

# Indiana Law Review

Volume 46

2013

Number 3

## NOTE

### STATUTORY TORT CAPS: WHAT STATES SHOULD DO WHEN AVAILABLE FUNDS SEEM INADEQUATE

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#### INTRODUCTION

Clouds were rolling in as concert attendees were anxiously awaiting the band, Sugarland, to start its performance on stage.<sup>1</sup> There was a big gust of wind and an upward swing of the stage tarp ceiling.<sup>2</sup> Screams of horror filled the air as the crowd instantaneously turned to run away, but it was too late.<sup>3</sup> Seven died and forty were severely injured from one of the worst disasters in Indiana's history.<sup>4</sup> Attendees fortunate enough to be in the stands stood in horror as those on the ground ran to lift the massive staging off those who had been crushed underneath. The next days and weeks held funerals, long hospital stays, and forever-changed lives for the concert goers. When talk of litigation began, attorneys questioned the adequacy of the tort funds available from the State.<sup>5</sup>

Section 34-13-3-4 of the Indiana Code provides that the maximum combined aggregate liability for the State of Indiana is \$700,000 for one person and \$5 million for claims resulting out of one incident or occurrence.<sup>6</sup> At least thirty-three states possess similar statutes limiting claimants' recovery.<sup>7</sup>

Although in most instances of state liability the tort allowance provided by statute is sufficient, extreme instances sometimes arise in which the tort cap is

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1. *Stage Collapse at Fairgrounds Kills 5, Injures More Than 40*, FOX 59 (Aug. 13, 2011), <http://www.fox59.com/2011/08/13/stage-collapse-at-fairgrounds-kills-5-injures-more-than-40/#axzz2uj8cRIQP>.

2. *Id.*

3. *Id.*

4. Tim Evans & Heather Gillers, *Ind. Lawmaker: \$5M Not Enough for Stage Collapse Victims*, USA TODAY (Sept. 2, 2011), <http://usatoday30.usatoday.com/news/nation/story/2011-09-02/Ind-lawmaker-5M-not-enough-for-stage-collapse-victims/50243594/1>.

5. *Id.*

6. *See* IND. CODE § 34-13-3-4(a) (2013).

7. Evans & Gillers, *supra* note 4.

challenged. As a result, states have occasionally waived the statutory damage cap, providing compensation in excess of that cap.<sup>8</sup> Once before, in Indiana, an agreement was made to provide compensation from state funds in excess of the statutory limit after an Indiana Fun Park train crash paralyzed four-year-old Emily Hunt.<sup>9</sup> The State paid Emily \$1.5 million from the tort claims fund, which was more than three times the per person limit at that time.<sup>10</sup> In another instance, a bill created a victims' compensation fund that totaled more than \$36 million after a bridge collapsed in Minnesota, killing thirteen and injuring more than one hundred others.<sup>11</sup> The statutory tort cap at the time was \$1 million for a single incident.<sup>12</sup> Currently, Minnesota's statute caps the state's tort liability at \$500,000 per individual or \$1.5 million per occurrence.<sup>13</sup>

Instances such as the Indiana State Fair stage collapse and previous waivers of limited state liability leave the question open regarding what to do in the face of catastrophic events, when the available funds simply do not seem like enough compensation for the victims. Part I of this Note describes the history of government tort liability and the events that led to the creation of state statutory tort caps. Part II examines state tort liability caps in general and provides a survey of existing tort liability caps. Part III explores alternative approaches to waiving statutory tort caps, allowing for greater recovery in low probability catastrophic situations. Lastly, Part IV discusses two proposals: one for state legislatures to create a statutory exception in order to prepare for future catastrophic events and one advocating for the implementation of no fault compensation funds after the catastrophic event occurs.

## I. HISTORY OF TORT CAPS

Historically, the government was immune from liability under the doctrine of sovereign immunity, but this doctrine has been largely abandoned over the last half-century.<sup>14</sup> The law of governmental liability developed through the Federal Tort Claims Act ("FTCA"), which allows claimants to recover against the federal government,<sup>15</sup> and at the state level through individual state tort claims acts,

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8. See generally *id.* (discussing Minnesota's and Indiana's waiver of their respective tort damage caps).

9. *Id.*

10. *Id.*

11. Barbara L. Jones, *Victims' Fund Won't End I-35W Bridge Litigation*, 12 MINN. LAW., May 12, 2008, at 1, available at [http://www.rkmc.com/~media/PDFs/Victims fund wont end i35w bridge litigation.pdf](http://www.rkmc.com/~media/PDFs/Victims%20fund%20wont%20end%20i35w%20bridge%20litigation.pdf); *NTSB: Design Flaw Led to Minnesota Bridge Collapse*, CNN.COM (Nov. 15, 2008, 4:43 AM), [www.cnn.com/2008/US/11/14/bridge.collapse/](http://www.cnn.com/2008/US/11/14/bridge.collapse/).

12. Jones, *supra* note 11, at 2.

13. MINN. STAT. § 3.736 subdiv. 4(a)-(g) (2013).

14. Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L. J. 543, 544-45, 553 (2003).

15. 28 U.S.C. § 2674 (2006).

which provide for recovery against the state.<sup>16</sup> Although these state tort claim acts provide for recovery against the state, they also place restrictions on the claimant's ability to recover.<sup>17</sup> Caps on tort recovery are one such restriction.

#### A. Sovereign Immunity

Prior to the creation of tort claims acts, the doctrine of sovereign immunity controlled. The doctrine of sovereign immunity dates back to early common law when dictatorships were prevalent, and “[t]he King [could] do no wrong.”<sup>18</sup> Under the doctrine of sovereign immunity, the government or governmental unit is immune from liability to private plaintiffs.<sup>19</sup> Rooted in historical pretenses, “[e]arly sovereign immunity decisions relied on little more than English common-law precedent and brief discussions of the indignity of hauling a state into court, bolstered . . . by citations to Blackstone’s explanation of the doctrine of sovereign immunity as rooted in the sixteenth-century prerogatives of the English Crown.”<sup>20</sup> The federal government has recognized the need for state sovereign immunity as to provide the states with “the dignity that is consistent with their status as sovereign entities.”<sup>21</sup>

The common law doctrine of sovereign immunity has been upheld since the eighteenth century.<sup>22</sup> The strong policy in favor of the doctrine is derived from “combined discussions of history and sovereignty with concerns that damage awards might unduly shift state priorities, moving state funding from public goods—education or road repair, for instance—to private plaintiffs.”<sup>23</sup> However, this strong policy in favor of the doctrine of sovereign immunity has gradually been abrogated by state governments, resulting in statutes that allow claimants to recover against the government, thus essentially waiving the government’s right to sovereign immunity.

As states transitioned away from the doctrine of sovereign immunity, state

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16. See, e.g., DEL. CODE ANN. tit. 10, § 4013 (2013); IDAHO CODE ANN. § 6-926 (2013); IND. CODE § 34-13-3-4 (2013); LA. REV. STAT. ANN. § 13:5106 (2013); MINN. STAT. § 466.04 subd. 1 (2013); NEV. REV. STAT. § 41.035(1) (2013); N.H. REV. STAT. ANN. § 541-B:14 (2013); N.M. STAT. ANN. § 41-4-19(A)-(B) (2013); 42 PA. CONS. STAT. § 8553 (2013); R.I. GEN. LAWS § 9-31-2 (2013); TENN. CODE ANN. §§ 29-20-311, 29-20-404(a) (2013); UTAH CODE ANN. § 63G-7-604(1) (West 2013); VA. CODE ANN. § 8.01-195.3 (2013).

17. See *supra* note 16 for a list of statutes that cap the state’s tort liability.

18. Robel, *supra* note 14, at 553.

19. *Id.* at 544-45.

20. *Id.* at 549 (footnote omitted).

21. *Id.* at 546-47 (quoting *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002)).

22. See generally *Hans v. Louisiana*, 134 U.S. 1 (1890) (illustrating the long standing doctrine of sovereign immunity) *superseded by constitutional amendment*, U.S. CONST. Amend. XI, *as recognized in* *Pennhurst State Sch. Hosp. v. Halderman*, 465 U.S. 89 (1984); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (same); *Edelman v. Jordan*, 415 U.S. 651 (1974) (same).

23. Robel, *supra* note 14, at 546.

supreme court justices led the reform by urging state governments “to work through the delicate problems of balancing state accountability with fiscal responsibility,” which resulted in legislative reform allowing for governmental tort liability.<sup>24</sup> The states’ response to waive governmental immunity became a moral reaction to provide for its citizens in the face of injuries caused by the government.<sup>25</sup> There are three main explanations that state judiciaries and legislators provided for moving away from sovereign immunity, which include the following:

First, courts . . . viewed the underlying theory of complete sovereign immunity as distasteful and anachronistic in a democracy. Second, courts and legislatures were influenced by the growth of the modern administrative state and the extension of governmental activities into broad new areas of government-citizen interaction, with the corresponding increase in possibilities for citizen injury. Third, states were influenced by the insights of tort reform scholarship, with its views about fault, risk, and loss-spreading.<sup>26</sup>

Accordingly, in addition to the doctrine of sovereign immunity stemming from seemingly ancient, hierarchical times, the current democratic form of state government does not blend well with the idea that the state is above its citizens or that it should not have to answer to them.<sup>27</sup>

#### *B. Federal Tort Claims Act*

One of the first steps towards the abrogation of the doctrine of sovereign immunity came from the federal government with the inception of the FTCA.<sup>28</sup> The FTCA only applies to liability of the federal government, but it is important to review, as it provides a waiver of sovereign immunity and the first efforts at tort reform. The FTCA waives sovereign immunity in suits for “personal injury . . . caused by the negligent or wrongful act or omission of any [Government] employee . . . while acting within the scope of his office or employment.”<sup>29</sup> The FTCA was enacted in 1946, and provides in part: “The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”<sup>30</sup> States followed the example set by the federal government by passing their own tort claim acts, which this Note will discuss in a later

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24. *Id.* at 552.

25. *Id.* at 545.

26. *Id.* at 553.

27. *Id.* at 554.

28. 28 U.S.C. § 2674 (2006).

29. *Id.* § 1346(b)(1), *amended by* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

30. *Id.* § 2674.

section.<sup>31</sup>

### *C. Leading to Tort Reform*

Although the FTCA and the subsequent state tort claim acts provide for possible recovery against the government, these statutes also place restrictions, such as liability caps, on that recovery. These restrictions, and tort reform in general, largely stem from the insurance crisis of the 1980s.<sup>32</sup> During the 1980s, insurance companies were realizing losses and raised their premiums as a result.<sup>33</sup> To compensate for increased premiums, some businesses raised their prices.<sup>34</sup> “This inability of businesses and municipalities to obtain reasonably priced insurance is commonly known as the insurance crisis.”<sup>35</sup> In addition to responding to the insurance crisis, “state legislatures also were responding to scholarship indicating that the tort system failed to achieve its objectives [of deterrence and compensation].”<sup>36</sup> Lastly, a distrust of juries that seemed to be producing larger awards against “deep-pocket” defendants, and the inconsistency of awards, also led to tort reform.<sup>37</sup> These issues spurred tort reform in general, that of which state tort caps were just one portion.

## II. STATE TORT LIABILITY CAPS

The following section provides an overview of state tort caps and specifically provides detail into state tort cap treatment in Indiana, as well as other states that provide for varying degrees of compensation. Because the common law rule is government immunity through the doctrine of sovereign immunity,<sup>38</sup> any statute that provides for recovery against the state is effectively a waiver of that immunity. The state tort claim acts generally allow entities to recover against the government, but the statutory state tort caps place a limit on the amount parties are able to recover. At least thirty-three states have some type of damage cap.<sup>39</sup> There are various types of damages that states cap: non-economic damages, punitive damages, recovery in products liability cases, and medical malpractice cases. However, this Note addresses only the caps that states place on the amount of compensatory damages that parties may recover from actions against governmental entities.

At least thirteen states have a cap on the amount of compensatory damages

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31. *See infra* Part III.

32. Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 629 (1988).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 628.

37. *Id.* at 631.

38. *See supra* Part I.

39. Evans & Gillers, *supra* note 4.

that can be recovered against the government.<sup>40</sup> These statutory caps vary greatly both in amount and under what circumstances recoveries are capped. For instance, some states do not have both a single incident and per person cap.<sup>41</sup> Additionally, the per person and total incident caps vary in amount—some are as small as \$300 thousand<sup>42</sup> and some are as large as \$5 million.<sup>43</sup> Lastly, some statutes provide exceptions or additional clauses in the language that would provide for greater awards than the stated amount.<sup>44</sup>

#### *A. Advantages of Tort Liability Caps*

There are many reasons for the inception of state tort caps. Managing the fiscal integrity of the government and not misallocating funds is a forefront reason. For instance, an object of the Indiana Tort Claims Act is to protect the fiscal integrity of governmental entities by limiting their liability for tort claims resulting from the actions of their public employees.<sup>45</sup> The fact that recoveries in tort against the government are funded by taxpayers' dollars makes tort claim caps a necessity.

Even in light of this important societal purpose, caps on damages, whether for medical malpractice, government liability, or otherwise, are challenged for constitutionality on several different constitutional grounds.<sup>46</sup> Some argue that tort caps violate the plaintiff's constitutional rights of due process, equal protection, or right to trial by jury.<sup>47</sup> However, challenges of these constitutional rights fall under the rational basis review standard, and it is easy to establish a rational basis.<sup>48</sup> An argument that the purpose of the statute is to protect the fiscal integrity of the governmental entity is likely to survive a rational basis review, as a reviewing court could reasonably find the statute to be rationally related to a legitimate governmental interest. Thus, many challenges for unconstitutionality have failed, further promoting the use of state tort caps. This is one reason why

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40. See, e.g., DEL. CODE ANN. tit. 10, § 4013 (2013); IDAHO CODE ANN. § 6-926 (2013); IND. CODE § 34-13-3-4 (2013); LA. REV. STAT. ANN. § 13:5106 (2013); MINN. STAT. § 466.04 subdiv. 1 (2013); NEV. REV. STAT. § 41.035(1) (2013); N.H. REV. STAT. ANN. § 541-B:14 (2013); N.M. STAT. ANN. § 41-4-19(A)-(B) (2013); 42 PA. CONS. STAT. § 8553 (2013); R.I. GEN. LAWS § 9-31-2 (2013); TENN. CODE ANN. §§ 29-20-311, 29-20-404(a) (2013); UTAH CODE ANN. § 63G-7-604(1) (West 2013); VA. CODE ANN. § 8.01-195.3 (2013).

41. See NEV. REV. STAT. § 41.035(1) (2013); 42 PA. CONS. STAT. § 8553(b) (2013); VA. CODE ANN. § 8.01-195.3 (2013).

42. See DEL. CODE ANN. tit. 10 § 4013(a) (2013).

43. See IND. CODE § 34-13-3-4(a)(2) (2013).

44. See *infra* Part III.

45. See *Baker v. Schafer*, 922 F. Supp. 171, 172 (S.D. Ind. 1996).

46. DAMAGES IN TORT ACTIONS § 3.06 (2011).

47. *Id.*

48. See generally *Davis v. Omitowaju*, 883 F.2d 1155 (3d Cir. 1989) (discussing the rational basis standard, which requires a slight correlation between the goal of the tort cap and the means to achieve the goal).

current challenges to Indiana law likely will fail.

### *B. Negative Aspects of Tort Liability Caps*

Although there are several reasons that support the need for state statutory tort caps, there are also many reasons to oppose these caps on damages. For one, courts have found in certain instances, statutory tort caps to be unconstitutional. In a medical malpractice case, a Virginia federal district court found that the damage cap violated the plaintiff's Seventh Amendment right to trial by jury, because one of the most important functions of a jury is to establish damage amounts.<sup>49</sup> Some states take this even further by deeming statutory tort caps expressly unconstitutional and prohibit any law to limit the damages for injury or death.<sup>50</sup>

Some states argue that statutory tort caps result in a failure to deter tortfeasors from engaging in negligent conduct. "Misconduct occurs not because the actors are unaware of standards-it occurs because all too often, the consequences of misconduct are known, predictable, and easily passed along to consumers, patients, and the public."<sup>51</sup> Caps allow entities to engage in riskier behavior and lower their level of care because the entities no longer face unlimited liability that would deter risky behavior.<sup>52</sup> "Statutory caps operate to distort the price tortfeasors must pay to engage in negligent conduct [and] such caps will result in inefficient judicial outcomes."<sup>53</sup>

The following section will take a closer look at the statutory caps of three states that provide for varying degrees of recovery and the states' treatment of the statutes.

### *C. Indiana—The Greatest Amount*

The Indiana General Assembly has enacted the Indiana Tort Claims Act, which permits tort claims to be brought against governmental entities or public employees.<sup>54</sup> Part of the Tort Claims Act limits the aggregate liability and also provides a list of liability exceptions. Indiana Code section 34-13-3-4 provides for the maximum "combined aggregate liability" as follows:

- (a) The combined aggregate of all governmental entities and of all public employees, acting within the scope of their employment . . . (1) for injury

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49. See *Boyd v. Bulala*, 672 F. Supp. 915, 922 (W.D. Va. 1987).

50. See, e.g., ARIZ. CONST. art. II, § 31; KY. CONST. pt. 1, § 54.

51. Andrew F. Popper, *Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits on Civil Liability*, 60 DEPAUL L. REV. 975, 978 (2011) (discussing caps in general, including those on private parties).

52. *Id.* at 995-96.

53. *Id.* at 1004 (alternation in original) (quoting Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 ST. JOHN'S J. LEGAL COMMENT. 237, 258 (2005)).

54. IND. CODE § 34-13-3-3 (2013).

to or death of one (1) person in any one (1) occurrence: . . . (C) Seven hundred thousand dollars (\$700,000) for a cause of action that accrues on or after January 1, 2008; and (2) for injury to or death of all persons in that occurrence, five million dollars (\$5,000,000).<sup>55</sup>

In addition to providing the maximum combined aggregate liability, the Indiana Tort Claims Act provides a list of governmental immunities. The list of governmental immunities denotes instances in which the government or governmental employees cannot be recovered against, even in the face of negligence or some other wrongdoing.<sup>56</sup> Indiana Code section 34-13-3-3 provides for twenty-four government immunities, ranging from situations where the loss results from “[t]he natural condition of unimproved property,” to “[t]he act or omission of anyone other than the governmental entity or the governmental entity’s employee” (third-party cause).<sup>57</sup>

Existing case law in Indiana supports the Indiana Tort Claims Act and the limiting of funds recovered against the government in general. As stated in the case law, an object of the Indiana Tort Claims Act is to protect the fiscal integrity of governmental entities by limiting their liability for tort claims resulting from the actions of their public employees.<sup>58</sup> The Indiana Tort Claims Act was the legislature’s response to *Campbell v. State*,<sup>59</sup> a case that abolished sovereign immunity in Indiana for most purposes.<sup>60</sup> Additionally, in an Indiana Appellate Court case, *Gibson v. Gary Housing Authority*,<sup>61</sup> the statutory damage cap was upheld to conform with the Indiana Tort Claims Act when the plaintiff’s damages awarded by the district court were reduced to \$300 thousand from \$2 million.

While Indiana generally adheres to the statutory tort caps in place, there have been instances in which the legislature waived the tort cap in order to provide a claimant with greater compensation than statutorily allowed.<sup>62</sup> In 1997, Indiana provided compensation greater than the statutory amount when Emily Hunter was left paralyzed after a train crash at the Indiana Fun Park.<sup>63</sup> Then Governor Frank O’Bannon made an agreement with four-year-old Emily Hunt’s parents to cover her medical care and long-term care, which amounted to a payout in excess of

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55. *Id.* § 34-13-3-4(a).

56. *Id.* § 34-13-3-3.

57. *Id.* § 34-13-3-3(1), (10).

58. *See Baker v. Schafer*, 922 F. Supp. 171, 172 (S.D. Ind. 1996).

59. 284 N.E.2d 733, 736-37 (Ind. 1972), *superseded by statute*, IND. CODE § 34-13-3, as *recognized in Gary Cmty. Sch. Corp. v. Roach-Walker*, 917 N.E.2d 1224 (Ind. 2009).

60. *See Cantrell v. Morris*, 849 N.E.2d 488, 495 (Ind. 2006); *Brownsburg Cmty. Sch. Corp. v. Ntare Corp.*, 824 N.E.2d 336, 345 (Ind. 2005); *King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 478 (Ind. 2003).

61. 754 F.2d 205, 207-08 (7th Cir. 1985).

62. *Evans & Gillers*, *supra* note 4 (discussing Minnesota’s waiver of a \$1 million liability cap for an occurrence).

63. *Id.*



\$1.5 million.<sup>64</sup> More recently, in the face of the State Fair tragedy, Indiana's tort cap has once again been called into question.<sup>65</sup>

In the case of the Indiana State Fair incident, the State hired Kenneth Feinberg (famous for his role as Special Master in the 9/11 Compensation Fund) to divide the funds of the \$5 million statutory limit.<sup>66</sup> Although Indiana is adhering to the statutory damage limits,<sup>67</sup> there is also a State Fair Commission fund that is comprised of private gifts and donations that are also being dispersed to victims.<sup>68</sup> Feinberg was instrumental in setting guidelines for this fund as well, which provides lump payments to victims depending on criteria.<sup>69</sup>

#### *D. Minnesota—Catastrophe Exception*

Like Indiana, Minnesota imposes a statutory limit on the amount of damages that can be recovered against the government.<sup>70</sup> However, the Minnesota statute does not provide for as great of a recovery as the Indiana statute:

- (a) Liability of any municipality on any claim . . . shall not exceed: . . .  
(3) \$500,000 when the claim is one for death by wrongful act or omission and \$500,000 to any claimant in any other case, for claims arising on or after July 1, 2009 . . . (7) \$1,500,000 for any number of claims arising out of a single occurrence, for claims arising on or after July 1, 2009.<sup>71</sup>

Treatment of these statutory limits under Minnesota case law is positive, and the limits have been found constitutional; they "have a legitimate purpose of maintaining a municipality's fiscal integrity."<sup>72</sup>

In the face of catastrophe, however, the Minnesota legislature did not limit damages to the statutory amount. On August 1, 2007, a Minneapolis Interstate Highway 35W bridge collapsed into the Mississippi River, killing thirteen people and injuring more than one hundred others.<sup>73</sup> The Minnesota legislature refers to this incident as a "catastrophe of historic proportions" as the bridge was the third

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64. *Id.*

65. *Id.*

66. John Tuohy, *28 Share \$964K from Fair Relief Fund*, INDIANAPOLIS STAR, Nov. 22, 2011, at B1.

67. Since the time this Note was written, Indiana passed one-time legislation providing an additional \$6 million in compensation for the victims. See Michael Boren, *Expert: Compensation Was Fair*, INDIANAPOLIS STAR, Sept. 12, 2012, at B1.

68. *Id.*

69. *Id.*

70. See MINN. STAT. § 466.04 subdiv. 1(a) (2013).

71. *Id.* § 466.04 subdiv. 1 (a)(3), (7).

72. See *In re Marie Ave. Natural Gas Explosion*, No. C5-98-2040, 1999 WL 417345, at \*4 (Minn. Ct. App. June 22, 1999).

73. Evans & Gillers, *supra* note 4.

busiest in the state and carried more than 140,000 cars every day.<sup>74</sup> At the time of the incident, Minnesota law would have capped the government's liability at \$1 million for the entire incident.<sup>75</sup>

Due to the catastrophic proportions of the event, the Minnesota legislature enacted a statutory compensation fund for victims.<sup>76</sup> The language of the fund expressly denied that its creation was an admission of liability, but stated that it "further[ed] the public interest by providing a remedy for survivors while avoiding the uncertainty and expense of potentially complex and protracted litigation to resolve the issue of the liability of the state, a municipality, or their employees for damages incurred by survivors."<sup>77</sup> The compensation fund waived the \$1 million per incident recovery limitation, but it maintained the per person limitation of \$400,000.<sup>78</sup>

Although both Indiana and Minnesota provide for possible recovery of a substantial amount of funds in their statutory damage caps, some states do not provide for the possibility of such large sums.

#### *E. Delaware—Insurance Policy Exception*

When compared to other states that have statutory compensatory damage limits, Delaware's compensatory damage cap statute provides for a comparatively small amount in recovery.<sup>79</sup> Under Delaware law, if the governmental entity did not purchase liability insurance, then the total aggregate amount recoverable for all claims arising out of a single occurrence is \$300,000.<sup>80</sup> In comparison to the Indiana statute that provides for up to \$5 million in recovery from a single occurrence, the amount allowed under the Delaware statute is nominal. In fact, under the Indiana statute, a single individual can recover up to \$700 thousand, which is greater than the allowance for aggregate claims from an entire occurrence in Delaware.

The Delaware statute does, however, provide an exception that allows for greater recovery; if the governmental entity at fault had purchased an insurance policy, the victims would be able to recover to the extent of the insurance policy

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74. MINN. STAT. § 3.7391 subd. 1 (2013).

75. Evans & Gillers, *supra* note 4.

76. Mike Steenson & Joseph Michael Saylor, *The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 WM. MITCHELL L. REV. 524, 526-27 (2009).

77. MINN. STAT. § 3.7391 subd. 2 (2013).

78. Steenson & Saylor, *supra* note 76, at 560.

79. *See* DEL. CODE ANN. tit. 10, § 4013 (a) (2013).

80. *See id.* (providing that "[i]n any action for damages permitted by this subchapter, the claim for and award of damages, including costs, against both a political subdivision and its employees, shall not exceed \$300,000 for any and all claims arising out of a single occurrence, except insofar as the political subdivision elects to purchase liability insurance in excess of \$300,000 in which event the limit of recovery shall not exceed the amount of the insurance coverage").

limits.<sup>81</sup> Neither Indiana nor Minnesota currently possess this statutory exception. The Delaware policy behind this provision was provided in Senate Bill 507, which explained the purpose for the insurance coverage amount exception:

This act reflects the General Assembly's intention that an insurer should not benefit from the political subdivisions immunity where the latter has expended taxpayers' funds to purchase liability insurance coverage greater than \$300,000. The maximum recovery in that latter situation would be to the extent of the insurance coverage available to the municipality and not the lower figure of \$300,000. This exception would not affect the liability exposure of municipalities that have coverage of \$300,000 or less.<sup>82</sup>

States have enacted varying types of statutory damage caps both in amount and in other conditions or exceptions. In light of these statutory damage caps, there are several ways that state legislatures could waive the caps if they determine a waiver is necessary in the face of a catastrophe.

### III. POSSIBLE APPROACHES TO WAIVING STATUTORY DAMAGE CAPS

There are several ways that states can waive statutory damage caps in the face of a catastrophe. Although all of these options possess both positive and negative considerations, this Note proposes an approach that requires state legislature to maintain statutory damage cap amounts, but also provides for an insurance policy exception that would allow for greater recovery. The two most prominent approaches to waiving the statutory damage cap are as follows: (1) passing one-time legislation to create a no-fault compensation fund; and (2) creating new legislation outlining exceptions.

#### *A. Option One: One-Time Legislation Creating a No-fault Compensation Fund*

The creation of no-fault compensation funds has been the topic of much discussion since the creation of the 9/11 Compensation Fund, which was established to compensate victims of the 9/11 terrorist attacks.<sup>83</sup> This no-fault compensation structure involves the government providing a statutory structure to disperse funds to victims.<sup>84</sup> In return, the victims waive their right to recovery through tort litigation.<sup>85</sup> This type of compensation, which generally acts as a waiver to any statutory damage caps in place, possesses both positive and negative characteristics. This Note will look at three compensations funds: the

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81. *Id.*

82. *White v. Town of Elsmere*, No. Civ. A. 82C-JN-36, 1985 WL 635621, at \*2 (Del. Super. Ct. Mar. 28, 1985).

83. *See generally* Steenson & Sayler, *supra* note 76, at 526, 530-59 (discussing the 9/11 Compensation Fund).

84. *Id.* at 551-52.

85. *Id.* at 530.

9/11 Compensation Fund, the I35W Bridge Collapse Compensation Fund, and the Indiana State Fair stage collapse compensation fund.

The most well-known compensation fund was created after the catastrophic events of the 9/11 terrorist attacks. Congress approved the 9/11 Compensation Fund less than eleven days after the attacks occurred.<sup>86</sup> The fund provided unlimited government funds to be dispersed to victims<sup>87</sup> at the discretion of the Special Master, Kenneth Feinberg.<sup>88</sup> In addition to the funds provided by the federal government, private donors contributed \$3 billion to the fund.<sup>89</sup>

The 9/11 Compensation Fund, created to compensate the victims and their families of the 9/11 attacks, operated under the following goals: Provide “a national sense of unity and compassion, ultimately leading to the compensation of the victims of an unprecedented tragedy in our nation’s history. [R]escue the . . . airline industry from financial ruin. [P]rovide[] an expedient means of compensating victims and reducing their inevitable legal fees.”<sup>90</sup>

The Fund had to appeal to the victims and the nation as a whole by balancing adequate, timely compensation for the losses but also avoid creating “a financial free-for-all that would be unpopular with the taxpaying public.”<sup>91</sup> Simply put, “it had to balance passion with prudence.”<sup>92</sup> Feinberg “understood, despite the emotional and magnanimous underpinnings of the Fund, that he needed to appropriately exercise discretion in limiting the awards because, after all, taxpayers were footing the bill.”<sup>93</sup>

The second example of a legislative compensation fund was created on the state level after the catastrophic Minnesota bridge collapse. The resulting fund was named the Minnesota Bridge Collapse Compensation Fund (“Bridge Fund”) and was created to compensate victims of the I-35W bridge collapse that occurred on August 1, 2007.<sup>94</sup> The Bridge Fund was roughly modeled on the 9/11 Fund.<sup>95</sup> Financed by the state, the Bridge Fund subjected the recoverable damages to the (then) \$400,000 per person cap.<sup>96</sup> It also could not be used to compensate those who suffered only emotional trauma as a result of the collapse, nor anyone not actually on the bridge, even if an economic loss was suffered.<sup>97</sup> The state government provided a total of \$36.64 million as the overall limit to the fund, which included \$24 million for settlement agreements and \$12.64 million in

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86. *Id.* at 526.

87. *Id.* at 539.

88. *Id.* at 534-35.

89. Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 678 (2003).

90. Steenson & Sayler, *supra* note 76, at 526 (footnotes omitted).

91. *Id.* at 533.

92. *Id.*

93. *Id.* at 535.

94. *Id.* at 527.

95. *Id.*

96. *Id.* at 564.

97. *Id.* at 568.

supplemental payments.<sup>98</sup>

The third example of a compensation fund occurred most recently with the Indiana State Fair stage collapse. After the incident, the State of Indiana asked Kenneth Feinberg, who was the Special Master in the 9/11 Compensation Fund, to help determine how to distribute the available \$5 million to victims of the accident.<sup>99</sup> While this fund did not waive the statutory tort cap, the fund resembled the 9/11 Compensation Fund and the Bridge Fund in that it is a no-fault distribution and is being determined independent of litigation. There was also a compensation fund comprised of private charitable donations and gifts, of which Feinberg helped structure the disbursement of the funds.<sup>100</sup> The disbursements are made on a lump sum basis, based on degree of injury.<sup>101</sup>

Compensation funds such as the 9/11 Compensation Fund, the Minnesota Bridge Collapse Compensation Fund, and the Indiana State Fair compensation fund possess both pros and cons in their effectiveness of meeting the needs of the victims of these catastrophes and also adhering to the policy of protecting the governmental entity.

1. *Advantages of Compensation Funds.*—Compensation funds are effective waivers of statutory damage caps for several reasons. First, the distribution of compensation funds is efficient. It is likely that funds are dispersed more quickly than through litigation, and the legal fees associated with litigation can be avoided. Second, compensation funds provide for potentially greater compensation to victims than would be available under the existing statutory tort caps, if the pool of money in the fund exceeds the tort cap limit. Third, and possibly one of the greatest advantages of this type of waiver, is that victims are guaranteed a pay-out whereas in litigation they are not.<sup>102</sup> “[W]ithout the establishment of a government-backed compensation fund, every victim of these massive tragedies likely would have obtained little, if any, compensation [due to existing government immunities].”<sup>103</sup> Lastly, compensation funds save resources and the costs of massive litigation, including avoiding clogging the court system.

2. *Disadvantages and Inequities of Compensation Funds.*—Alternatively, although there are several advantages to compensation funds, there are also negative aspects. The creation of poor precedent is one of the greatest concerns surrounding the use of compensation funds. Once an exception is made to the existing statute, there runs a problem of defining when the next exception should occur. This subjective identification of “catastrophic events worthy of compensation” could create a slippery slope. Second, these compensation funds are generally funded by the governmental entity, which in turn means taxpayers’ dollars. Not only is there policy against unlimited use of taxpayer dollars, but there is also a policy consideration in favor of maintaining the fiscal integrity of

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98. *Id.* at 591, 574; see also Jones, *supra* note 11.

99. Tuohy, *supra* note 66.

100. *Id.*

101. *Id.*

102. Steenson & Sayler, *supra* note 76, at 592.

103. *Id.*

the state. Third, these compensation funds can be highly inequitable; the compensation funds are not applied to every catastrophic event, leaving the victims of catastrophic events for which the government chooses not to create a compensation fund go uncompensated or are compensated less than others. Some historical instances of catastrophic events where victims were not compensated through a compensation fund or similar fund include the following: “the Oklahoma City bombings, the first W[orld] T[rade] C[enter] bombings, the U.S.S. Cole attack, and the bombings of the American embassies in Kenya and Tanzania.”<sup>104</sup> This inequity between who the government compensates through special compensation funds and those that are compensated through existing statutory prescriptions, which may be nothing at all, could be avoided by either not creating compensation funds in any situation or, in the alternative, developing a statutory measure that dictates when victims are to be compensated through a compensation fund. A statutory standard would decrease the subjective nature of the current process.

Compensation funds also possess the opportunity for inequity when determining *who* is “worthy” of compensation. People are injured all of the time, for one reason or another, without being compensated for their injuries. Everyday life involves risk, and it does not seem that sensational circumstances surrounding an injury should warrant greater recovery than those injuries that occur in less sensational circumstances. “Highly tragic events tend to spur the emotions and hearts of society because thousands of innocent victims have died or been injured. Yet there are thousands of other victims that suffer similar fates but not in the same highly sensationalized manner.”<sup>105</sup> Governmental immunities or other private party immunities also play a role in this disparity by completely barring some victims from recovery.

Even once it is determined that victims of a particular incident are going to be compensated under a compensation fund, there can be difficulties in defining who of the injured parties within the event should qualify or be compensated by the fund.<sup>106</sup> In the aftermath of the 9/11 attacks, the organizers of the compensation fund had to ascertain who should receive compensation. With a wide range of victims—from the business men and women who were at work in the towers when they collapsed, to firefighters who died rescuing people on scene, to those public officials who helped with the clean-up in the days after and developed illness from the debris and smoke—determining which, if not all, of the victims should receive compensation can pose a challenge. Is the firefighter who died a week after the attacks due to smoke inhalation any less worthy of compensation than the businessman who died immediately upon impact? Questions such as these can be very difficult to answer, and compensation funds run the risk of inequitable answers when such difficult choices have to be made.

Lastly, once it is determined which victims will be compensated, it must be determined what type of compensation those victims will receive and how each

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104. *Id.* at 541.

105. *Id.*

106. *Id.*

individual's compensation will be calculated. There are several options for forming this part of the compensation plan. The fund could compensate each victim equally regardless of the victim's unique circumstances and injuries, or the fund could calculate each victim's reward separately factoring in type of injury, personal circumstances such as income, and other means of recovery such as life insurance policies, etc.

When disbursing the 9/11 Fund, the Special Master was directed to take the individual circumstances of the victims into consideration, and this sometimes resulted in disparities in reward sizes between high income earners and lower income earners.<sup>107</sup> This disparity arose when calculating loss of income, as some of the 9/11 victims were very high earners, such as the businessmen, and some were very low wage earners.

However, for an opposite effect, if the collateral source doctrine is applied, those victims that had higher income are likely to receive less under the fund than low income earners. The collateral source doctrine holds that the amount of damages awarded is reduced by the amount already received from a collateral source—e.g., a life insurance policy, company benefits, or some other source of compensation.<sup>108</sup> This would most likely have a more adverse effect on the wealthier victims, as it is likely they had larger life insurance policies than those of lesser means. If the compensation plan provided a flat rate of compensation to all victims, and the collateral source doctrine applied, then those victims with large life insurance policies would likely receive little or no compensation from the government. Therefore, depending on what considerations the compensation plan makes, there is great chance for inequity between victims and their compensation under the plan.

In conclusion, no-fault compensation plans of this sort provide many positive aspects towards compensation, but the use of their sometimes unlimited funds provide for great inequities between recipients and those victims of less tragic events.

#### *B. Option Two: Create New Legislation Outlining Exceptions*

In the previous option of creating a compensation plan, the issue of victim compensation in the face of catastrophe was not addressed until post-disaster. An alternative approach is to anticipate the possibility of a catastrophic event and plan accordingly by creating statutory exceptions that provide for these types of low probability, high damage occurrences. Some states have already implemented this approach by creating statutory exceptions to caps on non-economic or punitive damages for severely injured claimants and other similar exceptions.

For example, Minnesota has an exception to the statutory cap of \$500,000 and incident cap of \$1.5 million that provides for “twice the limits . . . when the

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107. *Id.* at 551-52.

108. *Id.* at 529, 557.

claim arises out of the release or threatened release of a hazardous substance.”<sup>109</sup> Minnesota also boasts a catastrophic event exception that was utilized during the Minnesota bridge collapse catastrophe.<sup>110</sup> Minnesota defined the bridge collapse as a catastrophic event for the reasons that it was a highly traveled bridge, the collapse resulted in numerous deaths and injuries, and the state had never, in its history, experienced a similar structure collapse.<sup>111</sup> However, the bridge collapse was identified as a catastrophic event after it occurred and the magnitude was realized. A fine-line exists when determining whether to label something as a catastrophe post-event because horrific incidents occur and the victims remain uncompensated all of the time. However, no statute could possibly define a catastrophic event sufficient enough to include the magnitude of events that might warrant a waiver of statutory liability limits.

Deciding whether to define an event in which citizens are injured as a catastrophic event requires an evaluation of the circumstances. The absence of specified statutory guidance as to what constitutes a catastrophe necessitates a subjective evaluation. Some of the most horrific events are so rare and so sensational that no one could foresee, or even imagine, their occurrence, making a statutory definition particularly troublesome. One might imagine then that the best approach to this type of solution would be to define what constitutes a catastrophic situation through the use of an objective standard. This standard could operate on the number of people injured, total damages, or some other objective figure. Although this may help identify when a waiver of the statutory tort cap is to be issued, there are still several other factors that would need to be considered, such as how far to exceed the statutory tort cap as well as if there are exceptions to the statutory standard.

A second possible statutory exception is that of an insurance policy limit. Although the government is self-insured, it is possible for governmental entities to purchase private insurance policies.<sup>112</sup> The insurance policy exception would apply in situations where the government has purchased an insurance policy that provides for coverage upon a claim for the event. Statutory insurance policy exceptions provide for recovery in excess of the tort cap, up to the amount of insurance policy limits. Idaho includes this statutory exception,<sup>113</sup> as does Delaware,<sup>114</sup> which was previously discussed. Under these existing statutes, the purchase of additional liability insurance is not mandatory, it simply provides for greater recovery if insurance was in fact purchased.

The insurance policy limit exception is a positive alternative, as it allows

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109. MINN. STAT. § 466.04 subdiv. 1 (a)(8) (2013).

110. *Id.* § 3.7391 subdiv. 1.

111. *Id.*

112. This is based on the assumption that Idaho and Delaware would not have statutory insurance policy limit exceptions if it were not possible for governmental entities to purchase private insurance policies. See *Packard v. Joint Sch. Dist. No. 171*, 661 P.2d 770, 775 (Idaho Ct. App. 1983) (discussing a school district’s purchase of a liability insurance policy).

113. IDAHO CODE ANN. § 6-926(1) (2013).

114. DEL. CODE ANN. tit. 10, § 4013(a) (2013).



victims greater compensation in the face of statutory tort caps. Further, any public funds used to purchase these private insurance policies would be limited and definite. When victims recover funds under the insurance policy limit exception, then private dollars would pay for the funds exceeding those used to pay the premium. In other approaches, taxpayer dollars would pay for the funds exceeding the statutory cap. Therefore, purchasing an insurance policy would provide for greater recovery to victims, while at the same time limiting the use of taxpayer dollars. “Widespread insurance or insurance-like funds would enhance compensation in predictable disasters and minimize transaction costs.”<sup>115</sup>

In addition to providing more funds, the purchase of insurance would promote the tort goal of deterrence. Increasing the costs up-front by requiring entities to purchase insurance can reduce unwanted risky behavior.<sup>116</sup> “Adopting the insurance model would eliminate the procedural and philosophical difficulties associated with the tort compensation model. The program would be more easily administered and would better reflect the equality principle.”<sup>117</sup>

However, the statutory insurance exception does have its challenges. In the face of compulsory insurance, defining what events require the purchase of insurance can be challenging, as many of the great catastrophic events arguably are events that no one could have foreseen. “[E]vents of these sorts are so rare and the scope of the damage they cause so broad that ordinary insurance schemes and legal routines for resolving disputes do not fit the problems they pose.”<sup>118</sup> It was impossible to have purchased insurance for specific events such as the Minnesota bridge collapse or the terrorist attacks because the government could not have foreseen the occurrence of those events. In those instances, there was no actual event scheduled that would have required or prompted the purchase of insurance, contrary to the Indiana State Fair, which was a scheduled event that could have prompted purchasing additional insurance.

Even when there is an actual event planned, such as the state fair, the burden of purchasing insurance seems large. In light of the numerous types of events that states sponsor—e.g., concerts, fairs, sporting events, conventions, government meetings, and others—a requirement that the government purchase insurance for each and every event seems burdensome and expensive. Therefore, considering the magnitude of events hosted by governmental entities, a compulsory insurance scheme on an individual event basis does not seem like a viable option.

However, governmental entities could purchase private insurance policies that are not event-specific policies, instead covering high-damage situations in general. This would eliminate the challenge of foreseeing all possible catastrophic situations by providing for both planned events and unforeseen circumstances. While it would not be necessary to pre-define each catastrophic

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115. Richard Lempert, *Low Probability/High Consequence Events: Dilemmas of Damage Compensation*, 58 DEPAUL L. REV. 357, 387 (2009).

116. *Id.*

117. Alexander, *supra* note 89, at 660.

118. Lempert, *supra* note 115, at 385.

event, there would still have to be some standard or procedure to define, after an event occurs, if the policy covers the disaster. While the recurring challenge of defining what catastrophes the policy would cover is applicable to this situation, statute could mandate using an objective standard—such as the number of people injured or the total amount of actual damages. For example, the policy could cover events where the total number of injured people exceeds ten people, hypothetically, and the total number of damages claimed exceeds \$X. If an event met the statutory requirements, the victims would be allowed to recover beyond the statutory tort cap, up to the amount recited in the policy—not only providing for recovery in greater amount, but providing for recovery in private funds (subtracting insurance premiums paid by taxpayer dollars).

The statutory insurance policy exemption is a viable option since it avoids some of the definitional problems of other solutions and, at the same time, provides for greater compensation with a limited use of taxpayer funds. Overall, statutory exceptions would provide for a way to proactively face victim compensation. There are flaws with the option, including the challenges related to defining what events or catastrophes require statutory action or protection, but the insurance policy exception seems to overcome these challenges.

#### IV. PROPOSAL FOR LEGISLATIVE ACTION

In preparation for future catastrophes, this Note suggests that state legislatures should create a legislative insurance policy exception, and governmental units should purchase a private insurance policy. Additionally, when states encounter future catastrophes, this Note suggests state legislatures provide a no-fault compensation fund in the amount of the statutory tort cap limit, and also administer a fund to which private parties can make contributions.

##### *A. Statutory Insurance Policy Exception*

In preparation for compensation in future catastrophes, state legislatures should include an insurance policy exception to the existing tort cap legislature, allowing for recovery up to the amount of the insurance policy limit, even in excess of the tort cap limit. This type of exception would be similar to Delaware's existing statute that provides for total recovery out of a single event or instance up to \$300,000 *or* insurance policy limits, whichever is greater.<sup>119</sup> Including an exception similar to this will allow for greater recovery when insurance has been purchased while also maintaining the state statutory tort cap if insurance has not been purchased. This Note suggests the addition of this exception because it is a way to objectively provide for greater recovery to victims in the face of catastrophe. It is objective because it does not require defining the word "catastrophe" or otherwise require the legislature to subjectively choose to provide greater relief in certain situations by waiving the statutory tort cap. Rather, if insurance has been purchased, victims can recover up to the policy limits. If it has not been purchased, the amount victims recover

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119. DEL. CODE ANN. tit. 10, § 4013(a) (2013).

will be at the state statutory cap limit.

This exception should, however, maintain the per person recovery at the statutory tort cap amount. Maintaining the per person recovery at the statutory tort cap amount is similar to the compensation scheme used in the Minnesota bridge collapse. In the Bridge Fund compensation scheme, the total incident tort cap was waived providing \$36 million dollars to victims,<sup>120</sup> while still capping the per person recovery at the then \$400 thousand per person statutory limit. Dissimilarly, the Minnesota Bridge Collapse funds dispersed in excess of the state tort cap were from state funds, whereas this proposal provides for excess funds to emanate from insurance proceeds under a government-purchased private insurance policy.

Including a legislative insurance policy limit exception allows for greater recovery without relying on taxpayer funds. It also provides an objective standard to determine when the compensation funds should exceed the statutory tort cap amount. In preparation for future catastrophic events, state legislatures should add this exception.

#### *B. Purchase of Private Insurance Policies*

Accordingly, to better prepare for future catastrophes, state governments should purchase private insurance policies to provide coverage when the damages claimed exceed the tort cap amount. Obtaining a private insurance policy that provides coverage in catastrophic situations would result in private monies funding the excess recovery rather than taxpayer dollars. Taxpayer funds would in all likelihood be used to pay the insurance premiums required in obtaining such a policy, but it would keep the use of taxpayer funds at a limited, ascertainable amount. Such a policy could read: when the total number of claiming victims multiplied by the per person cap exceeds the total incident tort cap, the insurance policy will cover the difference or up to a certain amount.

The purchase of a private insurance policy need not be mandatory, but is rather a suggested avenue to allow for greater recovery in these low-probability, high-consequence scenarios. The ability to predict an event so catastrophic in nature as to warrant recovery in excess of the statutory cap would be impossible; a general private insurance policy would eliminate the need to predict the occurrence of such an event and instead provide coverage after the event occurs. By maintaining the per person tort cap, the policy reasons behind statutory tort caps and limiting the use of taxpayer funds are upheld but can also provide victims with greater recovery.

#### *C. No Fault Compensation Funds*

The previous two proposals involve preparing for future catastrophic events, but the legislature can also take action after the occurrence of the catastrophic event. In the face of future catastrophes, states should provide compensation to victims up to the maximum statutory damage cap amount regardless of the

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120. See *supra* notes 11-13 and accompanying text.

government's liability in the matter. By not requiring the victims to prove liability, the state is offering compensation to victims in a timelier manner than going through the typical litigation process to prove liability. This type of action by the state legislature is also very generous and altruistic, as these funds otherwise would not have to be dispersed until liability is proven.

This is similar to the no-fault compensation funds discussed in both the 9/11 Fund and the Minnesota Bridge Collapse Fund, but the legislature would cap this fund at the statutory amount, maintaining the purpose of the tort liability caps. This is what Indiana has done in the face of the State Fair stage collapse.<sup>121</sup> The state dispersed the \$5 million available under the state tort cap without requiring any proof of liability.<sup>122</sup> Allowing victims to avoid the litigation process and recover automatically is a sympathetic way for the state to respond in the face of tragedy. Not only does this scheme promote public policy in favor of protecting taxpayer funds, but it also prevents setting bad precedent and avoids defining the gray line of what catastrophe is deserving of an exception to the existing law. It provides relief from the government and a sense of altruism when the government does not require proof of its liability before dispersing funds, and a sense of liability or accountability from the government if it seems at fault for the accident.

However, providing this avenue for recovery does require the state to define when an event is catastrophic enough to be worthy of such a no-fault scheme. In the ordinary course of days, recovery against the state should require fault. This no-fault scheme is only for instances where the state determines that victims are worthy or need compensation without withstanding the litigation process.

Each individual victim's injuries should proportionally determine compensation under this fund. A Special Master, such as Kenneth Feinberg, administering the fund can determine the exact calculations and appropriations. The Special Master would also be responsible for defining who qualifies to recover under the compensation plan. Depending on the specific circumstances of the catastrophic event, the group of victims eligible for recovery could be more or less difficult to define. While the subjective approach to determining the amount of funds and to whom the funds should be administered is not ideal, it would be very difficult to create a plan that would adequately accommodate all of the possible future catastrophes.

#### *D. Encourage Private Fund*

Lastly, this Note encourages the state legislature administering the compensation funds to establish and assist in the administration of a fund to which private individuals can contribute. Dispersed in addition to and separately from the government fund, it would be similar to the lump sum fund created by the Indiana State Fair Commission in light of the Indiana State Fair incident.

If the public feels compelled to give, they can give to this fund, providing for

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121. See generally Evans & Gillers, *supra* note 4 (discussing the Indiana \$5 million payout).

122. *Id.*

an emotional reaction and allowing “patriotism” to work on its own. Regarding 9/11, “[a]s the massive outpouring of private charity demonstrated, the public wanted to take care of the victims, not only out of shock and pity but also as a show of collective unity and defiance.”<sup>123</sup>

Keeping the disbursement of government funds at the statutory cap level is the forefront advantage of this type compensation scheme. The policy behind maintaining the statutory tort caps is well established as explored earlier in this Note. Not only does maintaining the statutory amount promote the integrity of government, it is also consistent with the fact that the government is already waiving its common law immunity.

When weighing the pros and cons of this solution, the pros largely outweigh the cons. By adopting approaches that have been used in the past, it is possible to adhere to public policy concerns while providing greater compensation to victims than the tort caps allow.

#### CONCLUSION

In the face of some of the most horrific and gut-wrenching experiences that one could ever imagine, placing a limit on the amount of possible recovery may seem inhumane. However, one must step back and examine the policy and historical pretenses that led to the enactment of these limits. Although there are strong arguments for a multitude of approaches, in the spirit of equity and the law, it is best to leave emotional reactions to the hands of the able public and keep the state at its statutory “promise.” The State of Indiana responded well to the horrific stage collapse that injured and took the lives of so many. By not requiring the victims to prove fault, the victims were able to recover in a timelier manner and were guaranteed some form of payment. To better prepare for future catastrophes, the state should add an insurance policy limit exception to the existing statute and purchase an insurance policy to provide for greater recovery without relying on taxpayer funds. This approach would allow for adequate compensation for victims and the patriotic society we aspire to be.

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123. Alexander, *supra* note 89, at 637-38.