoption of the House Committee amendment providing that loss caused by our own forces would be compensated. *Hearings before House Committee on Banking and Currency on H. R. 6382*, 77th Cong., 2d Sess. (1942) 29.

37. N. Y. Times, June 3, 1942, p. 14, col. 1. In this connection, damage caused by the enemy in the Philippines will not be compensated.

38. *Ibid.* Section 80(1)(c) of the British Act specifically excludes damage caused by the imposition "of restrictions on the display of light." Cf. *Fox v. Newcastle-Upon-Tyne City Council* (1941) 2 All E. R. 563; Edwards, *City Problems and National Defense in MUNICIPALITIES AND THE LAW IN ACTION* (1942) 53, 94-97. In the United States the Senate Labor Committee "approved a bill to pay \$30 to \$85 a month to dependents of civilians killed or persons injured in war operations, including *practice blackouts*." N. Y. Times, June 6, 1942, p. 7, col. 2 (*italics added*).

39. N. Y. Times, June 3, 1942, p. 14, col. 1. See *Hearings before House Committee on Banking and Currency on H. R. 6382*, 77th Cong., 2d Sess. (1942) 94-5. However, the New York State statute providing state aid for war damage includes provision for pay-

In delimiting the concept of damage the Act clearly authorized compensation for direct damage and all of its proximate consequences.<sup>40</sup> It might also have been argued that consequential damages were to be indemnified as well.<sup>41</sup> Although loss of profits, and the other elements of business interruption damage,<sup>42</sup> probably will result from war damage to property, the Corporation has stated that they would not be compensated.<sup>43</sup> Difficulties, primarily in the determination of the extent of the damage,<sup>44</sup> inherent in the administration of most elements of business interruption insurance, support the Corporation's refusal to assume responsibility for a loss which ordinarily results in less hardship than does damage to tangible property.

The Corporation has the power under the Act to determine what percentage of the loss will be indemnified once compensable loss has been found. Thus disbursements can be restricted in accordance with the coinsurance principle<sup>45</sup> which limits compensation to less than the full value of the loss unless the owner has insured his property to its full value. The coinsurance

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ments "because of an emergency existing . . . or arising out of attack or sabotage." N. Y. Laws 1942, c. 578, § 55(a).

40. ". . . the damage for which fire insurance companies are liable is not confined to losses by actual burning, but . . . for all losses which are the immediate consequences of fire or burning." 5 COUCH, INSURANCE (1929) 4399. "The fire may not extend to the particular articles insured; they may be shriveled, cracked, or discolored by intense heat, the effect of an actual fire, or damaged by smoke, or may be broken or stolen while being removed . . . So, a loss from falling cinders, falling walls weakened by fire, or the fall of burning buildings, may be a loss by 'fire.'" *Id.* at 4393. See cases in VANCE, INSURANCE (2d ed. 1930) 751, n. 53-61.

41. On amendment by Representative Spence the term "tangible" was struck from the statement that protection was to be given against damage to "tangible real or personal property." Representative Vorys objected, saying that the Act would thus authorize "insurance against losses of credit, losses in profit, losses in patent rights." Representative Ploeser then stated that the amendment was necessary so that all who hold insurable interests in the property might secure insurance upon that interest and that consequential damages should be covered. Without any contradictory discussion the House then upheld the amendment. 83 CONG. REC., March 2, 1942, at 1915-17. That the English do not contemplate compensation for such damage, see 2 KRUSIN AND ROGERS, *op. cit. supra* note 9, at 967.

42. Rent, leasehold, use and occupancy (loss of earnings on business lost, fixed overhead charges), profits and commissions insurance (on goods lost). HUEDNER, PROPERTY INSURANCE (3d ed. 1938) cc. 17, 18.

43. N. Y. Times, June 3, 1942, p. 14, col. 1.

44. Even if the loss were to be predetermined [*cf.* *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. 810 (1902)] there is still difficulty in ascertaining the fair valuation.

45. See cases collected in VANCE, INSURANCE (2d ed. 1930) 773, n. 53, holding coinsurance valid. However, coinsurance has been proscribed in some states by statute. *Sachs v. London and L. F. Ins. Co.*, 113 Ky. 88, 67 S. W. 23 (1902); *Hartford Fire Ins. Co. v. Henderson Brewing Co.*, 168 Ky. 715, 182 S. W. 852 (1916). Notes (1924) 32 A. L. R. 651. Yet some countries have made coinsurance compulsory, *e.g.*, France, Italy, Spain, and Belgium. See HUEDNER, *op. cit. supra* note 42, at 217.



ratio operates, roughly, as follows: the amount of compensation paid is to the loss suffered as the amount of insurance upon the property is to its full value before loss.<sup>46</sup> Since the ratio tends to induce owners to insure to the full value of their property, it has been put to use by private insurance companies well aware of the fact that property losses are rarely total.<sup>47</sup> For if it were the general practice for owners to insure only to the probable extent of the loss, the companies would face a considerable diminution of income in proportion to their actual liability, thus seriously jeopardizing their reserve funds. Use of this principle serves to increase the companies' margin between income and liability, and is a more popular device than the alternative, an increase in the premium rate.<sup>48</sup> Though such consequences may justify private use of the coinsurance principle, they do not appear to be applicable to a Government scheme for war damage insurance; for the Government is not concerned with the maintenance of a self-sustaining insurance fund,<sup>49</sup> but rather with community responsibility for individual war losses. Therefore the Corporation's recent statement that fifty percent coinsurance will be required, "with fixed credits from the established rates for coinsurance" above that figure, seems to be ill-advised. A mitigating factor, however, is that "no coinsurance will be required on farm buildings and dwellings."<sup>50</sup> There is a possible justification for resort to coinsurance in a Government scheme utilizing voluntary insurance, since it induces insurance to full value, a desirable result in view of war insurance objectives, and

46. If a \$1,000 policy has been taken out on property valued at \$2,000 and the co-insurance requirement is that the property be insured to full value, a \$500 loss would be compensated by \$250. Where the coinsurance requirement is smaller, the extent of the recovery is proportionately greater. See adjustment table, ACKERMAN, *INSURANCE* (revised ed. 1939) 94.

47. See chart, HUEBNER, *op. cit. supra* note 42, at 213.

48. *Id.* at 218-20.

49. The Act provides the Corporation with a reserve of \$1,000,000,000, which is, presumably, to be used if the income from the premiums (which are set to a very low scale) proves insufficient. The English experience in this war indicates that this reserve may be ample. It has been estimated that the income from the British scheme would be \$1,000,000,000 to which the Government is prepared to add a like figure. 379 H. C. DEB. (5th ser. 1942) 1113. Since serious thought is being given to increasing the risk period which this sum would cover (see note 11 *supra*), it seems that the actual damage done is not quite so great as anticipated. This, then, militates against the possibility that due to the enormous burdens of the war the Government would reduce the scale of the value payments which are to be made after the war below what is now contemplated and revert back to the policy of the Weir Report (see note 10 *supra*.) Also operating against such a move is the political danger involved in increasing the discrepancy in the measure of value and cost of works payments (see notes 62-4 *infra*).

50. N. Y. Times, June 3, 1942, p. 14, col. 1. Upon floaters for movable property 100 percent coinsurance is mandatory. The varying rates and coinsurance requirement device has been used by the private companies in war damage insurance: 25% coinsurance meant a rate increase of 25%; 80%, a decrease of 30%; 100%, a decrease of 40%. N. Y. Times, Feb. 27, 1942, p. 29, col. 7.

makes more likely total compensation in the event of total loss. On the other hand coinsurance might limit loss indemnification, particularly for those who can least afford full coverage, and its hardships are likely to fall on those least able to bear them. This conflict can be resolved by a judicious use of free insurance.<sup>51</sup> If free insurance to a certain amount were adopted, there should be no decrease in the amount of indemnification for that portion of the loss which is covered without charge. Beyond that figure, it can be said, the Government's responsibility is lessened, and coinsurance might be utilized; if, however, the present plan of voluntary insurance is retained, it is suggested that there be no provision for the ratio.

The desideratum of avoiding measures which limit the amount of compensation for loss likewise applies to the type of "moral hazard" clause which should be adopted in a Government war damage plan. The "moral hazard" clause,<sup>52</sup> conventionally used by private insurance companies, provides that the insured shall have no right to recover if he has withheld any material information from the company. It has been generally held by the courts that a misstatement of material facts, whether wilful or unintentional, will avoid the policy,<sup>53</sup> but that omission of a material fact will lead to avoidance only where the non-disclosure is shown to be wilful or fraudulent.<sup>54</sup> The revised New York Standard Fire Policy, as amended, provides however, that the policy shall be avoided only "when the insured has wilfully concealed or

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51. If the amount of free insurance is included with paid insurance in the coinsurance ratio, the amount of free indemnification is lessened. Thus if free indemnification is given to \$5,000 and an additional \$1,000 is secured on property worth \$12,000, the right of recovery would be limited to \$3,000 (assuming the coinsurance requirement to be insurance to full value). However, the first \$5,000 of the loss should be granted without such limitation, the ratio to be operative only upon the insurance voluntarily secured. Consistency would then demand that the value of the property, for the purposes of the adjustment upon the \$1,000 policy, be diminished by the \$5,000. Otherwise the insured's recovery upon his \$1,000 would be limited to 1/12 instead of 1/2.

52. This policy "shall be void if the insured has concealed or misrepresented any material fact concerning this insurance; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." The policy shall be void if the ownership is "other than unconditional and sole," if a building is not on ground "owned by the insured in fee simple"; "if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale . . . by reason of any mortgage or trust deed; or . . . if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance . . . or . . . if this policy be assigned before a loss." N. Y. Standard Fire Policy in VANCE, *op. cit. supra* note 45, at 954.

53. "Accordingly, under the American authorities, the rule may now be considered as well settled that the failure on the part of the insured to disclose any fact, though clearly material, will not avoid a fire or life policy, unless such nondisclosure was fraudulent." *Id.* at 343, cases collected at n. 14.

54. "A false representation avoids a contract of insurance only when material, wholly without reference to the intent with which it is made, unless it is otherwise provided by statute." *Id.* at 362, cases collected at n. 79-81.

misrepresented any material fact";<sup>55</sup> thus innocent error does not lead to avoidance.<sup>56</sup> If such a measure is adopted under ordinary conditions for the use of private insurance companies, inclusion of a similar clause in the war damage plan in place of the usual "moral hazard" provision should find even greater justification in view of war damage insurance objectives. Furthermore, in the war damage situation the damaging force originates from some agency totally unconnected with the insured. And the possibility that some person might fire his property or resort to purposive negligence during an air raid can be adequately dealt with in provisions for avoidance of the policy where there has been fraud, or for mitigation of damage payments where there has been negligence.<sup>57</sup>

Apart from the advisability of adopting provisions which broaden the coverage of the War Damage Act, or the omission of ordinary insurance principles which would restrict its application, it seems desirable that the Corporation adopt regulations which depart from the traditional view of insurance as indemnification.<sup>58</sup> At common law and under the Standard Form, loss is calculated with reference to the market value of the property just before damage<sup>59</sup>—thus its depreciated value—although loss to the owner is more accurately measured by the considerably greater cost of replacement.<sup>60</sup> It is doubtless true that the expense involved in replacement cost makes it inadvisable for the nation to assume the total amount of loss; nevertheless, a compromise position might be adopted. One possibility for compromise is the provision in the British Act for disbursements<sup>61</sup> which combine the replacement cost and indemnity features. Cost of works payments,<sup>62</sup> calculated with reference to replacement cost, are usually given

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55. Legislative Record, Nat. Bd. of Fire Underwriters, April 22, 1942, p. 107.

56. The requirement that there be unconditional and sole ownership, except where there is an express statement to the contrary, has been held to be violated even in a situation where insurance is secured upon property represented as under the ownership of the husband and in fact owned by husband and wife as tenants by entireties or under joint ownership. *Goble, The Moral Hazard Clauses of the Standard Fire Insurance Policy* (1937) 37 COL. L. REV. 410, 417. See same generally for excellent discussion of the problem.

57. Cf. § 12, providing generally for a diminution of payment to the extent of the negligence; *German A. Ins. Co. v. Brown*, 75 Ark. 251, 87 S. W. 135 (1905); *Messler v. Williamsburg City F. Ins. Co.*, 42 R. I. 460, 108 Atl. 832 (1920).

58. Abandonment of this measure of loss is seen in the valued policy, providing that in the event of total loss the face value of the policy will be the measure of compensation—without regard for the property's actual value. *Orient Ins. Co. v. Daggs*, 172 U. S. 557. See 6 COOLEY, BRIEFS ON LAW OF INSURANCE (2d ed. 1927) 5101 (collection of statutes at n. 1).

59. VANCE, *op. cit. supra* note 45, at 760-61.

60. Property which may have a negligible market value may be, relatively, valuable in a functional sense.

61. Sections 3, 4, 5.

62. Section 3. The reasonable cost, § 3(3), of reinstating the property to its original form is given, after due allowance has been made for materials available in the damaged property, § 3(6), "unless the damage involves total loss, . . . is such that the making

where rebuilding the destroyed property is not so costly as to be impractical. On the other hand, value payments,<sup>63</sup> usually made where the property is a total loss, are determined, broadly, in accordance with the indemnity principle. This method has been sharply criticized<sup>64</sup> as putting the person who has sustained only a partial loss in a better position than the one who has suffered a total loss. A more equitable solution of the difficulty would be a calculation of the right to payment on a replacement cost basis until some set figure is reached, beyond which the straight indemnity principle is to be substituted.<sup>65</sup> By no means both types of loss are calculated in equal measure, the distinction being made only as to the amount of loss involved. If the War Damage Corporation adopts a compromise position, this, rather than the British, treatment should be adopted.

good thereof would be likely to require works costing more than the difference between the value which the hereditament would have" after repairs and its value, unrepaired, as a site, § 4(1) (a). These are to be given as soon after the damage as possible, § 8(1) (a) (yet see as to delay 379 H. C. DEB. (5th ser. 1942) 1139); advances to \$4,000 may be made, § 8(3), to enable a person "to secure housing accommodation . . .", § 8(3) (a), or to get an alternate site "for the carrying on of a trade or business", § 8(3) (b). Cf. *Forrester v. New York Underwriter's Ins. Co.*, 52 S. W. (2d) 233 (Tex. App. 1932). No total loss exists if that portion of the building left standing can reasonably be used in rebuilding. See *Midwood Sanatorium v. Firemen's Fund Ins. Co. of San Francisco*, 291 N. Y. 381, 385, 185 N. E. 674, 675 (1933).

63. Sections 3, 4. In the case of total loss, payment is made with reference to the value of the property as of March 31, 1939, in the open market, with vacant possession, "subject to any restrictive covenant, easement, quasi-easement, or other right inuring for the benefit of the public or any section thereof, and any restriction or liability imposed by . . . enactment, to which the hereditament was subject at that time, but free from any other encumbrance." § 3(5). Insofar as the payment has no regard for inflated or deflated property values, or depreciation since March 31, 1939, it is not a true indemnity payment. However in broad effect it does operate as such. Under § 14 it is possible to raise the amount of the value payment when "it appears to the Commission that, having regard to any circumstances arising since the passing of this Act, the amounts of any such payments computed as provided by section three of this Act are inadequate." The recommendation which will be retroactive [§ 14(3)] must have the approval of the Treasury [§ 14(2)] and ultimately the consent of the House of Commons [§ 14(7)]. It is most likely that these payments will not be made until after the war at the convenience of the Government (§ 8(1) (b); annotation in SLACK, *op. cit. supra* note 9, at 69). The provisions for advance payments (discussed note 62 *supra*) are particularly applicable here. An interest payment of 2½% is paid by the Government in the interim, yet during that period an obligation to pay interest in connection with a mortgage is not stayed—and the difference may be considerable over a period of time. 379 H. C. DEB. (5th ser. 1942) 1127-30.

64. See *Finer, The War Damage Act, 1941* (1941) 5 MOD. L. REV. 54, 56 (see same generally for excellent discussion of the main features of the Act); (1941) 91 L. J. 65; 379 H. C. DEB. (5th ser. 1942) 1121-23 (in discussion on the War Damage (Amendment) Bill). But see apologia for present arrangement, 379 H. C. DEB. (5th ser. 1942) 1169.

65. If property whose replacement cost is \$20,000 and depreciated value is \$10,000 is destroyed, a calculation as to indemnity would be \$10,000. However where replacement cost is used to \$5,000 the payment would be \$5,000 plus 50 per cent of the difference between that figure and the property's replacement cost, or \$7,500, totaling \$12,500.

The British provision for temporary cost of works payments,<sup>66</sup> which are made in addition to the regular insurance disbursements, should be embodied in our scheme. These payments are made to cover the cost of temporary repairs—undertaken primarily to provide temporary shelter and forestall further damage to gutted and semi-gutted property by weathering. Need for prompt repairs is increased in war time by the scarcity of structural material for actual rebuilding operations.<sup>67</sup> Temporary repairs will be more quickly undertaken if the cost is borne by the community. On the other hand, mitigation of damage payments can be used to induce immediate repairing in the place of disbursements for temporary repairs. Yet the two should be used as supplementary devices.

Since disbursements are to be made with rebuilding in mind, the technique of insurance might be used as an aid in replanning damaged areas. By placing conditions upon the use to which the payments are to be put, the Corporation can operate in harmony with regional planning developments to be undertaken after the war.<sup>68</sup> The condition customarily inserted in private fire policies that the Corporation might "take all, or any part, of the property at the agreed or appraised value"<sup>69</sup> would be a necessary implementation of such a program. This would result in a more direct federal control over housing developments.<sup>70</sup> The *Louisville* case<sup>71</sup> declared that the Govern-

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66. Section 5—reasonable cost at the time when undertaken. Where a value payment is to be made, these payments compensate for expenses undertaken before the decision that a value payment will be given, § 5(b). "Where a payment of cost of works is made, works, other than those taken into account in computing the amount of that payment, executed between the occurrence of the damage and the time when it is made good . . . ." § 5(a).

67. Note priority powers under title 3, Second War Powers Act, 1942, Pub. L. No. 507, 77th Cong., 2d Sess. (March 27, 1942). Cf. limitation order L-121, May 13, 1942, forbidding the sale of constructional lumber except to the army or navy for 60 days, (1942) 10 U. S. L. WEEK 2769.

68. See plans submitted in HANSEN AND GREER, *URBAN REDEVELOPMENT AND HOUSING* (Urban Land Institute, 1941).

69. Legislative Record, Nat. Bd. of Fire Underwriters, April 22, 1942, p. 107. Under § 7 of the British Act, powers are given to the Treasury (receiving advices from the Ministry of Works and Buildings, Health, Transport, and local authorities) which are to be used to direct building operations for the war effort—development of industries, agriculture, the use of building materials, and in planning for the future. See 368 H. C. DEB. (5th ser. 1941) 726-45; Greene, *Industrial Location and Reconstruction in Great Britain* (1941) J. LAND AND PUB. UTILITY ECON. 333; (Aug. 23, 1941) ECONOMIST 228. Value payments may be made instead of cost of works, § 7(2)(b), and *vice versa*, § 7(3)(b), imposing conditions upon both payments (§ 7(2)(a) for cost of works; § 7(3)(a) for value payments) for the public welfare.

70. Under the U. S. H. A. 50 STAT. 888 (1937), 42 U. S. C. § 1401 *et seq.* (1940), the amount of control exercised by the Federal Government varies with each phase of a housing development. See Note (1941) 50 YALE L. J. 525 n. 4. The source of power is, of course, in the funds advanced by the Government.

71. *United States v. Certain Lands in City of Louisville*, 78 F. (2d) 684 (C. C. A. 6th, 1935), *cert. granted*, 296 U. S. 567 (1935), *dismissed on motion of Government*, 297

ment could not exercise its powers of condemnation for housing activities. However, if, as in the *Lukens Steel* case<sup>72</sup> the Government is considered as merely occupying the position of a private party in a contractual relationship with the insured, it should be allowed to exercise its powers to fit into the broad pattern implicit in war damage insurance.

If the doctrine of national responsibility for war loss is to be most fully realized in a voluntary insurance scheme, careful attention must be given to the administrative techniques employed. The Corporation has recently outlined an administrative design involving participation by private insurance companies. Three and a half percent of the premiums collected is to be paid to the "Fiduciary Agents", and five percent to the insurance agents and brokers, to cover the cost of using the companies' facilities in writing the policies. In addition, the companies "will assume 10% of all losses in excess of net premiums collected after expense, . . . with a corresponding percentage of the net profits. . . ."<sup>73</sup> Under a very similar administrative structure the British in the last war found that a system of voluntary insuring would not be adequate "unless it was brought to the notice of those concerned much more effectively than . . . through the medium of the Fire Insurance Companies. . . ."<sup>74</sup> Therefore use was made of the Post Office system to a limited extent,<sup>75</sup> and publicity was more effectively given

U. S. 726 (1936). "If such a case were to come to the United States Supreme Court today, the power to condemn would be sustained on the ground that it involves the expenditure of public funds to promote the general welfare." DODD, *CASES ON CONSTITUTIONAL LAW* (3d ed. 1941) 441-42. See discussions in: Nichols, *The Meaning of Public Use in the Law of Eminent Domain* (1940) 20 B. U. L. REV. 615, 634; Corwin, *Constitutional Aspects of Federal Housing* (1935) 84 U. OF PA. L. REV. 131; Note (1935) 33 MICH. L. REV. 957.

72. *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940) (upholding the Walsh-Healey Act). Since insurance is voluntary, many of the damaged units will not be available for that purpose; at the same time, even if all properties were insured, damage will, most likely, fall in dispersed areas. Therefore, in order that there be a comprehensive, unified area for replanning, federal powers of condemnation should be expanded. See note 71 *supra*. If these powers are not upheld, an alternative device might be employed—condemnation by states for the use of the Federal Government. "If a state condemns for a purpose which is a public use under its own constitution, the taking is not less for that use if the purpose is achieved through the agency of the United States rather than by the state itself." Nichols, *The Meaning of Public Use in the Law of Eminent Domain* (1940) 20 B. U. L. REV. 615, 640 (cases collected in n. 136). Upholding the validity of state eminent domain proceedings for slum clearance purposes is *New York City Housing Authority v. Muller*, 270 N. Y. 333, 1 N. E. (2d) 153 (1936); cases collected in Nichols, *supra*, at 630 n. 80. The analogy between condemnation for slum clearance and that in the instant situation is close.

73. N. Y. Times, June 3, 1942, p. 14, col. 1. However, the maximum aggregate loss or gain is limited to \$20,000,000.

74. Preston and Sich, *op. cit. supra* note 8, at 72. The State Insurance Office, from which those wishing to deal with a Government unit might secure insurance, was found similarly wanting.

75. Nov. 9, 1915. Insurance was offered on household goods and stock "estimated to be worth not more than \$500, through the medium of the post offices; the maximum

to the scheme. A simple schedule of rates was adopted<sup>76</sup> which made it possible to use relatively untrained personnel and did not lead to any great administrative expansion. Our scheme, by basing the premium scale upon broad use differences and the existence and non-existence of fire-proofing,<sup>77</sup> is admirably adapted for partial administration by the post offices. Yet the facilities of private companies should be used as well, since their participation increases the possibility of achieving over-all insurance.

The scheme propounded by the War Damage Corporation departs from ordinary principles of insurance; and adoption of the recommendations made above would mark an ever greater break. Thus, free compensation to a certain amount would be provided. At the same time the risk against which insurance is offered would be construed very broadly. The indemnity principle would be partially abandoned in that the hardships involved in replacing damaged property would be recognized and additional payments would be made for temporary repairs. And this scheme for compensation would be administered, in part, through the Post Office. These suggestions, if adopted, would increase coverage and, consequently, distribute the risk throughout the nation.

By adopting these recommendations, the Corporation would develop further its expanded concept of insurance, manifested in the recently announced low rates and simple rating structure. At the same time the Corporation will have regard for the function of war damage insurance in meeting the responsibility of the Government for those made homeless as well as for the principle that the Government compensate for war damage as of right.

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claim was to be \$375 . . . . The premiums are on the same basis as those for private houses and their contents under the Government scheme established in July." *The Times*, Jan. 21, 1916, p. 15, col. a (Fin. and Comm. Rev.). However, when, on Sept. 1, 1917, free insurance was granted, the Post Office scheme was supplanted. Preston and Sieh, *op. cit. supra* note 8, at 72.

76. Based simply upon differences in the use to which the properties were put. However, a distinction was made between damage caused by aircraft and that caused by bombardment, with a greater premium charge if both were to be covered. REPORT OF THE AIRCRAFT INSURANCE COMMISSION, 1914-16, *op. cit. supra* note 5, at 12. Compare the complexity of the fire rating schedules in common use such as the Universal Mercantile Schedule and the Analytic System having regard for thousands of items, among them being water supply, fire department, police and building laws, and various structural points. See discussion in HUEBNER, *op. cit. supra* note 42, at 311-46.

77. The lowest charge made is for insurance of growing crops, then "farm buildings, dwellings, rural and urban, including contents." No distinction as to fireproofing is made in regard to these categories. Higher premiums are set for commercial properties. *N. Y. Times*, June 3, 1942, p. 14, col. 1.