

2008

Policing the Compensation of Victims of Catastrophes: Combining Solidarity and Self-Responsibility

Olivier Moreteau

Louisiana State University Law Center, olivier.moreteau@law.lsu.edu

Follow this and additional works at: https://digitalcommons.law.lsu.edu/faculty_scholarship



Part of the Law Commons

Repository Citation

Moreteau, Olivier, "Policing the Compensation of Victims of Catastrophes: Combining Solidarity and Self-Responsibility" (2008). *Journal Articles*. 299.

https://digitalcommons.law.lsu.edu/faculty_scholarship/299

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

POLICING THE COMPENSATION OF VICTIMS OF CATASTROPHES: COMBINING SOLIDARITY AND SELF-RESPONSIBILITY

*Olivier Moréteau**

I. INTRODUCTION

1. Personal experience sometimes happens to coincide with preexisting expertise. The author of this Article has worked on the topic of compensation of victims, of terrorism in particular,¹ and catastrophes in general,² in the context of French law, and also in the framework of comparative law projects. In August 2005, he left his previous position as professor of comparative law in Lyon to move with his family to the United States and, more precisely, to Baton Rouge, Louisiana.

2. This move was three weeks before Hurricane Katrina, one of the strongest hurricanes ever recorded on the Atlantic Ocean, made landfall in South Louisiana. A large shipping container, sheltering most of the family and household belongings, including a multi-thousand-volume professional and personal library, happened to be stranded on a railway-track in New Orleans, where it was flooded and abandoned for more than two months, caus-

* Professor of Law, Russell B. Long Eminent Scholars Academic Chair, Director of the Center of Civil Law Studies, Paul M. Hebert Law Center, Louisiana State University; formerly Professor of Law, Université Jean Moulin Lyon 3 and Director of the Edouard Lambert Institute of Comparative Law. This Article was first published in *SHIFTS IN COMPENSATION BETWEEN PRIVATE AND PUBLIC SYSTEMS* 199 (Willem H. Van Boom & Michael Faure eds., 2007), with the support of the European Center of Tort and Insurance Law (ECTIL), together with the Research Unit for European Tort Law of the Austrian Academy of Sciences. The author is grateful to the ECTIL and the Editors for authorizing a second, updated and expanded publication. Thanks are also due to Robert A. Pascal for his help on an earlier version, and to Chris Hannan, Jeff J. Keiser, Ellen Overmyer Lloyd, and Agustín Parise for their research and editing.

1. See, e.g., Olivier Moréteau & Fabien Lafay, *Liability for Acts of Terrorism Under French Law*, in *TERRORISM, TORT LAW AND INSURANCE, A COMPARATIVE SURVEY* 29 (Bernhard A. Koch ed., 2004).

2. See, e.g., Olivier Moréteau, Michel Cannarsa & Fabien Lafay, *Financial Compensation for Victims of Catastrophes, France*, in *FINANCIAL COMPENSATION FOR VICTIMS OF CATASTROPHES: A COMPARATIVE LEGAL APPROACH* 81 (Michael Faure, Ton Hartlief & Tola Amodu eds., 2006).

ing a more than 85% personal loss. Fortunately, the shipment was insured, compensating at least the loss of the items that had a commercial value. Leaving personal feelings aside, one legitimately may wonder, in an economic and legal perspective, whether it makes any difference to the victim if he has been harmed by the most devastating disaster in United States history or merely an individual accident.

3. Why should we make a distinction? Why have special treatments for victims of catastrophes? From a human point of view, a death is a death, whatever the cause; it is a disaster, whether individual or collective. A flood or a fire may be gigantic or very local, but individual losses are the same regardless of the cause. Why should victims of disasters benefit from compulsory insurance coverage, compensation funds, and other special schemes?

4. Why help people who choose to live in flood-prone or earthquake-prone areas with reinsurance, to keep the risk insurable where insurance companies would simply refuse to cover the risk? Why not tell them instead that their risks will not be insured unless they move to less dangerous places? After all, citizens in New Orleans knew the damage from hurricanes could be serious.

5. Yet, one may look at things from a different perspective and take into account two series of factors. First, large-scale disasters may result in a huge cost in human lives: 15,000 people died in Bhopal, India, in 1984 as a consequence of the gas leak at the Union Carbide plant;³ the terrorist attacks of September 11, 2001 killed nearly 3,000 people in New York and Washington; and the South-Asian tsunami of December 26, 2004 swept away some 230,000 people.⁴ Hurricane Katrina killed at least 1,400, and there were still some 700 missing one year later.⁵ Destruction may be extremely costly, reaching a compound total of 80 billion dollars in the case of Katrina,⁶ more than 25 billion in the case of Hurricane Andrew in 1992,⁷

3. The Union Carbide plant leaked deadly Methyl Isocyanate gas during the night of December 3, 1984. The poisonous gas killed thousands of people in the city and around, and thousands of people who were injured were still suffering from its effect more than twenty years later. See Union Carbide Corp., Bhopal Information Ctr., Chronology, available at <http://www.bhopal.com/pdfs/chrono05.pdf> (last visited Mar. 26, 2008).

4. See T. Matthew Ciolek, *2004 Tsunami Disaster—Scholarly and Factual Analyses*, ASIAN STUDIES WWW VIRTUAL LIBRARY, 2005, <http://www.ciolek.com/WWWVLPages/AsiaPages/Tsunami-Analyses.html> (last visited Mar. 26, 2008).

5. See La. Dep't of Health & Hospitals, Hurricane Katrina, Deceased Reports, Reports of Missing and Deceased: August 2, 2006, <http://www.dhh.louisiana.gov/offices/page.asp?ID=192&Detail=5248> (last visited Mar. 26, 2008).

6. Nat'l Oceanic & Atmospheric Admin. (NOAA), Fact Sheet: Noteworthy Records of the

and 1.8 billion euros in Toulouse, France, following the explosion of the AZF factory.⁸

6. Various causes of destruction may be vast and may affect both private homes and public or collective equipment. They have a high collective disruptive effect and a huge emotional impact far beyond the affected area. Additional damage must be taken into account, such as homelessness, lack or shortage of medical care, shortage of water or food, and often lack of administration and police protection. People's lives are changed during long periods of time, living in temporary shelters years after an earthquake or, in the United States, in FEMA trailers almost three years after Hurricane Katrina.⁹ More than one year after Katrina, many New Orleans' citizens are still having difficulty accessing normal supplies, education, or employment.¹⁰

7. Second, the consequences of catastrophes, aside from the catastrophes themselves, are largely man-made, such as terror attacks and industrial disasters. Conversely, however, some disasters are totally natural, like tsunamis, hurricanes, or earthquakes. Overall, most catastrophes are a combination of natural forces and human activity, such as the devastation of New Orleans in 2005. In all, the city fared rather well under the hurricane-force winds and downpour. However, the weakness of ill-designed levees and the absence of gates to shut the canals linking Lake Pontchartrain to the Mississippi River caused the city to be submerged by the storm surge in the lake.¹¹ The same may be said of the oil-spill disasters such as the wrecks of the Exxon Valdez in 1989, of the Erika in 1999, and of the Prestige in 2002:

2005 Atlantic Hurricane Season, Apr. 13, 2006, <http://www.noaa.gov/stories2005/s2540b.htm> (last visited Mar. 26, 2008).

7. Robert L. Rabin & Suzanne A. Bratis, *Financial Compensation for Victims of Catastrophes, United States*, in FINANCIAL COMPENSATION FOR VICTIMS OF CATASTROPHES: A COMPARATIVE LEGAL APPROACH 303, 342, ¶ 46 n.166 (Michael Faure, Ton Hartlief & Tola Amodu eds., 2006).

8. As a consequence of the explosion of a chemical plant called AZF (owned by Total Fina Elf) that was located in Toulouse, France, 30 people died, 5,000 suffered personal injury, and thousands of private and public buildings were damaged. The scene after the explosion was as if a large part of suburban Toulouse had been bombed. See Moréteau, Cannarsa & Lafay, *supra* note 2, at 81.

9. See, e.g., Becky Bohrer, Assoc. Press, *Nagin: Katrina Anniversary Goal for Getting Rid of FEMA Trailers*, KATC.COM, Mar. 15, 2008, available at <http://www.katc.com/global/story.asp?s=8022162> (last visited Mar. 26, 2008).

10. For a current survey of the situation in Louisiana after Hurricane Katrina, see U.S. Dep't of Homeland Security, *Hurricane Katrina: What Government is Doing?*, http://www.dhs.gov/xprepresp/programs/gc_1157649340100.shtm (last visited Mar. 26, 2008).

11. See, e.g., John Schwartz, *Engineers Faulted on Hurricane System*, N.Y. TIMES, July 11, 2007, at A013.

they were all caused by the combined effect of a tempest and human negligence.

8. Fatalities and losses in a catastrophe are not simply caused by individual choices that may lead to ordinary accidents, such as driving a smaller and less protective car to save on gas, engaging in a dangerous sports activity, or smoking in bed. Instead, fatalities and losses in a catastrophe are strongly linked to collective choices, political or economical, and to human contingencies that may not be ignored in the present context; not everyone may live on top of Mount Ararat to avoid the consequences of a possible deluge. Slopes may be unsafe because of the risk of landslide, and yet many people may have no better housing option. Unless they settle in unreasonable places, can we blame people for living in flood-prone plains? Most agricultural, industrial, and commercial activity develops in plains, alongside rivers used for irrigation and as waterways. Coastal ports have always been a haven for vibrant activity, from fishing to carriage of goods and passengers. Further, volcanoes fertilize the surrounding land and supply rich minerals and waters, to the benefit of people who live much further away.

9. Such choices result in human activity that makes pre-existing natural risks more threatening. For example, moving to Florida to age gracefully under the sun can increase the damage caused by natural events if crowds of people pursue the same idea. Further, channeling a huge river such as the Mississippi between high levees, sometimes made of concrete, may have the effect of protecting big cities and millions of people. However, at the same time, it may also deprive vast plains of necessary alluvia and cause the Gulf of Mexico's coastal region to be deprived of the barrier of low islands that once protected the New Orleans region against forceful hurricanes.¹²

10. In light of these factors, should we decide upfront the collective answer to what is a collective problem? For instance, considering that half of New Orleans' residents did not have flood insurance coverage, should we blame the victims of this catastrophe for not taking insurance wherever available. Just as many citizens of New Orleans were uninsured in the wake of Katrina, in Toulouse it was found that 15% of the victims of the AZF factory explosion did not have homeowners insurance.¹³

12. This theory was discussed in detail by John M. Barry at a luncheon address for the Centennial celebration of the Louisiana State University (LSU) Law Center on September 15, 2006. For further information, see JOHN M. BARRY, *RIISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA* (Simon & Schuster 1997).

13. See Moréteau, Cannarsa & Lafay, *supra* note 2, at 81.

11. Even if more residents maintained insurance coverage, insurance providers may nevertheless treat the claimed damages as uninsurable, and exclude some of the risks associated with an area or activity. This pattern is especially apparent after insurance companies have been faced with a large scale disaster, which put a number of insurance companies out of business. An example of this reaction and outcome occurred in Florida after Hurricane Andrew in 1992.¹⁴

12. Beyond individual claims, it is important to recognize that the effects of a catastrophe impact private and public entities alike. For example, who can deny that the Port of South Louisiana, stretching from New Orleans to Baton Rouge, is the largest volume shipping port in the Western Hemisphere and the fourth largest in the world?¹⁵ Who can deny the enormous contribution of Louisiana in the supply of oil and gas, to the benefit of the rest of the American nation? It can be argued that protection of this region should be regarded as a national priority.¹⁶

13. A catastrophe is much more than the sum of individual disasters, especially when it is large-scale. Yet, how do we define such disasters? Scales exist that measure the intensity of an earthquake and the destructive strength of a hurricane, but there is no general scale to measure catastrophes. Instead, we are left with the obvious observation that catastrophes affect a large number of people at one time and cause long-term disrupting consequences for the survivors. And, despite judgment by some after the fact, for most victims the impact of such catastrophes was unavoidable by sound individual choice.

14. Does this mean that society should inform potential victims of disasters that they may only rely on their individual choices and on the market forces to prevent, cure, or insure the consequences of catastrophes? Such an attitude is predominant in the United States, a society that relies on the individual and is organized from the bottom up. Americans often turn to their local municipality when unable to cope with the effects of a catastrophe. From there, a municipality may call upon county (or parish if in Louisiana) officials, then the state; and only if the state cannot cope may it resort to aid from the federal government. Within such a model, the State plays a limited regulatory function, ensuring that social and economic ac-

14. For further discussion of the reactions to Hurricane Andrew, see *infra* ¶¶ 30-31.

15. Port of South Louisiana, Transp. Ctr. of the Americas, Port Overview, http://www.portsl.com/pages/15_overview.html (last visited Mar. 26, 2008) (“The Port of South Louisiana, which stretches 54 miles along the Mississippi River, is the largest tonnage port district . . . in the Western Hemisphere.”).

16. See BARRY, *supra* note 12.

tors can interact in a legally safe and competitive environment, and intervenes only in large scale emergencies.

15. Should we expect state authorities to be proactive and to take preventive steps, to organize and regulate the compensation of victims *ex ante*? This is a predominant attitude in many European countries, especially in France, where solidarity matters more than prosperity.¹⁷ In fact, most French people seem to believe that too much competition triggers exclusion. In times past, the poor and the weak in France used to call on the lord or the king for protection. After the French Revolution, however, such calls shifted to the State administration. Today, French society remains organized from the top-down, and the State is expected to care for the people. Extensive State intervention is not only acceptable; it is constantly requested by the people.

16. This Article is not intended to discuss the respective merits of market economy and regulated economy, nor the respective value of solidarity as against self-responsibility. Rather, as contended below, both often coexist in the United States and in France. France promotes self-responsibility by giving incentives to people to insure their risks. In comparison, the United States promotes solidarity by giving tax exemptions on money donated to help victims of catastrophes,¹⁸ by creating a fund for the September 11 victims,¹⁹ and by voting for billions of federal dollars to be spent on catastrophe victims.²⁰

17. The purpose of this Article is to provide a comparison of the American and French systems for compensating catastrophe victims. First, under the American model, *ex ante* reliance on individual and market forces is completed by government intervention and is followed by huge *ex post* solidarity. Second, under the French model, preventive efforts openly combine the action of individuals, market forces, and State intervention, therefore limiting public expenditure after the event. The American and French models are chosen not only due to the fact that they are not totally unknown

17. The Preamble to the French Constitution of 1946, referred to in the Preamble to the present Constitution of 1958, states: "[T]he solidarity and equality of all French people as to the charge resulting from national calamities." See 1946 CONST. pmbl. (Fr.) (stating at paragraph 12: "la solidarité et l'égalité de tous les Français devant les charges qui résultent des calamités nationales").

18. Press Release, U.S. Dep't of Homeland Security, Federal Emergency Management Agency (FEMA), Tax Relief for Hurricane Katrina Evacuees (No. R4-05-149) (Oct. 5, 2005), available at <http://www.fema.gov/news/newsrelease.fema?id=19443> (last visited Mar. 26, 2008).

19. 49 U.S.C. § 40101 (2007).

20. Eric Lipton, *Leaders in Congress Agree on Aid for Gulf Recovery*, N.Y. TIMES, Dec. 19, 2005, at A529.

to the present contributor and well documented,²¹ but also because they are the most typical in their categories. Thus, each system will be surveyed in turn.

II. THE AMERICAN MODEL: MAKING COMPENSATION AVAILABLE

18. The American system relies predominantly on individual and local action, with obvious downsides when it comes to the management of large-scale disasters. Examples of incentives will be given, showing that at both the federal and state levels, efforts are made to make compensation available, usually by way of private insurance. Despite such measures, however, even in the United States, the government has become a major player in catastrophe compensation.

A. THE DOWNSIDE OF RELIANCE ON THE INDIVIDUAL AND ON LOCAL AUTHORITIES

19. The American system attempts to focus on providing compensation for catastrophe victims and increasing accessibility of catastrophe coverage for all individuals who are in need of such protection. The American social welfare system is underdeveloped in comparison to most European countries. Further, the role of tort law is predominant, not only as a gap-filler where no other recourse is available, but also because the American mindset is that only the tortfeasor should have to pay. While a Frenchman requests public help, an American searches for a tortfeasor to hold responsible for damages.

20. This reliance on bringing suit to require a tortfeasor to pay damages serves not only a personal, but a public policy function that helps to keep American society safe. In theory, this plaintiff-friendly procedural system increases the ease of accessing justice. The indigent victim having a good cause of action is expected to find a lawyer willing to be paid on a contingency fee basis. Damages are assessed by juries comprised of ordinary citizens, who often easily identify and sympathize with the victim. Thus, damages are likely to be high. Even after deducting 30% for attorney fees,²² the victim is generously compensated. Class actions are favored²³

21. See Rabin & Bratis, *supra* note 7.

22. In the "standard" contemporary contingency fee arrangement, the lawyer collects roughly a third of his or her client's recovery in the case, although this standard rule has many variations and exceptions. See generally Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 757-61 (2002).

23. See Linda S. Mullenix, *Developments in the Procedural Means for Resolution of Mass*

and punitive damages are allowed; each serving the same policing function and assistance towards eliminating noxious activities. In essence, a clear incentive to litigate exists, even when insurance coverage does not.

21. The trouble with natural disasters is that no recourse to tort lawsuits is available in a large number of instances. Yet, as suggested above, many natural disasters are also man-made. For instance, the New Orleans' victims of Hurricane Katrina have identified the Army Corps of Engineers²⁴ as a possible defendant in a potentially large class action suit, such as the one filed on July 12, 2006.²⁵ Some obvious mistakes in the conception of the levee system, a system for which the Corps of Engineers was responsible, have been demonstrated.²⁶ These mistakes have been pointed to as largely explaining the failure that cost so many lives and massive destruction by the effect of prolonged flooding.²⁷

22. On January 30, 2008, the United States District Court for the Eastern District of Louisiana dismissed the consolidated class action against the Corps of Engineers, but not without an at least implicit recognition of the Corps' role in the catastrophe.²⁸ In this opinion, Judge Duval stated:

While the United States government is immune for legal liability for the defalcations alleged herein, it is not free, nor should it be, from posterity's judgment concerning its failure to accomplish what was its task. . . .

. . . .

The cruel irony here is that the Corps cast a blind eye, either as a result

Tort Litigation in the United States, in TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY 204 (Bernhard A. Koch ed., 2004).

24. The United States Army Corps of Engineers provides engineering services to the United States, both for military and civil purposes. See U.S. Army Corps. of Engineers, *Who We Are*, <http://www.usace.army.mil/who/> (last visited Mar. 26, 2008). The agency's responsibilities include the levees that are intended to protect New Orleans from flooding.

25. See Charles Savoy v. United States, No. 06-3552, (E.D. La. filed July 12, 2006). See also McGlinchey Stafford, PLLC, *Hurricane Law Blog: News and Opinion from the Recovery in the Gulf States, MR-GO Class Action Against Corps of Engineers*, <http://www.hurricanelawblog.com/archives/la-litigation-actions-filed-mrgo-class-action-against-corps-of-engineers.html> (July 18, 2006) (last visited Mar. 26, 2008).

26. See IVOR VAN HEERDEN & MIKE BRYAN, *THE STORM: WHAT WENT WRONG AND WHY DURING HURRICANE KATRINA—THE INSIDE STORY FROM ONE LOUISIANA SCIENTIST* 211-49 (2006).

27. See *id.*

28. See *In re Katrina Canal Breaches Consol. Litig.*, 533 F. Supp. 2d 615, 643 (E.D. La. 2008), available at http://graphics8.nytimes.com/packages/pdf/national/20080130_Dismissal_Order.pdf (last visited March 26, 2008).

of executive directives or bureaucratic parsimony, to flooding caused by drainage needs and until otherwise directed by Congress, solely focused on flooding caused by storm surge. Nonetheless, damage caused by either type of flooding is ultimately borne by the same public fisc. Such egregious myopia is a caricature of bureaucratic inefficiency.

It is not within this Court's power to address the wrongs committed. It is hopefully within the citizens of the United States' power to address the failures of our laws and agencies. If not, it is certain that another tragedy such as this will occur again.²⁹

23. Alternatives to the courts for catastrophe victims are private or public insurance or public disaster relief programs, such as those administered by the Federal Emergency Management Agency (FEMA).³⁰ To access FEMA aid, the governor of the state in which the disaster occurred must declare a state of emergency and formally request from the President of the United States that FEMA and the Federal government respond to the disaster.³¹ Unfortunately, the aftermath of Hurricane Andrew that swept through South Florida proved that this system was not reactive enough.³² The primary issue with this system is that it requires foresight by local authorities at an early stage to assess whether the anticipated effects of the disaster will exceed their management capacity. The flaw in this scheme became glaringly apparent during Hurricane Katrina, when both the Mayor of New Orleans and the Governor of Louisiana failed to call early enough for federal help.³³ While the American federal system works very satisfactorily to stimulate competition and profit, the response to Hurricane Katrina shows that it may not be all that fit to respond national emergencies.³⁴ As a

29. See *In re Katrina Canal Breaches Consol. Litig.*, 533 F. Supp. 2d at 643.

30. FEMA was created in 1979 under President Carter to coordinate the response to a disaster occurring in the United States and overwhelming the resources of local and state authorities. It operated as an independent agency until the creation of the Department of Homeland Security in 2003 as a response by President George W. Bush to the September 11 terrorist attacks. For further information on the role of FEMA and its interaction with federal and state government, see Rabin & Bratis, *supra* note 7, ¶¶ 13-25.

31. 42 U.S.C. § 5170 (2007) ("All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State.").

32. Rabin & Bratis, *supra* note 7, ¶¶ 46-54.

33. See, e.g., Editorial, Bob Williams, Blame Amid the Tragedy: Gov. Blanco and Mayor Nagin Failed Their Constituents, *WALL ST. J.*, Sept. 7 2005, at A28.

34. See The Becker-Posner Blog: A Blog by Gary Becker and Richard Posner, *Federalism, Economics, and Katrina*—Richard Posner, http://www.becker-posner-blog.com/archives/2005/10/federalism_econ.html (Oct. 9, 2005, 19:30 CST) (last visited Mar. 26, 2008). Concluding that:

[W]hile state and local government can and should be given exclusive responsibility for responding to run-of-the-mill local emergencies, the federal government should have standby responsibility for regional and (of course) national emergencies, as well as for emergencies

result of this maladministration, FEMA reacted in an untimely manner, which left New Orleans residents in an unacceptable state of distress and increased the number of fatalities. The Administrator of FEMA was forced to resign over such issues, and it remains to be seen if the excuses provided by the President of the United States will fix the problem. Several class actions were filed against FEMA shortly after the event.³⁵

24. There is no intent to investigate the public insurance schemes in the present Article. Such a topic is all too complex and patchwork-like and has already been documented in the context of catastrophes.³⁶ While public schemes may provide relief in cases of individual accidents, such as disability and unemployment, it is well known that the public welfare system is underdeveloped in the United States. Instead, much reliance is placed on private insurance to protect people from the contingencies of life, with substantial government incentives to make coverage possible and available.

B. RELIANCE ON INSURANCE AND GOVERNMENT INCENTIVES

25. When it comes to private insurance coverage, there are a greater number of options. Private insurance may cover personal injury in the form of life, health, and disability insurance. It also may cover damage to property in the form of homeowner insurance and commercial casualty insurance. In general, these policies cover all risks, regardless of the cause of the loss. However, recent events have revealed gaps in commercial insurance coverage due to resistance by private insurers to cover damages related to disasters.³⁷ In response, governmental regulations, both at the federal and state level, have been enacted to increase the availability of private insurance coverage for disasters. Examples of such incentives, both at federal and state level, can be supplied in sufficient numbers to prove that this is not an exceptional practice.

26. One such federal example is the Price-Anderson Act, passed in

that, as in the case of the flooding of New Orleans as a result of Katrina, wreak destruction on a scale that it would not have been efficient for the local government to prepare to meet.

Id.

35. See, e.g., Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 121 (2007) (citing Ass'n of Cmty. Orgs. for Reform Now v. FEMA, 463 F. Supp. 2d 26, 36 (D.D.C. 2006) (finding a denial of due process guarantees from FEMA to hurricane evacuees); *McWaters v. FEMA*, 408 F. Supp. 2d 221, 225-26 (E.D. La. 2005) (finding violations of constitutional rights and relief statutes)).

36. Rabin & Bratis, *supra* note 7, ¶¶ 6-12.

37. See, e.g., Peter G. Gosselin, *Insurers Learn to Pinpoint Risks—and Avoid Them*, L.A. TIMES, Nov. 28, 2006, at A1.

1957 by Congress,³⁸ with the express purpose of encouraging private development of nuclear energy in the United States. The Act created a mixed system: a compulsory private insurance coverage scheme combined with an emergency compensation fund. A cap was placed on the total amount of liability that each reactor operator would have to face in the event of a nuclear accident.³⁹ Participation in this program is compulsory for all nuclear reactor operators.⁴⁰ The intent of this act was purely proactive. In fact, when the Act was first passed, no tragedy had yet occurred; the act's passage was long before the meltdown at Three Mile Island (1979)⁴¹ and the tragedy of Chernobyl (1986).⁴² Despite the proactive stance of this legislation, the threat of ruinous tort litigation was a barrier to private investment in this new promising industry.⁴³

27. The most striking example of a largely proactive incentive, however, is the National Flood Insurance Program.⁴⁴ Administered by FEMA, the program was established in 1968 in response to the private insurance industry's reluctance to sell flood coverage. Although the chance of flooding is geographically limited with the pool of potential purchasers of flood insurance, which is restricted to people living in floodplain areas, only people with less desirable risks and higher potential losses are likely to insure. Given this small pool of interested buyers, it is difficult for the insurance providers to spread the risk in a satisfactory way.⁴⁵ As a result, Congress intended the National Flood Insurance Program to ensure availability of flood insurance where needed, while encouraging disaster mitigation through incentives to restrict development on flood-prone lands.⁴⁶

28. Specific details of the National Flood Insurance program include: (1) the program is voluntary; (2) communities that choose to participate must implement land management and practices in compliance with federal

38. See Price-Anderson Act, 42 U.S.C. § 2210 (2006).

39. See *id.* §§ 2210(e)(1)-(7).

40. For further discussion, see Rabin & Bratis, *supra* note 7, ¶ 28.

41. See United States Nuclear Regulatory Comm'n, Fact Sheet: Three Mile Island Accident (2007), available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.pdf> (last visited Mar. 28, 2008).

42. See World Nuclear Ass'n, Chernobyl Accident, <http://www.world-nuclear.org/info/chernobyl/inf07.htm> (last visited Mar. 28, 2008).

43. For a detailed history of the successes and failures of the Price-Anderson Act, see Dan N. Berkovitz, *Price-Anderson Act: Model Compensation Legislation?—The Sixty-Three Million Dollar Question*, 13 HARV. ENVTL. L. REV. 1 (1989).

44. See National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-129 (2006).

45. For further information, see Rabin & Bratis, *supra* note 7, ¶¶ 33-34.

46. See 42 U.S.C. §§ 4001(d)-(e).

guidelines; (3) eligibility for national flood insurance is limited to residents of participating communities; (4) residents are generally free to purchase insurance or not, but insurance is mandatory in some cases;⁴⁷ and (5) federal agencies are barred from providing flood-related disaster assistance loans or grants to property located within identified hazard areas unless the community is participating in the program.⁴⁸ Moreover, the federal government assumes the role of primary insurer by covering the risk of financial loss associated with a disastrous flood under the flood insurance scheme. Private insurers collect premiums and settle all claims, but if the losses stemming from a flood event exceed the premiums collected by the private insurer, the government steps in and compensates the insured for losses in excess.⁴⁹ As noted by Robert Rabin and Suzanne Bratis:

Since the program was started in 1969, it has paid \$11.9 billion in claims. In the absence of the Program, this cost would have been borne by the taxpayers through federal disaster assistance funding or by the victims individually. In addition, by requiring communities to comply with FEMA floodplain management standards as a condition of participation, FEMA estimates that the program saves \$1 billion per year in avoided damages.⁵⁰

This program shows how much State intervention aimed at prevention can protect those who need and deserve it, while saving money for everyone—since solidarity always comes into play *ex post facto*, in a costly and less effective manner on account of the collective emotion caused by disasters.

29. Another more recent example arose as a reaction to the terrorist attacks on the World Trade Center and Pentagon on September 11, 2001.⁵¹ Shortly after the event, a Victim Compensation Fund was created to provide prompt and fair compensation to the victims of the attacks and their fami-

47. For further information, see Rabin & Bratis, *supra* note 7, ¶ 33.

48. See 42 U.S.C. § 4106.

49. For a general description of the National Flood Insurance Program administered by FEMA, see FED. EMERGENCY MGMT. AGENCY, NATIONAL FLOOD INSURANCE PROGRAM; PROGRAM DESCRIPTION: AUGUST 1, 2002 22-29 (2002), available at http://www.fema.gov/library/file?type=publishedFile&file=nfipdescrip_1_.pdf&fileid=e6fdab40-80bd-11db-9aa6000bdba87d5b (last visited Mar. 26, 2008).

50. Rabin & Bratis, *supra* note 7, at 332, ¶ 34.

51. See Rabin & Bratis, *supra* note 7, ¶¶ 29-30; see also Kenneth S. Abraham, *Liability for Acts of Terrorism Under U.S. Law*, in TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY 176 (Bernhard A. Koch ed., 2004); Kevin P. Hilliard, *Civil Litigation Arising out of the WTC Attacks*, in TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY 189 (Bernhard A. Koch ed., 2004).

lies, in order to address injury and fatality claims that totaled nearly \$7 billion.⁵² Insurance companies were called to pay huge amounts. By October 2003, they had received more than 35,000 claims (including personal property and business interruption claims) representing a total of \$19 billion.⁵³ This raised concerns as to the solvency of the American insurance industry. In response to such concerns, the Terrorism Risk Insurance Act of 2002⁵⁴ was passed to provide a cap on the losses for which the private insurance industry will be responsible in the event of a major act of terrorism. Under this act, the federal government assumes the role of excess liability insurer, beyond a threshold of \$5 million per event that qualifies as an “act of terrorism,” to cover 90% of the losses in excess within a \$100 billion annual aggregate limit.⁵⁵

30. Other examples of incentives can be found at the state level. The existence of such programs demonstrates that the government has become a major player in reacting to major disasters and preventing problems for the future. For example, consider the state of Florida, struck in August 1992 by Hurricane Andrew. Until then, Hurricane Hugo of 1989 ranked as the costliest tropical storm in terms of insured damages. In fact, as noted by Rabin and Bratis: “The insurance industry used the \$4 billion of insured losses caused by Hugo as a basis for assessing their future risks.”⁵⁶ This baseline, however, was rendered obsolete by the \$17 billion of insured losses caused by Hurricane Andrew.

31. After Andrew, a number of small insurers went bankrupt and many companies moved to stop covering hurricane-related losses.⁵⁷ Reinsurers also sought to limit coverage and raised both premiums and deductible rates.⁵⁸ To address the inability of its residents’ to obtain hurricane insurance coverage, the government of Florida forced private insurers to continue offering hurricane coverage at affordable rates. Moreover, the state created the Residential Property and Casualty Joint Underwriting As-

52. Peter H. Woodin, *The September 11th Victim Compensation Fund of 2001*, in *TERRORISM, TORT LAW AND INSURANCE: A COMPARATIVE SURVEY* 197 (Bernhard A. Koch ed., 2004). See also Rabin & Bratis, *supra* note 7, ¶¶ 29, 38-45.

53. Rabin & Bratis, *supra* note 7, ¶ 29.

54. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (codified as amended at 15 U.S.C. § 6701 (2006)).

55. For further information, see Rabin & Bratis, *supra* note 7, ¶ 30.

56. Rabin & Bratis, *supra* note 7, at 333, ¶ 36.

57. See Mireya Navarro, *Storms Expose Florida's Vulnerability*, N.Y. TIMES, Oct. 13, 1995, at A12.

58. Rabin & Bratis, *supra* note 7, ¶ 36.

sociation, which became the second largest insurer in Florida.⁵⁹

32. California offers another interesting example of government intervention. In 1994, the Northridge earthquake caused more than \$15 billion in insured losses, causing many insurers to move out of the business, much as they did in Florida after Hurricane Andrew.⁶⁰ The state tried to find solutions to protect the citizens against earthquake-related losses, while simultaneously protecting the state's insurance industry. As a result, the California Earthquake Authority (CEA) was created in 1996.⁶¹ Under a somewhat complicated scheme,⁶² private insurers that sell "residential property insurance"⁶³ in California are allowed to exclude earthquake-related losses from their standard coverage, but are required to offer earthquake insurance in some form. Wherever they do not cover the risk, they must notify the customer and must make an offer of an independent policy for such coverage.⁶⁴ The customer is free to accept or decline the limited coverage: there is no requirement to carry earthquake coverage. Where provided, however, coverage must comply with CEA regulations.⁶⁵ Interestingly, it has been noted that "[m]ost residential property insurers—those comprising about 80% of the market, including the largest homeowners' insurers in the state—have chosen to opt out of providing coverage themselves, and instead simply administer policy coverage for the CEA, which assumes primary risk-bearing responsibility."⁶⁶ In short, under this system, private insurers play a purely administrative role while the CEA assumes the financial risk.

33. Specifically, the CEA is a privately financed entity, composed of insurance companies licensed to do business in California and governed by

59. Rabin & Bratis, *supra* note 7, ¶ 36.

60. Rabin & Gratis, *supra* note 6, ¶ 31.

61. CAL. INS. CODE § 10089.6(a) (West 2008) ("The authority shall be authorized to transact insurance in this state as necessary to sell policies of basic residential earthquake insurance . . .").

62. For further information, see Rabin & Bratis, *supra* note 7, ¶¶ 31-32.

63. Residential property insurance is defined as:

[A] policy of residential property insurance shall mean a policy insuring individually owned residential structures of not more than four dwelling units, individually owned condominium units, or individually owned mobile homes, and their contents, located in this state and used exclusively for residential purposes or a tenant's policy insuring personal contents of a residential unit located in this state. Policy of residential property insurance, as defined, shall not include insurance for real property or its contents used for any commercial, industrial or business purpose, except a structure of not more than four dwelling units rented for individual residential purposes. A policy that does not include any of the perils insured against in a standard fire policy shall not be included in the definition of "policy of residential property insurance."

CAL. INS. CODE § 10087(a) (West 2008) (internal quotation marks omitted).

64. *See id.* § 10087.5.

65. *See id.* § 10089 (establishing minimum coverage and maximum deductibles permitted).

66. Rabin & Bratis, *supra* note 7, at 328, ¶ 31.

a three-member board of state officials including the Governor, the State Treasurer, and the State Insurance Commissioner.⁶⁷ Participating insurers (with mandatory contributions to create the initial operating capital), reinsurance, and the premiums charged for policies sold all contribute toward funding the CEA.⁶⁸ The Board is charged with ensuring that the CEA has sufficient capital to maintain operations, because there is no state liability to pay claims that would exceed the CEA's capability to pay.⁶⁹ It has been observed that "by establishing a ceiling on the mandated contributions from private insurers, and pooling these risks, the CEA represents a model under which the state has relieved the private insurers of the uncertainty and potentially catastrophic losses associated with a major earthquake,"⁷⁰ all within a system where the state does not pay. However, it should be noted that this does not exclude private intervention, where under a similar strategy, "major commercial insurance brokers have created pools of private insurers to offer coverage on large commercial properties."⁷¹ Despite the continuing presence of private insurers, the above examples clearly demonstrate that in the United States, the government has become a major player in disaster coverage.

C. THE GOVERNMENT HAS BECOME A MAJOR PLAYER

34. Not only in reaction to disasters, such as terrorism, hurricanes, and earthquakes, but also as a proactive measure to potential disasters from incidents like nuclear accidents or flooding, the government has become a major player in disaster recovery. In this role, the government works to prevent the withdrawal of private insurance in entire areas and ensure there is sufficient private or public funding to cover major risks. This government intervention takes place both at federal and state levels. These programs often go beyond making private insurance available. In fact, such programs pool the risks and sometimes inject substantial public funding, such as in the case of terrorism and the National Flood Insurance Program. Thus, currently in the United States, there exists a palpable shift from private coverage to public funding.

35. Some may complain that governmental intervention is a bad thing. One objection is that such intervention distorts the insurance market, causing insurance prices and availability to no longer reflect the risk level of the

67. CAL. INS. CODE § 10089.7 (West 2008).

68. *Id.* § 10089.15.

69. For further information, see Rabin & Bratis, *supra* note 7, ¶ 32.

70. Rabin & Bratis, *supra* note 7, at 330, ¶ 32.

71. Rabin & Bratis, *supra* note 7, at 330, ¶ 32.

activity.⁷² The Florida post-Andrew reaction gives a most interesting answer to this objection. Proponents of government intervention point out that the state is in a better position than private insurers to bear risks that the private sector no longer wants to assume, because the state has broader resources and a larger borrowing capacity. Further, it has been noted that “by using regulations to force insurance coverage and premium rates that are out of step with the actuarial assessment of the private insurers, the government creates a market in which private insurers are unable to compete, even if they wanted to re-enter.”⁷³ In the end, there is no market-distortion, but rather a new market emerges, where the private sector may remain free to intervene, subject to compliance with some rules, such as those seen in the above example of California.

36. Another familiar objection is that “government intervention forces the public at large to subsidize the risky lifestyle of a segment of society.”⁷⁴ There is little doubt that this is a sound argument when addressing the coverage of highly risky individual action totally based on personal choice, such as high mountain climbing with light equipment or riding a motorcycle wearing shorts and t-shirts.⁷⁵ However, disasters are likely to happen in heavily populated areas where large numbers of people are making a significant economic contribution to the general welfare while also benefiting those living in less risk-prone places. As pointed out in the introduction to this Article,⁷⁶ no society would be viable if all its members tried to take refuge and prosper in the least risky areas.⁷⁷ In addition, due to the global warming phenomenon, it becomes difficult to find reasonably safe places anywhere on our planet and impossible to move millions (if not billions) of people there, which would inevitably generate huge costs and unknown

72. Roger van den Bergh, *Compulsory Catastrophe Extension of First Party Insurance from a Competition Policy Perspective*, in FINANCIAL COMPENSATION FOR VICTIMS OF CATASTROPHES: A COMPARATIVE LEGAL APPROACH 361 (Michael Faure, Ton Hartlief & Tola Amodu eds., 2006).

73. Rabin & Bratis, *supra* note 7, at 334, ¶ 36.

74. Rabin & Bratis, *supra* note 7, at 334, ¶ 36.

75. See Olivier Moréteau, *More Personal Responsibility*, in TOPICS: PHARMACEUTICAL RISKS, EMERGING RISKS, US TORT LAW 12 (Münchener Rück Munich Re Group 2005), available at http://www.munichre.de/publications/302-04641_en.pdf (last visited Mar. 26, 2008).

76. See *supra* ¶ 10.

77. Politicians also call to emotion and imagination, like President George W. Bush in his speech at Jackson Square, in New Orleans, a few days after hurricane Katrina: “And all who question the future of the Crescent City need to know there is no way to imagine America without New Orleans, and this great city will rise again.” See President George W. Bush, Address at Jackson Square, New Orleans, La.: President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/200509158.html> (last visited Mar. 26, 2008).

risks.

37. Solidarity is vital,⁷⁸ and so is self-responsibility. Both are not conflicting values, but at all times complementary, essential social values. The U.S. National Flood Insurance Program shows how the two can be intelligently combined in modern policy. In comparison, the French model, which is heavily based on state regulation and the promotion of solidarity, similarly shows how the compensation of the victims of catastrophes can be based on a careful combination of collective solidarity and individual self-responsibility.

III. THE FRENCH MODEL: REGULATING COMPENSATION

38. France regards itself as a welfare state. Solidarity is a constitutional value,⁷⁹ as it is in Italy and in some other European countries.⁸⁰ Admittedly, the French way may have its downsides, for instance when it reduces authoritatively the working time to thirty-five hours a week, supposedly to promote the creation of new jobs, but thereby putting so many small businesses in a precarious situation that existing jobs are jeopardized.⁸¹ Likewise, French law looks as if it generously protects employees through increased job protection by making it difficult to dismiss employees. Yet, in so doing, the French system makes the job market less accessible for the unemployed.

39. Regarding the victims of disasters, actual or potential, solidarity is clearly promoted in France. In fact, the Preamble of the French Constitution affirms “the solidarity and equality of all French people as to the charge resulting from national calamities.”⁸² Thus, government policy takes care not only of the consequences of death and personal injury, but also of the compensation for damage to property. Yet, clear incentives are also given to preventive measures, promoting self-responsibility. Despite these benefits, the “French exception” admittedly has had associated costs, like 15,000 elderly people dying as a consequence of the formidable heat wave

78. And it is primarily private, as seen after every catastrophe.

79. See 1946 CONST. pmb. (Fr.).

80. See Alberto Monti & Filippo Andrea Chiaves, *Financial Compensation for Victims of Catastrophes, Italy*, in FINANCIAL COMPENSATION FOR VICTIMS OF CATASTROPHES: A COMPARATIVE LEGAL APPROACH 145, ¶ 3 (Michael Faure, Ton Hartlief & Tola Amodu eds., 2006); see generally STEINAR STJERNØ, SOLIDARITY IN EUROPE: THE HISTORY OF AN IDEA (Cambridge Univ. Press 2004).

81. See Philip Delves Broughton, *French 35-Hour Week “a Disaster,”* DAILY TELEGRAPH (LONDON), May 18, 2004, § News, at 14.

82. See 1946 CONST. pmb. (Fr.).

during the summer of 2003.⁸³ This disaster triggered a national debate and political action as to the fate of elderly people in a post-industrial society.

A. DEATH AND PERSONAL INJURY

40. Victims will always benefit from the French social security system, covering most medical expenses in case of personal injury. This system, known as the *Sécurité sociale*, is open to all and accessible regardless of the origin of the damage. However, compensation is minimal in the case of death and permanent disability, which creates an incentive to rely on tort suits for adequate compensation,⁸⁴ unless the victim or the dependants may rely on the new insurance coverage for accidents of private life that was proposed in the year 2000.

41. Under the name *garantie accidents de la vie* (literally, “guarantee against life accidents”), insurance companies offer almost full coverage of the consequences of death (for the dependants) or physical injury when such damage occurs in the course of private life, whether at home or outside.⁸⁵ The cost is minimal, starting as low as €15 per month for full family coverage.⁸⁶ The covered damage may be the consequence of a natural or technological catastrophe, a terrorist attack, or a medical risk, as long as some outside event caused the accident.⁸⁷ The compensation is usually limited to a maximum amount of €1 million.⁸⁸ It also covers the compensation of economic loss, loss of amenity and pain and suffering.⁸⁹

42. The *garantie accidents de la vie* is almost a novelty in France. Two major mutual insurance companies offered similar and yet not as extended coverage in the past.⁹⁰ It is unprecedented in Europe, in the sense

83. See Thomas Crampton, *Record Heat Wilts Europe, Strains Power Supply and Hurts Crops*, N.Y. TIMES, July 27, 2006, at A1.

84. For further information, see Moréteau, Cannarsa & Lafay, *supra* note 2, ¶¶ 5, 12-17.

85. See BUREAU OF THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION, REPORT ON INDEMNIFYING VICTIMS OF TERRORISM: A COMPARATIVE SURVEY FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION 11-13 (November 27, 2006) available at [http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/cj-s-vict/CDCJ-BU%20\(2006\)%2019%20e%20-%20ECTIL%20Report.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/cj-s-vict/CDCJ-BU%20(2006)%2019%20e%20-%20ECTIL%20Report.pdf) (last visited March 26, 2008).

86. Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 6.

87. See *The French GAV® Accident Compensation*, SCOR TECHNICAL NEWSL. (SCOR Group, Paris, France), Oct. 2003, at 2, available at http://www.scor.com/www/fileadmin/uploads/publics/NTNV2003_05_en_tuknv05.pdf (last visited Mar. 28, 2008).

88. *Id.*

89. *Id.*

90. For an exhaustive history of the insurance industry in France, see Bertrand Venard, *The French Insurance Market: Background and Trends*, in HANDBOOK OF INTERNATIONAL INSURANCE: BETWEEN GLOBAL DYNAMICS AND LOCAL CONTINGENCIES 241-96 (J. David

that it provides full coverage, as in a case of tort liability, and it also covers non-pecuniary damages. Instead of relying on the Welfare State, people are offered an affordable option geared at protecting them against the harsh consequences of daily life or less foreseeable accidents. In that sense, self-responsibility is promoted.

43. French tort law may be described as victim friendly, yet restrictive in terms of victim compensation. Among its benefits, the system is easily accessible with access such as legal aid to help the indigent. In addition, the cost of justice is much lower in France than in the United States and other common law countries. For those relying on the tort system,⁹¹ which may be possible only where a potentially liable party is identified, strict liability may be more generously available than in other legal systems where caps may exist that limit the amount of damages to be awarded. One downside, however, is that French courts are not generous in awarding damages, especially the administrative courts hearing disputes where the defendant is a government or public authority.⁹² In addition, like most civil law jurisdictions, the French system does not allow class actions.⁹³

44. Examples may be found where public authorities have been made liable for damage caused by a natural disaster. For instance, after the Grand-Bornans flooding, that killed twenty-three people in the Alps in the summer of 1987 and caused significant property damage, the State and local authorities were made jointly liable and had to pay compensation to the victims or their families; the State for lack of care in authorizing the development of a camping ground in an area likely to be flooded by the mountain torrent, and the local authorities for failure to warn of the possible dangers.⁹⁴

45. These possibilities for victim compensation are not limited to cases of catastrophes. However, the only disaster specific scheme to cover the consequences of death and personal injury is the Compensation Fund

Cummins & Bertrand Venard eds., 2007).

91. For further information, see Moréteau, Cannarsa & Lafay, *supra* note 2, ¶¶ 30-38.

92. For a current survey and criticism of the standards governing recovery of damages in French tort law, see David Corbé-Chalon & Martin A. Rogoff, *Tort Reform À La Française: Jurisprudential and Policy Perspectives on Damages for Bodily Injury in France*, 13 COLUM. J. EUR. L. 231 (2007).

93. For a discussion of the current debate in France and throughout the European Union on introducing the procedural mechanism of the class action, see Gary L. Gassman & Perry S. Granoff, *Global Issues Affecting Securities Claims at the Beginning of the Twenty-First Century*, 43 TORT TRIAL & INS. PRAC. L.J. 85 (2007).

94. [CAA] (Administrative Court of Appeal), Lyon, 13 May 1997, *Droit administratif* (Dr. adm.) July 1997, 7; Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 37.

for victims of terrorism.⁹⁵ The Compensation Fund for the victims of terrorist action and other offenses was created in 1986⁹⁶ in response to a number of terrorist attacks in the early and mid-1980s. It is funded by a levy on the insurance premiums paid for the coverage of damage to property, such as automobile or homeowner insurance. An additional €3.30 is paid per contract.⁹⁷ It covers all French citizens who are a victim of a terrorist attack in France or abroad, in addition to all foreign victims of terrorist attacks occurring in French territories, even in cases where the terrorists have been identified and prosecuted.⁹⁸ This is further evidence of a solidarity policy.

46. The Fund offers full compensation for personal injury, and additionally, compensation for pain and suffering and consequential loss not related to property.⁹⁹ Compensated victims are granted the status of victim of war, with all the rights and benefits inherent to such status.¹⁰⁰ This includes totally free medical care (a share of which is otherwise supported by benefits a patient may receive from *Sécurité sociale*) and the benefit of a pension, in addition to compensation.¹⁰¹ In case of death, the dependants are compensated for their economic loss.¹⁰²

47. Additionally, the system provides victims with full compensation within just a few weeks, without complex and lengthy proceedings. There is a ten-year period for filing a claim or applying for additional compensation. The offer of compensation must be made within three months follow-

95. Moréteau & Lafay, *supra* note 1, ¶¶ 6-15; Moréteau, Cannarsa, & Lafay, *supra* note 2, ¶ 29.

96. Law No. 86-1020 of Sept. 9, 1986 (art. 9), Journal Officiel de la République Française [J.O.] [Official Gazette of France], Sept. 10, 1986, p. 10956 (amended by Law No. 87-1060 of Dec. 30, 1987 and Law No. 90-589 of July 6, 1990 (art. 2), Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 11, 1990).

97. The amount is fixed annually by government decision. See C. INS. art. L422-4, ¶ 1, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6398> (last visited Mar. 26, 2008). In 2008, the contribution is fixed at €3.30 per contract. See S.O.S. Attentats, Aide aux victimes: Indemnisation, http://www.sos-attentats.org/aide-victimes-indemnisation.asp?lan_id=fr (last visited Mar. 28, 2008).

98. C. INS. art. L422-1, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6398> (last visited Mar. 26, 2008). See also Fonds de Garantie (FGTI), Guarantee Fund for Victims of Acts of Terror and Other Offences, Conditions for Making a Claim to the FGTI: Acts of Terrorism, <http://www.fgti.fr/anglais/terro/condition.htm> (last visited Mar. 28, 2008).

99. C. INS. art. L422-1, ¶ 1, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6398> (last visited Mar. 26, 2008).

100. Law No. 90-86 of Jan. 23, 1990 (art. 26), Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 25, 1990.

101. Moréteau & Lafay, *supra* note 1, ¶ 15.

102. C. INS. art. L422-2, ¶ 3, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6398> (last visited Mar. 26, 2008).

ing the filing of the claim.¹⁰³ Acceptance of the offer by the victim or the dependants subrogates the Fund in the claimant's rights for the amount paid.¹⁰⁴ However, it does not bar the victim from obtaining additional compensation in a tort action.¹⁰⁵ Apart from damage to or loss of clothing, the Compensation Fund does not cover damage to property.

B. DAMAGE TO PROPERTY

48. French law operates on the assumption that most citizens subscribe to first party insurance to cover possible damage to their property. However, homeowner insurance is not compulsory. Recent catastrophes revealed that approximately up to 15% of victims of major disasters do not carry such insurance.¹⁰⁶ Yet, most people living in rented premises are requested by the lessor to subscribe to insurance coverage called *multirisque habitation*, which covers most risks to the building, its contents, and the consequences of tortious acts committed by the insured or his dependants. Moreover, it is common practice for a landlord to request the prospective tenant to give evidence of such insurance before signing the lease. Private house and apartment owners also purchase such insurance, especially where the property is mortgaged. In fact, commercial lenders always request evidence of such insurance.

49. Under such policies, including first party car insurance for the insured value of the car and property left in it,¹⁰⁷ insurance companies are bound by law to insure damages resulting from natural catastrophes.¹⁰⁸ The Insurance Code gives the following definition for natural catastrophes:

Non insurable direct material damage whose determining cause was the abnormal intensity of a natural agent, when normal measures to be taken to protect against such damage have been unable to prevent the occurrence thereof or could not be taken, shall be deemed to be natural

103. C. INS. art. L422-1, ¶ 3, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6398> (last visited Mar. 26, 2008).

104. *Id.*

105. Moréteau & Lafay, *supra* note 1, ¶¶ 16-20 (discussing Cour de cassation, Chambre criminelle [Cass. Crim.] [court of cassation] Paris, Oct. 20, 1993, 1994, D. 280, note Anne d'Hauteville).

106. Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 81.

107. Third party car insurance is compulsory. In addition, a person may subscribe to first party insurance to cover damage caused to their car and property transported in the car.

108. See Law No. 82-600 of July 13, 1982, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 4, 1992, p. 187 (relating to the compensation of victims of natural catastrophes which are presently codified at C. INS. arts. L125-1 to -6). See also Moréteau, Cannarsa, & Lafay, *supra* note 2, ¶ 19.

disasters within the meaning of this chapter.¹⁰⁹

The catastrophe must be an abnormal phenomenon, a natural one not provoked by human activity. It must also be of exceptional intensity or duration. For instance, continuous rain is not considered exceptional, but may become so if it lasts for a very long period. An unusual change in the ecosystem may also qualify. Lastly, it should be unavoidable, in the sense that the consequences may not be evaded by the taking of normal care.¹¹⁰ As the Code puts it, the damage must be “non insurable.”¹¹¹ However, where an exceptional risk (one of those traditionally excluded before the creation of the compulsory system) is nonetheless covered by insurance, the more favorable coverage will of course apply.

50. Another feature that appears in legal literature (though not expressly in the above-mentioned statutory definition) is that the disaster should be perceived as intolerable, in such a way that collective consciousness compels it to be described as a natural catastrophe.¹¹² Floods, landslides, snowfalls, and droughts usually qualify. Tempests are usually covered by insurance but, as explained below, today they qualify when of outstanding magnitude.¹¹³ In short, the catastrophe may be compared to *force majeure*.¹¹⁴

51. Victims may be compensated for the consequences of such risks under the compulsory scheme only where the Government recognizes and declares that there is a “natural catastrophe.”¹¹⁵ This is done by way of administrative order, stating the geographic zone and times affected by the natural catastrophe and the nature of the damages to be covered by the insurance.¹¹⁶ This causes victims and local authorities to put the state government under pressure every time a disaster happens. Ministers, and even the President of the Republic, will promptly appear on the scene and promise an immediate declaration, so that the victims may be quickly compensated.

109. C. INS. art. L125-1, ¶ 3, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6260> (last visited Mar. 26, 2008).

110. See Moréteau, Cannarsa & Lafay, *supra* note 2, at 19.

111. C. INS. art. L125-1, ¶ 3, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6260> (last visited Mar. 26, 2008).

112. See Moréteau, Cannarsa & Lafay, *supra* note 2, at 19.

113. Moréteau, Cannarsa, & Lafay, *supra* note 2, ¶ 19.

114. Première chambre civile de la Cour de Cassation [Cass. 1e civ.] [first civil court of the court of appeal] Paris, July 7, 1998, RGDA 1998, 841, note Vincent.

115. C. INS. art. L125-1, ¶ 4, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6260> (last visited Mar. 26, 2008).

116. C. INS. art. L125-1, § 4 (as amended by Law No. 95-665 of July 16, 1992).

52. Where no declaration of “natural catastrophe” is made, the insured may benefit only from coverage of the risks expressly covered under the insurance policy. In 1990, compulsory coverage was extended to damages caused by tempests, hurricanes, and cyclones for every policy covering the risk of fire.¹¹⁷ There is no specific provision regarding floods. This means that damage caused by flooding may only be covered by the effect of an express stipulation in the contract or, failing express coverage, if the devastating event has been declared “natural catastrophe.”

53. It should be noted that compulsory coverage for damage to property is not limited to natural disasters. Instead, it is also extended to man-made catastrophes. For instance, insured victims of damage to property caused by terrorist attacks or bombing perpetrated on the French territory will benefit from full insurance coverage. Indeed, article L126-2 of the Insurance Code makes such coverage compulsory: “Property insurance contracts may not exclude the insurer’s cover for damage as a result of terrorist attacks or bombing perpetrated on the national territory. Any clause to the contrary shall be deemed null and void.”¹¹⁸ This reference to “property insurance contracts” includes housing insurance (*multirisque habitation*) as well as first party motor-vehicle insurance.

54. Similar coverage has been extended to property damage caused by industrial disasters. For example, in response to a disaster that occurred on September 21, 2001, when the explosion of a chemical plant called AZF (owned by Total Fina Elf) located in Toulouse killed thirty people, injured another 5,000 people, and devastated thousands of private and public buildings,¹¹⁹ a new act was passed in July 2003. Under this new act, designated as Law no. 2003-699 of 30 July 2003,¹²⁰ first party insurance coverage was extended to damage caused by industrial catastrophes.

55. In response to the passage of this act, new articles, L.128-1 to 128-4, were added to the Insurance Code to set the framework of the new mechanism. Under this revision, an official statement must recognize that there is a “*situation of technological catastrophe*,” as defined in the

117. Law No. 90-509 of 25 July 1990, *Code des assurances*, art. L122-7. Such coverage may not be excluded and applies where no declaration of “natural catastrophe” has been made. However, this does not apply where the winds “have reached or exceeded 145 kilometers an hour on average over ten minutes or 215 kilometers an hour in gusts,” in which case compensation is not due under the contract unless a declaration of “natural catastrophe” has been made.

118. C. INS. art. L126-2, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6263> (last visited Mar. 26, 2008).

119. For further information, see Moréteau, Cannarsa & Lafay, *supra* note 2, ¶¶ 81-82.

120. Law No. 03-699 of July 30, 2003.

Code.¹²¹ Only accidents occurring in specific “classified” plants (*installations classées*), causing damages to a large number of buildings, are taken into account. This applies to first party motor vehicle and housing insurance (*multirisque habitation*).¹²² These provisions apply to all victims, whether they are private persons or businesses. Further, in such cases of a technological catastrophe, insurance companies are bound to make a compensation proposal within three months after the victim asks for compensation or after the official statement declaring the catastrophe.¹²³ When compensation is paid, the insurer is subrogated into the victim’s rights for any tort action against a party at fault.¹²⁴

56. This new scheme is not meant to cover technological disasters caused by terrorist attacks. As explained above,¹²⁵ compensation of victims covered by first party insurance is compulsory and immediate and does not depend on an official statement recognizing the catastrophe situation. However, if there is doubt as to the cause of the catastrophe, it is not unusual for government authorities to be urged by the media and the public to make such recognition, in order to facilitate prompt compensation.¹²⁶

57. Generally, for uninsured victims, the only way to obtain redress is to sue the owner of the plant in tort. However, the new law of 2003 allows the compensation of the uninsured victims of technological catastrophes by a Compensation Fund.¹²⁷ This compensation structure resembles solidarity, yet without a positive incentive to self-responsibility.¹²⁸ Such coverage by a compensation fund ought to be limited to people living in precarious conditions, in order to cover their inexpensive losses. Thus, this limited example may give a wrong image of the French system. As will be seen, in actuality, its complex machinery of shifts and incentives offers a positive combination of solidarity and self-responsibility.

121. C. INS. art. L128-1, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6265> (last visited Mar. 26, 2008).

122. C. INS art. L128-2, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6265> (last visited Mar. 26, 2008).

123. *Id.*

124. C. INS art. L128-3, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6265> (last visited Mar. 26, 2008).

125. See *supra* ¶ 55.

126. Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 26.

127. *Code des assurances*, art. L421-16. Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 27.

128. Roger Van den Bergh & Michael Faure, *Compulsory Insurance of Loss to Property Caused by Natural Disasters: Competition or Solidarity?*, *WORLD COMPETITION*, 2006, at 25, 26, available at <http://arno.unimaas.nl/show.cgi?fid=4663> (last visited Mar. 26, 2008).

C. SHIFTS AND INCENTIVES

58. The French system of compensation of victims of catastrophes is not funded out of tax revenue but by insurance premiums. With the exception of the compulsory social security system, first party insurance coverage is not mandatory. People are free to insure their property or not. Except in the few cases where uninsured risk is covered by a compensation fund,¹²⁹ only those who insure their risks will benefit from coverage.

59. The main (some would argue major) distortion to a purely market based system is the compulsory coverage of risks linked to natural and man-made catastrophes at a regulated price. Under such a system, an additional amount is charged on the premium for every contract insuring property, such as first-party automobile insurance and homeowner policy, with the imposition of an additional amount fixed by State regulation.¹³⁰ The only shift in this system is related to technological catastrophes. Since January 1, 2004, an additional €5 is charged per year and per contract; thus, on the basis of the fifty million contracts existing at present, this means €250 million is levied every year in anticipation of the coverage of this risk.¹³¹ Unlike the case of natural catastrophe, one is more likely to identify a liable party, and third party insurance might have been a better option. However, the present system is more protective of victims, since they will be covered even when the owners of the defective plants are insolvent.¹³²

60. Reinsurance is a big part of the plan. This is provided through the *Caisse centrale de réassurance* (“CCR”), an entity acting under government control.¹³³ Half the premiums levied to cover the consequences of catastrophes go to the CCR, which will always cover half the damage insured and pay for it. With this structure, the CCR is acting as a mutual fund, under a very simple 50% rule, which balances the risk of catastrophes among all insurance companies. This national redistribution of risk is the hallmark

129. As in the case of industrial disasters, see *supra* ¶ 60.

130. An additional 12% is charged on property insurance policies to cover natural catastrophes. Regarding automobile insurance, there is an additional 6% of the premium covering theft and fire and 0.5% of premiums relating to damage insurance. For further information, see Moréteau, Cannarsa & F. Lafay, *supra* note 2, ¶ 51.

131. Michael Faure & Véronique Bruggeman, *Catastrophic Risks and First-Party Insurance*, SOC. SCI. RES. NETWORK, Sept. 2007, at 29, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086036 (last visited Mar. 28, 2008).

132. See Moréteau, Cannarsa & Lafay, *supra* note 2, at 51. Par Ann Michel, *Les assureurs vont faire payer aux particuliers le risque industriel*, LE MONDE (Paris), Sept. 10, 2003.

133. For additional information about the CCR, see Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 52.

of French national solidarity.¹³⁴ The CCR is itself covered by the State, which provides an unlimited guarantee. In the year 2000, for the first time in its history, the CCR had to call for the guarantee of the State. This was due to the combined cost of a drought, severe flooding in the South, and the two tempests in December 1999.¹³⁵

61. Another approach to victim compensation that should be mentioned is an initiative of private insurers. In 2002, the French insurance industry created a pool called GAREAT (*Gestion de l'assurance et de la ré-assurances des risques attentats et actes de terrorisme*), to reinsure damage to property caused by terrorist attacks.¹³⁶ The Pool GAREAT covers enterprises, local authorities, large buildings such as hospitals, and technological risk where the insured capital exceeds €6 million.¹³⁷ The system is organized in layers. The CCR appears at the third and fourth layers, with unlimited state coverage through the CCR. Some may argue that the state offers reinsurance without charging premiums. However, the state contribution is meant to be a security or guarantee. The CCR always remains the principal debtor.

62. Such an effort demonstrates that despite state intervention, the private sector remains a primary actor and continues to operate on a free competition basis. In essence, the state steps in to facilitate the coverage of the very large risk by pooling private money. In doing so, the state affords a financial guarantee to a privately capitalized system. *Ex post* state intervention is limited to fixing the public infrastructure, which is usually done in a quick and efficient way.

63. Incentives to promote self-responsibility have been developed at

134. The CCR also acts as a reinsurer for the French insurance companies; a victim may not call directly on the CCR. The CCR also protects insurance companies for the share they themselves are supposed to cover, through a stop-loss system. See Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 52.

135. For a historical description of the CCR including references to the unprecedented events of the year 2000, see CAISSE CENTRALE DE REASSURANCE, LES CATASTROPHES NATURELLES EN FRANCE: NATURAL DISASTERS IN FRANCE 19, 24-26 (2005), available at http://www.ccr.fr/fr/pdf/catnat_2005.pdf (last visited Apr. 7, 2008).

136. Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 53.

137. For a comprehensive description of the system, see GAREAT, Documentation, <http://www.gareat.com/gareat/rtaccueil.nsf/documentation?Openpage>; ERWANN MICHEL-KERJAN, INSTITUTE VEOLIA ENVIRONNEMENT, REPORT NO. 3: FINANCIAL PROTECTION OF CRITICAL INFRASTRUCTURE, § Commercial Terrorism Insurance in France (GAREAT), available at <http://www.institut.veolia.org/en/cahiers/protection-insurability-terrorism/analysis-partnership/terrorism-france.aspx> (last visited Apr. 7, 2008). For an update on GAREAT in 2007, see Lloyd's Worldwide, France: GAREAT in 2007, http://www.lloyds.com/Lloyds_Worldwide/International_compliance_news/France_GAREAT_in_2007.htm (last visited Mar. 29, 2008).

different levels. Examples can be found in relation to technological risks and natural catastrophes. In regards to technological risks, the law of July 2003 created some exclusion zones around the high risk areas. Article L128-4 of the Insurance Code introduces a limitation to the insurance coverage that was made compulsory by the new law of 30 July 2003 when the existence of a technological catastrophe has been officially recognized. Under this limitation, insurance coverage is excluded for all buildings erected in special areas recognized in a prevention plan of technological risks (*plan de prévention des risques technologiques*) as causing a serious risk to human life,¹³⁸ if erected in such an area after the plan has been published. Insurance coverage is also excluded for buildings erected in violation of administrative rules when the purpose of such rules is to prevent damages caused by a technological catastrophe.¹³⁹ This creates a clear incentive not to build in these special danger zones, where expropriation may be exercised, or to comply with protective administrative rules. When no expropriation has been exercised, insurance coverage in the special zones will only be granted to buildings existing before the publication of the plan. Further, when expropriation appears to be the only reasonable solution, fifty-percent of the compensation is paid for by state funds, and the other fifty-percent is paid for by local industry.¹⁴⁰

64. When a disaster is declared a “natural catastrophe,” the insured must bear a share of the loss, which remains uninsured (deductible or *franchise*). The amount of the deductible is fixed by the State.¹⁴¹ In municipalities not having adopted a “prevention of risk plan” (*plan de prévention des risques*), the deductible gets higher every time there is a declaration of natural catastrophe: twice as much the third time, three times as much the fourth time, and four times as much any additional times.¹⁴² This creates an incentive for the local population to press the municipality to adopt a prevention plan or to relocate to safer areas.

IV. CONCLUSION

65. A careful study of the law and practice related to catastrophes shows that solidarity, public or private, always exists after a catastrophic event. In fact, such responses have even been described as excessive (by

138. See C. ENV'T arts. L515-15 to 26 (especially note art. L515-16).

139. C. INS. art. L128-4 ¶ 2, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=38&r=6265> (last visited Mar. 26, 2008).

140. Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 68.

141. C. INS. art. L125-2, ¶ 2, L125-3, ¶ 2, A125-1 annex II. See also Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 67.

142. Moréteau, Cannarsa & Lafay, *supra* note 2, ¶ 67.

comparison to other urgent, legitimate, and unsatisfied needs) after large scale catastrophes such as the South Asia Tsunami of December 26, 2004 where some charities finally declared that they could no longer accept gifts for that purpose. However, nobody would question the shifts and distortions to market rules where public money is spent in sometimes huge amounts after the event. In such cases, reason seems to be trumped by emotion.

66. Yet, *ex post* state funding is raising major concerns that are not addressed in this Article. For instance, in Louisiana, the post Katrina and Rita question comes up repeatedly: "Where does the money go?" The ghost of corruption continues to linger.

67. Solidarity may be organized *ex ante*, combining self-responsibility, the resort to market forces, and state intervention. This cocktail is familiar even in the United States. True, the mix is not the same in Jacobin France and decentralized America, but careful analysis shows that it would be wrong to believe that there is always more state intervention and public money spent in France than in the United States of America. The French tend to regulate insurance premiums but leave the onus on the insured, the state offering a financial guarantee behind a strong and healthy reinsurance system.¹⁴³ In contrast, Americans do not interfere with premiums, but are more willing to inject public money directly where the levied premiums do not suffice.

68. It is clear that prevention and solidarity must combine individual and collective action.¹⁴⁴ In every place where large-scale disasters have occurred, market forces alone were never sufficient to entirely fix the problems. But, when properly combined, solidarity and self-responsibility appear to be the most desirable and respectable social values, justifying some distortion to competition rules. Law and economics scholars usually reject such views, and yet Roger Van den Bergh and Michael Faure find that efficiency and solidarity may legitimize compulsory insurance coverage of loss of property caused by natural disasters: "[R]estrictions of competition may be presented as the price to pay for guaranteeing that victims of catastrophes are appropriately compensated."¹⁴⁵ Such solutions should be on the

143. On the financial health of the French *Caisse centrale de réassurance*, see Moréteau, Canarsa & Lafay, *supra* note 2, ¶ 52.

144. For an alternative view, basing the response on an international social insurance system, with a fund managed by the World Bank or under its control, see Jef Van Langendonck, *International Social Insurance for National Disasters?*, in *SHIFTS IN COMPENSATION BETWEEN PRIVATE AND PUBLIC SYSTEMS* 183 (Willem H. Van Boom & Michael Faure eds., 2007).

145. Van den Bergh & Faure, *supra* note 81, ¶ 51 (concluding that the French model, which has

agenda of every political ticket instead of solutions merely aimed at satisfying particular private interest groups. Comparative studies are useful in a world more and more prone to destructive disasters. Such studies show that there is no miracle recipe by highlighting that *ad hoc* and *ex post* solutions are less efficient and cause more distortions, and concluding that sound prevention lies in the art of mastering the mix of solidarity and self-responsibility.

69. This Article has addressed the issues of compensation and, to some extent, prevention. But there is much more to be done to that effect. Global warming is still denied by some, who do not want their activity to be identified as a cause. Political action is limited by the short horizon of re-election. Part of the answer may be in collective action. But the engine to progress also lies in the individual. Why not sue politicians, private companies, and their directors for making our planet an unlivable world for the generations to come? The law can be used for purposes going far beyond the satisfaction of selfish interests. Instead, it can also be a weapon to fight man-made disasters and protect our individual and collective future.

been followed by a significant number of countries not covered in the present study, may benefit from a solidarity exception).