

LSU Journal of Energy Law and Resources

Volume 9
Issue 2 *Spring 2021*

5-5-2022

Held Accountable: A Comparative Analysis of Public Liability and Executing Judgments for Flood Damage

Samantha M. Kennedy

Repository Citation

Samantha M. Kennedy, *Held Accountable: A Comparative Analysis of Public Liability and Executing Judgments for Flood Damage*, 9 LSU J. of Energy L. & Resources (2022)
Available at: <https://digitalcommons.law.lsu.edu/jelr/vol9/iss2/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in LSU Journal of Energy Law and Resources by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Held Accountable: A Comparative Analysis of Public Liability and Executing Judgments for Flood Damage

*Samantha M. Kennedy**

TABLE OF CONTENTS

Introduction	388
I. Increased Liability, Generally.....	388
II. Limited Federal Liability.....	390
III. State Liability.....	392
A. Louisiana (Estimated Loss Between 2015–2030: \$2.6 Billion)	392
B. Florida (Estimated Loss Between 2015–2030: \$7.9 Billion)	393
C. California (Estimated Loss Between 2015–2030: \$10.3 Billion)	394
D. New York (Estimated Loss Between 2015–2030: \$3.7 Billion)	396
E. Texas (Estimated Loss Between 2015–2030: \$1.2 Billion)	397
F. Alabama (Estimated Loss Between 2015–2030: \$1.23 Billion)	397
G. North Carolina (Estimated Loss Between 2015–2030: \$1.5 Billion)	398
H. Maryland (Estimated Loss Between 2015–2030: \$2 Billion)	399
I. New Jersey (Estimated Loss Between 2015–2030: \$10.4 Billion)	400
IV. Local Government Liability, Generally	401
V. Where Does the Liability Go?	403

Copyright 2021, by SAMANTHA M. KENNEDY.

* Samantha M. Kennedy is a 2020 graduate of the Paul M. Hebert Law Center where she graduated with a diploma in comparative law and a certificate in energy law and policy. She grew up in Luling, Louisiana and now practices at Bienvenu, Bonnecaze, Foco & Viator, LLC focusing on the area of toxic tort litigation.

Conclusion.....	404
-----------------	-----

INTRODUCTION

With disastrous flood events happening more frequently than ever before and more extreme weather events on the horizon, states have increased their flood damage mitigation and prevention efforts. According to the National Conference of State Legislatures, more than 16 states have enacted legislation regarding new floodplain diversion or storage; more than 10 states have passed legislation to restore floodplains and streams; and 19 states in total have passed legislation regarding flood mitigation efforts.¹ With increased action comes the potential for an increase in liability.

Much is at stake for these government entities should they be held liable for flood damage. Between 2015 and 2030, researchers from the Natural Oceanic and Atmospheric Administration predict property damage losses in the billions.² New Jersey is expected to experience a whopping 10.4 billion dollars' worth of flood damage by 2030.³ If, for example, Louisiana were forced to pay its judgments within a certain time frame, the resulting budget damage could potentially halt flood mitigation developments for the state. With large damage margins at issue, and potentially detrimental flood losses on the horizon, this Article will provide a comparative look at state liability schemes with the following focus: If a state can be found liable under its own state laws for flood damage, what are the mechanisms for enforcing judgment?

I. INCREASED LIABILITY, GENERALLY

As a useful backdrop to the discussion of executing judgments, it is important to consider why and how a government may be found liable for

1. *Flood Mitigation*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 10, 2019), <http://www.ncsl.org/research/environment-and-natural-resources/flood-mitigation.aspx> [https://perma.cc/6YJM-HWGX].

2. Kristina A. Dahl et al., *Effective Inundation of Continental United States Communities with 21st Century Sea Level Rise*, 5 *ELEMENTA: SCI. OF THE ANTHROPOCENE* art. 37 (2017), <https://doi.org/10.1525/elementa.234> [https://perma.cc/7MRJ-62R4].

3. *Id.*

flood damage.⁴ In many instances, government entities themselves create a higher standard of care for their own actions. For example, many states now exceed minimum Federal Emergency Management Agency standards for construction in flood hazard areas.⁵ The government is then bound to follow this increased standard of care.

By providing extra assistance, one theory is that the government should not be punished with extra liability. The general theory is that if the government is going above and beyond the call of duty, should it be liable if extreme weather events put a claimant in the position they would have been in even in the absence of government intervention? The easiest example of this theory is a levee breach. Should the government be held liable if a mechanism, which they had no duty to create, fails, thus flooding areas which would have naturally flooded in the absence of government action? The courts seem to answer in the affirmative. Courts have repeatedly held that once a government decides to engage in mitigation or prevention efforts, even when doing so in the absence of any duty to do so, they must exercise reasonable care.⁶ Increased government action thus creates increased risk for liability.

However, overextending liability may deter flood mitigation and prevention efforts. If the government spends money on these mechanisms only to impose liability upon itself, the government may simply stop development altogether. A liability scheme which punishes and thus stifles protection measures is hardly in line with public policy. This concern was addressed by a Wisconsin court in regard to a rising lake.⁷ The court seemed to apply a notice theory that the government abatement action should have in and of itself deterred further building of homes and other development. The court opined that imposing government liability for unsatisfactory flood abatement efforts “would be to enter a field with no sensible or just stopping point.”⁸ This general principle may serve to explain the abundant limits on government liability.

In the following sections, this Article will do a state-by-state, then local government, case study of several states predicted to suffer detrimental flood damage over the next few years.⁹ The aforementioned

4. JOHN KUSLER, ASS’N OF STATE FLOODPLAIN MANAGERS FOUND., A COMPARATIVE LOOK AT PUBLIC LIABILITY FOR FLOOD HAZARD MITIGATION (2009).

5. JOHN KUSLER, ASS’N OF STATE FLOODPLAIN MANAGERS, PROFESSIONAL LIABILITY FOR CONSTRUCTION IN FLOOD HAZARD AREAS (2007).

6. *See, e.g.*, *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

7. *Butler v. Advanced Drainage Sys., Inc.*, 717 N.W.2d 760 (Wis. 2006).

8. *Id.*

9. Dahl et al., *supra* note 2.

public policy ideals lay important underpinning to the discussion that is to follow. Though it appears obvious that someone should be held liable for flood damage, what becomes apparent is the intense hesitance and avoidance of placing that liability on the government. It seems that throughout the varying laws and jurisprudence, a general public policy exists to promote government activity, and thus limit government liability in whatever way possible. This idea is reflected well in the various states' sovereign immunity schemes. Sovereign immunity itself is based on the age-old English monarchy, with the general policy idea being that "the Crown can do no wrong."¹⁰ While this archaic ideal is certainly no longer believed, statutory immunity lives on in varying forms in all of the states to be discussed below.

While overall government liability for flood is a fascinating topic, and has been well-researched by others,¹¹ the rest of this Article will focus on how states limit their own accountability even if liability has been found. Even when governments are found liable, enforcement mechanisms against the state often provide other, oftentimes impossible, hurdles for plaintiffs.

II. LIMITED FEDERAL LIABILITY

As another essential backdrop to a discussion on state liability, it is important to recognize the severe limitations to federal liability for flood damage. Federal liability may arise in the instance of federal constructions and flood mitigation efforts. Under the Federal Tort Claims Act of 1946, which is often the model for many states' waiver of statutory immunity, the federal government can be sued for some types of negligence.¹²

However, the federal government's waiver of immunity is limited to "nondiscretionary" negligence. This means that actions which are part of the general policing power of the federal government remain immune to suit. Many decisions regarding flood mitigation, such as the decision whether to open a dam, are considered discretionary decisions and thus remain immunized from liability under federal law. "Nondiscretionary" actions often are limited to negligent design or maintenance of flood control operations, so many of the cases regarding flood damage are based off of those and similar claims.

The gray area between discretionary and nondiscretionary actions is an important one because it provides the most room for legal argument and

10. ROBERT DORSEY WATKINS, *THE STATE AS A PARTY LITIGANT* (1927).

11. KUSLER, *supra* note 5.

12. *See* 28 U.S.C. § 1346 (2018).

artistry. The best example of this is through the Hurricane Katrina canal breaches litigation.¹³ Plaintiffs claimed that a failure to maintain and safely operate the Mississippi River Gulf Outlet canal constituted gross negligence which resulted in plaintiff's losses. The district court awarded plaintiffs approximately \$720,000 in damages. The U.S. Army Corps of Engineers successfully appealed the decision by arguing that their actions were "discretionary" and thus subject to exemption under the Federal Torts Claims Act.¹⁴ This distinction between discretionary and "nondiscretionary" is mirrored in all of the states discussed below, and is an important rule to note in considering the high limitations on finding or asserting liability against a government entity.

In further limitation of potential liability, the federal government specifically exempted federal agencies from any negligence related to construction of flood control operations.¹⁵ The Flood Control Act of 1928 exempts the federal government for negligence associated with flood control measures, including design, operation, and maintenance. The law states that "(n)o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."¹⁶

The Flood Control Act of 1928 exemplifies the very public policy concerns which underlie all flood control projects: the goal to protect the public and enhance flood mitigation efforts while avoiding the potential liability that may follow. Many mitigation efforts themselves are a huge economic undertaking. At the time, the Flood Control Act was the largest public works project ever taken on by the United States as it sought to prevent flooding along the entire Mississippi River Valley.¹⁷ The project was estimated to cost \$325 million at its time, so the government was understandably concerned with protecting itself from any costs associated with later findings of liability.¹⁸

While these laws broadly exempt the federal government from liability, they do not bar takings claims. The same is true for all of the states in the forthcoming sections. However, takings claims are not an easy "get around" to general statutory immunity. More often than not, these claims are largely unsuccessful for a myriad of reasons. Generally, to succeed in a takings claim, the property owner faces a huge burden of

13. *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 732 (E.D. La. 2009), *rev'd in part, aff'd in part*, 696 F.3d 436 (5th Cir. 2012).

14. *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 450 (5th Cir. 2012).

15. Act of May 15, 1928, ch. 569, 45 Stat. 534 (popularly called the Flood Control Act of 1928).

16. 33 U.S.C. § 702c (2018).

17. *United States v. James*, 478 U.S. 597, 606 (1986).

18. *Id.* at 607–08.

proof; they must show a loss of all economic value to the property.¹⁹ Further, public rights often supersede any private rights to the property. As a result, many claimants are forced to seek damages through tort law within the limited exceptions to statutory immunity.

The result of the federal law, which immunizes the government from most flood claims, is a swell of lawsuits at the state and local levels, which may explain why executing judgments against many of the following states appears at times impossible.

III. STATE LIABILITY

A. Louisiana (Estimated Loss Between 2015–2030: \$2.6 Billion)

Louisiana is infamous for failing to pay judgments rendered against it.²⁰ The Louisiana Constitution contains an appropriations clause which limits payouts significantly.²¹ It bars regular mechanisms for the enforcement of judgments against the state. Property which is owned by a public entity in any capacity is not subject to seizure or sale in the way a normal defendant's property might be.²² This is logical as allowing for the seizure and sale of government property would be absurd and detrimental to the state.

Instead, the Louisiana Constitution and Revised Statutes require the payment be made only from funds the legislature has appropriated for that purpose. Louisiana Revised Statutes reiterate and further codify this principle, making it nearly impossible to collect from the state.²³ There is no time limit for appropriating these funds.²⁴ Simply put, if these funds are not appropriated, no remedy exists to compel payment. In this model, even the successful plaintiff is left unpaid and empty-handed. When the judgment is for a large number of persons, this is often the case.

For an example of how this legal principle affects the state, look to Tangipahoa Parish. In 1983, the parish won in a suit against the state for over \$100 million in flood damage amounts. The claim at the time was that an addition to the interstate acted as a dam, causing blockage which

19. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

20. *Louisiana Flood Victims Owed Over \$300 Million Sue State*, AP NEWS (Mar. 24, 2020), <https://apnews.com/article/a0cf41397728d00e585816db30970088> [<https://perma.cc/SH9D-N2CA>].

21. LA. CONST. art. XII, § 10(C).

22. *Foreman v. Vermilion Parish Police Jury*, 336 So. 2d 986 (La. Ct. App. 3d Cir. 1976).

23. See LA. REV. STAT. § 13:5109 (2020).

24. *Foreman*, 336 So. 2d 986.

resulted in catastrophic, unprecedented flooding.²⁵ Though the court ultimately ruled in the plaintiff's favor (though over 23 years later), it is a mischaracterization to say that the plaintiffs were "successful." To date, the judgment, which is now worth an estimated \$300 million, has not been paid. \$8 million was appropriated for partial payment, but it appears even when funds are appropriated, the state lacks the mechanisms or structures necessary for disbursement and distribution of those funds.²⁶ While the Louisiana legislature does occasionally appropriate funds for payment of judgments, they usually only do so in regard to road accidents.²⁷ The Tangipahoa Parish example serves as the best indicator for how the legislature will behave when a future flood catastrophe strikes. In that regard, the future is bleak for flood victims in Louisiana.

While Louisiana's judgment execution structure is relatively well-known, this Article will use the predicted property damage rankings from the Natural Oceanic and Atmospheric Administration study cited at the start of this Article.²⁸ The study determined the states with the highest predicted losses between 2015–2030. This Article will cover several of the states mentioned in that study and look to their various models for enforcing judgment against the state. Ultimately, this Article should help practitioners determine one of the most basic threshold questions in law: Can the plaintiff recover?

B. Florida (Estimated Loss Between 2015–2030: \$7.9 Billion)

Florida's government liability scheme in relation to flood loss is very similar to Louisiana. As is the case in many states, though no affirmative duty exists to provide drainage, the state has jurisprudentially recognized a duty to maintain and manage such systems once they are provided.²⁹

25. Caroline Grueskin, *Tangipahoa Residents' Lawsuit Over I-12's Role in Flooding Dealt Blow by Louisiana's Top Court*, ADVOCATE (Nov. 8, 2017, 7:07 PM), https://www.theadvocate.com/baton_rouge/news/communities/livingston_tangipahoa/article_af076ce8-c3ec-11e7-9881-1b592275f6cd.html [<https://perma.cc/V756-24R2>].

26. *Id.*

27. Mark Ballard, *Louisiana Pays \$42 Million to Settle Lawsuits, Many Over Deadly Accidents on Bad Roads*, ADVOCATE (Jun. 24, 2018, 10:15 PM), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_6f4cff7c-780b-11e8-bd19-279dc226d0e5.html [<https://perma.cc/STA2-FNLP>].

28. Dahl et al., *supra* note 2.

29. *Sw. Fla. Water Mgmt. Dist. v. Nanz*, 642 So. 2d 1084, 1086 (Fla. 1994); *Slemp v. City of N. Miami*, 545 So. 2d 256, 258 (Fla. 1989); *Collazos v. City of W. Miami*, 683 So. 2d 1161 (Fla. Dist. Ct. App. 1996).

However, the courts have also ruled that “upgrading” stormwater systems is a discretionary rather than “operational” function, and is thus not part of the government’s duty.³⁰ While the government maintains sovereign immunity, the Florida Tort Claims Act consents to the state’s potential liability for a highly limited number of torts.³¹

Sovereign immunity is further expounded upon by Florida Statutes section 373.443 which provides complete immunity to the state against claims regarding “[c]ontrol or regulation of stormwater management systems, dams, impoundments, reservoirs, appurtenant work, or works regulated under this chapter . . . [or m]easures taken to protect against failure during emergency.” These laws substantially limit government liability to takings claims and the limited torts that do not fall within general statutory immunity. This is similar to—though not nearly as broad or expansive as—the federal Flood Control Act. If a plaintiff is able, despite these limitations, to successfully sue the government for flood damage, they will remain subject to a huge procedural hurdle: the Florida appropriations clause.

The appropriations scheme in Florida is virtually identical to the one in Louisiana.³² It provides that the state shall not pay any judgment unless the legislature appropriates funds for such a purpose. Further, it provides that the only “remedy” for nonpayment is to petition the legislature to seek appropriation of funds in fulfillment of the judgment.³³ This provision has been jurisprudentially understood to limit payment of judgments arising out of the exercise of the state’s policing powers and does not bar payment of contract claims.³⁴

C. California (Estimated Loss Between 2015–2030: \$10.3 Billion)

California is another example of where state action results in increased liability. A California appellate court has even gone so far as to extend government liability to a flood management system the state did not itself build. In *Paterno v. State of California*, the court found that “when a public

30. Thomas Ruppert & Carly Grimm, *Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea-level Rise*, FLA. B.J., Nov. 2013, at 29.

31. FLA. STAT. ANN. § 768.28(1) (Westlaw 2020).

32. FLA. STAT. ANN. § 11.066.

33. *Id.*

34. Fla. Dep’t of Env’tl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 2d 1260 (Fla. 2008).

entity operates a flood management system built by someone else, it accepts liability as if it had planned and built the system itself.”³⁵

As in the preceding sections, California maintains a broad statutory immunity over tort claims.³⁶ It similarly does not apply to takings claims or claims of breach of contract.³⁷ Under the California Government Code, the state explicitly places immunity on actions which are considered “discretionary acts.”³⁸ California courts have interpreted this rule to apply not to the ministerial decisions that follow policy implementation but rather to the initial policy decisions.³⁹ This broad immunity has been applied to result in dismissal of a claim for intentional breach of a levee which resulted in severe property damage.⁴⁰ Further, the Code immunizes the state from damages associated with permit issuance and inspections.⁴¹ These limitations reflect what appears to be a push against imposing liability on the government, and that same underpinning is reflected in the law regarding execution of judgments.

In California, a similar appropriations clause requires that a state may not be required by any court to pay or offset any tort liability claim, settlement, or judgment, unless the legislature authorizes the payment of that specific judgment, or the director of finance or director of transportation certifies that a sufficient appropriation for the payment exists.⁴² The law does not provide for the normal methods of enforcing judgments like levying of property, etc. In the event no sufficient appropriation exists, the attorney general must report the judgment either to the senate appropriations committee or the assembly committee on ways and means, whose job it is to introduce legislation which would appropriate such funds.⁴³

California law does impose a time limit, however. Government entities are required to budget for the payment of judgments during the fiscal year they were rendered.⁴⁴ If they cannot, they must do so within the

35. *Paterno v. State*, 6 Cal. Rptr. 3d 854, 857 (Cal. Ct. App. 2003).

36. CAL. GOV'T CODE § 815 (Westlaw 2020).

37. *Id.*

38. CAL. GOV'T CODE § 820.2.

39. *Odello Bros. v. Cty. of Monterey*, 73 Cal. Rptr. 2d 903 (Cal. Ct. App. 1998).

40. *Id.*

41. CAL. GOV'T CODE § 818.4.

42. CAL. GOV'T CODE § 965.2.

43. CAL. GOV'T. CODE § 965.

44. CAL. GOV'T. CODE § 970.5.

following year. Further, if the judgment is made in installments, those installments cannot span over ten years in total.⁴⁵

These acts may be properly compelled through a writ of mandate.⁴⁶ The writ of mandate may compel the legislature to undertake the steps listed above but may not in and of itself compel the legislature to appropriate funds or make a payment or offset.⁴⁷ If the writ of mandate proves unsuccessful, the proper remedy for local entities is to have them held in contempt of court pursuant to the California Code of Civil Procedure.⁴⁸ While this has been successfully done to compel local government entities to pay,⁴⁹ it is unclear if this is a precedent or practiced way to compel judgments rendered against the state itself.

D. New York (Estimated Loss Between 2015–2030: \$3.7 Billion)

New York and its communities have no affirmative duty to prevent or mitigate flood damages.⁵⁰ New York has partially waived its sovereign immunity through the Court of Claims Act.⁵¹ This waiver broadly allows the state to be held liable under the same rules of law which could be applied to corporations or individuals. However, the state maintains its immunity for “error in judgment by an officer of the state in the performance of a duty involving a function that is intrinsically governmental.”⁵² This would likely limit any claims which involve government discretion regarding flood mitigation or prevention efforts.

New York does not allow the regular procedures for enforcement of money judgements to be rendered against the state.⁵³ New York has an appropriations clause which provides for an official whose sole duty it is to present judgments to the state’s budget-making authority for inclusion in the appropriation of funds.⁵⁴ When or if the state fails to make a payment, the proper remedy is a mandamus proceeding.⁵⁵ New York’s

45. CAL. GOV’T. CODE § 970.6.

46. CAL. GOV’T. CODE § 965.7.

47. *Id.*

48. CAL. CIV. PROC. CODE §§ 128(a)(4), 129(a)(5) (Westlaw 2020).

49. *Joseph v. S.F. Hous. Auth.*, 25 Cal. Rptr. 3d 179 (Cal. Ct. App. 2005).

50. *O’Donnell v. City of Syracuse*, 76 N.E. 738, 740 (N.Y. 1906).

51. 62 N.Y. JUR. 2D *Government Tort Liability* § 3 (2019).

52. *Id.*

53. N.Y. C.P.L.R. 52 § 5207 (McKinney 1962).

54. *Id.*

55. N.Y. C.P.L.R. 78.

unique enforcement mechanism places a direct threat of liability on whichever state official is charged with the duty to make the payment.⁵⁶

E. Texas (Estimated Loss Between 2015–2030: \$1.2 Billion)

Texas is different from the states discussed in prior sections because it follows a model strikingly similar to the federal model. That is, while other states somewhat limit government liability, Texas dramatically limits liability only to inverse condemnation (takings) and nuisance claims. The Texas Tort Claims Act creates government immunity which bars a claim for negligence absent certain exceptions which are inapplicable in the flooding context. The Texas Supreme Court has explicitly stated that, to the extent claims are based on the state's negligent performance of government functions, the government is immune from liability for property damage.⁵⁷

While nuisance claims are exempted, the act specifically maintains government immunity for a claim for nuisance which results from the release of water.⁵⁸ While takings claims are the main, if not only, remedy available for flood damage caused by state action or inaction, these claims are further limited to those takings which are recurrent. Texas courts have explicitly stated that a single flood event does not rise to the level of a taking.⁵⁹

The extremely narrow liability model provides an important context for understanding Texas law in regard to executing judgments against the state. The Texas Code provides that a judgment not payable by an insurer need not be paid by a government unit until the first fiscal year following the fiscal year in which the judgment becomes final. The government thus has a year or two at maximum to settle or pay their judgment. This is likely possible due to the low level of liability possible for government entities under Texas law.

F. Alabama (Estimated Loss Between 2015–2030: \$1.23 Billion)

Alabama has a traditional sovereign immunity scheme codified in its state constitution.⁶⁰ This sovereign immunity is waived, however, for inverse condemnation claims.⁶¹ Alabama imposes a strict limit on

56. N.Y. C.P.L.R. 52 § 5207.

57. *City of Tyler v. Likes*, 962 S.W.2d 489, 504 (Tex. 1997).

58. *Wickham v. San Jacinto River Auth.*, 979 S.W.2d 876 (Tex. App. 1998).

59. *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004).

60. ALA. CONST. art. I, § 4.

61. *Ala. Dep't of Transp. v. May*, 985 So. 2d 409 (Ala. 2007).

government entity liability for tort actions. While it does not appear to limit the way with which judgments are executed, the law prohibits any action which would result in the “plaintiff’s recovery of money from the state.”⁶² This dramatically limits property damage claims against the government. The code also states that, even if a claimant were able to successfully bring forth a claim against the state, the maximum amount recoverable for property damage is \$100,000 for a single occurrence.⁶³

G. North Carolina (Estimated Loss Between 2015–2030: \$1.5 Billion)

North Carolina has partially waived its statutory immunity through its State Tort Claims Act.⁶⁴ This allows the state to be sued, though it differs from other states in that it provides for a separate mechanism for hearing claims against the state. The law provides that the “North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State.”⁶⁵ The rule allows the commission to hear claims of negligence relating to flood activity. However, the state does not allow action against the state for damages sustained due to injury or property damage in relation to a structure or obstruction which was permitted by the state.⁶⁶

In North Carolina, no judgment against the state may be collectible unless the legislature appropriates funds which can be used to pay the obligation.⁶⁷ Further, the maximum amount that the State may pay to all claimants for any one occurrence is \$1,000,000. This cap could be detrimental to a class action claim for mass flood damage. Further, under the State Tort Claims Act, post-judgment interest may not be assessed against the state.⁶⁸

North Carolina statutory immunity does not excuse the state for inverse condemnation claims, and the court has noted that a claim for negligence under the State Tort Claims Act is not barred by res judicata, even if the same occurrence was tried in an inverse condemnation claim.⁶⁹ In *Pate v. North Carolina Department of Transportation*, the court held

62. Shoals Cmty. Coll. v. Colagross, 674 So. 2d 1311, 1314 (Ala. Civ. App. 1995).

63. ALA. CODE § 11-93-2 (Westlaw 2020).

64. N.C. GEN. STAT. ANN. §§ 143-291 to 143-300.1a (Westlaw 2020).

65. N.C. GEN. STAT. ANN. § 143-291.

66. N.C. GEN. STAT. ANN. § 143-215.60.

67. Smith v. State, 222 S.E.2d 412, 418 (N.C. 1976).

68. Myers v. Dep't of Crime Control & Pub. Safety, 313 S.E.2d 276 (N.C. Ct. App. 1984).

69. Pate v. N.C. Dep't of Transp., 626 S.E.2d 661 (N.C. Ct. App. 2006).

that property owners could sue for negligent drainage which caused flooding, despite having already sued under an inverse condemnation theory.⁷⁰ This was due to the unique jurisdictional scheme in North Carolina. The plaintiffs in the above-mentioned matter could not bring the action for tort in the state's Superior Court because the legislature conferred exclusive jurisdiction of those claims to the Industrial Commission.⁷¹

H. Maryland (Estimated Loss Between 2015–2030: \$2 Billion)

Maryland has partially waived its statutory immunity through the Maryland Tort Claims Act.⁷² This act, unlike others discussed, creates an overlap between the law on executing judgments against the state and the laws which provide basis to sue the state in general. In Maryland, even if a statute explicitly waives immunity for a certain cause of action against the state, that action may only be brought if (1) “funds [are] available for the satisfaction of the judgment,” or (2) the agency sued has the power/capability “for the raising of funds necessary to satisfy a recovery against it.”⁷³ As is the case in many other states, Maryland has a cap for compensatory damages at \$400,000 maximum per a single claimant and a single occurrence.⁷⁴ By waiving statutory immunity only where it can be shown that funds for payment exist, Maryland has substantially limited claims which may be brought against the state.

However, Maryland is unique in that its laws do not merely pass along the issue of state liability to the will and whim of the legislature. Rather, the Maryland Tort Claims Act sets forth lengthy procedural preconditions to suit creating the possibility for insurance payment and settlement. Such prerequisites contemplate that the state treasurer, not the legislature, will bear the deciding power as to whether such claims may be covered.⁷⁵ First, the claimant must give notice to the state treasurer within one year after

70. *Id.*

71. N.C. GEN. STAT. ANN. § 143-291.

72. MD. CODE ANN., STATE GOV'T §§ 12-101 to 12-110 (Westlaw 2020).

73. *See* Univ. of Md. v. Maas, 197 A. 123, 125 (Md. 1938); *see also* Bd. of Trs. of Howard Cmty. Coll. v. John K. Ruff, Inc., 366 A.2d 360, 366 (Md. 1976).

74. *See* MD. CODE ANN., STATE GOV'T § 12-104(a)(1)–(2) (Westlaw 2020). A recent 2021 amendment adjusts the limits in this section, but only for torts committed by law enforcement officers. Maryland Police Accountability Act of 2021, 2021 Md. Laws ch. 59.

75. Karen J. Kruger, *Governmental Immunity in Maryland: A Practitioner's Guide to Making and Defending Tort Claims*, 36 U. BALT. L. REV. 37, 55 (2006).

the injury to person or property.⁷⁶ The notice of claim must set forth the basis of the claim and the facts underlying the same. Such notice provides information necessary to determine whether the claim is covered by any active insurance policies, whether the state needs Attorney General representation, and whether the claim should be settled.⁷⁷ “In every budget bill since the enactment of the MTCA, the General Assembly and the Governor have deposited finds into the [State Insurance Trust Fund,]” intended to compensate future claimants.⁷⁸

I. New Jersey (Estimated Loss Between 2015–2030: \$10.4 Billion)

New Jersey is the state most prone to flood loss in the upcoming years at a whopping \$10.4 billion in predicted losses between 2015 and 2030. It recently passed a bill to appropriate \$3.054 million to acquire properties throughout the state that are prone to or have incurred flood or storm damage, or that could act as a buffer to protect other lands from flood damage as part of its Blue Acres program.⁷⁹ This program hopes to avoid future repair and mitigation costs by simply buying flood prone lands for other uses.⁸⁰

New Jersey has a generic Tort Claims Act which provides general immunity from tort liability.⁸¹ Further, the law explicitly immunizes the state for liability related to permitting and inspections.⁸² The state constitution has an appropriations clause which provides that no money shall be drawn from the state but for appropriations.⁸³ While the language does not expressly bar the normal execution of judgments, it has been jurisprudentially understood to limit enforcement mechanisms in a way similar to the other states discussed prior.⁸⁴ The New Jersey Supreme Court has stated that the “judiciary could not order the Legislature to appropriate money, or the Governor to approve an appropriation if one

76. MD. CODE ANN., STATE GOV'T § 12-106(b)(1) (Westlaw 2020).

77. Kruger, *supra* note 75, at 55 (citing *Johnson v. Md. State Police*, 628 A.2d 162, 166–67 (Md. 1997)).

78. *Id.* at 57.

79. *Flood Mitigation*, *supra* note 1.

80. *Blue Acres Floodplain Acquisitions*, ST. OF N.J. DEP'T OF ENVTL. PROTECTION, https://www.nj.gov/dep/greenacres/blue_flood_ac.html [<https://perma.cc/L9RD-5LN6>] (last updated Apr. 1, 2021).

81. N.J. STAT. ANN. § 59:1-2 (Westlaw 2020).

82. N.J. STAT. ANN. §§ 59:2-5 to :2-6.

83. N.J. CONST. art. VIII, § 2, ¶ 2.

84. *Fitzgerald v. Palmer*, 219 A.2d 512, 514 (N.J. 1966).

were made . . . [n]or would it do to issue a writ of execution” against state property.⁸⁵

The proper procedure for executing judgments is to submit a sort of supplemental application to the state treasury for determination that the appropriation can and should be made.⁸⁶ The court has recognized an exception to the general principle that the court cannot enforce judgments.⁸⁷ The U.S. Third Circuit Court of Appeals held that if there is a constitutional right to the funds, the court may compel payment even in the absence of the appropriation of funds.⁸⁸ While this may seem like a get around to the general rule, it is not unlike the other states which generally allow for enforcement of certain types of claims including breach of contract and takings.

IV. LOCAL GOVERNMENT LIABILITY, GENERALLY

While state immunity may appear strict, states uniformly extend this statutory immunity to localities and municipalities. This may be particularly harmful to plaintiffs as many of the decisions and efforts directly affecting flood control or mitigation measures are done at the municipal level. Some states simply include municipalities under their general sovereign immunity statute. Florida follows this model. However, in several of the above-researched states, local and municipality liability is limited through various mechanisms.

Treatment of municipalities in California varies with little consistency among courts. Several cases found municipalities liable for interaction with privately owned drainage systems,⁸⁹ while other cases required the municipality actually own the offending drainage system.⁹⁰ Overall, California seems to follow a stricter model for its municipalities, meaning the state appears more willing to allow for liability against municipalities for flood damage. As discussed in the earlier section, California allows judgments against local governments to be properly compelled through a writ of mandate.⁹¹ If the writ of mandate proves unsuccessful, the proper remedy for local entities is to have them held in contempt of court pursuant

85. *Id.*

86. *City of E. Orange v. Palmer*, 245 A.2d 327 (N.J. 1968).

87. *Baraka v. McGreevey*, 481 F.3d 187 (3d Cir. 2007).

88. *Id.*

89. *Marin v. City of San Rafael*, 168 Cal. Rptr. 750 (Cal. Ct. App. 1980); *Frustuck v. City of Fairfax*, 28 Cal. Rptr. 357 (Cal. Dist. Ct. App. 1963).

90. *Ullery v. Contra Costa Cty.*, 248 Cal. Rptr. 727 (Cal. Ct. App. 1988); *Yox v. City of Whittier*, 227 Cal. Rptr. 311 (Cal. Ct. App. 1986).

91. CAL. GOV'T CODE § 965.7 (Westlaw 2020).

to the California Code of Civil Procedure.⁹² Further, in 2019, California enacted legislation which would require a city or county to include information identifying residential developments in hazard areas that do not have at least two emergency evacuation routes.⁹³

New York limits liability through a heightened burden of proof. The law bars any finding of liability against a local entity unless four criteria are met: (1) assumption of the duty through either undertaking action or efforts, or through an existing affirmative duty; (2) knowledge that part or all of the local government entity's actions could lead to some harm; (3) some form of direct contact between the local government entity or agents and the injured person or persons; and (4) that person's justified reliance on the local government entity's action or inaction.⁹⁴

Texas explicitly allows for municipalities to be held liable for "governmental functions," which include a listed variety of activities including street construction and design, dams and reservoirs, zoning and planning, engineering functions, and more.⁹⁵ The law does not, however, apply to create liability to what are deemed "proprietary functions." These include operation and maintenance of utilities. This bifurcation is a mirror image of the "discretionary" and "nondiscretionary" distinction within federal law.

By comparison, other states have heightened burdens of proof which are not as difficult to meet. While Alabama maintains a level of immunity for municipalities, it allows for liability in the instance of "neglect, carelessness, or unskillfulness of some agent, officer, or employee of the municipality."⁹⁶

New Jersey law generously provides immunity to local governments and municipalities. In *Panepinto v. Edmart, Inc.*, a New Jersey appellate court dealt with a claim for negligent maintenance of sewers and drainage.⁹⁷ The claimants sued the city planning board and city engineer for damage sustained when the sewers backed up during heavy rainfall, resulting in flooding to numerous houses in New Jersey. The court held that decisions made in good faith and in the exercise of discretionary and quasi-judicial functions were protected by sovereign immunity even when those actions were proven negligent.⁹⁸

92. CAL. CIV. PROC. CODE §§ 128(a)(4), (a)(5) (Westlaw 2020).

93. CAL. GOV'T CODE § 65302(g)(5) (Westlaw 2021).

94. *Cuffy v. City of New York*, 505 N.E.2d 937, 940 (N.Y. 1987).

95. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(1)–(36) (Westlaw 2020).

96. ALA. CODE § 11-47-190 (Westlaw 2020).

97. *Panepinto v. Edmart, Inc.*, 323 A.2d 533 (N.J. Super. Ct. App. Div. 1974).

98. *Id.* at 536–37.

V. WHERE DOES THE LIABILITY GO?

With more dramatic and frequent flood events on the horizon, litigants will need to search for more creative ways to assess damages for flood loss. The government is well-insulated on all levels against liability for flood damage. Perhaps in light of this, it appears there may be an uptick in recognizing new theories of liability for flood-related action at the jurisprudential level. When federal law protected the government from liability, the states mirrored their policies to avoid the overflow. If not the government, then who will bear the loss? It seems, now, landowners and professionals may bear the burden.

For example, courts have begun to recognize causes of action between landowners that they did not before.⁹⁹ The traditional “common enemy” doctrine allowed landowners relatively unrestricted use of their own lands, including leveeing, grading, diking, and other mechanisms they may wish to undertake to protect their own property. The landowner could do as they wished to protect themselves while being protected from liability if their actions resulted in damage to the other landowners. That doctrine has been jurisprudentially erased and replaced by the “reasonable use doctrine” which imposes liability on a landowner for any activity which may unreasonably affect the flooding of a neighboring landowner’s property.¹⁰⁰

The more likely result, however, is an uptick in lawsuits against the professionals hired to perform such government functions. The reasonable use doctrine extends to professionals. Further, more than 20,000 local and state governments have adopted exhaustive regulatory standards for new structures and their impact on displacement of water and flood risk.¹⁰¹ Such standards, as well as the industry-specific customs for engineering design likely create clear basis for claims of negligence. Outside and in addition to the letter of the law, contracts themselves are likely to function as a burden-shifting mechanism for government entities to avoid liability. For example, the Supreme Court of Kansas held that where an engineering company entered into a contract with the local municipality, the company “undertook the duty the County owed to downstream property owners in connection with the design of the new bridge.”¹⁰²

Burden-shifting to private contractors presents significant public policy concerns. A legal regime which creates disproportionate recovery

99. *E.g.*, *Heins Implement Co. v. Mo. Hwy. & Transp. Comm’n*, 859 S.W.2d 681 (Mo. 1993) (en banc), *abrogated by* *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. 2008) (en banc).

100. *Id.*

101. KUSLER, *supra* note 5.

102. *Johnson v. Bd. Of Cty. Comm’rs*, 913 P.2d 119, 130 (Kan. 1996).

against third parties “would have a chilling effect on innovation and would tend to deter creativity.”¹⁰³ Further, professional liability insurance rates are rising concurrently with a rise in claims.¹⁰⁴ While professional liability insurance is available to those practicing architecture or engineering design, a significant number of practitioners do not and cannot afford to carry coverage.¹⁰⁵ Worse still, this lack of coverage is often rationalized as a means to avoid litigation.¹⁰⁶ Thus, claims for flood liability at the private level suffer similar threats to recovery.

CONCLUSION

While statutory immunity coupled with limited enforcement mechanisms may appear a harsh reality for persons who fall victim to flood losses, the alternative may even be harsher. With increased flood risk in mind, many governments at the federal, state, and local level are spending more than ever to prevent future flood losses. Miami Beach recently released plans to spend more than \$200 million to expand the city’s drainage system.¹⁰⁷ Further, the government at multiple levels is, in addition, spending enormous amounts of money on disaster relief. The Center for American Progress found that Congress spent at least \$136

103. Kenneth R. Michael, *Design Professional Liability: A Balanced Framework for Third-Party Actions by Tenants and Users*, CONSTRUCTION LAW., Aug. 1994, at 8, 14 (citing Anthony F. Earley, *Liability of Architects and Engineers to Third Parties: A New Approach*, 53 NOTRE DAME L. REV. 306, 317 (1977)).

104. See AMES & GOUGH, *PLI MARKET 2021: AS CLAIMS EXPERIENCE DETERIORATES, INSURERS SEEK NEW RATE HIKES* (2021), <https://amesgough.com/wp-content/uploads/2021/02/AG-Market-Survey-2021.pdf> [<https://perma.cc/92WG-ENMY>].

105. Michael, *supra* note 103, at 16 (citing Jeffrey L. Nischwitz, *The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties*, 45 OHIO ST. L.J. 217, 260 (1984)).

106. *Id.* (citing JUSTIN SWEET, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS* 337 (4th ed. 1989)).

107. Curtis Morgan, *Deep Trouble: How Sea-Rise Could Cause Havoc in South Florida*, MIAMI HERALD (Mar. 12, 2013, 10:37 AM), <https://www.miamiherald.com/news/local/community/miami-dade/article1948068.html> [<https://perma.cc/QNF5-CLTJ>].

billion on disaster relief between 2011 and 2013 alone.¹⁰⁸ These payments are usually under-budgeted and thus must come out of deficit spending.¹⁰⁹

If a method existed to execute judgments in the traditional sense, it is not difficult to imagine the absurd and detrimental results. A state could not sustain a model where a citizen could place a lien on the state hospital, for example. Even if states and localities were forced to pay monetary damages, the payments would interfere with the public funds currently used to mitigate future disasters. As harsh as the reality may seem for claimants, the limitations on liability and executing judgments, even if liability is found, are likely more beneficial to the citizenry as a whole when compared to an outright limitless stream of state or local payouts. As mentioned in the above, professional liability appears to be another, albeit less-straightforward dead end to recovery.

Rather than continue this legal game of hot potato, the government owes a level of respect and responsibility to its people for a steadily increasing risk. Such credence is best demonstrated by the law in Maryland. There, while the government recognizes the logical limits to government liability, the government also recognizes that it may and eventually will be at fault in some way. Rather than require the legislature to appropriate funds for past due judgments, Maryland has a designated State Insurance Fund for claims against it.¹¹⁰ Though liability is capped and such claims are subject to rigorous procedural requirements, the existence of the Fund indicates a concern and regard for government actions and their effect on citizenry.¹¹¹ Further, similar policy in no way removes the existing standards for professionals. Rather, the law appears to be the most honest, fair way to balance a government's need to maintain its economy with the public's need to be compensated when injured.

With flood an increasing concern for our country, the public cannot be expected to bear total losses and devastating flood damage on its own. This is a particularly concerning concept in light of the literature regarding who is likely to bear the brunt of such flood losses.¹¹² Simply put, those most

108. Brad Plumer, *The Government Is Spending Way More on Disaster Relief Than Anybody Thought*, WASH. POST (Apr. 29, 2013, 7:45 AM), <https://www.washingtonpost.com/news/wonk/wp/2013/04/29/the-government-is-spending-way-more-on-disaster-relief-than-anybody-thought/> [<https://perma.cc/ETT2-JSLV>].

109. *Id.*

110. Kruger, *supra* note 75, at 55–56.

111. *Id.*

112. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *GREATER IMPACT: HOW DISASTERS AFFECT PEOPLE OF LOW SOCIOECONOMIC STATUS* (2017).

likely to be impacted by flood are those who are least likely to have the means to afford rehousing or restoration.¹¹³ It is incumbent upon government at all levels to anticipate flood hazards and dedicate the proper resources to both prevent and compensate for losses when held liable. It is incumbent that where the law holds a party accountable, they fulfill their liability.

113. *Id.* at 6–8.