

# ALLOCATION OF THE COSTS OF PREVENTING AN INSURED LOSS\*

## INTRODUCTION

When an insured has incurred expenses to prevent a loss for which the insurer would have been liable had it occurred, should the insured be allowed to recover his expenses from the insurer? Consider the following illustration.<sup>1</sup> The insured, who was in the building construction business, took out a contractor's liability policy. During the policy term, as the insured was engaged in excavating along a hillside preparatory to erecting a warehouse, the land on the embankment began to slide, endangering several homes located at the top of the hill. The insured immediately ceased all excavating operations, drove his trucks against the bank, and pounded stakes into the ground to hold the trucks immobile. He summoned a shoring expert and with his advice and the help of a work crew, the slide was substantially halted. The insurer was saved the expense of large liability claims (there was one minor claim) because of the insured's prompt actions. But the insured incurred \$13,000 of prevention costs. Should this money ultimately come out of his own pocket or should he be able to recover from his insurer?

Consider a comparable situation<sup>2</sup> where the insured is a homeowner with a standard fire insurance policy covering his property rather than his potential liability to others. His home was in an area unprotected by a public fire department. During the policy term, the house caught fire and the insured called a private fire department, which extinguished the blaze with a minimum of loss. Should the insurer be required to indemnify the insured for the cost of the services of the private fire department?

The case for the insured has been made persuasively by the Pennsylvania Supreme Court in *Leebov v. United States Fidelity & Guaranty Company*,<sup>3</sup> where the court concluded that the insurer must pay prevention costs because it would be unreasonable not to indemnify an insured who acted decisively and effectively to prevent a loss while completely indemnifying an insured who refused to act in the face of an impending disaster. As Judge Musmanno, speaking for the majority, colorfully put it:

It would be a strange kind of argument and an equivocal type of justice which would hold that the [insurer] would be compelled to pay out, let us say, the sum of \$100,000 if the [insured] had not prevented what would have been inevitable, and yet not be called upon to pay the smaller sum which the [insured] actually expended

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1. The events described are taken from the case of *Leebov v. United States Fidelity & Guaranty Co.*, 401 Pa. 477, 165 A.2d 82 (1960).

2. The situation alluded to is based upon the case of *Farmers Mut. Fire Ins. Co. v. McMillan*, 217 Tenn. 125, 395 S.W.2d 798 (1965).

3. 401 Pa. 477, 165 A.2d 82 (1960).

to avoid a foreseeable disaster. . . . It is folly to argue that if a policy owner does nothing and thereby permits the piling up of mountainous claims at the eventual expense of the insurance carrier, he will be held harmless of all liability, but if he makes a reasonable expenditure and prevents a catastrophe he must do so at his own cost and expense.<sup>4</sup>

This Note will discuss the validity of Judge Musmanno's conclusion not only in liability insurance cases, such as *Leebov*, but also in property insurance cases.

## I. THE HISTORICAL DEVELOPMENT OF PREVENTION COSTS

### A. *Developments in Marine Insurance*

On property and liability insurance questions in general, the legal researcher will usually find his most hoary authority in the field of marine insurance.<sup>5</sup> As far as prevention costs are concerned, relevant provisions in marine insurance policies provide the earliest authority allowing an insured to recover his costs for preventing a loss.

Before proceeding to analyze the marine law in regard to prevention costs, however, it must be made clear that this Note is not concerned with recovery under the main coverage provision, no matter how liberally it is construed. The term "main coverage provision" refers to that portion of the insurance policy where the insurer sets forth the primary insured event or events. The main coverage provision in a marine policy is the perils clause, *viz.*, "we, the assurers, agree to pay for all losses due to perils of the sea." It should be noted that by broadly interpreting the direct coverage language, many decisions have included within that provision items which closely resemble or actually are prevention costs.<sup>6</sup>

The main coverage provision must be distinguished from a full supplementary coverage provision, wherein the insurer agrees to pay for certain preventive acts of the insured, and from a partial supplementary coverage provision, in which the insured agrees to prevent or mitigate a possible loss without any express term indicating who is to pay for it. In a marine policy, the sue and labor clause is such a supplementary coverage provision, with its fullness or partiality depending upon whether a contribution clause is in-

4. *Id.* at 481, 165 A.2d at 84.

5. Marine insurance is the oldest form of indemnity. As early as the twelfth century, businessmen realized the need to distribute the high risks inherent in marine ventures. See W. WINTER, *MARINE INSURANCE* 1 (3d ed. 1952).

6. The main coverage provision in the standard fire policy, for example, has been interpreted to include water damage, see *White v. Republic Fire Ins. Co.*, 57 Me. 91, 94 (1869); the deliberate destruction of a building to cause a fire break, see *id.*; cost of removing insured property from a building about to catch fire from an adjoining building, *id.*; *Case v. Hartford Fire Ins. Co.*, 13 Ill. 676, 680 (1852); 5 G. COUCH, *INSURANCE* § 1221, at 4468 (1929); and the theft of goods so removed, *Case v. Hartford Fire Ins. Co.*, 13 Ill. 676, 680 (1852); *Hall v. Great Am. Ins. Co.*, 217 Iowa 1005, 252 N.W. 763 (1934); *Watson v. American Colony Ins. Co.*, 179 S.C. 149, 183 S.E. 692 (1936).

cluded; in a fire policy, it is the protection of the property clause which constitutes the supplementary coverage provision.

As intimated above, in marine policies an express undertaking to pay certain prevention costs is found in the full sue and labor clause.<sup>7</sup> The central question about such "full" clauses is whether they are necessary for recovery of prevention costs.

Marine underwriters insure three principal interests by hull, cargo, and freight contracts. A hull policy insures the vessel itself. A cargo policy insures the cargo carried by the vessel. Under each of these two basic types of policies are found many subtypes.<sup>8</sup> The freight policy insures a carrier against the risk that for a reason connected with the voyage he will not collect from the shipper the agreed freight on the cargo. This risk is realized, for example, when the carrier cannot deliver the cargo because it is lost en route. Since it does not matter to a shipper at what point in the voyage his cargo was lost, the general rule in affreightment contracts is that freight is payable either in full or not at all. Failure to deliver at the destination relieves the shipper from his promise to pay freight.<sup>9</sup>

In virtually every policy, whether on a hull, a cargo, or on freight, there is a sue and labor clause. This clause is so old that it is found in the first written Anglo-American marine insurance policy on record. The policy was drafted by British underwriters and insured the hull of the good ship *Tiger*. Although this policy is dated 1613,<sup>10</sup> many believe that the clause dates

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7. What are called "prevention costs" in a strict sense must be distinguished from successive losses. An illustration should make this distinction clear. A cargo ship with hull insurance sets out from New York City to London. High seas and strong winds severely damage the ship. The master believes that the ship can make it to London but would probably be a constructive total loss upon its arrival. Hence he enters Boston as a port of distress, where the ship is repaired. It then sets out again only to founder and sink in the North Atlantic. The insurer pays the face amount of the policy for the total loss but refuses to pay for the repair costs incurred in Boston. The Boston repairs can properly be called prevention costs, but they are clearly within the meaning of the main coverage provision of the policy ("All hurt, detriment and damage . . . by peril of the seas"). Therefore, expenses such as the Boston repairs will not be considered here as prevention costs. *Livie v. Janson*, 12 East 624 (1810); see *Marine Insurance Act*, 6 Edw. 7, c. 41, § 77 (1906); cf. *Le Cheminant v. Pearson*, 4 Taunt. 367 (1812).

8. Hull policies, for example, may cover a vessel on a particular voyage (voyage, hull policy), or may cover a vessel on all its voyages during a period of time (time, hull policy). WINTER, *supra* note 5, at 262; W. RODDA, *MARINE INSURANCE: OCEAN AND INLAND* 52, 54 (3d ed. 1970). Cargo policies may cover a particular cargo on a particular ship for a certain voyage (voyage, cargo policy), or may cover all cargo shipped by the insured on any ship during a certain period of time to any port (open or floater policy). RODDA, at 60.

9. Unfortunately, at some point in antiquity this rule of freight payments was applied to the following situation which should be distinguished. Frequently a ship is driven into a port of distress in a condition so damaged that her further use is impossible. The cargo, however, is safe, but still a long way from home. Under the rule of affreightment contracts discussed in the text, the carrier in this situation was unable to collect any part of the freight. This rule is frequently expressed as "no freight *pro rata itineris*." See *Kidston v. Empire Marine Ins. Co.*, [1866] L.R. 1 C.P. 535, 542, *aff'd*, [1867] L.R. 2 C.P. 357, 363-64.

10. It is kept in the Bodleian Library at Oxford. WINTER, *supra* note 5, at 195. Two older marine policies do exist but they were not written by Anglo-American underwriters. These two are Florentine policies dated 1523 and 1527. Neither has a sue and labor clause. 4 G. RICHARDS, *INSURANCE* 2074, App. K (5th ed. W. Freedman 1952); *Pride & Son v.*

back even further and probably grew out of the unwritten customs of the maritime trade existing in the major seaports since antiquity.<sup>11</sup>

The sue and labor clause has changed only slightly over the centuries. The wording today is in many respects the same as it was in the "Tiger" policy:<sup>12</sup>

And in the case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defense, safeguards, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance;<sup>13</sup> to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured.<sup>14</sup> And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment.<sup>15</sup>

The clause so stated requires the insurer to pay expenses incurred by the insured to avert a loss covered by the policy.<sup>16</sup> This is the holding of

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Providence-Washington Ins. Co., 6 Pa. Dist. 227, 231 (C.P. Phila. Co. 1897). One respected commentator places the origin of the clause between 1430 and 1455. J. ARNOULD, *MARINE INSURANCE* 814 (6th ed. Maclachten 1887).

11. See *American Merchant Marine Ins. Co. v. Liberty Sand & Gravel Co.*, 282 F. 514, 520 (3d Cir.), *cert. denied*, 260 U.S. 737 (1922); *Munson v. Standard Marine Ins. Co.*, 156 F. 44, 47 (1st Cir. 1907); G. RICHARDS, *INSURANCE* § 455-a, at 822 n.45 (4th ed. R. Long 1932).

12. The following is taken from the standard Lloyd's policy. E. PATTERSON & W. YOUNG, *INSURANCE* 648-49 (4th ed. 1961). For examples of slight variations of this wording, see WINTER, *supra* note 5, at 195; *White Star S.S. Co. v. Northern British & Mercantile Ins. Co.*, 48 F. Supp. 808, 809 (E.D. Mich. 1943). The wording of the clause which appears in the text is that embodied in the Marine Insurance Act, 6 Edw. 7, c. 41, sched. 1 (1906).

13. This was the extent of the original sue and labor clause. Its purpose was to permit the insured to use every possible opportunity he had to preserve the cargo and hull without waiving his right to tender abandonment and claim a total loss. *American Merchant Marine Ins. Co. v. Liberty Sand & Gravel Co.*, 282 F. 514, 519-20 (3d Cir.), *cert. denied*, 260 U.S. 737 (1922); Annot., 86 A.L.R.2d 1247, 1250 (1962).

14. The undertaking in this part of the clause was added sometime before 1783. The insurer by this undertaking agreed to pay for any reasonable expense incurred by the insured to preserve the cargo and hull. *American Merchant Marine Ins. Co. v. Liberty Sand & Gravel Co.*, 282 F. 514, 520 (3d Cir.), *cert. denied*, 260 U.S. 737 (1922) (the clause was omitted in the policy with which this case is concerned); Annot., 86 A.L.R.2d 1247, 1250 (1962).

15. Footnotes added. The waiver provision of the clause was adopted after the decision in *Peele v. Merchants' Ins. Co.*, 19 F. Cas. 98 (No. 10905) (C.C.D. Mass. 1822), which held that an insurer accepted a shipowner's abandonment of his vessel by salvaging and repairing the ship without the consent of the owner. *Northwestern Transp. Co. v. Continental Ins. Co.*, 24 F. 171, 177 (E.D. Mich. 1885); *Gloucester Ins. Co. v. Younger*, 10 F. Cas. 495 (No. 5487) (C.C.D. Mass. 1855). The purpose of this waiver provision is to avoid the result in the *Peele* case. The insurer does not want his actions in preserving the property interpreted as an acceptance of the abandonment, just as the original part of the sue and labor clause allows the insured to attempt a recovery without waiving his right to abandon. *Northwestern Transp. Co. v. Continental Ins. Co.*, 24 F. 171, 178 (E.D. Mich. 1885). At least one commentator believes that the waiver provision was introduced "in part at least" only to make clear a privilege which the underwriters have always had. WINTER, *supra* note 5, at 195.

16. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 68 (1957): "Under this clause, the underwriter may become liable for certain charges incurred by the assured in caring for the insured property, *whether or not there is any actual loss or damage.*" (emphasis added); *accord*, *St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co.*, 157 F. 625, 629 (9th Cir. 1907) (cargo policy); *Kidston v. Empire Marine Ins. Co.*, [1866] L.R. 1

*Kidston v. Empire Marine Insurance Company*,<sup>17</sup> which involved a freight policy covering guano<sup>18</sup> to be transported from the Chincha Islands to Great Britain. The ship was damaged while rounding Cape Horn and was required to enter Rio de Janeiro as a port of distress. In order to fulfill the contract of affreightment and avoid a total loss of the freight, in addition to the already existing total loss on the vessel, the captain landed and warehoused the cargo at Rio. Then, chartering another ship, he forwarded the cargo to London, where he sought to recover from the insurer the forwarding cost. The court held that this expense was recoverable because it was incurred in a successful attempt to forestall a total loss of the freight and was therefore well within the meaning of the sue and labor clause.

The meaning [of the clause] is obvious, that, if an occasion should occur in which by reason of a peril insured against *unusual* labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwriters will contribute, not as part of the sum insured in case of loss or damage because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have avoided detriment by the result in proportion to what they would have had to pay if such detriment had come to a head for want of timely care.<sup>19</sup>

In *Aitchison v. Lohre*,<sup>20</sup> the British House of Lords was asked to decide whether a salvage award was recoverable under the sue and labor clause of a hull policy.<sup>21</sup> The case involved the ship *Crimea* which had encountered bad

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C.P. 535, *aff'd*, [1867] L.R. 2 C.P. 357 (freight policy); RICHARDS, *supra* note 11, at 824, 825. *Contra*, WINTER, *supra* note 5, at 196:

This clause [sue and labor] becomes operative *only after loss or misfortune has occurred* and is not merely a statement of the duty with which the law would naturally charge an assured but is an affirmative agreement that the assured shall perform the duty of saving and preserving the property. (emphasis added).

Winter represents the insurance industry's point of view and his opinion as to the meaning of the clause is apparently a minority view.

17. [1866] L.R. 1 C.P. 535, *aff'd*, [1867] L.R. 2 C.P. 357.

18. Guano is "a natural manure composed chiefly of the excrement of sea birds, found esp. on islands near the Peruvian Coast." THE AMERICAN COLLEGE DICTIONARY 537 (1960). This footnote has been included for those with insatiable curiosity.

19. *Kidston v. Empire Marine Ins. Co.*, [1866] L.R. 1 C.P. 535, 543, *aff'd*, [1867] L.R. 2 C.P. 257 (emphasis added). The cost of forwarding must be reasonable. The least expensive method for transshipping should be used. *See Lee v. Southern Ins. Co.*, [1870] L.R. 5 C.P. 397.

20. [1879] 4 App. Cas. 755, *rev'g in part on other grounds*, [1878] 3 Q.B.D. 558.

21. Note that the guano case described above involved a freight policy, which covers a carrier's contract contingency that he will be unable to deliver the cargo and receive freight. The court implied that the application to freight insurance was not an inappropriate extension of the cases applying the sue and labor clause to hull and cargo policies (where the insurance covers an owner's or a bailee's interest in the insured property respectively). The fact that freight insurance covers the insured's possible loss of a contract right while hull and cargo policies cover other types of interests was not viewed as a material distinction.

In principle, the insurance of freight differs not at all from the insurance of hull or cargo. The interest is intangible, being based merely on a contractual relation, but the perils to which the interest is exposed are precisely the same perils to

weather on her voyage home and was in danger of sinking when the steamer Texas took her in tow and brought her into Queenstown. The House of Lords, in holding that salvage awards were not recoverable under the sue and labor clause, interpreted the clause in the same way as it had been interpreted in the *Kidston* freight policy.<sup>22</sup> Thus, it is clear that the insurer must pay for sue and labor expenses independent of and even in addition to the total face value of the policy. The construction of the clause in the foregoing cases has been codified in Great Britain,<sup>23</sup> and followed without variation by American courts.<sup>24</sup> These interpretations have also been approved by highly respected commentators in both countries.<sup>25</sup>

As one can imagine, it was a short step to carry the sue and labor clause over to the liability field from the area of property insurance. The transition step was the protection and indemnity policy, the most common type of marine liability policy.<sup>26</sup> It covers "a variety of risks and liabilities incident to the business of shipowning and not covered by the usual marine insurance policies."<sup>27</sup> These include damage to docks and piers, the cost of removal of a wreck, loss of and damage to cargo, personal injury to passengers and crew,

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which hull and cargo are exposed. The earning of the freight in most cases is dependent on the continued existence of the cargo and the successful prosecution of the voyage by the vessel.

WINTER, *supra* note 5, at 318.

22. [1879] 4 App. Cas. 755, *rev'g in part on other grounds*, [1878] 3 Q.B.D. 558.

23. Marine Insurance Act, 6 Edw. 7, c. 41, § 78 (1906):

(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

Both salvage charges and general average losses and contributions are covered by the main coverage provision in every marine insurance policy. Marine Insurance Act, 6 Edw. 7, c. 41, §§ 65(1), 66(5), 66(6) (1906).

24. *Reliance Ins. Co. v. The Escapade*, 280 F.2d 482 (5th Cir. 1960) (hull policy); *Home Ins. Co. v. Ciconett*, 179 F.2d 892 (6th Cir. 1950) (hull policy); *American Merchant Marine Ins. Co. v. Liberty Sand & Gravel Co.*, 282 F. 514 (3d Cir.), *cert. denied*, 260 U.S. 737 (1922) (hull policy); *St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co.*, 157 F. 625 (9th Cir. 1907) (cargo policy); *White Star S.S. Co. v. Northern British & Mercantile Ins. Co.*, 48 F. Supp. 808 (E.D. Mich. 1943) (hull policy); *Cory v. Boylston Ins. Co.*, 107 Mass. 140, 9 Am. R. 14 (1871) (cargo policy); *Alexandre v. Sun Mutual Ins. Co.*, 51 N.Y. 253 (1873) (hull policy); *Barker v. Phoenix Ins. Co.*, 8 Johns. 307, 5 Am. Dec. 339 (N.Y. 1811) (cargo policy); *Jumel v. Marine Ins. Co.*, 7 Johns. 412, 5 Am. Dec. 283 (N.Y. 1811) (hull policy). It should be noted that American courts are very prone to follow British cases in the sue and labor field. GILMORE & BLACK, *supra* note 16, at 51.

25. *See* 2 J. ARNOULD, MARINE INSURANCE 864-73 (14th ed. L. Chorley 1954); GILMORE & BLACK, *supra* note 16, at 68. A commentator for the marine insurance industry, however, feels that the sue and labor clause only becomes operative after a loss or misfortune of some extent has already occurred. WINTER, *supra* note 5, at 196.

26. WINTER, *supra* note 5, at 306-09.

27. 1 ARNOULD, *supra* note 25, § 81, at 104.

maintenance and cure expenses for sick members of the crew, quarantine expenses, customs and immigration fines, and expenses in connection with deserters and stowaways.<sup>28</sup>

The keynote was provided by the British case of *Cunard Steamship Company v. Marten*,<sup>29</sup> where a court first recognized the insured's right to recover prevention costs from the insurer under a sue and labor clause in a marine *liability policy*. An ocean carrier had purchased a liability policy to cover a shipment of mules. During the voyage, the ship was forced on the rocks by high winds and seas. The mules were thrown into the sea and the insured incurred sizeable expenses to recover most of the mules, which otherwise would have drowned. The court found that the sue and labor clause in the policy issued by the insurer in the case was identical with that normally found in hull policies. Based upon a very literal interpretation, the court held that since the insurer only undertook to pay expenses for safeguarding the "said goods," it did not undertake to pay expenses for preventing or minimizing the insured's "liability." However, the author of the opinion conceded, "I fully recognise that a suing and labouring clause might be framed which would be appropriate to such an insurance as was effected in the present case."<sup>30</sup>

The conclusion that no distinction should be made between property and liability policies regarding the recovery of prevention costs is persuasive

. . . [b]ecause it is just as much to the interest of the [insurance] company that the property to be defended or recovered when the liability of the carrier for its loss is insured as when the property itself is. The provision is as much appropriate to the one risk as to the other.<sup>31</sup>

#### B. *Non-Marine Insurance*

As suggested by the above discussion, in marine insurance, where the question first arose, the validity of claims for prevention costs is uncertain in the absence of the full supplementary coverage provision. In the area of non-marine insurance, one finds a variety of pertinent policy language. Inland marine policies, which have served to carry over many marine concepts into non-marine insurance<sup>32</sup> usually contain sue and labor clauses. Such clauses

28. *Id.*; N. HEALY & B. CURRIE, ADMIRALTY 708-09 (1965).

29. [1902] 2 K.B. 624, *aff'd* [1903] 2 K.B. 511.

30. *Id.* at 630. American courts have not interpreted the sue and labor clause so literally and in this case probably would have allowed the insured to recover his prevention costs. *See, e.g.*, *Munson v. Standard Marine Ins. Co.*, 156 F. 44, 48 (1st Cir. 1907), *cert. denied*, 209 U.S. 543 (1908); *Pride & Son v. Providence-Washington Ins. Co.*, 6 Pa. Dist. 227 (C.P. Phila. Co. 1894).

31. *Miami Jockey Club v. Union Assurance Society*, 82 F.2d 588, 589 (5th Cir. 1936). An inland marine policy was involved in the case. *But cf.* *Westchester Fire Ins. Co. v. Rhoades*, 405 S.W.2d 812 (Tex. Civ. App. 1966), where the property insurer argued that as between it and liability insurers, a trade understanding existed that only the liability insurers would be responsible for litigation expenses, a form of prevention costs.

32. Inland marine insurance is essentially the coverage of property which is shipped over land, that is, by rail and motor truck. Shipment by air is increasingly important . . . .

were prominent in early non-marine cases involving prevention costs. Subsequently, dry land policies were developed with related but distinct clauses: the "protection of property insured" clause<sup>33</sup> and the "protection from further loss" clause.<sup>34</sup> When these two clauses include express provisions for reimbursement, prevention costs may be claimed under them, subject to certain conditions: that the costs claimed be reasonable and necessary,<sup>35</sup> and, in regard to "protection from further loss" clauses, that there be a loss giving rise to the prospect of further loss.<sup>36</sup>

Most courts, however, have not allowed an insured to recover prevention costs from the insurer without an express recovery provision. But there has been a noteworthy exception—*Leebov v. United States Fidelity & Guaranty Company*,<sup>37</sup> which more clearly than any other case, has allowed prevention costs.

The facts of the case are described in the "landslide" example presented earlier.<sup>38</sup> A homeowner whose porch was destroyed by the landslide recovered \$1150 from Leebov, the insured, in litigation where the insurer had refused to defend Leebov. Since Leebov's counsel fees were \$550, his expenses were \$1700 in addition to the prevention costs of shoring up the excavation.

The insurer had undertaken to pay "sums which the insured shall become obligated to pay by reason of liability for property damage caused by accident." In response to Leebov's claim for his prevention costs, the insurer argued that the insured could not recover because there was no showing that he would have been liable for the averted damage. The court ruled, however, that the insured was absolutely liable for interference with lateral support. The court reasoned that the insurer must be held liable for prevention costs in this case because it would be "an equivocal type of justice" to allow the insured to be indemnified if he does nothing in the face of an impending disaster, and yet deny his claim for prevention costs if he acts to prevent the disaster.

It should be noted that the policy in *Leebov* contained no supplementary coverage provision comparable to a "protection of property insured" clause or a "protection from further loss" clause. This may indicate that *Leebov* was actually decided on a quasi-contractual theory—a possible basis for prevention cost recovery to which this Note will now turn.

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Prior to 1921, all insurance on property in transit was called marine insurance in the United States. There was no segregation of ocean marine as distinct from inland marine.

RODDA, *supra* note 8, at 5. See also WINTER, *supra* note 5, at 137-38.

33. See, e.g., policy cited in *Smith v. Orion Ins. Co.*, 298 F.2d 528 (10th Cir. 1961).

34. See, e.g., policy cited in *Thornewell v. Indiana Lumbermens Mut. Ins. Co.*, 33 Wis. 2d 344, 350, 147 N.W.2d 317, 321 (1967).

35. See, e.g., *Smith v. Orion Ins. Co.*, 298 F.2d 528, 534 (10th Cir. 1961).

36. See, e.g., *Thornewell v. Indiana Lumbermens Mut. Ins. Co.*, 33 Wis. 2d 344, 350, 147 N.W.2d 317, 321 (1967).

37. 401 Pa. 477, 165 A.2d 82 (1960).

38. See notes 1, 3-4 *supra* and accompanying text.



## II. QUASI CONTRACT

There are numerous cases of recoveries in which the terms of the integrated contract do not expressly cover the contingency which has occurred. Courts have supported such claims in several ways.<sup>39</sup> In cases where the parties have agreed on what should be done in such a case but neglected to reduce the understanding to writing, the court may enforce the oral understanding of the parties.<sup>40</sup> In cases where the parties never considered the contingency, the courts have either granted recovery on grounds of equity and justice or have enforced the contract as the parties would have intended had they foreseen the problem.<sup>41</sup> The equity ground represents a contract implied in law; the inferred intent approach, an implied term in the policy. This latter approach has generally been utilized by the courts to enforce such concepts as "good faith" or "reasonableness"<sup>42</sup> and is an unlikely basis for the recovery of such extraordinary damages as prevention costs. The alternative equity approach would require in an insurance case that the court find that the expenditure conferred a benefit on the insurer for which, in justice, he should be accountable. The insurer would then be liable in quasi contract, a "constructive" or "implied in law" contract.<sup>43</sup> Such liability is based on mutual consent or agreement.<sup>44</sup>

[A] quasi contract arises where one person has received or used something for which it is just that he should compensate another; if one person confers a benefit upon another he may recover in quasi contract its reasonable value if as between the two persons it is unjust for the recipient to retain it.<sup>45</sup>

"A quasi contractual obligation is one that is created by the law for reasons of justice."<sup>46</sup> Even if the services are performed in the face of the beneficiary's express refusal to pay, a quasi contract will require payment when he is under a legal obligation to perform a duty and the services performed are in fulfillment of that duty.<sup>47</sup> The person benefited is then liable to pay the reasonable value

39. See generally R. KEETON, *INSURANCE LAW: BASIC TEXT* § 6.1 (1971).

40. Courts, relying on prior oral agreements of the parties, must be aware of the parol evidence rule. An exception to the rule, however, can often be found to allow such oral agreements to be admitted into evidence. See *RESTATEMENT OF CONTRACTS* §§ 238, 240, 242 (1932). If the court will not enforce an unwritten provision of an agreement, the insured may seek to have the written agreement reformed. See Covington, *Reformation of Contracts of Personal Insurance*, 1964 U. ILL. L.F. 548, 549-50.

41. Williams, *Language and the Law*, 61 L.Q. REV. 384, 401 (1945); *Parev Prods. Co. v. I. Rokeach & Sons*, 124 F.2d 147 (2d Cir. 1941). See also H. JONES, E. FARNSWORTH & W. YOUNG, *CONTRACTS* 284-95 (1965) and cases cited therein.

42. See, e.g., *Hayden v. Hoadley*, 94 Vt. 345, 111 A. 343 (1920); *Bergum v. Weber*, 136 Cal. App. 2d 389, 288 P.2d 623 (1955).

43. JONES, FARNSWORTH & YOUNG, *supra* note 41, at 195.

44. *Id.*; Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533, 534 (1912).

45. JONES, FARNSWORTH & YOUNG, *supra* note 41, at 195; *RESTATEMENT OF RESTITUTION* § 1 and Comment (1937).

46. 1 A. CORBIN, *CONTRACTS* § 19, at 46 (1963).

47. *Sommers v. Putnam County Board of Education*, 113 Ohio St. 177, 148 N.E. 682

of the services rendered in his behalf. This theory seems to offer the soundest basis for the recovery of prevention costs.

In fact many cases use the language of "benefit bestowed" to make more palatable a ruling favorable to the insured.<sup>48</sup> In *Home Insurance Company v. Ciconett*,<sup>49</sup> for example, the hull insurer was required to pay a sum in addition to the total amount of the policy because such sum was expended in an unsuccessful effort to raise the vessel. The court based its decision on the sue and labor clause, but felt obliged at the very end of its opinion to add that "[s]uch expenditures are for the benefit of the underwriters."<sup>50</sup>

There is authority both here and in Great Britain for the proposition that, in marine insurance, an insured can recover prevention cost on such a theory. In *Kidston* the court said that no recovery for preventing loss can be had under the policy unless the policy contains a full sue and labor clause.<sup>51</sup> But in the subsequent case of *Aitchison v. Lohre*,<sup>52</sup> which was decided by the House of Lords—for most purposes the highest authority in Britain<sup>53</sup>—Lord Chancellor Cairns stated that sue and labor expenses must be assessed upon the *quantum meruit* principle.<sup>54</sup> He thereby suggested a theory which would allow recovery of prevention costs in the absence of a full sue and labor clause. The argument would be that if the insured will be indemnified (within the limits of the policy) upon allowing a loss to occur, but cannot recover his expenses when he prevents a loss, an inequity exists; this is an unjust enrichment to the insurer to the extent that the insured's conduct benefits the insurer.<sup>55</sup> In *Alexandre v. Sun Mutual Insurance Company*,<sup>56</sup> an early

(1925); *Morse v. Kenny*, 87 Vt. 445, 89 A. 865 (1914); 1A A. CORBIN, CONTRACTS § 234, at 360 (1963).

48. See, e.g., *Home Ins. Co. v. Ciconett*, 179 F.2d 892, 896 (6th Cir. 1950); *Jumel v. Marine Ins. Co.*, 7 Johns. 412, 424, 5 Am. Dec. 283, 286 (N.Y. 1811) (Kent, C. J.).

49. 179 F.2d 892 (6th Cir. 1950).

50. *Id.* at 896.

51. Speaking for the court, Chief Baron Kelly said:

... we think that, under a policy like this, [the assured] is entitled to claim the cost which he so incurs under the suing and laboring clause, *where such a clause is to be found in the policy*, on the ground that he has thereby preserved the subject-matter of the insurance from total loss. . . .

*Kidston v. Empire Marine Ins. Co.*, [1867] L.R. 2 C.P. 357, 365 (emphasis added).

52. [1879] 4 App. Cas. 755. See notes 20-22 *supra* and accompanying text.

53. W. GELDART, ELEMENTS OF ENGLISH LAW 6 (7th ed. D. Yardley 1966).

54. 4 App. Cas. at 766.

55. Often the insurer is not the only one benefited by the insured's conduct. In *Jumel v. Marine Ins. Co.*, 7 Johns. 412, 5 Am. Dec. 283 (N.Y. 1811) (a hull insurance case) the court said:

[The sue and labor expenses] were incurred for the joint benefit of the ship, freight and cargo, as all were equally put in jeopardy by the capture. The [insurers] ought not to be responsible beyond that share of the expenses which, upon the principles of a general average, will fall upon the vessel.

*Id.* at 424-25, 5 Am. Dec. at 286. See also *Barker v. Phoenix Ins. Co.*, 8 Johns. 307, 5 Am. Dec. 339 (N.Y. 1811) (cargo insurance case).

If the insurance policy only covers a part of the full value of the hull or cargo, the insured himself is benefited in part by his costs incurred to prevent or minimize the loss. In such a case, the insurer would not have to pay all the prevention costs but just the portion of them represented by the fraction: amount insured/hull's value. Hood Rubber

American hull insurance case, the court recognized in dictum that an insured could recover, under "the general principles of the contract of insurance," certain costs if they were incurred to prevent or diminish the extent of the loss.<sup>57</sup> The general principles referred to must be the principles of quasi contract.

The germinal possibilities of quasi-contractual theory in this field were seemingly rejected by *American Merchant Marine Insurance Company v. Liberty Sand & Gravel Company*.<sup>58</sup> The case involved a hull policy<sup>59</sup> on a dredge operating in Port Jefferson Harbor, Long Island. The dredge suffered ice damage and sank. The insured then incurred expenses in caring for the wreck until the spring, which was the earliest time that the extent of the damage could be determined. When examined, the dredge proved to be a constructive total loss. The insured sued for prevention costs, but the court specifically stated that a recovery for costs in preventing a loss cannot be implied in a marine policy.<sup>60</sup> Professors Gilmore and Black, noted American authorities on admiralty law, have criticized this view as "unnecessarily narrow,"<sup>61</sup> and instead suggested that the contribution clause might have been implied in the policy on a quasi-contractual theory. It appears, however, that a quasi-contractual theory, if viewed narrowly, may not have been applicable to the facts of the case because the insured's expenses did not actually result in any benefit to the insurer—the ship was ultimately lost. A quasi-contractual theory, therefore, cannot be ruled out by the *Liberty Sand & Gravel* case; indeed the court there specifically recognized that the sue and labor clause allows recovery over the policy limit for sue and labor expenses incurred for the benefit of the insurer,<sup>62</sup> a doctrine relying on quasi-contractual-like considerations. Of course a broader and more solidly based view of benefits, which is supported by Gilmore and Black, would hold that a benefit is bestowed on an insurer simply by the attempt to save even though the loss is not ultimately mitigated or averted. Thus, it would seem that the case was actually based on an excessively narrow conception of benefit.

A more favorable approach is found in *Munson v. Standard Marine Insurance Company*,<sup>63</sup> where the court seemed to indicate a willingness to find a promise to pay prevention costs, at least to avert physical damage, even

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Co. v. Atlantic Mutual Ins. Co., 161 F. 788 (S.D.N.Y. 1908); *Cunard S.S. Co. v. Marten*, [1902] 2 K.B. 624, *aff'd*, [1903] 2 K.B. 511; RICHARDS, *supra* note 10, § 334, at 1130.

56. 51 N.Y. 253 (1873).

57. *Id.* at 258.

58. 282 F. 514 (3d Cir.), *cert. denied*, 260 U.S. 737 (1922).

59. The sue and labor clause in the policy omitted the usual undertaking: "to the charges (i.e., sue, labor and travel expenses), whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured."

60. *American Merchant Marine Ins. Co. v. Liberty Sand & Gravel Co.*, 282 F. 514, 522 (3d Cir. 1922), *cert. denied*, 260 U.S. 737 (1922).

61. GILMORE & BLACK, *supra* note 16, at 68 n.93.

62. 282 F. at 521.

63. 156 F. 44 (1st Cir. 1907), *cert. denied*, 209 U.S. 543 (1908).

though the policy did not contain the contribution part of the sue and labor clause. The case holds that the insured could not recover litigation expenses under the sue and labor clause in a marine liability policy unless the insurer expressly undertook to pay such expenses. The court, however, distinguished litigation expenses from expenses required to avert actual physical damage, and stated in dictum that it would allow the insured to recover his costs to avert physical loss or damage for which the insurer would have been liable even if the policy did not expressly require payment of such expenses.<sup>64</sup>

In non-marine insurance, the question of prevention costs arises in several contexts. The first is when a policy has a partial supplementary coverage provision and the court is asked to imply an undertaking to reimburse. Courts have taken this step in a few marine liability cases,<sup>65</sup> but when faced with this problem in non-marine cases, they have generally denied recovery of prevention costs.<sup>66</sup>

Other contexts include situations where the policy is silent as to preventive steps or the prevention costs incurred are beyond those enumerated in the policy.<sup>67</sup> In cases where the policy does not have a supplementary coverage provision, some courts have allowed an insured to recover his expenses incurred to minimize a loss by misapplying the rule of contracts law that a nonbreaching party cannot recover for avoidable consequences of the breach.<sup>68</sup> As Corbin once said:

Where a large loss can be avoided by using a little time and effort or by the expenditure of a small amount of money, damages are not recoverable for losses that could have been avoided by incurring such effort or expense.<sup>69</sup>

The duty to mitigate is required only when the advantageous efforts of

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64. The sue and labor clause involved in the case did not contain the traditional second part, *viz.*, "to the charges whereof we, the assurers, will contribute . . ." There was, therefore, no full supplementary coverage provision to pay prevention costs. Yet the court said that it would not follow the strict British rule set forth in the shipment-of-mules case (*Cunard S.S. Co. v. Marten*, [1902] 2 K.B. 624, *aff'd*, [1903] 2 K.B. 511:

In the present case, *Cunard Steamship Company v. Marten*, if literally accepted, might compel us to hold that, if the tug had been liable for stranding the tows in question, the tug could not recover from the underwriters any expenditure made in relieving the tows from their stranded position [because the policy did not expressly undertake to pay prevention costs]. *This we would be reluctant to do.* (emphasis added).

156 F. at 48.

65. See note 30 *supra* and accompanying text.

66. *Pennsylvania Lumbermens Mut. Fire Ins. Co. v. Nicholas*, 296 F.2d 905, 908 (5th Cir. 1961); *Oppenheimer v. Barker & Williams*, 225 App. Div. 58, 232 N.Y.S. 5 (1st Dept. 1928). *Contra*, *O. Talamon & Co. v. Home & Citizens' Mut. Ins. Cos.*, 16 La. Ann. 426 (1862).

67. See, e.g., *Pennsylvania Lumbermens Mut. Fire Ins. Co. v. Nicholas*, 296 F.2d 905 (5th Cir. 1961).

68. See, e.g., *American Universal Ins. Co. v. Kruse*, 306 F.2d 661, 665 (9th Cir. 1962) (cost of forwarding undamaged cargo from point of accident is recoverable); *Alamo Cas. Co. v. Laird*, 229 S.W.2d 214, 218 (Tex. Civ. App. 1950) (insured recovered his expenses in recovering, repairing, and selling stolen property which was insured).

69. 5 A. CORBIN, CONTRACTS § 1042, at 268 (1964).

the nonbreaching party are "almost certain" to have a beneficial effect.<sup>70</sup> Corbin also notes that:

[t]his rule is not applicable . . . if the avoidance of the losses would necessitate an expenditure out of proportion to the losses to be avoided or would cause personal humiliation or unreasonable inconvenience.<sup>71</sup>

The rule is relevant, however, only to cases where one party to the contract has breached. In insurance cases, such as *Leebov*, there has been no breach. Hence the rule should not be applied, as some courts have done, so as to require insureds to prevent further loss from the insured event.

Although courts have technically misapplied this rule, it is nevertheless apparent that they were correctly perceiving the policy which underlies it. Just as it would be inequitable to allow the non-breaching party to recover for avoidable consequences, it is inequitable for an insurer not to pay prevention costs for reasonable efforts by the insured to minimize or avert a loss covered by the policy. Quasi-contract theory underlies the duty to mitigate and provides the theory for its extension to these insurance cases.

Although the court in *Leebov* did not expressly use a quasi-contract theory, such an approach is consistent with the facts and reasoning of the court. The case involved prevention costs and a policy lacking a supplementary coverage provision. The court expressly recognized that the costs involved were to prevent an insured loss. Before the *Leebov* case, most courts allowing coverage for prevention costs had done so by presenting their decisions as interpretations of the main coverage provision,<sup>72</sup> thereby avoiding any formal recognition of prevention costs as such. Possibly because the *Leebov* court did not specifically enunciate a quasi-contractual theory, later courts have not yet recognized the decision's innovative potential.<sup>73</sup> For example, in *Farmers Mutual Fire Insurance Company v. McMillan*,<sup>74</sup> the court was faced with the private fire department situation set out previously, and affirmed a judgment for the insurer on the ground that the main coverage provision in the policy, *viz.*, ". . . all direct loss by fire . . .," did not include prevention costs. The court did not even comment on the possibility of a recovery in quasi contract. Thus, it appears that the central question

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70. *Id.* at 264.

71. *Id.* at 268.

72. In *White v. Republic Fire Ins. Co.*, 57 Me. 91 (1869), for example, the Supreme Court of Maine allowed the insured to recover his expenses for the preventive act of removing the insured goods from a building which was in the path of a spreading fire. The policy covered "all losses by fire." It was written before the modern phrasing, *viz.*, "all direct losses by fire." The modern policies covered this type of loss explicitly. See 1943 New York Fire Insurance Policy in E. PATTERSON & W. YOUNG, *INSURANCE* 662 (4th ed. 1961).

73. See Annot., 33 A.L.R.3d 1262, 1273 n.2 (1970), on the difficulty of distinguishing the *Leebov* case because of the particular wording of the policy involved there.

74. 217 Tenn. 125, 395 S.W.2d 798 (1965).

concerning express provisions for reimbursement of prevention costs—whether they simply make explicit what would necessarily be implied in a policy—is still in doubt. Whether such expenses should be reimbursed under every insurance contract is a determination which involves several complex policy considerations.

### III. POLICY IMPLICATIONS OF PREVENTION COST REIMBURSEMENT

A number of factors must be considered before a court allows recovery for prevention costs, but it is evident that a quasi-contractual theory is the most persuasive basis for allowing recovery. In his treatise, Corbin uses an example of a quasi contract which is strikingly similar to the one under discussion herein: "A finds B's house afire and his cattle starving and renders service and incurs expense in saving and feeding them."<sup>75</sup> Excepting the fact that there was an express contract in *Leebov*, this example so readily fits Judge Musmanno's view of that case that it can be said that *Leebov* was decided on a quasi contract theory. As Judge Musmanno concluded:

It is folly to argue that if (A) does nothing and thereby permits the piling up of mountainous (losses) . . . he will be held harmless . . . but if he makes a reasonable expenditure and prevents a catastrophe he must do so at his own cost and expense.<sup>76</sup>

If a stranger, as in Corbin's example, can recover expenses for preventing a loss to another's property, may not an insured recover prevention costs from his insurer?<sup>77</sup> The insured is not an officious intermeddler whereas a stranger may be. An insured, on the other hand, may be acting gratuitously since his loss is insured but surely a stranger's acts would be even more gratuitous. The insured, of course, had an opportunity to contract with the insurer to cover prevention costs while the stranger did not. But this argument overlooks the fact that quasi-contractual liability may be found even in the face of a refusal to contract by the party benefited. In sum, it would seem that the roles of the stranger and the insured are quite analogous—the insured is a stranger to unanticipated situations.

There are, however, a number of potential problems inhering in the application of the doctrine to insurance cases. It should be noted that, as a practical matter, not all benefits give rise to a quasi contract. Sometimes the benefit conferred is too slight, and sometimes, although sufficient, it is

75. 1 A. CORBIN, *CONTRACTS* § 19, at 48 (1963). See also *Todd v. Martein*, 37 P. 872 (Cal. 1894); *Chase v. Corcoran*, 106 Mass. 286 (1871).

76. *Leebov v. United States Fidelity & Guaranty Co.*, 401 Pa. 477, 481, 165 A.2d 82, 84 (1960). See also *Harper v. Pelican Trucking Co.*, 176 So. 2d 767, 773 (La. App. 1965): "[A]n insured is entitled to reimbursement of the expenses incurred in protecting his insurer against loss by application of general principles of law and equity."

77. See *RESTATEMENT OF RESTITUTION* § 117 (1937). But cf. *Cutter v. Powell*, 6 L.T.R. 320 (1795); *Stoljar, The Great Case of Cutter v. Powell*, 34 CAN. B. R. 288, 293 (1956).

diffused over so large a group that a quasi contract cannot be found to exist with any one particular person or interest benefited. It must be remembered that since the insurance contract is not the foundation of the quasi contract, it places no bounds on the quasi contract. If the insurer is benefited by preventative actions, many others might also be benefited. In *Leebov*, for example, more parties than the liability insurer were benefited; these others included the homeowners on the hill, their insurers,<sup>78</sup> Leebov himself to the extent that he was not fully insured for the total liability which he faced,<sup>79</sup> and Leebov's business interruption insurer. The ripples of benefits can continue to expand until the benefits conferred become so slight as to go unnoticed. Why then, out of all those persons benefited, should the liability insurer be selected to bear this loss? Should all those benefited contribute in the nature of general average<sup>80</sup> for the prevention costs? If so, how can an adjuster compute such damages?<sup>81</sup> Of course, some of those benefited are not legally benefited in that the insured's actions on their behalf may well be regarded as gratuitous. There is also no benefit if the "beneficiary" would have had a cause of action against the insured had he not acted. Furthermore, if the insurer's burden is to be shared, the circle of legal beneficiaries will often be sufficiently narrow to permit easy calculation of each party's debt to the insured.

An apparent distinction between marine and non-marine insurance in regard to allocation of benefits and payments can be seen in the fact that most marine insurance is valued. This distinction is of little consequence, however, when one remembers that we are discussing recovery based on quasi contract, not on the contract itself. More significantly, the scope of interests benefited by preventive action on water is generally narrow in contrast to the wide arc of beneficiaries of such action on land. Nevertheless, limitations on the scope of potential liability are provided by the use of such doctrines as *de minimis* and gratuitousness, which limit the definition of legal benefit.<sup>82</sup>

Another problem in allowing quasi contractual recoveries is illustrated by the following hypothetical.<sup>83</sup> A general contractor took out an "all risks"

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78. The homeowners on the hill and their insurers would be able to recover their losses against Leebov if his liability caused their loss. But his prevention efforts still convey benefits because some things cannot be readily indemnified by money, such as the interruption of the quiet enjoyment of one's home. Furthermore, subrogation against Leebov is of little value if he is judgment proof. Even if the homeowner or his insurer can recover a judgment against one such as Leebov, the judgment will be equal to the value of the home lost, not its replacement value, which is the homeowner's real interest.

79. See also *Farr v. Traders & General Ins. Co.*, 235 Ark. 185, 188, 357 S.W.2d 544, 546 (1962).

80. For an explanation of "general average," see KEETON, *supra* note 39, § 3.6(a), at 129-30 (1970).

81. Cf. *Cunard S.S. Co. v. Marten*, [1902] 2 K.B. 624, *aff'd*, [1903] 2 K.B. 511.

82. It is true that the scope of legally recognized benefits must sometimes be derived through litigation—an added burden that is not a feature of marine insurance.

83. See *Teeple v. Tolson*, 207 F. Supp. 212 (D. Ore. 1962), for a similar factual situation.

policy to cover a building he was in the process of constructing. The building later collapsed due to architectural defects in its design. All parties stipulated that the costs of repair of those units which had actually collapsed were covered by the policy and that the original design of the building was wholly inadequate and further damage would occur unless the building was entirely redesigned. Would the insurer be liable for the costs involved in engaging a new architect and engineer to redesign the entire building? Is he liable for the construction costs necessary to restructure the building to meet the specifications of the new design? If the new plans require a start-from-scratch approach, must the insurer pay for the demolition of the partially built structure? In sum, if prevention costs are going to be allowed, how broad is the concept of such costs going to be and where can a reasonable line be drawn? While the question may be answerable in the context of an individual case, it must be remembered that this is a difficult problem area.

Another question raised by the prevention costs controversy has reference to the public interest in forestalling casualty losses and the need for an incentive to achieve that goal. An insured who realizes that any effort he makes to prevent or minimize a loss will go unreimbursed may be induced not to act—he will be tempted to allow the loss to occur and seek indemnity from the insurer. This was the primary reason for the marine underwriters' decision to reimburse the insured for sue and labor expenses. Marine underwriters did not want the master of the ship to hesitate in effecting preventive measures. The underwriters, at least in the beginning, were so generous in making adjustments for sue and labor expenses that sue and labor expenses were often padded and sometimes even manufactured.<sup>84</sup> The underwriters, however, considered such inflated claims to be a small price for instigating prompt preventive action by the master when threatened with a possible loss of or damage to property.

This consideration may not be as salient in non-marine fields because the non-marine insured often has a strong incentive to take loss prevention measures: he may not be fully insured or the subject-matter of the insurance such as his home, may have great personal value to him. In marine insurance, the ship, cargo, and freight which are at risk usually do not belong to the master, and the insured can ordinarily replace them quickly after a loss. A homeowner, however, even if fully insured (a rarity with today's inflationary values unless he has recently increased the coverage of his policy) faces great inconvenience in the event of a loss: he must find temporary living quarters, choose and finance a new home, and replace his personal possessions. Furthermore, the insured's home has a value to him which often surpasses its market value.<sup>85</sup> Thus, the incentive effect of reimbursement

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84. See *Kidston v. Empire Marine Ins. Co.*, *supra* note 17, at 547.

85. It is true that in most states an insured will receive the actual cash value of his



of prevention costs may be both less needed and less felt in such cases. The argument for reimbursement, however, retains most of its validity when the homeowner is faced with prevention costs which approach the value of the goods insured. Unless he can recover, the insured is liable to forego these costs no matter what the personal value.

The analogy to marine insurance may be made with even greater persuasiveness when a commercial interest is insured. Business enterprises are often insured to nearly their full value, the goods involved have little personal value to the businessmen involved, and the firm may have business interruption insurance.

The incentive rationale for reimbursement may be answered by the insurer's argument that every contract of insurance carries an implied, if not an express, continuing warranty that the insured will make every effort to prevent or minimize a possible loss. In *Columbian Insurance Company v. Lawrence*,<sup>86</sup> the Supreme Court said:

Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. . . . Underwriters do not rely so much upon the principles, as on the interest, of the assured . . . .

Thus, an insured who wilfully fails to prevent the spread of a fire cannot recover for the damage that results.<sup>87</sup> An insured who just negligently fails to prevent the spread of a fire may sometimes be denied recovery.<sup>88</sup> However, the modern trend is apparently to forgive negligence, no matter how gross.<sup>89</sup> The *Columbian* doctrine is limited to situations where the insured wilfully fails to make every effort to prevent or minimize the loss.

Denying prevention costs on the theory that they are a condition precedent to recovery on the policy is consistent with the expected instinctive reactions of the typical insured. Normally, where an insured has been in a position to prevent a loss from occurring or from spreading, he has instinctively done so.

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loss up to the coverage of his policy, but unfortunately that concept is so murky and the personal value of certain lost goods is so hard to prove that an insured may feel that his eventual recovery will be closer to the market value of his home than to his personal value of it.

86. 27 U.S. (2 Pet.) 25, 49 (1829).

87. See *Manter v. Boston Fire Ins. Co.*, 93 N.H. 21, 35 A.2d 196 (1943). See also *Aetna Ins. Co. v. Sachs*, 186 F. Supp. 105 (E.D. Mo. 1960) (repeated misbehavior of pooler, all-risk policy).

88. 1943 New York Standard Fire Insurance Policy, lines 11-13, 21-24 so provide:

This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by:

(i) neglect of the insured to use all reasonable means to save and preserve the property at and after the loss, or when the property is endangered by fire in neighboring premises.

E. PATTERSON & W. YOUNG, *supra* note 72, at 664.

89. See *New York, N.H. & H. R.R. v. Gray*, 240 F.2d 460, 464 (2d Cir. 1957).

Since most of these insureds have never received any reimbursement, it must be assumed that some other force was motivating them. The insured's actions can probably be attributed to his desire to have the goods rather than the insurance proceeds. Extraordinary prevention efforts—those which are unlikely to succeed, require a high cost in relation to the value of the goods insured or to the policy limits, or involve some physical risk to the insured—are, however, not instinctive and are probably not encompassed by a warranty to prevent losses.

An often overlooked, yet alluring, argument against allowing recovery of prevention costs is that such awards would lead insurers to increase premiums greatly in order to cover a risk which is actuarially impossible to compute. While this problem could be solved by setting a ceiling on recovery, this would be a thin veil of protection when a solidly based quasi-contract claim is presented. This argument is, however, of little significance beyond its fright content because the insurer's payment of prevention costs would be infrequent enough that the insurance industry could meet the threat with only a slight increase in premiums. Actuarially, their task is no more difficult than that which confronted marine insurers when they had to calculate the possibility of having to pay sue and labor claims beyond the policy limits.

A cardinal rule of underwriters is to define the insured event clearly so that proof of its occurrence is beyond doubt. A fire or a liability judgment, for example, is such an event. A loss of cargo by peril of the sea is not as certainly delimited an insured event. The loss is clear, but whether it is caused by a peril of the sea is not. Even a specifically defined event such as a fire can leave much confusion as to whether a coverable event has occurred. For example, is heat or smoke or water damage included in "loss by fire"? It may perhaps be argued that to allow prevention costs would require the insured event to be too imprecise. In liability insurance, for example, three difficult determinations would have to be made before the occurrence of an insurable event could be established. The insurer would have to determine whether a loss would have occurred without the prevention costs; whether the insured would have been liable for it if it had occurred;<sup>90</sup> and finally what the damages would have been if the loss had occurred.<sup>91</sup> An insured event requiring these three findings would probably lead to frequent litigation between the insured and the insurer. Of course, similar findings would have to be made in a case of actual loss; in determining

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90. Absolute liability cases may be an exception. In property insurance, this question does not arise.

91. The amount of damages that would have resulted is a necessary determination because the insurer must be sure that the deductible would have been covered and more importantly he must decide if the possible damages would have surpassed the policy limits, in which case the insurer would not be liable for all of the prevention costs. This problem is not necessarily insurmountable, however, because marine insurers have been doing this computation for many years.

prevention costs, however, the court is dealing in probabilities, which makes the decision more difficult. While this potential added burden on the courts may suggest some caution in allowing prevention costs in all situations, it hardly suffices to justify a blanket rejection of reimbursement of extraordinary costs.

The determination of whether the insurer is to be liable for prevention costs would, at the outset, be made *ex parte* by the insured because he is the one on the scene facing the crisis. Besides the question of whether such an *ex parte* decision can be trusted, there is a further question of whether such a determination makes the contract non-aleatory.<sup>92</sup> The former problem is answered by the fact that an insured's decision to undertake prevention costs can be reviewed for reasonableness by a court. As for the aleatory nature of the insurance contract, a court can also determine whether the costs were really due to a fortuitous occurrence or undertaken by the insured to defraud the insurer. Furthermore, many situations which require prevention costs are not so urgent that the insured does not have time to consult the insurer before or shortly after he begins his preventive efforts.<sup>93</sup> In such situations the insured can guarantee himself prevention costs by securing the insurer's consent to reimburse him for such costs. Of course, an insurer may refuse to consent in reliance upon the insured's implied or express warranty to take all reasonable and necessary steps to prevent loss. Moreover, an insurer's consent to cover such expenses may even be overturned if a court finds that the consent was given under duress.<sup>94</sup>

As a general rule, the insured should seek consent. This may tend to simplify the problem and avoid at least some subsequent litigation. Even in the absence of a valid and binding consent, however, the result may be the same where extraordinary efforts and large expenditures would be required to prevent the loss. If efforts beyond the scope of the warranty are required and would be beneficial, the insured should be able to recover them from the insurer either by consent, when feasible, or, if consent cannot be obtained, by quasi contract. An exception to the practice of seeking the insurer's consent would clearly apply in those cases where the lack of time or communication facilities prevent the obtaining of insurer's consent. Furthermore, a refusal of consent by the insurer would in no way prevent a court from finding liability in quasi contract. The insurer might consider only the face amount of the policy and the type of losses it covers. Thus, for example, if

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92. The insurance contract belongs to a class known as "aleatory contracts." An aleatory contract is one in which at least one promise imposes a duty of performance which is conditioned upon the happening of a contingent event, that is, one which may or may not occur, or have occurred.

E. PATTERSON & W. YOUNG, *supra* note 72, at 2-3.

93. See *Prime Drilling Co. v. Standard Accident Ins. Co.*, 304 F.2d 221 (10th Cir. 1962); *J.L. Simmons Co. v. Lumbermens Mut. Ins. Co.*, 84 Ill. App. 2d 98, 107, 228 N.E.2d 227, 232 (1967).

94. See *The Elfrida*, 172 U.S. 186 (1898) and cases cited therein.

he insures against property loss, he might not take into account the possibilities of personal injury or damage to uninsured property. Public policy may well argue against leaving a decision to avert or minimize damage in the hands of a judge with such a limited ken. An insured who faces losses both within and without his policy should be able to take preventive steps with the knowledge that a court of law will review the insurer's denial of prevention costs.<sup>95</sup>

Consent should continue to be the customary mode for determining who is to pay for on-going safety measures as opposed to emergency prevention costs. A small shop owner in the central city realizes that he may be burglarized any night and that a night watchman would be an effective preventive measure. Whether the insurer pays for this expense is a matter for negotiation and agreement.

#### CONCLUSION

Close analysis demonstrates that there is no compelling reason why claims for prevention costs cannot be allowed in non-marine insurance cases when based on a quasi-contractual theory of recovery. Care should be taken, however, in defining the meaning of prevention costs. It should be clear that on-going types of expenses that are closely analogous to maintenance costs are not included. Rather, prevention cost recovery should be limited to extraordinary cases—cases where extensive measures need to be undertaken, or where the cost to the insured is uncommonly high, or where the personal risk to the insured is great. For the courts to permit reimbursement in such cases not only meets normal standards of basic fairness, but promotes important societal values as well—a basic consideration in shaping any law.

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95. *See* *Prime Drilling Co. v. Standard Accident Ins. Co.*, 304 F.2d 221 (10th Cir. 1962).