

# LEGISLATIVE BUDGET AND FINANCE COMMITTEE

A JOINT COMMITTEE OF THE PENNSYLVANIA GENERAL ASSEMBLY

**A Report on the Limitations on Liability  
Under Pennsylvania's Sovereign and  
Governmental Immunity Laws  
Conducted Pursuant to Senate Resolution 2021-146**

**June 2022**



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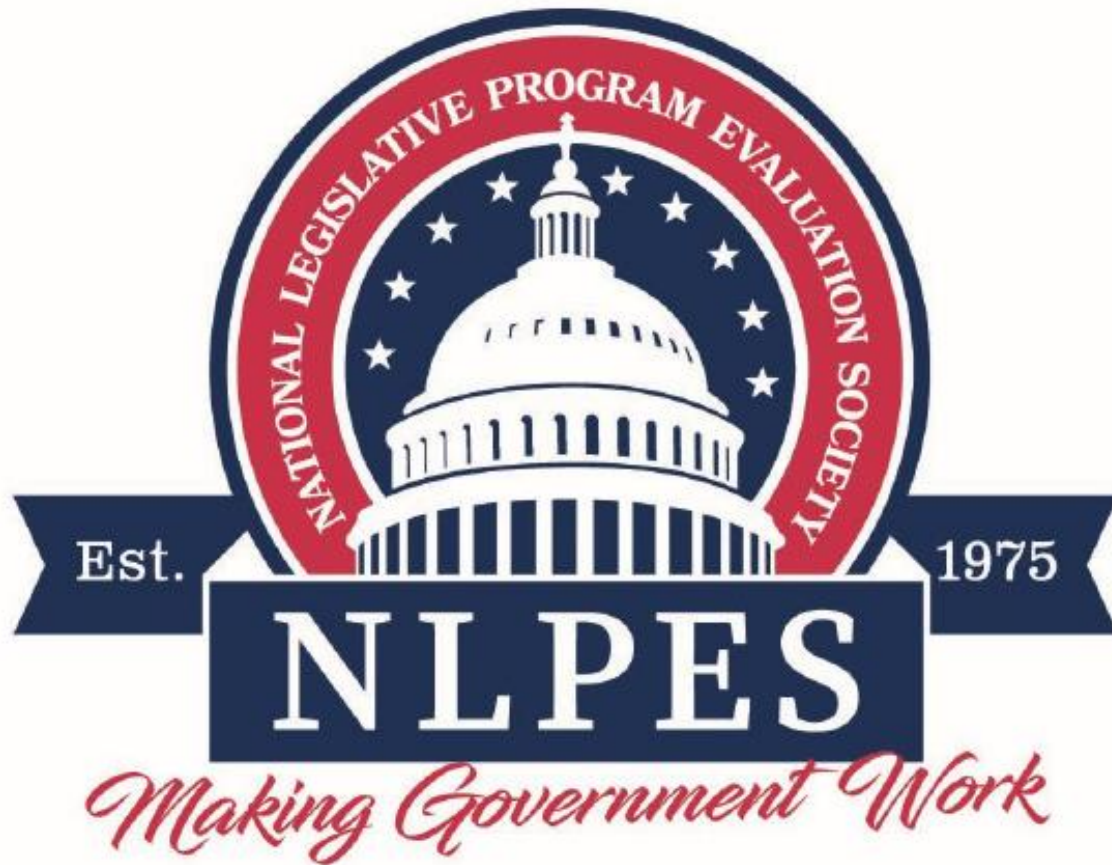
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# REPORT SUMMARY



## Objectives and Scope

- ❖ To examine the impact on plaintiffs of the current limitations on liability.
- ❖ To examine the impact of changing the limitations on liability on state and local government entities.
- ❖ To review the factors contained in the Joint State Government Commission's 1978 report on the recommendations of the task force on sovereign immunity.
- ❖ To consider any other factors that will allow the General Assembly to evaluate and determine whether the limitations on liability should be increased.

This report primarily covers available data from 1970 to 2020.

## Report Overview

The Senate of Pennsylvania adopted Senate Resolution 2021-146 directing the Legislative Budget and Finance Committee (LBFC) to conduct a study and prepare a report concerning the limitations on Commonwealth and local government liability established in Act 1978-152 and Act 1978-330, respectively. Provisions in these laws established liability caps at \$250,000 per individual (\$1,000,000 aggregate) for claims against the Commonwealth and \$500,000 for per incident for claims against local governments.

The limits on liability adopted in 1978 have not since been changed. In two cases, *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1093 (Pa. 2014), and *Grove v. Port Authority. Of Allegheny County*, 218 A.3d 877 (Pa. 2019), the Pennsylvania Supreme Court addressed the issue as to whether the current statutory limitations on liability infringe on the constitutional right to a jury trial guaranteed by Article I, Section 6 of the Constitution of Pennsylvania.

In both cases, the court upheld the caps but acknowledged the court could be faced with a case in which the limitations could render cost-prohibitive a plaintiff's right to a jury trial. The court also acknowledged the superior capacity of the General Assembly to evaluate questions of public policy inherent in any possible need to change the caps. Further, Article I, Section 11 of the Constitution of Pennsylvania vests with the General Assembly the sole authority to determine how and in what cases lawsuits against the Commonwealth are to be brought.

## Impact on State Government

In 1973, the Pennsylvania Supreme Court in *Brown v. Commonwealth*, 453 Pa. 566 (1973), suggested the General Assembly provide for a waiver of sovereign immunity. Ultimately, the General Assembly would debate and pass the Pennsylvania Sovereign Immunity Act, Act 1978-152, which reaffirms the Commonwealth's sovereign immunity, provides for waivers of that immunity in certain circumstances, and limits the maximum recovery for any plaintiff.

The Pennsylvania Department of General Services (DGS) manages the Commonwealth's self-insurance program. Specifically, the Bureau of Finance and Risk Management (FARM) within DGS is responsible for managing claims against the Commonwealth. Currently all Commonwealth agencies (both executive and independent), the state judiciary, and General Assembly participate in the self-insurance program.

While the Commonwealth damage caps are sufficient for 99 percent of claims, the existing General Fund Restricted Receipt Appropriation may not be adequate for the future, regardless of any change to the existing liability cap.

The Office of Attorney General's (OAG) Civil Law Division represents the Commonwealth in lawsuits, including representing Commonwealth executive and independent agencies and their employees in the course of their job duties, along with civil appellate litigation for the Commonwealth.

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*Although the damage caps have not been changed since 1978, the current \$250,000 (\$1,000,000 aggregate) liability cap sufficiently provides relief for over 99 percent of claims against the Commonwealth.*

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We reviewed data for over 360,000 claims against the Commonwealth.<sup>1</sup> Of those claims, 250,178, or 69.3 percent, resulted in no payment to the claimant. It is important to note that in stating that 250,178 claims resulted in no payment, it does not mean that there were no expenses related to them. There are administrative, legal, and/or investigative costs associated with every claim regardless of whether any amount is paid to a claimant. For example, in Fiscal Year 2020, DGS reported claim payments totaled \$13.8 million, but an additional \$860,475 in related expenditures were incurred related to the self-insurance program. Of the 361,082 claims, 110,904, or 30.7 percent of all claims, resulted in a payment to the claimant.

The claims in the highest ranges (\$200,000+) made up less than one percent of the claims that resulted in payment. Claims in this range are an even smaller percentage of all claims against the Commonwealth. The 981 claims with payments in the highest ranges made up 0.27 percent of all claims against the Commonwealth from 1970 through 2021.

To get a clearer picture of what has occurred more recently, we reviewed claims from 2010 through 2020 and separated them by the self-insurance fund type. There were 72,337 total claims during this period. Only 0.2

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<sup>1</sup> To review as much data as possible through the period the current \$250,000 cap (\$1 million aggregate) on liability has been in place, we requested all available data from claims against the Commonwealth from 1978 through 2020. DGS was able to provide some data dating back to the earlier 1970s, however, they noted they cannot verify its accuracy. DGS stated they changed claims tracking systems around 2000 from a paper/hard copy file system to Risk Master software that tracked basic claim information (parties involved, financial information, payments, claim status, correspondence/letters, etc.). Some of the claims submitted prior to 2000 were uploaded from the old system to Risk Master, however, not all case details were uploaded. Additionally, since the older data also predates current staff, they cannot verify the accuracy of the older data. We did not audit the DGS data, and the conclusions that we drew assume the data is complete and accurate.



percent of all claims resulted in payment near the \$250,000 statutory cap, with about 91 percent resulting in payments of \$4,999 or less.

Although the damage caps have not been changed since 1978, the current \$250,000 (\$1,000,000 aggregate) liability cap sufficiently provides relief for over 99 percent of claims against the Commonwealth.

## Impact on Local Government Entities

*The current \$500,000 liability cap is sufficient for over 99 percent of claims against local government entities we reviewed.*

Act 1978-330 reestablished general governmental immunity<sup>2</sup> for political subdivisions (local government entities), made exceptions to the immunity enjoyed by local governments, and placed limitations on said exceptions. The Act limited local government liability to \$500,000 per event or occurrence and limited recovery to specific types of damages. In Section III we provide an historical review of claims against a sample of local government entities and an examination of the impact of changing the limitations on liability for local government entities, including the ability of local government entities to raise revenues and provide services, benefits, and programs.

Local government entities insure against risk in various manners. Pennsylvania Title 42 § 8564 provides several options for local government entities and they may utilize a mix of these to cover different types of assets, areas of liability, or specific funds. For example, a city may self-insure against general liability claims up to a certain dollar amount, and then purchase a commercial policy for a higher dollar amount. A city may join a risk pool for workers compensation and then purchase a commercial policy for another area such as property insurance.

To assess the prevalence of claims near or at the \$500,000 liability cap, we reviewed claims data for local government risk pools, self-insured entities, and commercial carriers for local government entities.<sup>3</sup>

Outside of payouts to a claimant, such as settlements, verdicts, and orders, there are additional costs to insurers, risk pools, and local government entities. Claims that result in no payment to a claimant have costs associated with them. For example, in one of the risk pools for which we reviewed data, a \$200,000 settlement was agreed to. The legal expenses

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<sup>2</sup> This followed the Pennsylvania Supreme Court's abrogation of the common law doctrine of sovereign immunity. See Section VII.

<sup>3</sup> To review as much data as possible through the duration of the current \$500,000 cap on liability, we requested all available data from claims made against local government entities from 1978 through 2020. Not all entities had data spanning multiple decades. In some cases, risk pools did not exist for that entire period, and in other cases tracking systems changed. We did not audit the data we received and the conclusions that we draw are under the assumption it is complete and accurate information. Additionally, we did not adjust the figures for inflation because these were actual amounts paid and the cap itself has not been adjusted for inflation.

to defend the case were just over \$170,000 in addition to another \$12,000 for other expenses related to the claim. In another risk pool, an aggregate data set showed the 2020 general liability claims (167 occurrences) payments totaled \$128,364, but the pool faced an additional \$263,225 in expenses related to those occurrences.

Although this analysis was not a representative sample of all local government entities (because of an inconsistent number of years of data between the entities, various tracking systems, etc.), we think it provides valuable insight into the history of claims since the liability cap has been in place. Over 99 percent of claims we reviewed resulted in a payout to the claimant under \$250,000. The local government entity data we reviewed indicates a small percentage of claims, less than one percent of all claims, resulted in payouts from \$250,000 to the cap of \$500,000. The current cap does not appear to be problematic for most claims.

The Current \$500,000 liability cap is sufficient for over 99 percent of claims against local government entities we reviewed.

## Impact on Plaintiffs

We interviewed individuals involved in three tort claims against an entity created by the Commonwealth, the Commonwealth, and citizens of Philadelphia brought by the City of Philadelphia. The individuals participated with the knowledge that information obtained could be used in our report. We present them in Section IV as case studies to provide additional understanding of a complex issue.

The first case study involved Hayley Freilich who brought a cause of action against the Southeastern Pennsylvania Transportation Authority (SEPTA). It is currently before the Pennsylvania Supreme Court.

The second is a suit brought against the State Correctional Institution at Pittsburgh, Pennsylvania Department of Corrections, and Capital Technologies, Inc.

The third is suit brought by the City of Philadelphia against citizens of Philadelphia to reduce the City's liability for a water main break.

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*For plaintiffs who have been catastrophically injured by governmental entities subject to the caps, the caps are inadequate and have devastating health and financial consequences.*

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**Hayley Freilich.** On October 2, 2017, Ms. Hayley Freilich was struck by a bus operated by the Southeastern Pennsylvania Transportation Authority (SEPTA) as she headed east on Vine Street in downtown Philadelphia. Ms. Freilich had been crossing Broad Street during a green light (she had the right-of-way) while walking within a crosswalk. Just moments before, she had walked in front of the stopped SEPTA bus. Reaching the corner, she turned left, waited for the light to turn green, looked both ways, and

entered the intersection. While she was in the crosswalk, a SEPTA bus turned right from Vine Street onto Broad Street. The bus turned into the crosswalk, struck Ms. Freilich, and ran over her left foot, de-gloving it.

**Dr. Joseph Mollura.** On May 4, 2016, routine water testing in Water Cooling Tower Number One (Cooling Tower One) at State Correctional Institution at Pittsburgh (SCI Pittsburgh) was conducted by Capital Technologies, Inc. (CTI). The testing showed over four times the allowed number of colonies forming units per milliliter of Legionella bacteria. The results of the test were reported to the Pennsylvania Department of Corrections (DOC) on May 12, 2016. Subsequent testing in June, July, and August of 2016 revealed the continued presence of the bacteria.

On August 5, Dr. Mollura went to the emergency room of Orlando Health hospital complaining of a wheezing cough and congestion in the left lung. A chest x-ray revealed severe pneumonia of the left lung. When urinalysis tested positive for *Legionella* antigen, Dr. Mollura was diagnosed with Legionnaire's pneumonia.

The medical staff at Orlando Health were unable to stop the progression of the disease. Dr. Mollura died on August 8, 2016.

**Water Main Break, 21<sup>st</sup> and Bainbridge Streets, Philadelphia.** At approximately 11:00 PM on Sunday, July 22, 2012, a 48-inch water main pipe ruptured at 21<sup>st</sup> and Bainbridge Streets in the Graduate Hospital Neighborhood of Philadelphia. The resulting flood forced the evacuation of about four blocks of residents and caused nearly \$2 million in damage. Over 100 homes and businesses were affected.

According to the Philadelphia Water Department, the break spilled, "several millions of gallons of water" into the street. Additionally, the water caused a sink hole approximately 15 feet deep. The pipe was put in service in 1916.

The City of Philadelphia claimed they were only responsible for \$500,000 in damages, the maximum amount set by 42 Pa.C.S. § 8553. The court appointed a special master to recommend to the court the equitable distribution of the funds.

The City's claims division compiled, and reviewed information supplied by individuals who had their homes damaged. Additionally, the claims division decided what items were compensable and applied a depreciation figure to the amount of the claims.

In total, 85 households and businesses submitted claims. Of those, only 29 had property insurance that also covered water damage. Because of the \$500,000 cap, claimants only received 60 percent of their City approved claim.

The special master charged \$225/hour for his services, totaling \$19,611.49. The fee was paid from the \$500,000 capped amount, reducing the total available funds for claimants. The special master's fee exceeded the amount received by all but one individual claim.

For plaintiffs who have been catastrophically injured by governmental entities subject to the caps, the caps are inadequate and have devastating health and financial consequences.

## **Local Government Entity Survey**

In February 2022, the LBFC distributed a survey to local government entities to determine the impact changes to limitations on liability would have on these entities. The survey objectives were: (1) highlight factors related to limitations on liability, and (2) describe the impact an increase in damage caps could have on local government entities. Within the Commonwealth's 67 counties there are 2,560 municipal corporations, 56 cities, 956 boroughs, one incorporated town, 93 first-class townships, and 1,454 second-class townships. In addition, Pennsylvania has 500 school districts and 1,532 active authorities.

Survey responses were most heavily weighted among municipal governments, at 76.3 percent (193). Of the local government entities that responded, 56.3 percent (129) were from second-class townships. Of the survey respondents, 66.4 percent had a population of fewer than 10,000 residents. Annual budgets varied among respondents, with 26.9 percent having an annual budget of more than 10 million dollars, 21.7 percent between \$500,000 to \$1 Million, and 19.8 percent under \$500,000.

For local government entities that responded to our survey (see Section V), over 50 percent have property and liability insurance coverage through a commercial insurer. Further, over 90 percent of local government entities agree or strongly agree that insurance coverage will become prohibitively expensive in Pennsylvania if damage caps are eliminated or increased based on inflation.

If damage caps were eliminated or increased based on inflation, over 80 percent of local government entities agree or strongly agree that it is likely there will be a negative impact on services provided to the community. The three main services affected, according to these local governments, would be general government, highways and streets, and culture and recreation. Seventy-five percent of local government entities that responded to our survey agree or strongly agree their municipality will likely have to increase taxes/fees.

## Other Factors

As directed in Senate Resolution 2021-146, the LBFC identified other factors the General Assembly may consider as part of its evaluation of the limitations on liability. The sections that follow highlight other factors, such as recent changes in other states, transparency, and inflation that the General Assembly may want to consider when evaluating the need to increase the liability limits.

**Other States.** We reviewed other states' Sovereign Immunity statutes and found that more than half of the states have damage caps. We chose to highlight states based on the most recent changes to their respective sovereign immunity laws and damage cap structure; with an understanding there are different nuances among states.

North Dakota recently made changes (March 2021) to its damage cap, structure, and phased approach. Claims against the state or political subdivision are limited to a total of \$250,000 per person and \$1,000,000 for any number of claims arising from any single occurrence. The damage cap will be adjusted annually, increasing to \$500,000 per person and \$2,000,000 dollars for any number of claims arising from any single occurrence on July 1, 2026. The caps will return to the 2021 level in 2027.

*The damage caps set in 1978 (\$250,000, \$500,000, and \$1,000,000) would be equal to \$1,046,000, \$2,092,000, and \$4,185,000 respectively in 2022.*

In Colorado, for all claims on or after January 1, 2022, and before January 1, 2026, the inflation adjusted limitation is \$424,000 for any injury to one person in any single occurrence, and \$1,195,000 for any injury to two or more persons in any single occurrence; except that, in such instance, no person may recover more than \$424,000.

**Transparency.** The process to obtain claims data among local government entities was complicated and arduous. A statewide reporting system for local government claims data would have allowed for a more in-depth statistical analysis of governmental immunity and its effect on government. Additionally, statewide reporting would allow policymakers to know and understand areas for improving operations to reduce risk.

Currently, the City of New York produces a web-based annual claims report to assist the city's comptroller's office in identifying high claims areas to reduce claims costs and working closely with city agencies to manage risk.

**Inflation.** The liability limits for the Commonwealth were set in 1978 at \$250,000 per plaintiff and \$1 million per event or occurrence. The limit for local government was set at \$500,000 per event or occurrence. The limits on damages have not been changed.

Since 1978, inflation has eroded the purchasing power of certain claimants who suffer “catastrophic injury” or “devastating loss.” For example, in 1978, \$250,000 – the statutory cap for an individual claim against the Commonwealth – purchased a certain amount of goods and services. Today, the same amount of goods and services would cost roughly \$1.04 million.

## Recommendations

We recommend:

1. The General Assembly should consider:
  - Developing new liability caps for economic damages to cover catastrophic claims. This cap should reflect the same purchasing power as the 1978 caps in today’s dollars and should be adjusted for inflation going forward.
  - Maintaining the \$250,000 (\$1 million aggregate) caps for Commonwealth agencies/entities and \$500,000 for local government entities for non-catastrophic claims.
  - Increasing the medical expenses threshold for non-economic damages (pain and suffering) by the same percentage increase as the increases for economic damages in catastrophic cases.
  - Reviewing other states’ most recent changes to their sovereign immunity statutes and damage cap structures.
  - Requiring local government entities to report their insurance carrier for property and liability (insurance) coverage. We suggest using DCED’s municipal statistics database, which currently captures statistics through a required e-filing form.
2. Should the General Assembly raise the Commonwealth’s liability cap, the General Assembly should consult with the Department of General Services’ Bureau of Finance and Risk Management to determine the appropriate General Fund Restricted Receipt Appropriation level for the applicable scenario to best protect Commonwealth agencies/entities.
3. The General Assembly should direct appropriate resources to the Department of Community and Economic Development (DCED) to establish and maintain a statewide reporting system for claims made against local governments.

# Section I

## OBJECTIVES, SCOPE, AND METHODOLOGY



### **Why LBFC Did This Study**

- ❖ *To examine the impact on plaintiffs of the current limitations on liability.*
- ❖ *Recognizing this concern, the Senate passed SR 2021-146 directing LBFC to conduct a study determining the effects of the limits on plaintiffs and defendants.*
- ❖ *This report addresses that question and provides recommendations for the General Assembly to consider.*

### **Introduction**

In 1978 the Pennsylvania General Assembly Enacted Act 1978-152 and Act 1978-330. The first reestablished sovereign immunity<sup>4</sup> for the “Commonwealth, and its officials and employees acting within the scope of their duties.” The statute also waived the Commonwealth’s sovereign immunity in certain limited circumstances and limited its liability. The second placed similar limitations on tort liability for local government entities.

These limits on liability have not been changed since 1978. In two cases, *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1093 (Pa. 2014), and *Grove v. Port Authority. Of Allegheny County*, 218 A.3d 877 (Pa. 2019), the Pennsylvania Supreme Court addressed the issue as to whether the current statutory limitations on liability infringe on the constitutional right to a jury trial guaranteed by Article I, Section 6 of the Constitution of Pennsylvania.

In both cases, the court upheld the caps but acknowledged the court could be faced with a case in which the limitations could render cost-prohibitive a plaintiff’s right to a jury trial. The court also acknowledged the superior capacity of the General Assembly to evaluate questions of public policy inherent in any possible need to change the caps. Further, Article I, Section 11 of the Constitution of Pennsylvania vests with the General Assembly the sole authority to determine how and in what cases lawsuits against the Commonwealth are to be brought.

Responding to this issue, the Senate of Pennsylvania adopted Senate Resolution 2021-146 directing the Legislative Budget and Finance Committee (LBFC) to conduct a study and prepare a report concerning the limitations on liability previously mentioned. See Appendix A for a copy of the resolution.

<sup>4</sup> This followed the Pennsylvania Supreme Court’s abrogation of the common law doctrine of sovereign immunity. See Section VII.

## Objectives

Our study under Senate Resolution 2021-146 has the following objectives:

1. To examine the impact on plaintiffs of the current limitations on liability.
2. To examine the impact of changing the limitations on liability on state and local government entities, including the ability of state and local government entities to raise revenues and provide services, benefits, and programs.
3. To review the factors contained in the Joint State Government Commission's 1978 report on the recommendations of the task force on sovereign immunity as they relate specifically to caps on recovery and waivers of sovereign and governmental immunity.
4. To consider any other factors that will allow the General Assembly to evaluate and determine whether the limitations on liability should be increased.

## Scope

This report primarily covers available data from 1970 to 2021.

## Methodology

To determine the impact of changing liability limitations on the Commonwealth, LBFC staff interviewed Department of General Services (DGS) and Office of Attorney General staff to get an understanding of the Commonwealth self-insurance program and the process of resolving claims against the Commonwealth.

We also obtained data for claims against the Commonwealth to provide an historical context of the existing liability cap. We note several limitations with this data: the use of multiple tracking systems; the lack of detail available with older claims; and DGS staff being unable to verify the accuracy of older claims.

To determine the impact of changing the liability limitation on local government entities, LBFC staff interviewed various local government associations, local government entities, and municipal risk pools. We obtained claims data from the sources we interviewed to provide an historical



context of the existing liability cap. We provided scenarios of changing the current cap to local government entities and risk pools to theorize potential outcomes. We analyzed municipal data submitted to the Department of Community and Economic Development to give context to the current liability cap versus municipal budgets generally. We reviewed current limitations on local government entities in their ability to raise revenue, issue debt, and file for bankruptcy. We reviewed documents related to a municipality that filed for bankruptcy because of a lawsuit.

We also spoke to associations that represent school districts, municipal authorities, local governments, and transit authorities. We spoke with risk pools, an association that represents the commercial insurance industry, a risk-pool reinsurer, a regional transportation authority, a First-class city, DGS, and the Office of Attorney General.

To determine the potential impact changes to limitations on liability could have on local government entities, we developed a local government entities survey. We used a survey structure that included qualitative and quantitative questions.

We reviewed other states' most recent changes to respective sovereign immunity laws and damage cap structures. We reviewed other states' transparency and reporting structures.

We conducted a literature review on the insurance crisis in the United States.

To examine the impact on plaintiffs of the current limitations on liability, LBFC staff interviewed individuals involved in three tort claims against an entity created by the Commonwealth, the Commonwealth, and citizens of Philadelphia brought by the City of Philadelphia (to reduce the initial award). The individuals participated with the knowledge that information obtained from the interview could be used in our public report. The interviews are presented as case studies to provide an understanding of a complex issue. Additionally, we reviewed court documents associated with the claims.

For a list of frequently used abbreviations, please see Appendix B.

## **Acknowledgments**

We acknowledge and appreciate the cooperation we received from the staff of the Department of General Services and the Office of Attorney General in completing the section of this study on the Commonwealth.

Additionally, we acknowledge and appreciate the cooperation of the various municipal risk pools, local government entities, and the following associations: County Commissioners Association of Pennsylvania, Pennsylvania School Boards Association, State Association of Boroughs, Pennsylvania Municipal League, Municipal Authorities Association, Pennsylvania State Association of Township Supervisors, and the Insurance Federation of Pennsylvania in completing the section of this study on local governments. We acknowledge and appreciate the cooperation we received from the staff of the Department of Community and Economic Development in the section of this study on local government and reporting. We also thank the counties, municipal governments, special district governments, school districts, and public transportation agencies that participated in the Local Government Entities survey.

Finally, we appreciate the participation of Ms. Hayley Freilich, Mrs. Maria Mollura, Mr. Jim McLaughlin, Ms. Marla Rosenberg, and Ms. Kathy Pernini in providing their personal accounts and related documents for the case studies in this report.

## **Important Note**

This report was developed by the staff of the Legislative Budget and Finance Committee, including project manager Christopher Latta and staff analysts Stevi Sprenkle, Shanika Mitchell-Saint Jean, and Rebanta Mukherjee. The release of this report should not be construed as an indication that the Committee as a whole, or its individual members, necessarily concur with the report's findings, conclusions, or recommendations.

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## SECTION II IMPACT OF CHANGING LIABILITY LIMITATIONS ON STATE GOVERNMENT



### **Fast Facts...**

- ❖ *Of the 361,082 claims against the Commonwealth in the data we reviewed, 69.3 percent resulted in no payment to the claimant.*
- ❖ *Of the 110,904 claims in which payment was made to a claimant, 89.7 percent were \$5,000 or less.*
- ❖ *The current self-insurance program collects a total of \$9.5 million annually from participating Commonwealth agencies/entities. Another \$9 million is appropriated from the Motor License Fund for specific PennDOT claims.*

### **Overview**

As noted in Senate Resolution 2021-146, the Pennsylvania Supreme Court holding in *Brown v. Commonwealth*, 453 Pa. 566 (1973) suggested the General Assembly provide for a waiver of sovereign immunity. Upon reviewing this issue, the Task Force on Sovereign Immunity reaffirmed and resolved to retain the Commonwealth's sovereign immunity. The Task Force recommended the maximum recovery for any plaintiff be limited to \$250,000 and the maximum liability exposure for the Commonwealth be limited to \$1 million per event or occurrence. This ultimately became the language of the Pennsylvania Sovereign Immunity Act, Act 1978-152.<sup>5</sup> In this section we provide an historical review of claims against the Commonwealth and an examination of the impact of changing the limitations on liability on state government, including the ability of state government to raise revenues and provide services, benefits, and programs.

We found:

1. The current \$250,000 (\$1,000,000 aggregate) liability cap sufficiently provides relief for over 99 percent of claims against the Commonwealth.
2. The existing General Fund Restricted Receipt Appropriation to the Department of General Services may not be adequate for the future, regardless of any change to the existing liability cap.

<sup>5</sup> Act 1978-152 was repealed and replaced by Act 1980-142 on October 5, 1980; however, the Commonwealth cap remained the same in Title 42 after Act 1980-142 became effective.

## Issue Areas

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### A. Commonwealth Self-Insurance Program and Historical Claims Perspective

**Pennsylvania Self-Insurance Program.** To consider the impact of changing the limitations on liability on the Commonwealth, we first discuss how the Commonwealth insures against tort claims. Section 2404(b) of the Administrative Code of 1929 requires the procurement of “public liability insurance covering all state employees, including members of boards and commissions, while engaged in the performance of their duties.” Based on our research, the decision for the Commonwealth to self-insure dates to the 1970s. As noted in *Official Opinion 1976-25 of the Office of the Attorney General*:

For six years prior to March of 1975, the Commonwealth carried a public liability insurance policy covering State employees while engaged in the performance of their duties. Before the expiration of the policy on March 17, 1975, the Department of Property and Supplies (predecessor to the Department of General Services) contacted hundreds of insurance companies inviting them to bid on specifications for a new public liability insurance policy, but in the end only one bid was received, and that bid did not comply with the specifications.

In view of this development, the Department devised a plan for establishing a fund by assessing each department, board and commission of the Commonwealth a certain amount per employee similar to the previous method of assessing each department, board or commission for its pro rata share of the premium paid for the liability insurance policy.<sup>6</sup>

The decision to self-insure amid the waiver of sovereign immunity was also evident in the Pennsylvania House Appropriations Committee hearing in 1979 in which the Department of General Services presented its Fiscal Year 1979-80 budget request:

This year our budget request must include appropriations for the payment of Tort claims and the administration of these Tort claims. With the passage of [The State Sovereign Immunity Act] constitutional sovereign

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<sup>6</sup> Office of the Attorney General of Pennsylvania. (1976) *Opinions of the Attorney General of Pennsylvania 1976*. [https://www.attorneygeneral.gov/wp-content/uploads/2018/01/1976\\_AG\\_Kane\\_opinions.pdf](https://www.attorneygeneral.gov/wp-content/uploads/2018/01/1976_AG_Kane_opinions.pdf).

immunity was reaffirmed with eight specific areas of liability where immunity is waived. It now becomes necessary to establish a plan of action in order to conform with the legal dictates of the waived immunity. The Department of General Services and the Attorney General have agreed that the best course of action is to self-insure these eight areas of waived immunity. This Department will handle all of the pre-litigation of claims within the guidelines established by the Attorney General and the disbursement of funds on claims that are settled. The responsibility to defend the Commonwealth through the litigation process will rest solely with the Attorney General.<sup>7</sup>

A nearly identical system of risk management for the Commonwealth exists today. We outline this system below.

**Department of General Services.** The Pennsylvania Department of General Services (DGS) manages the Commonwealth's self-insurance program. Specifically, the Bureau of Finance and Risk Management (FARM) within DGS is responsible for managing claims against the Commonwealth. Currently all Commonwealth agencies (both executive and independent), the state judiciary, and General Assembly participate in the self-insurance program.

The Underwriting and Claims Division does an annual review of each agency to determine the amount it must pay into the self-insurance program. Much like underwriting in commercial insurance, there are many variables considered such as history of claims, number of employees, number of properties, number of fleet vehicles, etc. DGS also contracts with an actuarial firm to perform estimated outstanding losses likely to occur to help determine the necessary funding levels of the self-insurance program.

The Tort Claims Pre-Litigation Division reviews, investigates, and negotiates settlements of claims and lawsuits against the Commonwealth and its employees, including notifying the Office of the Attorney General and the General Counsel's Office of claims resulting in lawsuits. The division also manages the claims reporting system which is used for annual financial reporting and budgeting for the self-insurance program.

**Office of the Attorney General.** The Office of the Attorney General's (OAG) Civil Law Division represents the Commonwealth in lawsuits, including representing Commonwealth executive and independent

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<sup>7</sup> Commonwealth of Pennsylvania House of Representatives Committee on Appropriations. (1979, April 4) *In Re: Capital Budget Request – 1979-80 General Services*. [https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/1979\\_0043T.pdf](https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/1979_0043T.pdf).

agencies and their employees in the course of their job duties,<sup>8</sup> along with civil appellate litigation for the Commonwealth.

**Types of Commonwealth Claims.** The Commonwealth self-insurance program is broken into four different “fund” types as outlined below:

- **Motor License Fund Tort Claims.** These funds are unique from the other self-insurance funds managed by DGS. These claims are paid by an appropriation under the Motor License Fund (MLF) as a separate line item. They are used for claims made against the Pennsylvania Department of Transportation (PennDOT), except claims caused by PennDOT vehicles (which are covered by the automobile liability fund below).
- **Employee Liability.** The Employee Liability Self-Insurance Program (ELSIP) covers claims or suits against specifically named officials or employees, acting in good faith within the scope of employment for unintentional acts in civil rights and errors and omissions situations. These claims are funded by the General Fund.
- **Automobile Liability.** The Auto Liability Self-Insurance Program (ALSIP) covers any claims arising from the use of a vehicle owned by the Commonwealth. These claims are funded by the General Fund.
- **General Tort Liability.** The General Tort Claims Self-Insurance Program (GTCSIP or “general torts”) covers claims for liability caused by any agency (except PennDOT), except for claims covered under ALSIP and ELSIP. As addressed in “Management Directive 310.41, Reporting of General Tort Fund Claims” issued on September 15, 2021, this fund covers claims up to \$20,000 per occurrence, with the remainder paid for by the agency the claim is against. This will be discussed further in the section on the Commonwealth’s ability to increase the current caps. These claims are also funded by the General Fund.

**Self-Insurance Premiums.** Premiums are determined by a General Fund restricted receipt appropriation,<sup>9</sup> except for Motor License Tort Fund

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<sup>8</sup> Not all lawsuits against the Commonwealth (and its employees) are defended by OAG. Management Directive 310.41, Reporting of General Tort Fund Claims, states: An attorney assigned by the Office of the Attorney General will defend the Agency or Entity in the event of a civil suit filed unless a conflict or other special circumstances prohibit the same. At the OAG’s discretion, legal representation may be delegated back to the respective Agency or Entity counsel. An Agency or Entity has the right to obtain its own counsel upon receipt of the appropriate delegation from the OAG. DGS retains the right, when appropriate, to preclude or otherwise limit the payment of attorney’s fees and litigation costs associated with the Agency’s or Entity’s choice to use outside counsel.

<sup>9</sup> Restricted Revenues: Monies designated either by law or by administrative decision for specific purposes. The revenues are deposited in the General Fund or in certain special funds but reported separately. Restricted revenue accounts continue from one year to the next and finance a regular operation of state government. Disbursements from restricted revenue accounts must be accounted for as expenses of state government. (Commonwealth of Pennsylvania, *Executive Budget, 2022-2023*). [https://www.budget.pa.gov/Publications%20and%20Reports/Documents/Other-Publications/Budget%20Book%202022-23\\_Web%20Version.Updated.pdf](https://www.budget.pa.gov/Publications%20and%20Reports/Documents/Other-Publications/Budget%20Book%202022-23_Web%20Version.Updated.pdf).

claims, which are set by a specific Motor License Fund appropriation. The total amount for each fund/claim type (employee, automobile, and general tort) is determined by the appropriation and is then divided among the participating Commonwealth agencies/entities. Each agency/entity pays their pro rata share of the premium based on the equations shown in Exhibit 1 below.

Exhibit 1

**Commonwealth Self-Insurance Premiums**

Program	Total Premium Amount Collected	Equations for Determining Each Participating Commonwealth Agency/Entity Share of the Premium <sup>a/</sup>
ALSIP (General Fund)	\$3,250,000 divided among the participating Commonwealth agencies/entities	Number of Vehicles (75%) and 5 Year Loss History (25%)
ELSIP (General Fund)	\$5,750,000 divided among the participating Commonwealth agencies/entities	Number of Employees (25%) and 10 Year Loss History (75%)
General Torts (General Fund)	\$500,000 divided among the participating Commonwealth agencies/entities <sup>b/</sup>	Number of Employees (15%) and 5 Year Loss History (85%)
Motor License Tort Fund	\$9,000,000 appropriation <sup>c/</sup> (Only applies to PennDOT)	Annual appropriation request based on history of claims

**Notes:**

<sup>a/</sup> According to DGS, a 10-year loss history is used in the billing equation for the ELSIP fund because the types of claims that are covered by this fund typically take much longer to resolve than other torts. A 5-year loss history is used in the billing equation for the ALSIP and general tort funds because the types of claims that are covered by these funds can usually be resolved quickly.

<sup>b/</sup> Currently this fund covers claims up to \$20,000 and any additional costs are charged to the agency/entity.

<sup>c/</sup> This appropriation amount was lowered in 2017 from \$10 million to better reflect actual expenditures.

Source: Developed by LBFC staff from information provided by the Department of General Services.

**Pennsylvania Claims Data.** To consider the impact of raising the current \$250,000 cap on liability on claims against the Commonwealth, we requested historical claims data from DGS. While historical data is not a guarantee of future events, historical data is often used in the insurance industry to help predict risk.

**Data Limitations.** To review as much data as possible through the period the current \$250,000 cap (\$1 million aggregate) on liability has been in place, we requested all available data from claims against the Commonwealth from 1978 through 2020. DGS was able to provide some data dating back to the earlier 1970s, however, they noted they cannot

verify its accuracy.<sup>10</sup> DGS stated they changed claims tracking systems around 2000 from a paper/hard copy file system to Risk Master software that tracks basic claim information (parties involved, financial information, payments, claim status, correspondence/letters, etc.). Some of the claims submitted prior to 2000 were uploaded from the old system to Risk Master, however, not all case details were uploaded. Additionally, since the older data also predates current staff, they cannot verify the accuracy of the older data.<sup>11</sup> We did not audit the DGS data, and the conclusions that we drew assume the data is complete and accurate.

The DGS data also includes data for claims that may have been outside the scope of this report, meaning that claims that were ultimately decided in federal court are included. According to DGS, “presently, there is no way for FARM to differentiate between claims that were filed in Federal Court versus those claims filed in State Court.” We noted nine claims (out of 110,904) that resulted in payment to claimant(s) over \$1 million (the cap for multiple claimants under the state Sovereign Immunity Act) which would likely mean those occurred from a federal court claim such as a U.S. Civil Rights violation, but for claims under \$1 million we cannot determine how many were payments to claimants resulting from federal actions.

Additionally, we note that we did not adjust the figures for inflation because the figures shown were actual amounts paid and the cap itself has not been adjusted for inflation.

***Claims Resulting in Payment to Claimant.*** We reviewed data for over 360,000 claims against the Commonwealth. Of those claims, 250,178, or 69.3 percent, resulted in no payment to the claimant. It is important to note that in stating that 250,178 claims resulted in no payment, it does not mean that there were no expenses related to them. There are administrative, legal, and/or investigative costs associated with every claim regardless of whether any amount is paid to a claimant. For example, in FY 2020, DGS reported claim payments totaled \$13.8 million, but an additional \$860,475 in non-payout related expenditures were incurred related to the self-insurance program.<sup>12</sup>

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<sup>10</sup> This includes claims that may have occurred between 1970 and 1978 but were not paid until years later.

<sup>11</sup> Although we did not review any 2022 data, we wanted to note that DGS implemented a new claim tracking system on February 1, 2022, utilizing Origami Risk software. According to DGS, “with Origami, FARM will be able to store and manage all its claim[s] accurately.”

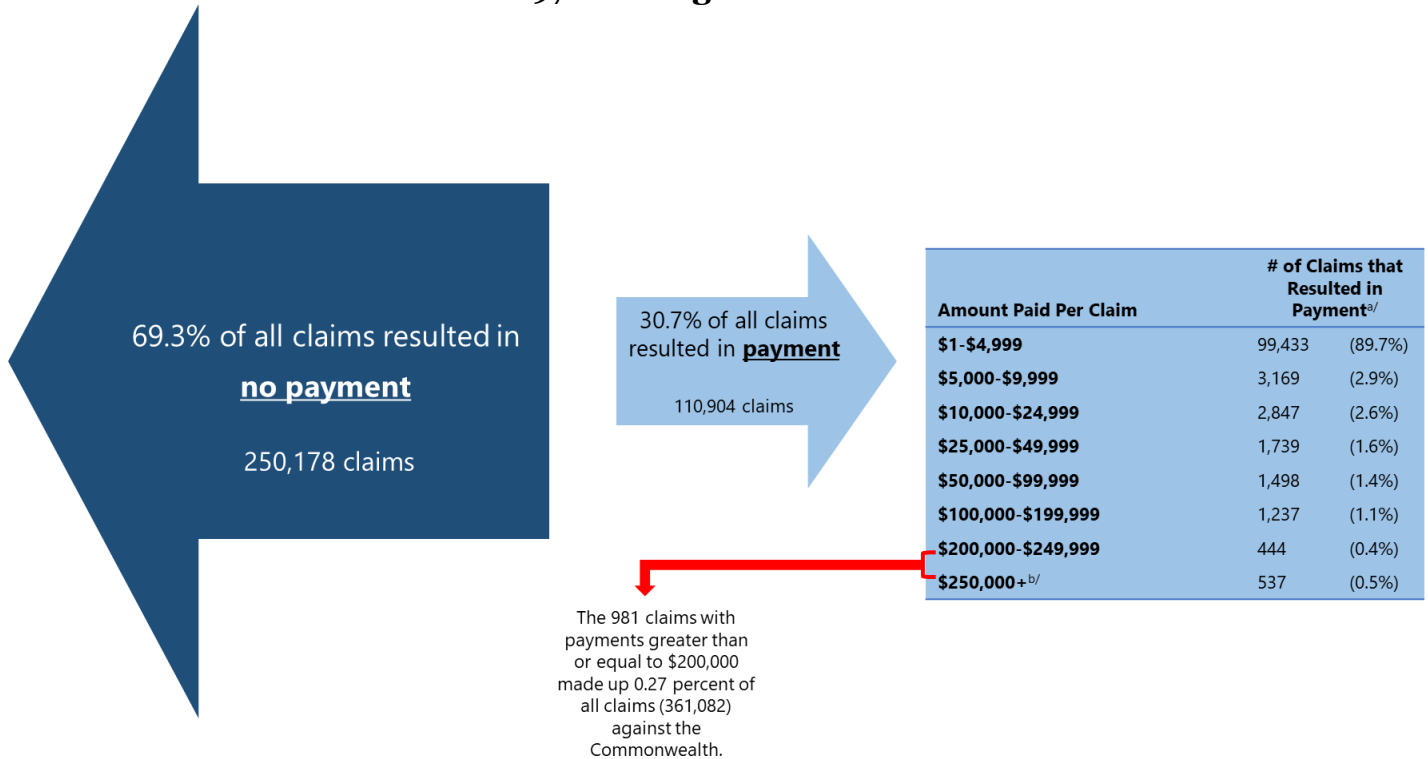
<sup>12</sup> These payments and expenditures were the total of general tort, employee, and auto liability claims.



Of the 361,082 claims, 110,904, or 30.7 percent of all claims, resulted in a payment to the claimant. Exhibit 2 shows the payment ranges.

Exhibit 2

**Summary of Claims Against Commonwealth Agencies/Entities  
 1970 through 2021<sup>\*/</sup>**



**Notes:**

<sup>\*/</sup> Includes claims where the event occurred in 1970 or later but were not paid until after 1978. The claims go through November 2021.

<sup>a/</sup> Sum of percentages greater than 100 percent due to rounding.

<sup>b/</sup> Range includes claims that were over the \$250,000 cap because of multiple claimants, and nine claims that were over \$1 million (likely because they were payouts that occurred outside of the State Sovereign Immunity Act exceptions although DGS was unable to provide the exact circumstances). One of the nine claims involved 10 claimants each receiving payments of \$250,000 (\$2.5 million total for the event), however, because the event occurred in 1985 the department was unable to retrieve details about the circumstances surrounding the case.

Source: Developed by LBFC staff from information provided by the Department of General Services.

As shown, the overwhelming majority, or 89.7 percent, of claims in which payment was made to a claimant resulted in payments under \$5,000.

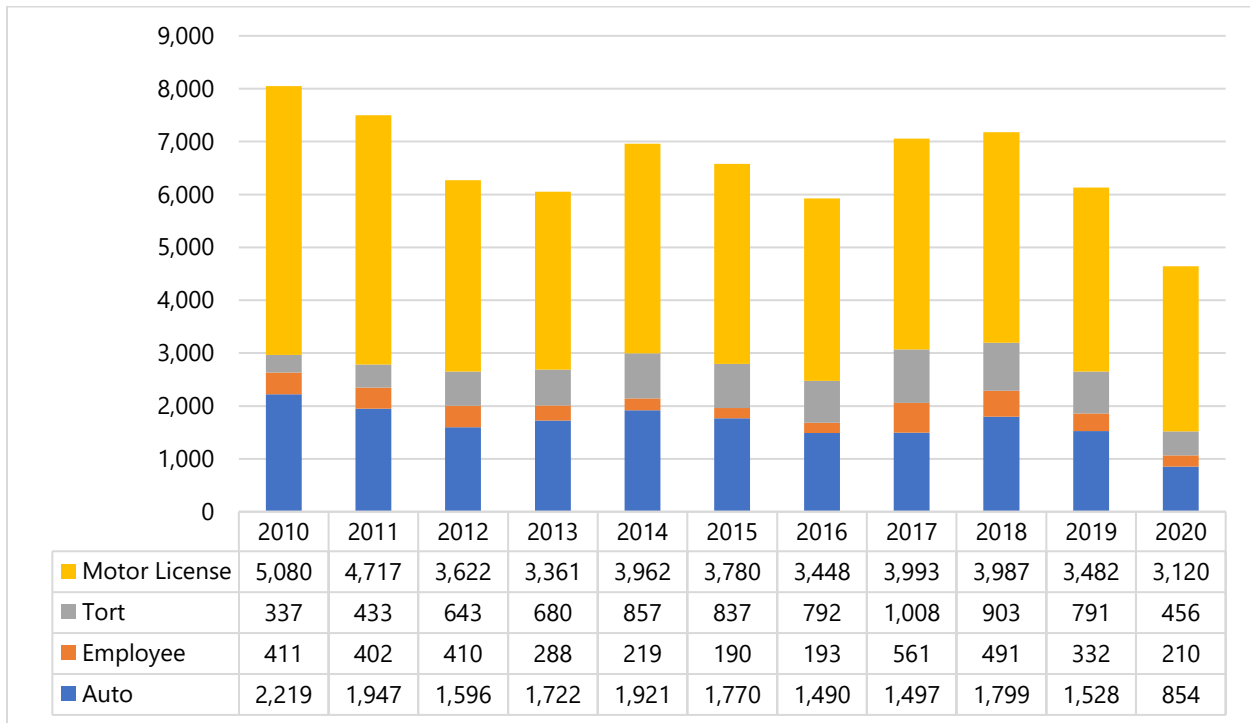
The claims in the highest ranges (\$200,000 or more) made up less than 1 percent of the claims that resulted in payment. Claims in this range are an even smaller percentage of all claims against the Commonwealth. The

981 claims with payments in the highest ranges (\$200,000 or more) made up 0.27 percent of all claims against the Commonwealth from 1970 through 2021.<sup>13</sup>

To get a clearer picture of what has occurred more recently, we reviewed claims from 2010 through 2020 and separated them by the self-insurance fund type. There were 72,337 total claims during this period. Most of the claims against the Commonwealth are the claims covered by the Motor License Tort Fund, and the least common were the employee claims (under the General Fund). See Exhibit 3.

### Exhibit 3

#### All Claims Against the Commonwealth by Self-Insurance Fund Type 2010 through 2020



**Note:**

Date indicates when the event occurred and was not always the same year that the claim was paid.

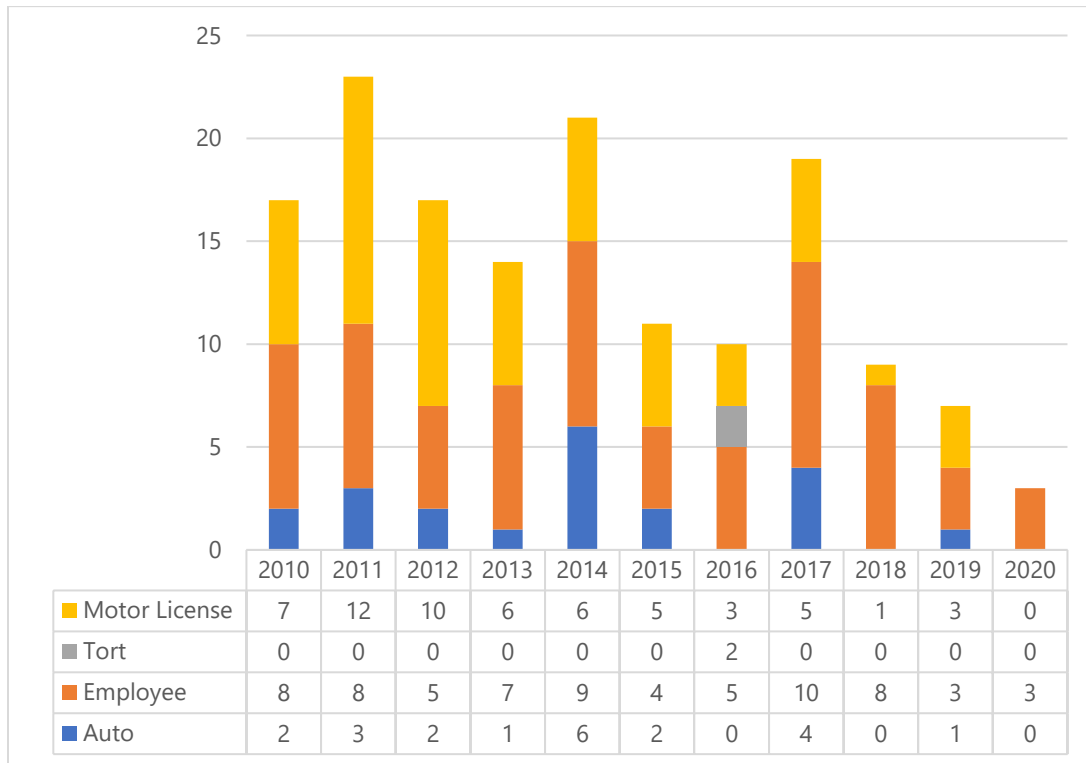
Source: Developed by LBFC staff from information provided by the Department of General Services.

<sup>13</sup> This includes claims that the event occurred in 1970 and later but were not paid until after 1978. The claims go through November 2021.

From 2010 through 2020, 26,726 claims (or 36.9 percent) of the 72,339 total claims resulted in payment. Of the claims that resulted in payment, 151 claims (or 0.6 percent) were greater than or equal to \$200,000.<sup>14</sup> Put another way, only 0.2 percent of all claims resulted in payment near the \$250,000 statutory cap. Exhibit 4 shows the fund type used to pay the 151 claims with payment at or over \$200,000 (2010 through 2020).

Exhibit 4

**Commonwealth Claims Paid Greater Than or Equal to \$200,000\*/  
2010 through 2020\*\*/**



**Notes:**

\*DGS stated they cannot differentiate between claims that fell under the State Sovereign Immunity Act and claims that were brought in federal courts (which do not have a liability cap), therefore, these numbers may overstate the claims that apply to the state Sovereign Immunity Act.

\*\*Date indicates when the event occurred and was not always the same year that the claim was paid.

Source: Developed by LBFC staff from information provided by the Department of General Services.

<sup>14</sup> From 2010 through 2020, 24,191 claims (or 90.5 percent) resulted in payment between \$1 and \$4,999. Another 2,384 claims (or 8.9 percent) resulted in payouts between \$5,000 and \$199,999. The remaining 151 claims (or 0.6 percent) out of 26,726 claims where payment was made were greater than or equal to \$200,000.

As shown on Exhibit 4, the employee claims were most common in the claims resulting in payment over \$200,000. Overall, the claims that resulted in a payment to claimants greater than or equal to \$200,000 made up only 0.2 percent of all claims filed against the Commonwealth from 2010 through 2020.

In Exhibit 5 we show the Commonwealth agencies and entities for which claims were paid that were greater than or equal to \$200,000 from 2010 through 2020.

Exhibit 5

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**Commonwealth Agencies/Entities with Claims Paid  
Greater than or Equal to \$200,000  
2010 through 2020**

Agency/Entity	Number of Claims
Attorney General	3
Conservation and Natural Resources	1
Court Administration	1
Education	1
Environmental Protection	1
Corrections	24
Game Commission	1
General Services	1
Health	1
House of Representatives	4
Labor and Industry	3
Liquor Control Board	1
Military and Veteran's Affairs	2
Milk Marketing Board	1
Public Welfare	1
Revenue	3
State System of Higher Education	14
State	1
State Police	17
Transportation	70
<b>Total:</b>	<b>151</b>

**Note:**

DGS stated they cannot differentiate between claims that fell under the State Sovereign Immunity Act and claims that were brought in federal courts (which do not have a liability cap), therefore, these numbers may overstate the claims that apply to the state Sovereign Immunity Act. For example, we know there were three claims between 2010 to 2020 that resulted in payment over \$1 million (all three were claims against the Department of Corrections).

Source: Developed by LBFC staff from information provided by the Department of General Services.

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These claims were more likely to occur against agencies/entities that have the most interaction with the public, university students, or prisoners.

As the data shows, few claims are at or near the statutory cap (which we defined as \$200,000 or more). Over the 10-year period (2010 through 2020), 99.8 percent of all claims resulted in a payout of less than \$200,000. Despite claims greater than or equal to \$200,000 being only 0.2 percent of all claims during that period, claims greater than or equal to \$200,000 totaled \$58.2 million, which was 39.2 percent of the \$148.3 million in total payouts from 2010 through 2020.

It is likely that some of the 151 claims shown as being greater than or equal to \$200,000 were federal claims, with state Sovereign Immunity Act claims likely occurring in even fewer than in 0.2 percent of the claims. Since DGS stated they could not differentiate between the claims that fell under the state Sovereign Immunity Act versus those under federal law, we likely overstate how many claims were at or near the Commonwealth's liability cap.

We do not doubt or question the seriousness of claimants' cases, however the data we reviewed do not support the need to raise the liability cap for all claims against the Commonwealth.

The General Assembly is often asked to weigh competing interests and this area is no exception. While on the surface it does seem that a cap established over 40 years ago may be out-of-date compared to today's dollar, the data over the last 40 years, and specifically for the last decade, indicates \$250,000 per individual claimant remains a reasonable payment limit for over 99 percent of claims against the Commonwealth. In the next section we will discuss what the impact of changing the cap might be.

## **B. The impact of changing \$250,000 (\$1,000,000 aggregate) cap on liability and the ability of the Commonwealth to raise revenues and provide services, benefits, and programs**

Increasing the \$250,000 (\$1,000,000 aggregate) cap on liability or eliminating the cap all together would have an almost immediate impact on the Commonwealth, its agencies/entities, and its self-insurance program. Changing the \$250,000 cap would undoubtedly create more uncertainty and less predictability for future payments. If self-insurance and claim costs against the Commonwealth rise, this would require an increase in

revenue, a decrease in current expenditures for various government programs, or a combination of both.

Under the current self-insurance program, arguably the Commonwealth does not appropriate enough funds within the current General Fund restricted receipt appropriation account (\$9.5 million between auto, employee, and general tort). According to the actuarial reports completed by a contractor from 2009 through 2021, the Commonwealth is often made aware that budgetary reserves in the self-insurance program may not be enough to cover the actuary's projections for estimated losses in the future. This is also made evident by the fact that DGS made the decision to internally cap all general tort claims to \$20,000 per occurrence (for claims that result in payment over \$20,000, the difference is charged back to the agency/entity). This was done through a Management Directive (310.41, Reporting of General Tort Fund Claims) enacted on September 15, 2021, which states:

The limitation of coverage provided by the General Tort Fund shall be established annually by DGS based on thorough review of the solvency of the General Tort Fund and the five-year loss history of claims paid. The event threshold will be communicated no later than July 15 of each fiscal year to all Agencies and Entities participating in the program. This event threshold is inclusive of all expenses related to the claim such as litigation costs and attorney's fees.<sup>15</sup>

If the total judgement or settlement costs along with paid expenses exceed the event limitation of coverage, DGS shall issue an invoice for payment of all costs exceeding event limitation of coverage to the Agency or Entity Office of Chief Counsel. DGS will not pay such a judgment or settlement amount until funds exceeding the event limitation of coverage have been paid to DGS.<sup>16</sup>

Even though general torts are the smallest group of claims, the \$500,000 total premium to cover general tort claims has proven to not be enough when stretched across the various agencies/entities in recent years. Because DGS is limited in the total amount they can collect from agencies/entities they have to internally limit the amount the fund can cover. DGS further explains it this way:

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<sup>15</sup> Commonwealth of Pennsylvania. (2021) *Management Directive 310.41, Reporting of General Tort Fund Claims*. Section 5 (b). <https://www.oa.pa.gov/Policies/md/Documents/310-41.pdf>

<sup>16</sup> Commonwealth of Pennsylvania. (2021) *Management Directive 310.41, Reporting of General Tort Fund Claims*. Section 7 (f). <https://www.oa.pa.gov/Policies/md/Documents/310-41.pdf>

FARM receives a total of \$9,500,000 within Restricted Receipt Appropriations from the General Assembly for its funds each year. The Restricted Receipts are split between the Auto, Employee, and Tort self-insurance funds based upon recommendations made in an actuarial report FARM has completed [*sic*] each year and the actual loss history for each fund. The trend indicates the \$9,500,000 allocation may not be enough money to pay the claims filed against the Commonwealth in future years. Currently, the total assessment amount each agency/entity is responsible for paying is based upon several factors, including loss history. The Office of Budget prohibits FARM from collecting more than the total amount of approved Restricted Receipt appropriation (which has remained \$9,500,000 for several years) from participating agencies/entities. The General Assembly would need to increase the amount in order for FARM to increase the amount it can assess each agency/entity.

This means that under the current funds appropriated from the General Fund to DGS for the purpose of Commonwealth self-insurance, any changes that are made to the liability cap would likely result in a similar situation that exists for general torts. Essentially there would be an internal limit set at the amount of the self-insurance fund appropriation, and any claims over that threshold would get charged back to the agency/entity in which the claim occurred. DGS stated that "an increase to, or the elimination of, the \$250,000 statutory cap would not affect the amount FARM can assess each participating agency/entity. The General Assembly would need to increase the Restricted Receipt Appropriations amount in order for FARM to increase the amount it can assess each agency/entity." DGS had the same response when we asked if the cap remained, but exceptions were made for catastrophic circumstances (such as death).

We again caution against the notion that the cap must be raised on all claims against the Commonwealth. There are no guarantees that increasing the caps on all claims would not increase the amount paid on individual claims. For example, raising the cap on all claims begs the question, "does a claim that resulted in a \$50,000 payout previously now become a \$100,000 payout simply because the "value" of the highest claims has increased?" As we previously showed, most historical claims are far below the statutory cap and never reached the level that raised concerns by members of the state Supreme Court. However, four of the current nine justices have expressed the concern that doing nothing could ultimately result in a complete removal of the cap:

In the event that the Legislature does not so act, this Court may be faced with a developed challenge to the

statutory caps as violative of the constitutionally guaranteed right to a jury trial. If a plaintiff properly constructs a record to establish that the statutory caps place an onerous burden on his or her right to a jury trial, *this Court may be compelled to strike the cap, which could leave the Commonwealth or the local governments exposed to full liability if, and until, new legislation is passed.*<sup>17</sup> [emphasis added]

Although the Chief Justice did not respond to our request to discuss this issue, we believe the court's concern can be addressed, and elimination of the cap avoided by carving out some of the factors we discuss in Section IV. We also believe to fiscally prepare for any changes the General Assembly may make, the self-insurance funds will need to be increased (through the restricted receipt appropriations).<sup>18</sup> Either way, funds to pay claims will need to come from the General Fund (and MLF for the specific PennDOT claims) whether it is already set aside in the self-insurance funds or from charge backs to the agencies/entities after a claim is paid. If the objective of the self-insurance program remains "to protect the health and welfare of the Commonwealth's employees and maintain the financial integrity of the Commonwealth's assets," and to "seek the most economical ways to manage the impact of risk" we believe that is through building a strong reserve.<sup>19</sup> Building a reserve through the budget process allows Commonwealth agencies/entities to continue to "pool" their risk instead of leaving agencies/entities scrambling to pay for claims after claims occur.

Aside from the General Fund, the Motor License Tort Fund appropriation today stands fiscally strong against claims. For example, the appropriation request was lowered in 2017 to \$9 million, because of continued budgetary surpluses in this fund. This same amount was requested for the upcoming 2022-23 fiscal year.<sup>20</sup> If the General Assembly should change the liability cap; DGS may have to request an increase in that appropriation in the future.

We know state revenues are uncertain in post-pandemic recovery. In its "Economic and Budget Outlook for Fiscal Years 2021-22 to 2026-27," the Independent Fiscal Office projected a "substantial surplus" for current

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<sup>17</sup> *Grove v. Port Authority of Allegheny County*, 218 A.3d 877 (Pa. 2019) (Baer, J., concurring).

<sup>18</sup> It is important to remember that the Commonwealth has also faced claims significantly higher than the caps for actions against the Commonwealth that were challenged in federal court. While those claims were outside the scope of this study they are uncapped and must be budgeted for from the same funding sources.

<sup>19</sup> *Actuarial Study of the Torts Self-Insurance Program of Commonwealth of Pennsylvania*. (2021, July 3) Revielle Consulting Services.

<sup>20</sup> Pennsylvania Department of General Services. *Budget Fiscal Year 2022-2023*. <https://www.dgs.pa.gov/Documents/Appropriations%20Budgetary%20Submissions/15-DGS-FY-2022-Budget-Hearing-Request.pdf>.



Fiscal Year 2021-22, “but operating deficits for future years.”<sup>21</sup> Adding liability uncertainties by way of changing the cap could create difficulties with budgeting for existing programs and spending levels. On the other hand, to avoid the Court from striking the liability cap altogether and exposing the Commonwealth to unlimited risk and potentially immense fiscal harm, preemptive changes to the cap should be considered. If the General Assembly determines there is a need for change to the existing cap (in whole or in part), DGS and its contracted actuary should be consulted for specific amendments to the General Fund Restricted Receipt Appropriation for the self-insurance programs. While doing so will require funds to be diverted from other areas of the General Fund, it could protect Commonwealth agencies/entities and help preserve their existing services, benefits, and programs.

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<sup>21</sup> Pennsylvania Independent Fiscal Office. (2021, November) *Pennsylvania Economic and Budget Outlook Fiscal Years 2021-22 to 2026-27*. [http://www.ifo.state.pa.us/download.cfm?file=Resources/Documents/Five\\_Year\\_Outlook\\_2021.pdf](http://www.ifo.state.pa.us/download.cfm?file=Resources/Documents/Five_Year_Outlook_2021.pdf)

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# SECTION III

## IMPACT OF CHANGING LIABILITY LIMITATIONS ON LOCAL GOVERNMENT ENTITIES



### **Fast Facts...**

- ❖ *Of the 118,202 local government entity claims we reviewed; 0.43 percent resulted in payouts between \$250,000 to \$500,000.*
- ❖ *In one risk pool data set we reviewed, their general liability claims (167 occurrences) in 2020 totaled \$128,364, but the pool faced an additional \$263,225 in expenses related to those occurrences.*
- ❖ *The only Pennsylvania township to be deemed financially distressed was due to a multi-million-dollar lawsuit.*

### **Overview**

Act 330 of 1978<sup>22</sup> reestablished general governmental immunity for political subdivisions (local governments), made exceptions to the immunity enjoyed by local governments, and placed limitations on said exceptions.<sup>23</sup> The Act limited local government liability to \$500,000 per event or occurrence and limited recovery to specific types of damages.<sup>24</sup> In this section we provide an historical review of claims against a sample of local government entities and an examination of the impact of changing the limitations on liability for local government entities, including the ability of local government entities to raise revenues and provide services, benefits, and programs.

We found:

1. The current \$500,000 liability cap is sufficient for over 99 percent of claims against the local government entities we reviewed.
2. Local government entities are limited by state law in their ability to generate revenue, issue debt, and file for bankruptcy.
3. The ability of local government entities to adjust revenues and/or services provided if liability caps were to be eliminated or increased, varies greatly based on many different factors, e.g., state laws, current revenue sources, tax base, fiscal health, and local priorities.

<sup>22</sup> Act 1978-330 was repealed and replaced by Act 1980-142.

<sup>23</sup> Specifically, Act 1978-330 reestablished general governmental immunity for local governments by providing that local governments would not be liable for any damages on account of any injury to a person or property caused by any act or omission of the local government or its employees.

<sup>24</sup> See 42 Pa.C.S. §§ 8542 and 8553.

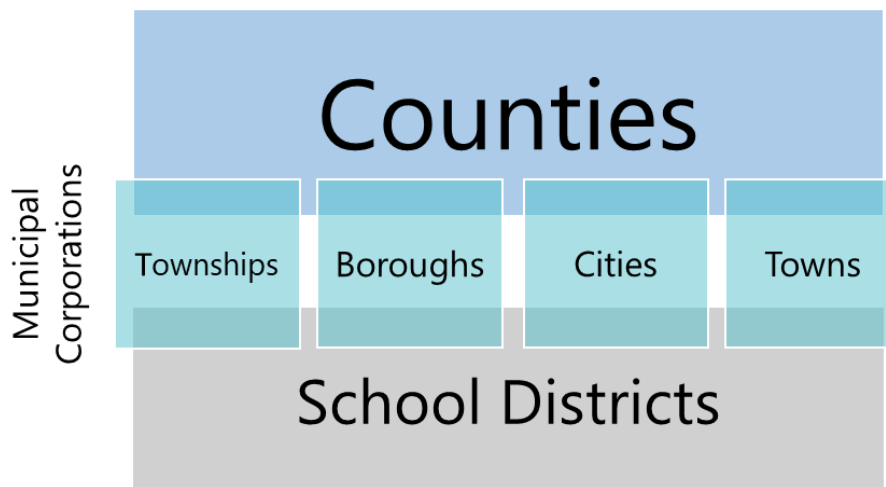
## Issue Areas

### A. Local Government Entity Risk Management and Historical Claims Perspective

Pennsylvania has a diverse and abundant number of local governments. Within the same types of local government entities is significant diversity in populations, fiscal health, geography, services offered, and liability risk. According to the Local Government Commission, "In 2020, there were 2,560 municipal corporations in Pennsylvania in addition to the Commonwealth's 67 counties – 56 cities, 956 boroughs, one incorporated town, 93 first class townships and 1,454 second class townships. Furthermore, Pennsylvania has 500 school districts and 1,532 active authorities."<sup>25</sup> As shown in Exhibit 6, every Commonwealth resident lives and pays taxes within a county, a municipal corporation, and a school district. Local government entities are likely interacting with their citizens more than any other level of government.

Exhibit 6

#### Every Pennsylvania Resident Resides within a County, Municipal Corporation, and a School District



**Note:**

Municipal authorities were excluded from Exhibit 6 because not every Pennsylvania resident lives in a municipality with an authority (or authorities).

Source: Developed by LBFC staff.

<sup>25</sup> Local Government Commission. (2020) *Pennsylvania Legislator's Municipal Deskbook*, 6<sup>th</sup> Ed. <https://www.lgc.state.pa.us/deskBook.cfm>

**Local Governmental Organizations in Pennsylvania.** It is important to understand what we are referencing when we discuss “local government entities” throughout this section. Of course, in any type of local government entity where there are employees, buildings/properties, and vehicles, there are risks. There are some nuances among the different types of entities we will discuss throughout this section. The following are local government entities in Pennsylvania:

- Counties
- Municipal Corporations
  - Cities
  - Boroughs
  - Townships
  - Incorporated Towns
- School Districts
- Municipal Authorities and Intergovernmental Corporations<sup>26</sup>

**Types of Risk Management for Local Government Entities.** Local government entities insure against risk in various manners. Pennsylvania Title 42 § 8564 provides options for local government entities that are outlined below. Local government entities may utilize a mix of these to cover different types of assets, areas of liability, or specific funds. For example, a city may self-insure against general liability claims up to a certain dollar amount, and then purchase a commercial policy for a higher dollar amount. A city may join a risk pool for workers compensation and then purchase a commercial policy for another area such as property insurance. Title 42 defines the following local government risk management practices:

- **Commercial.** Much like private entities, local governments have the option to purchase commercial insurance policies.<sup>27</sup> While the insurance carriers are the same companies utilized in the private and retail sectors, the policies are specially tailored to the needs of individual governments. A local government with a full-time police force would have a different policy than a local government without a police force. A local government with more employees and physical assets would have a different policy than those that have fewer employees and physical assets. Premiums are based on the risk profile for each local government. Commercial insurers may also provide risk management services to local governments to assist them in identifying and mitigating risks.

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<sup>26</sup> In Pennsylvania these currently include the following types: airport, ambulance service, business district, business improvement district, economic development, equipment, floor control, higher education, hospital, library, market, mass transit, mixed use improvement district, museum, nursing home, parking, public facilities, recreation, redevelopment, residential improvement district, school, sewer, solid waste, storm water, and water.

<sup>27</sup> 42 Pa.C.S. § 8564 (a).

- **Municipal Risk Pools/Coinsurance or Joint Action by Local Agencies.** Title 42 authorizes the use of risk pools.<sup>28</sup> Risk pools are like commercial insurance in that they are a group of members that pay collectively to cover the risks of their members. The main difference is that risk pools are not-for-profit entities. Our research shows it seems likely that a municipal risk pool is backed by at least one commercial insurer or a larger risk pool for reinsurance purposes.<sup>29</sup>

Similarly, Title 42 also allows “joint action by local agencies,” which allows two or more agencies to join together to contract with or develop risk management.<sup>30</sup>

- **Self-Insurance.** Title 42 also authorizes the use of self-insurance.<sup>31</sup> As the name indicates, self-insured entities act as their own insurance fiduciary. The entity holds funds and then directly pays for claims, settlements, and verdicts from those funds.
- **Risk Manager.** The final option for local government entities is to utilize a risk manager, which as presented in Title 42 is responsible for administering a public liability insurance program for the local agency and initiating any risk management program for the local agency and its employees.<sup>32</sup>

**Claims data.** To assess the prevalence of claims near or at the \$500,000 liability cap, like the analysis we performed for the Commonwealth’s cap, we reviewed claims data for local government risk pools, self-insured entities, and commercial carriers for local government entities.

**Data Limitations.** To review as much data as possible through the duration of the current \$500,000 cap on liability, we requested all available data from claims made against local government entities from 1978 through 2020. Not all entities had data spanning multiple decades. In some cases, risk pools did not exist for that entire period, and in other cases tracking systems changed. We did not audit the data we received and the conclusions that we draw are under the assumption it is complete and accurate information. Additionally, we did not adjust the figures for inflation because these were actual amounts paid and the cap itself has not been adjusted for inflation.

While we requested claims filed in state court, it was difficult to parse out solely claims adjudicated in state court, therefore the data may also include federal actions. It is possible that claims were taken to federal

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<sup>28</sup> 42 Pa.C.S. § 8564 (d).

<sup>29</sup> Reinsurance is an arrangement whereby an insurer transfers all or part of a risk to another insurer to provide protection against the risk of the first insurer.

<sup>30</sup> 42 Pa.C.S. § 8564 (c).

<sup>31</sup> 42 Pa.C.S. § 8564 (e).

<sup>32</sup> 42 Pa.C.S. § 8564 (b).

court for U.S. Civil Rights violations, but also included aspects that fell under the state sovereign/local government immunity laws. In some cases, a federal judge can claim jurisdiction over the state challenges. In other cases, the federal aspect is decided in federal court, but the state aspect is decided by the state judicial system. Either way, these types of claims make it difficult to determine the portion of a claim that applies to the state liability cap. It was not always possible for entities to separate these claims.

Additionally, outside of payouts to a claimant, such as settlements, verdicts, and orders, there are additional costs to insurers, risk pools, and local government entities. Even claims that result in no payment to a claimant have costs associated with them. For example, in one of the risk pools for which we reviewed data, a \$200,000 settlement was agreed to. The legal expenses to defend the case were just over \$170,000 in addition to another \$12,000 for other expenses related to the claim. In another risk pool, an aggregate data set showed the 2020 general liability claims (167 occurrences) payments totaled \$128,364, but the pool faced an additional \$263,225 in expenses related to those occurrences.

While these examples where expenses are greater than payouts are not always the case, it is important to show expenses for local government entities can be significant beyond the payout itself. Additionally, it was not always possible to extract the payouts to claimants from the expenses, so we note where that is the case (when we were made aware of such payments).

**About the Data.** As we noted in the Commonwealth section, while historical data is not a guarantee of what will happen in the future, historical data is often used in insurance to help predict future risk.

We looked at claims data from three main sources:

- **Municipal Risk Pools.** We had significant participation from the municipal risk pools in providing us data. We estimate that at the time of this report, approximately 1,362 local government entities are in one of the municipal risk pools. This represents 29 percent of the 4,649 local government entities.
- **Self-Insured Government Entities.** It was far more difficult to identify entities that self-insure. We captured data from two of the largest municipal governments who self-insure, as they had large volumes of data. We also obtained data from two other self-insured entities that are more local in nature but are legally under the Commonwealth caps (they will be shown in their own section).

- **Commercial Insurance.** It was also difficult to identify commercial insurance companies that write policies for local government entities. We contacted the Pennsylvania Insurance Department for a list of insurance companies that write policies specifically for local government entities, however, the department does not collect this information. We also contacted the Pennsylvania Department of Transportation (PennDOT) to see whether it tracks automobile insurance carriers for municipal plated vehicles. According to PennDOT, that information is not tracked.

Ultimately, The Insurance Federation of Pennsylvania assisted us in retrieving data from some commercial carriers though this was limited to their trade association membership. We estimate that the data we received from commercial insurance represented another 938, or 20.1 percent, of local government entities.

It does not appear that data is collected on the type of insurance method local government entities utilize or the number of claims filed or paid by these entities.

While we believe greater transparency is needed in claims data and the insurance used by local government entities (we will discuss this in more detail in Section III), we are sensitive to the fact that insurance data is in many ways considered proprietary information. Therefore, we agreed to not identify businesses or risk pools in our report. Instead, we present the data with general labels, e.g., "Data Set #." The data sets presented in Exhibit 7 range from one local government entity (self-insured) to a maximum of over 600 local government entities covered by one insurer or risk pool.



Exhibit 7

**Local Government Entities Claims Data  
 Total Number of Claims in Each Range  
 for Number of Years Shown at Bottom**

Claims in Ranges	Data Set #1	Data Set #2 <sup>a/</sup>	Data Set #3	Data Set #4	Data Set #5 <sup>a/</sup>	Data Set #6 <sup>a/</sup>	Data Set #7 <sup>a/</sup>	Data Set #8 <sup>b/</sup>	Data Set #9	Data Set #10 <sup>a/</sup>	Data Set #11 <sup>a/</sup>	Data Set #12
<b>\$0</b>	2,738 (56.71%)	8,431 (98.71%)	- <sup>c/</sup>	13,909 (56.01%)	67 (0.26%)	1,134 (30.53%)	3,411 (64.43%)	1,647 (27.98%)	6,714 (52.15%)	190 (28.36%)	41 (2.13%)	6,369 (46.68%)
<b>\$1 to \$25,000</b>	2,025 (41.94%)	2 (0.02%)	- <sup>c/</sup>	9,922 (39.96%)	21,402 (82.19%)	2,375 (63.95%)	1,684 (31.81%)	4,018 (68.26%)	5,907 (45.88%)	388 (57.91%)	147 (75.77%)	6,896 (50.54%)
<b>\$25,001 to \$100,000</b>	47 (0.97%)	13 (0.15%)	- <sup>c/</sup>	733 (2.95%)	3,395 (13.04%)	174 (4.68%)	155 (2.93%)	167 (2.84%)	174 (1.35%)	70 (10.45%)	6 (3.09%)	268 (1.96%)
<b>\$100,001 to \$250,000</b>	9 (0.19%)	43 (0.50%)	21 (0.18%) <sup>c/</sup>	188 (0.76%)	936 (3.59%)	22 (0.59%)	31 (0.59%)	30 (0.51%)	62 (0.44%)	12 (1.79%)	0 (0.00%)	80 (0.59%)
<b>\$250,001 to \$499,999</b>	8 (0.17%)	52 (0.61%)	11 (0.09%)	44 (0.18%)	225 (0.86%)	7 (0.19%)	9 (0.17%)	18 (0.31%)	18 (0.14%)	6 (0.90%)	0 (0.00%)	23 (0.17%)
<b>\$500,000</b>	1 (0.02%)	0 (0.00%)	5 (0.04%)	36 (0.14%)	14 (0.05%)	2 (0.05%)	4 (0.08%)	6 (0.10%)	5 (0.04%)	4 (0.60%)	0 (0.00%)	8 (0.06%)
<b>Total Claims in Data Set</b>	4,828	8,541	11,685	24,832	26,039	3,714	5,294	5,886	12,875	670	194	13,644

<b>Years in Data Set</b>	15	13	34	23	24	5	9	21	33	31	24	21
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**Notes:**

<sup>a/</sup> Column sum does not equal 100 percent due to rounding.

<sup>b/</sup> Includes expenses related to claims.

<sup>c/</sup> The entity did not provide claims under \$200,000. The entity provided specific data for claims over \$200,000 (as shown) and the total number of claims (11,685).

Source: Developed by LBFC staff from data provided by municipal risk pools, self-insured government entities, and commercial insurance companies.

Although this analysis was not a representative sample of all local government entities (because of having an inconsistent number of years of data between the entities, various tracking systems, etc.), we think it provides valuable insight into the history of claims since the liability cap has been in place. Over 99 percent of claims we reviewed resulted in a payout to the claimant under \$250,000. The local government entity data we reviewed indicates a small percentage of claims, less than 1 percent of all claims, resulted in payouts from \$250,000 to the cap of \$500,000. The current cap does not appear to be problematic for most claims.

**Local Government Entities Legally Subject to the Commonwealth Cap.** As we mentioned, a few entities fall under the Commonwealth liability cap (\$250,000, or \$1,000,000 aggregate) because they are legally interpreted to be instrumentalities of the Commonwealth.<sup>33</sup> Because the general public would think of them as local government entities, we chose to include them in the local government section of this report. Additionally, because they are locally managed and do not have the opportunity to participate in the Commonwealth’s self-insurance program, we did not want to co-mingle their data with the Commonwealth’s. Exhibit 8 shows the claims history for these entities.

Exhibit 8

**Local Government Entities Under Commonwealth Cap \$250,000  
 (\$1,000,000 aggregate)  
 Claims Paid**

Payment to Claimants Range	Number of Claims in Range			
	Entity #1 1990-2021		Entity #2 1998-2022	
<b>\$1 to \$50,000</b>	49,999	(96.19%)	2,355	(97.03%)
<b>\$50,001 to \$100,000</b>	1,303	(2.51%)	41	(1.69%)
<b>\$100,001 to \$150,000</b>	294	(0.57%)	14	(0.58%)
<b>\$150,001 to \$200,000</b>	156	(0.30%)	9	(0.37%)
<b>\$200,000 to \$249,999</b>	91	(0.18%)	5	(0.21%)

<sup>33</sup> While the Southeastern Pennsylvania Transportation Authority (SEPTA) is a regional transportation authority, it falls under the Commonwealth’s \$250,000 liability cap. *Feingold v. Southeastern Pennsylvania Transportation Authority* (517 A.2d 1270, Pa.1986), stated “SEPTA was created by an act of the state legislature as an ‘agency and instrumentality’ of the Commonwealth.” Similarly, the PA Supreme Court said the same of SEPTA’s sister agency in western Pennsylvania. In *Marshall v. Port Authority* (568 A.2d 931, Pa.1990) the Court stated the Port Authority of Allegheny County (PAT) was also “created by the Commonwealth, rather than by local governments, and acts as an agency of the Commonwealth,” therefore, PAT is an “agency of the Commonwealth” and “entitled to the protection of sovereign immunity.” The remainder of the transit authorities in Pennsylvania fall under the \$500,000 cap.

**Exhibit 8 Continued**

Payment to Claimants Range	Number of Claims in Range	
	Entity #1 1990-2021	Entity #2 1998-2022
\$250,000 (or more) <sup>a/</sup>	139 (0.27%) <sup>b/</sup>	3 (0.12%)
<b>Total:</b>	51,982	2,427

**Notes:**

<sup>a/</sup> Includes claims that were over \$250,000 because of multiple causes of action and/or multiple claimants.

<sup>b/</sup> Includes 46 claims that involved multiple claimants, two of which were at the \$1 million aggregate cap. Two others were claims adjudicated in state court, but federal actions were included, one of which totaled over \$6 million.

Source: Developed by LBFC staff from data provided by self-insured government entities.

As shown throughout our review of the claims data, these two entities also saw very few claims near the cap.

There is no easy way to balance claimants wrongfully injured versus the financial interests of the local government entity and its taxpayers/citizens. The General Assembly tried to strike a balance between the two in 1978 and 1980. On one hand are claimants, who in some cases suffered from catastrophic injury or death because of gross negligence. On the other hand, are government entities that are required to collect taxes (and/or fees) from citizens and in turn finance services and programs.

Members of the state Supreme Court have called upon the General Assembly to reconsider the liability caps on local government entities. The balancing act in 2022 is no easier than it was in 1978 and 1980. However, we now have decades of data to show the existing caps have been sufficient for over 99 percent of cases. In the next section we will discuss the impact of raising the current caps.

## **B. The Impact of Changing the Current Cap on Liability and the Ability of Local Government Entities to Raise Revenues and Provide Services, Benefits, and Programs**

The success of local government entities in budgeting is often defined by their ability to anticipate, project, and plan for expenditures with the revenue available, ideally in a balanced manner. For the last 40 years liability caps have provided stability in managing risk. It is unreasonable to assume no accidents will occur in the day-to-day operations of local government entities. Where there are human beings there are accidents.

What happens when or if the limitations on liability that local governments have relied on are changed or eliminated is the question at hand.

One concern often raised in interviews with associations representing local government entities is the fear that increasing or eliminating the liability caps would result in an insurance market in Pennsylvania that no longer partners with local government entities, either by not writing policies altogether or setting premiums that are cost prohibitive for local government entities. Likewise, risk pools are also concerned about their ability to obtain reinsurance.

This same point was also echoed by self-insured entities in the *Zauflik v. Pennsbury School District*, Brief of Amici Curiae the City of Philadelphia, the City of Pittsburgh, and Allegheny County in Support of Appellee, which states: "currently Amici are self-insured, either due to the difficulty of obtaining insurance against all claims or because the costs of such insurance is itself prohibitive. The situation would only become more of a fiscal challenge in the absence of the \$500,000 liability limit."<sup>34</sup> We also cited this same reason in Section II for Pennsylvania ultimately implementing a program of self-insurance instead of commercial insurance it previously utilized. Associations that represent local government entities repeatedly referenced to us an insurance crisis from the late 1970s and 1980s. In Section VII we discuss the past insurance crisis, but it appears to continue to be a common concern among local government entities.

In our survey of local government entities most of the respondents indicated that if there is an increase in liability caps the cost and/or availability of liability coverage would be impacted. See Section V for the survey results.

While self-insured entities would not have the same concern about losing coverage like those that utilize risk pools or commercial insurance, the current liability cap offers them predictability in budgeting appropriate self-insurance reserves. One of the self-insured local government entities explained it to us this way:

...maintaining the status quo, allows our municipal corporation to anticipate its day-to-day reasonable and necessary expenses and corresponding exposures, allowing our legislative unit to set short-term annual budgets and to plan for long-term capital expenditures. By providing reasonable predictability, we have budget stability, and our constituents avoid exposure to the volatility of unknown and unpredictable whims and passions of juries, many of whom are not resident citizens of the

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<sup>34</sup> Brief of Amici Curiae the City of Philadelphia, the City of Pittsburgh, and Allegheny County in Support of Appellee. *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096 (Pa. 2014).

municipality over which they will stand in judgment. With the above in mind, our municipality, a self-insured political subdivision, staffs an internal law department, sets an annual reserve for the payment of claims, settlements, and judgements and establishes as part of its budget, a means and method for the day-to-day costs associated with claim administration and protracted litigation.

As discussed in Section VII, regarding the past insurance crisis, uncertainty is unfavorable in the insurance market. With many different variables outside of the caps it is difficult to measure the exact impact eliminating (or increasing) the caps would have on the affordability or availability of liability insurance for local government entities. Because the insurance market is known to be cyclical<sup>35</sup> regardless of liability caps, it is possible that during a hardening insurance market<sup>36</sup> an increase in risk due to increases in the liability caps could leave local government entities scrambling to find coverage. We know from the past liability crisis that other lines of coverage were impacted, "but municipalities were some of the hardest hit."<sup>37</sup> Regardless, it is reasonable to assume that adding any new uncertainty will raise premiums or self-insured costs for local government entities. In government that can only be resolved by increasing revenue, decreasing existing services, or a combination of both. In the sections that follow, we discuss revenues and existing services separately, but a combination of both is possible.

**Ability to Increase Revenues.** In our system of state government, local government units are creations of the state, and thus subject to state rules and laws regarding how local government operates, including how and to what extent a local government may tax its citizens. Property taxes are a significant source of local government finances in Pennsylvania. It is the only tax authorized by law to be levied by all classes of local government in Pennsylvania, with real estate taxes paid to counties, municipalities, and school districts.<sup>38</sup> Statutory limits on property tax, however, are also common in part because residential property taxes are often unpopular with taxpayers and can be a burden for lower-income households. For example, limitations are placed on the rate of real estate taxes for all classes having taxing jurisdiction in Pennsylvania, except the cities of Philadelphia, Pittsburgh and Scranton, and the Philadelphia

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<sup>35</sup> See the Insurance Information Institute's data charts that show the cyclical nature of the insurance market at: <https://www.iii.org/graph-archive/96103>.

<sup>36</sup> A hard market in insurance is "the upswing in a market cycle when premiums increase and capacity for more types of insurance decreases. Can be caused by a number of factors, including falling investment returns for insurers, increases in frequency or severity of losses, and regulatory intervention deemed to be against the interests of insurers." (International Risk Management Institute, Inc., <https://www.irmi.com/term/insurance-definitions/hard-market>)

<sup>37</sup> Rappaport, John. (2017, April) *How Private Insurers Regulate Public Police*. Harvard Law Review. Vol 136, No. 6, 1156.

<sup>38</sup> Commonwealth of Pennsylvania Governor's Center for Local Government Services. (2019, February) *Taxation Manual*. Tenth Edition. <https://dced.pa.gov/download/taxation-manual/>.

School District.<sup>39</sup> Exhibit 9 shows the rate limits on general purpose levies.

### Exhibit 9

#### Legal Limits on General Purpose Levies

Taxing Jurisdiction	Rate Limit
Counties, Second Class (Allegheny)	25 mills
Counties, Second Class A (Bucks, Delaware & Montgomery)	40 mills
Counties, Third through Eighth Class <sup>a/</sup>	25 mills
Institution Districts	10 mills
Cities, Third Class <sup>a/</sup>	30 mills
Boroughs <sup>a/</sup>	30 mills
Townships, First Class <sup>a/</sup>	30 mills
Townships, Second Class <sup>a/</sup>	14 mills
School Districts, First Class A (Pittsburgh)	no limit
School Districts, Second, Third and Fourth Class <sup>b/</sup>	25 mills

**Notes:**

<sup>a/</sup> An additional five mills may be added to the foregoing rate limits by the applicable governing body with court approval. Court approval is to be granted if the taxing body shows the additional millage is necessary to meet the needs of an approved budget.

<sup>b/</sup> School districts can levy unlimited additional millage to pay salaries and debt service.

Source: Department of Community and Economic Development's *Taxation Manual* (2019).

Home rule jurisdictions may establish their own property tax rate limits by charter.<sup>40</sup> The assessment law, however, bars counties of second through eighth class from imposing countywide property taxes under a revised assessment until the entire county has been reassessed. Act 1987-47 assists local governments designated by the state as financially distressed and grants them options to raise revenue beyond what is normally allowed by the limits given in statute.<sup>41</sup>

Beyond property tax, local government has a limited range of other revenue sources – also within limits established by state law. There are three general state statutory sources for local taxing authority: 1) the respective legal codes applicable to counties, municipalities, and school districts; 2) the general tax enabling acts; and 3) a series of single-purpose statutes,

<sup>39</sup> Commonwealth of Pennsylvania Governor's Center for Local Government Services. (2019, February) *Taxation Manual*. Tenth Edition. <https://dced.pa.gov/download/taxation-manual/>.

<sup>40</sup> Commonwealth of Pennsylvania Governor's Center for Local Government Services. (2019, February) *Taxation Manual*. Tenth Edition. <https://dced.pa.gov/download/taxation-manual/>.

<sup>41</sup> Municipalities Financial Recovery Act, Act 1987-47, P.L. 246, No. 47.

either authorizing a particular tax, such as the Library Code,<sup>42</sup> or authorizing an increased rate of an existing tax, such as the Municipalities Financial Recovery Act.<sup>43</sup> Taxes under these sources include the earned income or wage tax, the per capita tax, the occupation tax, occupational privilege tax, real estate transfer tax, amusement/admissions tax, and the business gross receipts tax. Additionally, only two counties (Philadelphia and Allegheny) can collect a local sales tax.<sup>44</sup>

The Local Tax Enabling Act<sup>45</sup> was originally established to give comprehensive taxing authority to political subdivisions other than Philadelphia, but now primarily authorizes certain taxes with maximum rates set by the legislature.<sup>46</sup> Twelve types of taxes under the Local Tax Enabling Act (as amended) are limited by statute in their rates and the aggregate of all local taxes levied under the Act may not exceed the equivalent of twelve mills times the market value of real estate within the taxing district.<sup>47</sup>

On the other hand, the Sterling Act gives Philadelphia city the authority “to levy, assess and collect...such taxes on persons, transactions, occupations, privileges, subjects, and personal property... as it shall determine...” except for any subject preempted by state tax or license fee. Additionally, there are no limits on the kinds of taxes Philadelphia can impose, no limits on the rates of those taxes, and no limit on the aggregate amount of revenue that can be raised.<sup>48</sup>

In addition to tax limits, most state constitutions have uniformity clauses, which in Pennsylvania requires that “All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws.”<sup>49</sup> The clause, as interpreted by the state courts, requires that all local and state taxes be flat, with the same percentage applied to all taxpayers or properties. This can disproportionately impact lower-income taxpayers. Attempts to make a flat tax less burdensome for low-income taxpayers by excluding a portion of everyone’s wages from the tax have been rejected by the courts under the Uniformity Clause. And the state Supreme Court has rejected the creation of different categories of property in

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<sup>42</sup> 24 Pa.C.S. § 9351 authorizes a special library tax.

<sup>43</sup> Municipalities Financial Recovery Act, Act 1987-47, P.L. 246, No. 47.

<sup>44</sup> Commonwealth of Pennsylvania Governor’s Center for Local Government Services. (2019, February) *Taxation Manual*. Tenth Edition. <https://dced.pa.gov/download/taxation-manual/>

<sup>45</sup> Act 511 of 1965, 53 P.S. §6901

<sup>46</sup> Commonwealth of Pennsylvania Governor’s Center for Local Government Services. (2019, February) *Taxation Manual*. Tenth Edition. <https://dced.pa.gov/download/taxation-manual/>

<sup>47</sup> The Local Tax Enabling Act, Act 1965-511, P.L. 1257, No. 511.

<sup>48</sup> The Sterling Act (First Class City Taxation), Act 1932-45, P.L. 45, No. 45.

<sup>49</sup> The Constitution of Pennsylvania, Article VIII.

Philadelphia with different tax rates for each—such as residential, commercial, and industrial properties.<sup>50</sup>

Similar limitations are placed on municipal authorities in 53 Pa.C.S. § 5601 - § 5622, which outlines the authorities' ability to collect fees and generate revenue. Municipal authorities are not authorized to receive any of the taxes collected from the municipality that created them.

We point out the existing limitations on taxes and fees to note that if a local government entity is, because of a change in the caps on damages, required to increase revenue, their choices are limited.

The ability to raise revenue is a concern raised by the entities that responded to our survey. In the survey, when asked about revenue, most respondents indicated a change in liability caps would require an increase in taxes/fees. See Section V for the survey results.

In discussions with associations representing local governments, we were asked by those associations to consider that some municipalities have entire budgets less than the current cap. As shown in Exhibit 10, we reviewed the financial data submitted by local governments to the Department of Community and Development (DCED) annually and found that in 2019, 29.1 percent of municipalities had total revenue less than or equal to \$500,000 (we will review expenditures in the same way in the next section).<sup>51</sup>

### Exhibit 10

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#### Municipal Governments 2019 Total Revenue

Total Revenue	Number of Municipal Governments in Range	
Less than or equal to \$500,000	725	(29.1%)
\$500,000 to \$1 million	490	(19.6%)
More than \$1 million	1,279	(51.3%)
<b>Total:</b>	<b>2,494</b>	

Source: Developed by LBFC staff from information downloaded from Department of Community and Economic Development's website on March 4, 2022.

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<sup>50</sup> The city argues the inability to categorize property for tax rate purposes creates a scenario where raising property tax rates on large office buildings, the city must also raise rates on modest homes occupied by individuals with fixed incomes. In a 2017 court case, a Montgomery County apartment complex owner sued the Upper Merion School District, claiming the district violated the Uniformity Clause when it reassessed large commercial properties (such as the apartment complex) while not reassessing residential properties. The state Supreme Court agreed. In contrast, in a challenge to Philadelphia's tax on sugary drinks filed by industry groups and others, the state Supreme Court decided in 2018 that singling out the beverages for additional taxation did not violate the Uniformity Clause.

<sup>51</sup> Pennsylvania Department of Community and Economic Development. *Municipal Statistics*. <https://dced.pa.gov/local-government/municipal-statistics/>



Municipal total revenues ranged from \$2,027 to \$9.8 billion in 2019.<sup>52</sup> For small municipalities, \$500,000 remains a large amount compared to their revenues. The Commonwealth is very diverse in the size of local municipalities, and it is important to remember that under the current liability cap, no matter how much revenue a local government receives, they share the same liability cap as significantly larger local governments.

We also reviewed municipal tax revenues that were compared to all sources of revenue. The average percentage of total taxes that made up total revenue statewide was 46 percent. As shown in Exhibit 11, most local government tax revenues are in the 25 percent to 75 percent range of total revenues.

### Exhibit 11

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## Municipal Governments 2019 Total Taxes Compared to Total Revenue

Percent of Total Revenue that is Made-up of Taxes	Number of Municipal Governments in Range	
0% to 25%	334	(13.4%)
25% to 50%	1,091	(43.7%)
50% to 75%	1,000	(40.1%)
75% to 100%	69	(2.8%)
<b>Total:</b>	2,494	

Source: Developed by LBFC staff from information downloaded from Department of Community and Economic Development's website on March 4, 2022.

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In addition to taxes, other municipal revenue sources included revenues from intergovernmental transfers (federal, state, and other local governments), service fees (sewer, water, solid waste, electric system, gas system, parking, culture and recreation, other charges for services), licenses and permits, cable TV franchise fees, fines and forfeits revenues, interest rents and royalties, contributions and donations from the private sector, unclassified operating revenue, and other financial sources. These other revenue sources are more likely to be earmarked for a specific purpose, but that is not always the case. The ability to increase or change these revenue sources varies greatly among governments.

As previously noted, municipal government authorities differ from municipal governments in terms of raising revenue. Because they do not have taxation authority, their ability to raise revenue is almost exclusively

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<sup>52</sup> The Borough of Valley-Hi in Fulton County had \$2,027 in revenue in DCED's 2019 data. The population in Valley-Hi was 15 in 2019. The \$9.8 billion revenue was Philadelphia, which is included in DCED's municipal data instead of the county data.

determined by fees paid by users of the service(s). Of the municipal authorities that reported operating revenue in the DCED *2020 Statewide Municipal Authorities' and NIDs Financial Report*,<sup>53</sup> 42 percent of municipal authorities reported operating revenues of less than or equal to \$500,000.<sup>54</sup>

Some authorities receive revenue from other sources such as grants (federal, state, and local governments) or interest income, but this varies based on type of authority. There is also no guarantee that any additional revenue source(s) would offset an increased cap.

Compared to municipal governments, county budgets are significantly larger, but it is important to remember that the populations they serve are also significantly larger as well. On a statewide average, municipal governments have higher per capita revenue than counties do. Additionally, a large share of county budgets consists of intergovernmental transfers from federal and state government for human services and other designated purposes. Thus, they have little control over a large portion of their revenue.

At the beginning of the Covid-19 pandemic, the National League of Cities published a policy brief that ranked Pennsylvania as the state with the highest revenue loss percentage for cities, towns, and villages in 2020.<sup>55</sup> More recent national studies have shown a positive rebound for local governments.<sup>56</sup> The full post pandemic revenue impact may not be fully realized for some time, however, and, coupled with inflation, these are important factors to keep in mind regarding local government revenue.

***Ability of Local Government Entities to Provide Services, Benefits, and Programs.*** Local government entities and the associations that represent them often told us that their main purpose is to provide their community with services the private sector cannot or does not provide. Additionally, they noted that some aspects of local government remain open 24 hours a day, 7 days a week, 365 days a year, and citizens depend on their critical services. At the same time local governments are asked to serve all citizens they are also asked to be responsible stewards of tax dollars.

The consensus of the entities we talked to about the current cap on liability was to maintain the current liability cap. The current caps allow

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<sup>53</sup> NIDs are neighborhood improvement districts.

<sup>54</sup> Pennsylvania Department of Community and Economic Development. *Municipal Statistics*. <https://munstats.pa.gov/Reports/ReportInformation2.aspx?report=AuthForm>

<sup>55</sup> McFarland, Christiana and Breanna Rivett. *Cities Anticipate \$360 Billion Revenue Shortfall*. National League of Cities. <https://www.nlc.org/article/2020/05/14/cities-anticipate-360-billion-revenue-shortfall/>. Retrieved March 17, 2022.

<sup>56</sup> Lieb, David and Camille Fasset. (2022, January 28). *State and local governments see rebound after billions of dollars in losses during pandemic*. PBS News Hour. <https://www.pbs.org/newshour/economy/state-and-local-governments-see-rebound-after-billions-of-dollars-in-losses-during-pandemic>. Retrieved March 17, 2022.

local government entities to find coverage and manage their risks in a more predictable manner. As we did in the Commonwealth section, we do caution against doing nothing to change the current caps as members of the state Supreme Court have signaled, they may be compelled to strike the cap.<sup>57</sup>

If the cap were eliminated by the court, it has the most potential to be fiscally detrimental to local government entities. Should the General Assembly decide to make no changes to the current cap, it could lead to a situation in which the state Supreme Court strikes the cap in its entirety.

The majority of respondents to our survey stated that if liability caps change there will be a negative impact on services provided to their community. See Section V for the survey results.

Similar to how we reviewed total revenues, as shown in Exhibit 12, we reviewed the financial data that is submitted to DCED annually and found that in 2019, 31.1 percent of municipalities had total expenditures less than or equal to \$500,000.

### Exhibit 12

#### Municipal Governments 2019 Total Expenditures

Total Expenditures	Number of Municipal Governments in Range	
Less than or equal to \$500,000	780	(31.3%)
\$500,000 to \$1 million	485	(19.4%)
More than \$1 million	1,229	(49.3%)
<b>Total:</b>	2,494	

Source: Developed by LBFC staff from information downloaded from Department of Community and Economic Development's website on March 4, 2022.

Municipal total expenditures ranged from \$2,693 to \$9.5 billion in 2019.<sup>58</sup> We point this out to show how \$500,000 is not an outdated amount to many local governments in terms of how much they are currently spending to provide services to their communities. In theory, one \$500,000 claim could decimate entire budgets of these municipal governments if they are self-insured. Local governments that utilize commercial

<sup>57</sup> See page 99 for more details on what the concurring opinion stated. *Grove v. Port Authority of Allegheny County*, 218 A.3d 877 (Pa. 2019) (Baer, J., concurring).

<sup>58</sup> The Borough of Valley-Hi in Fulton County had the \$2,693 expenditures in DCED's 2019 data. The population in Valley-Hi was 15 in 2019. The \$9.8 billion revenue was Philadelphia, which is included in DCED's municipal data instead of the county data.

insurance or risk-pools are at risk of higher premiums or even risk losing coverage. No matter the size of the local government entity, services must be provided as taxpayers expect streets to be plowed in the winter, and emergency services to be available when they are needed.

Municipal government authorities are in an even more precarious situation as they cannot easily change services offered as their sole purpose is to provide those specific services. For example, a water company cannot stop providing water to reduce expenditures.

To what extent services would be impacted by a change in the cap greatly depends on what that specific change looks like and varies by local government type. We presented a few scenarios to local government entities to get their feedback on what changes in the cap would look like for them.

**Scenarios for Changing the Current Cap.** We presented the following scenarios to local government entities in an open-ended format so they could best answer based on their situation.

**Elimination of Cap.** We asked local government entities how no caps would specifically impact them and received the following responses:

- A self-insured entity stated they “cannot quantify the likely impacts.”
- A self-insured transit entity estimated their additional total claims exposure to be \$169 million to \$183 million more than their current payouts. To put this number in perspective they provided what \$10 million increments means in terms of service:
  - 12 new hybrid buses at \$814,000.
  - 10 new electric buses at \$992,000 each.
  - 4 new multi-level rail cars at \$2,481,000 each.
  - 200 million rides subsidized (a fifty-cent discount to social agencies that provide tickets to their clients).
- A different self-insured entity stated they “envision proactively approaching the change” by “doubling, or perhaps tripling reserves to cover verdicts or settlements and litigation expenses.” They also stated a complete removal of the cap may result in having to consider options other than self-insurance (such as a risk pool or commercial insurance). This entity further added, “In either case, the municipal budget must account for these increased costs and expenses, and the taxpayer constituent will pay – either through a reduction in municipal services because of the reallocation of funds to claim management, compromise, or verdict or through an increase in municipal taxes to pay for these costs and expenses.”

- A risk pool told us they would “likely be unable to obtain excess coverage” which would likely result in municipal risk pools being forced to dissolve – leaving those municipalities without insurance coverage.
- Another risk pool stated that if the pool continued to exist (and they emphasized “if”), it would require an increase in revenue coupled with a decrease in existing services. This pool also stated: “the level of self-insurance required (i.e., increased level of self-insurance retention) to attract excess insurer/reinsurers would be a significant financial burden in an already less than desirable class of business in the insurance market. From experience, we know excess carriers will not cover the program because the program is predicated on the immunity status of pool members.”
- Another risk pool estimated their members could face an increase between 40 to 60 percent on top of the existing premium trend (5 to 10 percent).
- The associations that represent local government entities conveyed to us that local governments who utilize commercial insurance are fearful their premiums would skyrocket, or they just would not be able to find a commercial carrier who will write them a policy.

The historical claims data does not support such a change on all claims. If the cap was eliminated, it is reasonable to assume an increase in premiums at the very least, would occur immediately. We found no method to measure the likelihood of a commercial insurer not offering coverage.

We looked to other states that have no liability cap to see what managing risk looks like in these states.<sup>59</sup> We found no data source that presented premium or insurance coverage for all states without liability caps.<sup>60</sup> One source stated that about 85 percent of California cities belonged to risk pools.<sup>61</sup> California does not have a liability cap. Similarly, South Dakota does not have a liability cap and one risk pool estimates they have over 85 percent of the municipalities and counties in South Dakota as members.<sup>62</sup> The Association of Governmental Risk Pools estimates that at least 80 percent of the more than 90,000 public entities in the United States participate in a risk pool.<sup>63</sup> In comparison, as noted previously, we estimate that about 29 percent of Pennsylvania local government entities are currently members of risk pools. Risk pools are

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<sup>59</sup> See Appendix C for summary of all state’s liability limitations.

<sup>60</sup> A national reinsurance pool that reinsures one of the Pennsylvania risk pools and has members in other states (including states that have no liability cap) declined to provide national data to us.

<sup>61</sup> Rappaport, John. (2017, April) *How Private Insurers Regulate Public Police*. Harvard Law Review. Vol 136, No. 6, 1559.

<sup>62</sup> South Dakota Public Assurance Alliance. *Lessons Learned: The History of Public Pooling in South Dakota*. <https://sdpaonline.org/news/lessons-learned-the-history-of-public-pooling-in-south-dakota>.

<sup>63</sup> Association of Governmental Risk Pools. (2020) *Fact Sheet: Public Entity Risk Pools*. [https://www.nlc.org/wp-content/uploads/2020/10/Fact\\_Sheet-3.docx](https://www.nlc.org/wp-content/uploads/2020/10/Fact_Sheet-3.docx)

generally formed in the absence of affordable commercial insurance, so perhaps the popularity of risk pools in other parts of the country is in part due to the lack of affordable and available commercial insurance. Due to pools being not-for-profit, one estimate calculated a 10 to 20 percent lower pool contribution compared to the costs of a commercial premium.<sup>64</sup>

Risk pools are also not immune from the impacts of market conditions. Risk pools rely on reinsurers, which are commercial insurers for excess losses. "Reinsurers do not typically manage municipal risk directly. But they vet insurers and pools to make sure that they are attending to loss prevention, and price the aggregate risk accordingly. In doing so, they exert a regulatory force although pools and commercial insurers are competitors in the market for primary coverage, they are nonetheless tightly intertwined in reinsurance relationships that experts describe as 'mutually dependent' and 'symbiotic.'"<sup>65</sup>

Self-insured entities may not be subject to the market conditions of insured and pooled entities but managing a reserve to cover claims requires a similar knowledge of claims history that occurs in the commercial underwriting process. A complete removal of liability caps requires an immediate increase in self-insurance reserves or risks the fund running out of sufficient money to cover losses.

New York does not have liability caps, and New York City self-insures. A news report noted, "New York City spends more money on lawsuits than the next five largest American cities – Los Angeles, Chicago, Houston, Phoenix, and Philadelphia – combined New York now allocates more taxpayer dollars to settling personal-injury lawsuits than it does to parks, transportation, homeless services or the City University system"<sup>66</sup> On a smaller city level, Inkster, Michigan (self-insured city in an uncapped state) "was forced to raise property taxes by about \$179 per household to cover a \$1.4 million settlement."<sup>67</sup>

**Double the Existing Cap.** We asked local government entities about the impact of doubling the current cap and received the following responses:

- A self-insured entity stated "unless the City's number of cases dropped, this would likely increase the City's costs, although the City cannot quantify the likely impacts. It is difficult to anticipate behavior change(s) stemming from an increase to the cap that might affect the scale of impact(s). The financial impacts of increasing the cap are likely less than the impact of eliminating the cap, although the extent

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<sup>64</sup> Rappaport, John. (2017, April) *How Private Insurers Regulate Public Police*. Harvard Law Review. Vol 136, No. 6, 1562.

<sup>65</sup> Rappaport, John. (2017, April) *How Private Insurers Regulate Public Police*. Harvard Law Review. Vol 136, No. 6, 1569.

<sup>66</sup> Avlon, John. (2009, July 14). *Sue City*. Forbes. <https://www.forbes.com/2009/07/14/new-york-city-tort-tax-opinions-contributors-john-p-avlon.html?sh=4f96e575e816>

<sup>67</sup> Rappaport, John. (2017, April) *How Private Insurers Regulate Public Police*. Harvard Law Review. Vol 136, No. 6, 1588.

of the variance in impact is not quantifiable at this time.”

- A self-insured entity stated this would “increase the settlement values for all cases including those that have a value of less than \$250,000” because the entity is “risking a \$500,000 jury verdict if that case does not settle.” (Note: this entity is one of the local government entities legally interpreted as being under the Commonwealth’s cap.)
- Another self-insured entity stated this would offer “most if not all of the protection afforded” by the current cap, but “increasing the overall monetary exposure will raise the opportunity and the distinct possibility for additional claims and litigation... For example, those claimants who now settle claims below the current cap will adjust and increase their demands to compromise because they can demand more since more is available. So, as the exposure rises, the risk increases, and the municipality’s cost to protect the public fisc will increase.”
- A risk pool stated their costs for excess liability coverage would “likely double.” They explained that when in their workers compensation self-insurance pool, they were “forced by market conditions to go a \$1 million per occurrence retention from a \$500,000 retention.” Their actuary explained that “every claim now had the potential to be worth double that of the previous year. That change impacted [their] reserving practices as well as the rates [they] had to charge the municipal members of the pool.”
- Another risk pool echoed what they stated about removing the cap altogether, that it would be difficult for them to attract excess insurers/reinsurers, if they would continue to exist as a pool.
- A different risk pool roughly estimated the range of increase their members would see would be somewhere between 15 percent and 30 percent on top of the existing trend (which is typically 5 to 10 percent).
- The impact on commercial insurance premiums and/or the ability of local government entities to find coverage with a doubled cap is unknown, but it is reasonable to assume premiums would increase. It is possible that it might price local governments out of the market or that insurers would not offer coverage.

If the purpose of increasing the cap is for “fairer” compensation for certain plaintiffs of “catastrophic injury” or “devastating loss”<sup>68</sup> as some justices of the state Supreme Court have asked the General Assembly to consider, we think increasing the cap on all claims does not address that

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<sup>68</sup> *Grove v. Port Authority of Allegheny County*, 218 A.3d 877 (Pa. 2019) (Baer, J., concurring).

issue nor does the data support the need for increasing the cap on non-catastrophic claims at the time of this report.

**No Change to Cap, Except Catastrophic Claims.** In this scenario we attempted to measure the impact carving out certain claims in an uncapped environment. We gave a broad example in which we asked what impact a scenario where there were (1) no change in limitations on claims that do not include serious bodily injury and/or major trauma, and (2) for claims that do include serious bodily injury and/or major trauma, removal of the limitation for economic damages, but no change in the cap limitation for noneconomic damages. We received the following responses:

- A self-insured entity stated: this would increase their costs, but they “cannot quantify the likely impacts” because “it is difficult to anticipate behavior change(s) stemming from any increase to the cap that might affect the scale of impact(s).” Additionally, they added “the financial impacts of eliminating the cap for bodily injury and major trauma are likely less than the impact of eliminating the cap in all instances, although the extent of the variance in impact is not quantifiable at this time.”
- A self-insured entity stated: “the current budget and reserve system would change to address the increased threat of litigation and the corresponding exposures to liability and damages. ”
- A self-insured entity stated this scenario would be “financially devastating... undermine the purposes of the damage cap... and would be virtually no shield to runaway verdicts.” They provided examples of previous claims in which economic losses claimed were exponentially higher than the current cap:
  - 2018 claim in which total economic losses totaled \$1.9 million.
  - 2017 claim in which total economic losses totaled \$2.6 million.
  - 2021 claim in which total economic losses totaled over \$450,000.
  - Multi-claimant event – although economic damages were not calculated the entity estimated the economic damages “would have resulted, conservatively, in a payout of tens of millions of dollars.”
- A different self-insured entity stated in this scenario “there will be many more cases taken to Jury Trial and many more cases with high dollar settlements... removing the limitation for economic damages” would “have a catastrophic financial effect.” They provided examples of claims that resulted in settlements below or at the cap, but had higher estimated economic damages:
  - 2017 claim where economic loss would have been \$850,000.
  - A claim in which the future wage loss could have exceeded \$4 million.



- A claim in which anticipated economic damages for future wage loss alone could have exceeded \$2 million.
  - Another claim in which anticipated economic damages for future wages could have exceeded \$2 million.
  - A claim in which plaintiff sought economic damages more than \$20 million.
  - A multi-claimant event with a potential financial liability more than \$10 million.
- A risk pool stated having those instances uncapped could “create an enormous liability.” They added they “anticipate that excess liability coverage may be unavailable or so prohibitively expensive that it would be unaffordable.” If this were to occur this particular risk pool predicts “it could also lead to the dissolution of municipal liability self-insurance pools.”
  - Another risk pool stated: “Providing an analysis of such a change is difficult to quantify. Anecdotally and logically, in an environment experiencing a significant increase in social inflations, larger jury awards, especially involving significant auto claims is reasonably more prevalent through the country and more probable in Pennsylvania. Excess insurance and/or reinsurance costs would increase significantly. Several years of experience would need to pass before insurers would deem adequate empirical data to reduce, further increase or maintain initial rating. Similarly, higher tort caps would likely require greater self-insurance. Again, from experience, we know excess carriers will not cover the program because the program is predicated on the immunity status of pool members.”
  - Another risk pool stated it is difficult to “quantify”, and they believe the projections may fall somewhere between no cap (40 to 60 percent on top of current trend) and doubling the current cap (15 to 30 percent on top of current trend).
  - The impact on commercial insurance premiums and/or the ability of local government entities to find coverage with a carved-out exemption for catastrophic claims is unknown, but it is reasonable to assume premiums would increase. It is possible that it might price local governments out of the market or that insurers would not offer coverage due to the potential for unlimited payouts in cases of serious bodily injury and/or major trauma.

Carving out a separate cap limitation in certain circumstances is a reasonable approach to address the concerns for claimants with the current cap while also protecting the public’s tax dollars. As one municipality stated it: “the limitation on damages seeks to balance; allowing an opportunity for the injured to pursue a recovery and protecting the taxpayer from becoming a de facto insurer.”

The historical claims data do not support eliminating the cap on all claims nor would this be a fiscally sound decision for local government entities. Having any aspect uncapped could lead to bankruptcy of local government entities, which we will discuss next.

We believe the most reasonable approach is to raise, but not eliminate the cap on claims that the General Assembly deems to be catastrophic.

**Limitations on Bankruptcy and Debt Issuance.** It is important to discuss what could happen in a worst-case scenario for local government entities should they face a significant increase in expenditures because of liability claims. Much like how local government entities are limited in their ability to generate revenue, local governments are limited in both the issuance of debt, and what they can do if they run out of funding and are unable to make payments to cover their debts.

Article IX, Section 10 of the Constitution of Pennsylvania gives the General Assembly the power to limit debt of local government entities. The issuance of debt is specifically limited by state laws through a variety of methods depending on the type of local government entity. Therefore, issuing debt to pay a tort claim is not a simple endeavor for a local government entity.

If local government entities experience financial hardship, state law also provides oversight under the Commonwealth's Municipalities Financial Recovery Act, otherwise known as Act 47.<sup>69</sup> Under Act 47, DCED has a responsibility to assist Pennsylvania municipalities that are experiencing severe financial difficulties. In fact, bankruptcy is only an option for municipalities if approved by the state government under Act 47 (except for Philadelphia). Chapter 9 of the U.S. Bankruptcy Code outlines how municipalities may declare bankruptcy and requires that municipalities must be specifically authorized by their state to file for a Chapter 9 bankruptcy.<sup>70</sup> Pennsylvania's Chapter 9 procedures are contained in Act 47 and require the following before a municipality may file for bankruptcy relief:<sup>71</sup>

- The Act 47 coordinator recommends filing.<sup>72</sup>
- There is imminent action by a creditor that would threaten the ability of the municipality to provide services.
- A creditor has rejected the Act 47 plan and the rejection cannot be resolved.
- A condition causing financial distress could be solved by filing.

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<sup>69</sup> Municipalities Financial Recovery Act, Act 1987-47, P.L. 246, No. 47.

<sup>70</sup> 11 U.S.C. § 109(c).

<sup>71</sup> Municipalities Financial Recovery Act, Act 1987-47, P.L. 246, No. 47.

<sup>72</sup> The Act 47 coordinator is appointed by the DCED secretary. The coordinator may be an employee of DCED or a consultant. (Act 1987-47, P.L. 246, No. 47).

- The governing body has failed to adopt an Act 47 plan or carry out the recommendations of the coordinator.

While Act 47 does not apply to Philadelphia, The Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class requires approval in writing by the Governor for a filing by the city under Chapter 9.<sup>73</sup> The next section will discuss an example of actual events in a township faced with a lawsuit that ultimately resulted in it being placed in Act 47 status.

**Case Study: Westfall Township Act 47.** Events that occurred in Westfall Township in Pike County may give some insight into a potential outcome for a smaller municipal corporation (population just over 2,000) facing lawsuits in an uncapped liability environment. While the specific type of lawsuit in the case of Westfall is outside the scope of this report, it provides a useful scenario to understand the issue as it relates to smaller local governments.<sup>74</sup> To date Westfall has been the only Pennsylvania township that has been under Act 47 financial distress.

In 2009, Westfall filed for Voluntary Chapter 9 Bankruptcy because of a zoning and civil rights dispute with a real-estate developer that resulted in a \$20.8 million judgment. As a result of the bankruptcy, the township was deemed financially distressed and ultimately was required to pay \$1.15 million in legal fees and infrastructure improvements followed by \$6 million, payable in 80 quarterly installments of \$75,000 each, to the real-estate developer (reduced from the almost \$21 million if Westfall agreed to make all 80 payments on time). According to DCED records, this lawsuit resulted in a 30 percent increase in real estate taxes (from 24 mills to 31.5 mills<sup>75</sup>) and "significant spending cuts in all areas not related to the legal settlement."<sup>76</sup>

Westfall faced another financial setback when it faced a lawsuit with a former police officer for \$703,000 in 2012.<sup>77</sup>

The DCED local government policy specialist assigned to the Westfall case stated during a hearing:

[The financial situation] should not be taken lightly... however, it is still important to note that Westfall does not have persistent structural distress. It does not have extraordinary expenditures which cannot be funded through basic taxation. It does not have

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<sup>73</sup> Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class, Act 1991-6, P.L. 9, No. 6.

<sup>74</sup> This was a civil rights case with the lawsuit filed in federal court.

<sup>75</sup> A mill rate is \$1 per each \$1,000 of assessed value on a property.

<sup>76</sup> Commonwealth of Pennsylvania, Department of Community and Economic Development. (2014, October 21) *Request for Rescission of Status Under Section 253 of Municipalities Financial Recovery Act, Re: Township of Westfall*. <https://dced.pa.gov/download/westfall-twp-order-and-exit-report-pdf/?wpdmdl=58588>. Retrieved March 14, 2022.

<sup>77</sup> They were required to make two payments of \$175,000, followed by eight annual payments of \$35,000.

a deteriorating tax base, an underfunded pension system, unwieldy contractual obligations, or a failing infrastructure.<sup>78</sup>

That was further echoed in a DCED document: "...prior to the bankruptcy in 2009, Westfall was financially sound and had no significant financial issues, with an average annual budget of approximately \$1 million and operational reserves generally between \$300,000 and \$350,000 annually on approximately 24 mills in real estate taxes."<sup>79</sup>

Westfall Township ultimately remained financially stable after the bankruptcy filing, to the point where DCED rescinded their Act 47 financially distressed municipality status in 2014; however, it remains a cautionary tale. Westfall Township continues to make payments on the 2009 lawsuit. Taxpayers ultimately assume the burden of a large lawsuit either in the taxes they pay, fewer services provided, or a combination of both. In an uncapped liability environment bankruptcy is a real possibility for local government entities.

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<sup>78</sup> Brelje, Beth. (2014, June 11) *Westfall Township nears removal from financially distressed status*. Pocono Record. <https://www.poconorecord.com/story/news/2014/06/11/westfall-township-nears-removal-from/37038302007/>. Retrieved March 14, 2022.

<sup>79</sup> Commonwealth of Pennsylvania, Department of Community and Economic Development. (2014, October 21) *Request for Rescission of Status Under Section 253 of the Municipalities Financial Recovery Act, In Re: Township of Westfall*. <https://dced.pa.gov/download/westfall-twp-order-and-exit-report-pdf/?wpdmdl=58588>. Retrieved March 14, 2022.

## SECTION IV IMPACT OF LIABILITY LIMITATIONS ON PLAINTIFFS



### Fast Facts...

- ❖ *About 1 percent of claims are paid near or at the statutory cap. Those cases where the statutory cap is paid out may represent individuals with significant, life-changing injuries.*
- ❖ *In Case Study 1, the \$7 million stipulated verdict was reduced to \$250,000 due to Pennsylvania's sovereign immunity statute.*
- ❖ *In Case Study 2, the State Correctional Institution at Pittsburgh was aware their water system was infected by the bacteria that causes Legionnaires Disease and took no effective action resulting in a death.*
- ❖ *In Case Study 3, claimants' homes were severely damaged by a city owned 48-inch water main break. Victims received 60 percent of their approved loss.*

## Overview

Senate Resolution 2021-146 directs the Legislative Budget and Finance Committee (LBFC) to consider the impact of Pennsylvania's liability limitations on plaintiffs.

We interviewed individuals involved in three tort claims against an entity created by the Commonwealth, the Commonwealth, and citizens of Philadelphia brought by the City of Philadelphia. The individuals participated with the knowledge that information obtained could be used in our report. We present them here as case studies to provide additional understanding of a complex issue.

The first case study involved Hayley Freilich who brought a cause of action against the Southeastern Pennsylvania Transportation Authority (SEPTA). It is currently before the Pennsylvania Supreme Court.

The second is a suit brought against the State Correctional Institution at Pittsburgh, Pennsylvania Department of Corrections, and Capital Technologies, Inc.

The third is suit brought by the City of Philadelphia against citizens of Philadelphia to reduce the City's liability for a water main break.

We found:

1. The statutory caps play no significant role for the vast majority of plaintiffs (as shown in Sections II and III). However, for those few who have been severely injured by governmental entities subject to the caps, the limitations on liability have devastating health and financial consequences.

## A. Case Studies

A case study is a method used to learn about a complex issue or event, based on a comprehensive and extensive description of it.<sup>80</sup>

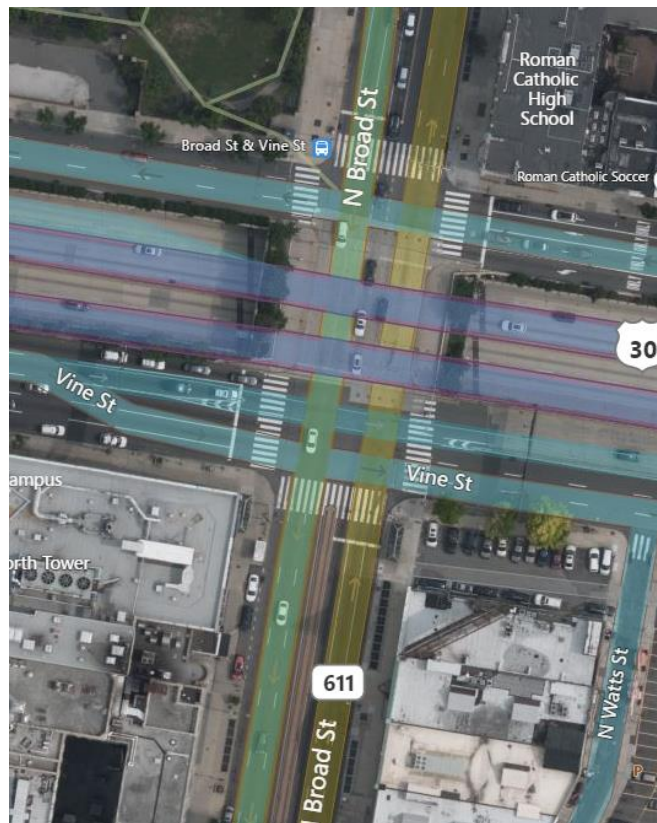
<sup>80</sup> Government Accountability Office. (1990, November) *Case Study Evaluations*.

This section of our report provides an extensive description of three complex events – injuries or property damage suffered by citizens of Pennsylvania that were found to be caused by governmental agencies of Pennsylvania and the fairness of the results of these events.

**Case Study #1: Hayley Freilich.** On October 2, 2017, Ms. Hayley Freilich was struck by a bus operated by the Southeastern Pennsylvania Transportation Authority (SEPTA) as she headed east on Vine Street in downtown Philadelphia. Ms. Freilich had been crossing Broad Street during a green light (she had the right-of-way) while walking within a crosswalk. Just moments before, she had walked in front of the stopped SEPTA bus. Reaching the corner, she turned left, waited for the light to turn green, looked both ways, and entered the intersection. While she was in the crosswalk, a SEPTA bus turned right from Vine Street onto Broad Street (See Exhibit 13). The bus turned into the crosswalk, struck Ms. Freilich, and ran over her left foot. The SEPTA bus driver exited the bus immediately after striking Ms. Freilich and told her: “I’m so sorry, I did not see you. I’ll be praying for you.”

### Exhibit 13

#### Map Depicting Accident



Source: Depiction of Vine and Broad Streets, Philadelphia - Search (bing.com), retrieved April 25, 2022

Emergency medical personnel rushed Ms. Freilich to Hahnemann Hospital in critical condition. As a result of her injuries, Ms. Freilich underwent a partial left foot amputation. Her injuries have required multiple surgeries and significant medical care. She is disfigured. Her medical bills are extraordinary. Her capacity to earn a living has been significantly diminished.<sup>81</sup>

These are the basic facts of the case, and they are not in dispute. In fact, SEPTA agreed to these facts and to a verdict for Ms. Freilich of \$7 million. The agreed to verdict was reduced to \$250,000 based on the limits on liability set in the Sovereign Immunity Act.<sup>82</sup>

Hayley Freilich was walking to work the day she was hit. Taking her usual route, she was about four-fifths of the way to work. Because there had been some narrow misses at the intersection of Vine and Broad Streets, she crossed over to the other side of the street to what she thought would be a safer place to cross.

She waited for the light to cycle through so she would have the entire time to cross the intersection. Three lanes into the intersection, she saw the bus – the same bus she had just crossed in front of – and she started to run the other way. The bus was so close that she was able to put her hand on it to move herself a bit out of the way, likely saving her life. As it was, the bus ran over Ms. Freilich’s foot, knocking her down.

The main witness to the accident was a volunteer paramedic who directed Ms. Freilich to stay lying down.

Naturally, Ms. Freilich was terrified, but not only because she had been hit by a SEPTA bus. Ms. Freilich has a history of ventricular tachycardia – a very fast and dangerous heartbeat. Because of this, she has a pacemaker and defibrillator implanted. A sudden influx of adrenaline is very dangerous to an individual with ventricular tachycardia. It can cause an electrical storm in her heart.<sup>83</sup> Ms. Freilich was taken to the trauma room, put under anesthesia, and is unable to remember much after that.

When she woke up, her sister, who lives in South Carolina, was in the room. It was at that moment, given how far away her sister lives, Ms. Freilich realized how long she must have been unconscious. She thought she had a badly broken bone. Because she had been knocked to the ground, she was not aware of the extent of her injuries. Among other

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<sup>81</sup>Application for Extraordinary Relief Under 42 Pa.C.S. § 726 of Hayley Freilich, *Freilich v. Southeast Pennsylvania Transportation Authority*, Docket No. \_\_\_ EM 2022 (Supreme Court of Pennsylvania).

<sup>82</sup>42 Pa.C.S. § 8528 (b).

<sup>83</sup> In this case, an electrical storm is when the pacemaker and defibrillator keep shocking the heart in a desperate attempt to regulate it. It is painful and frightening.

things, her injuries consisted of a crushed and partially degloved foot.<sup>84</sup> It was her sister who told her the doctors had to amputate part of her foot.

Ms. Freilich slowly began to realize the injury would change many things in her life. She was not able to get out of bed, go to the bathroom, or get something across the room. Someone had to help her do everything. Her world became her bed – the only area she could access independently.

**Recovery.** As noted above, Hayley Freilich’s injury was a crushing and degloving of her foot. The doctor tried to preserve as much of her foot as possible to give her some functionality. It took about a year to determine if she would be able to keep any part of her foot. The wound itself took about two years to heal because of the scarring. Doctors used skin to create flaps allowing it to become a type of hermetic seal around the interior tissues. It causes the wound to heal from the inside out. Every time she went to the doctor for follow-up appointments, they had to provide extensive wound care. At home, her family had to hire in-home nursing to inspect and clean the wound and change the bandages. While her family includes medical professionals, the care of her wound was beyond what they could provide.

**Bills Related to Accident.** According to Ms. Freilich, her attorney was able to freeze some of her medical bills. While she does have health insurance through her employer, it does not cover all her medical expenses. For example, she was wheelchair bound for a year. During her second stay in a rehabilitation facility, the facility recommended a mechanized wheelchair. Insurance would pay for a wheelchair, but not a mechanized one. Other equipment such as wound supplies, certain prescriptions, outpatient follow-up, physical therapy, co-pays, bedside toilet, and walker were not covered by her insurance.

Because she was unable to get back into her third-floor apartment, she had to rent a temporary space which was not covered by insurance. Finally, some of her prosthesis costs have been paid out of pocket.

All in, Ms. Freilich, her parents, her employer, and the hospital have covered her medical costs. SEPTA has yet to pay for anything.

**Earning Capacity.** Ms. Freilich currently serves as the Director of Healthcare of an architectural firm in downtown Philadelphia. Prior to her accident, she was on track to make partner. Her job is to design “positive distraction moments” so a patient is not focusing on the stressful parts of their treatment or waiting for treatment. Children’s Hospital

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<sup>84</sup> Degloving happens when a large piece of skin and the layer of soft tissue right under it partially or completely rip from one’s body. Imagine partially removing a sock from a foot with the sock representing the skin.



of Philadelphia (CHOP) is her biggest client. She is unable to do the job as she once did. For example, when she was wheelchair bound, Ms. Freilich was unable to go to jobsites because of the number of obstacles in a construction setting. Currently, she is unable to keep up with clients on a walkthrough of a facility.

Getting to a jobsite is just as difficult. She is unable to go anywhere on her own because she is not strong enough to get her wheelchair out of her vehicle on her own. There is not always someone available to travel with her for work.

Currently, she is planning on going on short-term disability for at least three months. The goal is to work part-time and focus the rest of her time and energy on recovering her strength and overall level of fitness. Because she had to be sedentary for so long, she continues to experience extensive pain and her pulmonary and cardiac status continues to decline – so much so that she needs supplementary oxygen whenever she is not at rest.

**The Family.** Ms. Freilich's mother, Sharon Herz-Freilich, agreed to be interviewed by LBFC staff. She is very proud of her daughter and her capacity to withstand the struggle of her recovery. However, she reports that her daughter's strength is a "double edged sword." "We want our kids to be able to deal with all the hard things life hands us. But I cringe a bit when I hear about resilience – because people can appear strong when they aren't."

According to Ms. Herz-Freilich, the grief that goes along with the injury is enormous. "It's wonderful to be admired, to have the ability to express yourself, and have coping mechanisms. But there's a whole level of resentment and anger that go along with those things. Outsiders aren't privy to the darker moments."

The whole experience has created plenty of dark moments that are not limited to the injured person. For her, constantly worrying about her daughter produces "horrible anxiety." She is concerned that her daughter will not have the resources necessary to pay for her care and live a full life. She is worried that she will have to go bankrupt before she can get the necessary help. Like any parent, Ms. Freilich's mother does not want her daughter to be in a situation where she must lose everything before getting help.

Because Ms. Herz-Freilich must be available to help her daughter, she is no longer able to work. Additionally, she had to leave her husband for two years (they live out of state) to care for Ms. Freilich as her in-home caregiver.

Ms. Herz-Freilich is also concerned about her daughter's financial condition. "The horror of having medical liens for someone of her age. She's been responsible. She's been high achieving. She's done without and saved. It will all be gone. And we've been financially responsible as well. But now we have to borrow from family in order to help Haley."

"I'm frustrated. My daughter was independent and dynamic. But now I am on call all the time. I have to be ready to leave on a moment's notice. I'm bitter and angry. I wasn't before all of this."

"This has impacted my entire family – psychologically, financially, emotionally. I can't do the job I love. I can't contribute to the tax base. Everyone pays for this. Everyone, except SEPTA."

Ms. Herz-Freilich is, of course, technically wrong. SEPTA will pay \$250,000. By way of comparison, the Greyhound bus company, by law must carry \$5 million in liability insurance.<sup>85</sup>

**Ms. Freilich's Future.** Ms. Freilich worries a lot about her long-term wellbeing. She is painfully aware there may be a time where she must have further surgical interventions. Because of the necessary wound treatment as she ages and continues to use the remaining part of her foot, she might need a further amputation because the blood circulation in her foot is not what it should be for the foot to remain healthy.

Ms. Freilich would like to have a family one day, but she is concerned that she will not be able to do that. She worries whether she will be able to keep her children safe or even able to run and keep up with them. She also worries about the finances of having children given her situation.

Now, she takes extra time before she goes to bed to make sure her skin is intact. Every night she must apply various treatments to make sure the skin on the remaining portion of her foot stays healthy. If her foot hurts, she must use crutches. Crutches or not, it is exhausting to walk even on her good days. She uses supplemental oxygen because she has been unable to regain her strength. She has constant reminders. She cannot ever forget. Something simple like shoe shopping can bring her to tears.

When she allows herself to be vulnerable, she gets angry, "... because once this case is done, it's done. THEY don't have to go home every day and think about this. But I haven't had a single day when I haven't been in pain. It's been hard. It's been four and a half years. And I'll have that pain my whole life."

**Case Study #2: Dr. Joseph Mollura.** On May 4, 2016, routine water testing in Water Cooling Tower Number One (Cooling Tower One) at State

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<sup>85</sup> 17 Pa.C.S. 3217 and 66 Pa.C.S. §§ 501, 512, and 1103(d).

Correctional Institution at Pittsburgh (SCI Pittsburgh) was conducted by Capital Technologies, Inc. (CTI). The testing showed over four times the allowed number of colony forming units per milliliter of *Legionella* bacteria.<sup>86</sup> The results of the test were reported to the Pennsylvania Department of Corrections (DOC) on May 12, 2016. Subsequent testing in June, July, and August of 2016 revealed the continued presence of the bacteria.

Cooling Tower One is adjacent to and serves the medical department of SCI Pittsburgh, where Dr. Mollura worked. Around August 1, 2016, Dr. Mollura began experiencing a dry cough and shortness of breath. On August 3 of that year, he completed his shift at the prison and left the facility. On August 4, Dr. Mollura traveled with his wife to Orlando, Florida for a family vacation to celebrate a graduation and a birthday.

On August 5, Dr. Mollura went to the emergency room of Orlando Health hospital complaining of a wheezing cough and congestion in the left lung. A chest x-ray revealed severe pneumonia of the left lung. When urinalysis tested positive for *Legionella* antigen, Dr. Mollura was diagnosed with Legionnaire's pneumonia.

The medical staff at Orlando Health were unable to stop the progression of the disease. Dr. Mollura died on August 8, 2016.

A Department of Corrections report stated the cooling tower was cleaned on August 12, four days after the death of Dr. Mollura. However, an email dated September 1 sent by DOC Chief of Safety and Environmental Protection contradicts the DOC report. In his email, the Division Chief wrote, "The original report of the cooling tower being drained and cleaned was inaccurate. Therefore, a super chlorination will occur to eliminate the *Legionella* bacteria growth in the cooling tower."

These are the basic facts of the case, and they are not in dispute. In fact, all parties settled with Dr. Mollura's estate. The Department of Corrections and SCI Pittsburgh portions were reduced to \$250,000 each.

**Mrs. Maria Mollura.** Mrs. Mollura is the wife of Dr. Mollura. She agreed to be interviewed by LBFC staff for this report.

Dr. and Mrs. Mollura were the parents of four adult children. According to Mrs. Mollura, they had a very happy marriage.

The memories of the summer her husband died are naturally very painful for Mrs. Mollura. For her, it began with her husband complaining the air

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<sup>86</sup> The Occupational Safety and Health Administration recommends that any water cooling that has 100 cfu/ml or more undergo a cleaning and biocide treatment to prevent the spread of Legionnaires' disease. This guideline is for healthy individuals. Dr. Mollura was immunocompromised.

conditioning at the jail was broken. It had been a particularly hot summer in Pittsburgh with average high temperatures around 85 degrees.

The cooling tower where the excessive levels of Legionella bacteria were found was next to Dr. Mollura's office. Her husband began to have some difficulty breathing. Originally, he thought it was just the heat of the summer, the lack of air conditioning, and air circulation in his building.

Dr. and Mrs. Mollura were looking forward to a trip to Florida that was to take place a few weeks later. It would be a chance to be close to their entire family and to celebrate. After arriving in Florida, Dr. Mollura's symptoms took a dramatic turn for the worse and he was admitted to the hospital a day later. It was a Friday and by Monday, he was dead.

"I wasn't with him his first night in the hospital. As things got worse, I spent the next two nights with him. Even with the treatments, he couldn't breathe."

On Monday morning Mrs. Mollura woke up in her husband's hospital room to the sound of the respiratory therapist coming in to give her husband his treatment. During the treatment, Dr. Mollura went into cardiac arrest. The hospital medical team began an extended attempt to resuscitate him, and Mrs. Mollura was escorted from the room.

As one can imagine, Mrs. Mollura misses her husband. She loved listening to her husband's funny stories about the prison and the "characters" there. She looked forward to growing old with him, travelling together, and doting on their grandchildren.

It angers her that the Department of Corrections and SCI Pittsburgh did not take care of a known issue. In May, June, July, and August of 2016, the water system was evaluated for the presence of Legionella bacteria. On each occasion, it was detected.

For three months, SCI Pittsburgh knew Legionella bacteria was present, their attempts to remediate the infestation were failing, and the water system was defective in its ability to prevent the colonization of the bacteria and effectuate the remediation and eradication of the bacteria already present.

The prison chose not to notify employees of the situation, however, Dr. Mollura's death triggered a series of emails among prison officials and prompted two staff to ask the Allegheny County Health Department to test them for Legionnaire's disease.

"I'm angry the prison didn't take care of a known issue," Mrs. Mollura said. She's also very angry at how the prison treated her after her husband's death.

Interestingly, Mrs. Mollura is also frustrated that CTI ended up paying more than they otherwise would have because of the cap. In her view, the most culpable party paid the least.

**Case Study #3 – Water Main Break, 21<sup>st</sup> and Bainbridge Streets, Philadelphia.** At approximately 11:00 PM on Sunday, July 22, 2012, a 48-inch water main pipe ruptured at 21<sup>st</sup> and Bainbridge Streets in the Graduate Hospital Neighborhood of Philadelphia. The resulting flood forced the evacuation of about four blocks of residents and caused nearly \$2 million in damage. Over 100 homes and businesses were affected.

According to the Philadelphia Water Department, the break spilled, “several millions of gallons of water” into the street. Additionally, the water caused a sink hole approximately 15 feet deep. The pipe was put in service in 1916.

The City of Philadelphia claimed they were only responsible for \$500,000 in damages, the maximum amount set by 42 Pa.C.S. §8553. The court appointed a special master to recommend to the court the equitable distribution of the funds.

The City’s claims division compiled, and reviewed information supplied by individuals who had their homes damaged. Additionally, the claims division decided what items were compensable and applied a depreciation figure to the amount of the claims.

In total, 85 households and businesses submitted claims. Of those, only 29 had property insurance that also covered water damage. Because of the \$500,000 cap, claimants only received 60 percent of their City approved claim.

The special master charged \$225/hour for his services, totaling \$19,611.49. The fee was paid from the \$500,000 capped amount, reducing the total available funds for claimants. The special master’s fee exceeded the amount received by all but one individual claim.

**Jim McLaughlin and Vincent Bechler** lived about half of a block from the junction where the pipe burst. “My partner and I noticed low water pressure while we were doing the dishes after dinner. We never have low water pressure, so we knew something was wrong.”

They went to their basement to see if there was a leak and found nothing. Sometime later, they heard water outside and opened their front door to a three-foot-deep river of water. “Our neighborhood went from calm and quiet to total chaos.”

Both knew there would eventually be water in the basement, so they worked quickly to remove everything from the bottom shelves and the

floor of the basement, thinking that would be enough. However, within three hours their basement went from “bone dry” to covered in six feet of water.

“We lost everything – pictures, heirlooms, my book and music collections, and appliances. There was so much water it knocked the shelves over.”

In the middle of the night the fire department knocked on their door and told them they would have to evacuate the area. They were concerned about electric and gas lines. The concern was prescient as a gas line also broke at the same intersection.

Mr. McLauphlin and Mr. Bechler had to pack up everything and move out. Fortunately, they had friends in the Villanova neighborhood of the city who let them stay at their house.

According to Mr. McLauphlin, they were one of the few homeowners that had extra insurance coverage for water damage. Their insurance company told them they would send a cleaning company to begin work the next day. However, the City would not let the cleaning company onto the block because there were too many trucks hired by the City to clean houses owned by individuals who did not have insurance.

Any personal items that could not be cleaned had to be thrown away. For Mr. McLauphlin, that meant losing books, clothing, heirlooms, music scores, and other items. To have these items approved by the city, claimants were required to provide receipts. For those items that were approved, the city applied a depreciation factor to arrive at a final approved amount.

Their basement had to be treated, sealed, and restored to preserve the structural integrity of the house. This was in addition to normal water remediation efforts such as dry wall replacement and mold mitigation.

Their total claim was \$30,000, of which the city approved \$9,000. Because of the cap, they were only able to receive 60 percent of the approved number, or \$5,400. While it is true that number is 60 percent of the approved claim, it is only 18 percent of their total loss.

**Marla Rosenberg and her husband, Albert Clark** live two townhouses from 21<sup>st</sup> and Bainbridge Streets, the location of the water main rupture. Ms. Rosenberg and her husband had lived in their home for two years along with Mr. Clark’s mother. At about 9:00 PM, there was a frantic knock at their front door. When Ms. Rosenberg answered, she saw a fireman and a river of rapid water flowing down the street.

Ms. Rosenberg went to the basement to see water leaking through the wall where her basement attached to the next building up the street. The

pressure was so intense, the water began punching holes through the foundation wall causing the water to gush as if it were coming from a large hose. In a short period of time, the water level in the basement rose to the last step before the first floor – about eight feet.

She remembers cars floating down the street and emergency workers using river rescue boats to evacuate residents. After getting her to dry land, Mr. Clark's mother needed to be transported, by ambulance, to a makeshift shelter in a school. She was 90 years old at the time.

Their claim was \$47,405, which included tools, clothing, food, photos, letters, diplomas, military awards, vital family documents, a rare stamp collection, and antique instruments. After determining what was allowable and factoring in depreciation, the city reduced the claim to \$28,206. Because of the cap on damages, Ms. Rosenberg and her husband received \$16,923.

**Kathy Pernini and her husband, Kim Milner,** live at the home next to the water main break. Returning home, they found all the roads near their house were blocked. Finding their way to 20<sup>th</sup> Street, they parked their car and walked up to Bainbridge Street where they were stopped by a police officer who informed them the water main had burst. Looking up the block, they could see water spewing from a hole in the street.

Not knowing what to do, they waited for about three hours to see what would happen. Finally, they left to find a place to stay for the night. The next day they returned and were able to get within a block of their home. However, they were not allowed into their house for three days.

Ms. Pernini and her husband had to replace subflooring, carpet, cabinets, and dry wall. Additionally, their water heater, furnace, ducts, electrical service, windows, and front door had to be replaced.

In addition to the property damage, there was a significant loss of personal property, including horse tack and supplies, bins of art and craft supplies, Ms. Pernini's mother's wedding dress, family Christmas decorations, the family china set, original artwork, clothing, and tools. Damage to their home and personal property exceeded \$74,000. However, the city only approved a loss of \$33,071. Of that, the award amount was set at \$19,842, or 27 percent of their estimated loss. The loss was significant enough to cause Ms. Pernini and her husband to postpone retirement.

## **B. Conclusions**

As shown in Sections II and III, less than one percent of claims are paid near or at the statutory cap. However, those few cases where the

statutory cap is paid out may represent individuals with significant, life-changing injuries or losses where that limitation results in payments far below what a non-governmental actor would pay. We have provided three detailed examples to show the effect of the statutory caps in these types of injuries and losses.

By any reasonable definition, the individuals highlighted in these case studies suffered catastrophic injuries and losses. In the cases of Ms. Freilich and Dr. Mollura – literally, life and limb. The injuries of all claimants are financial, and emotional.

In the case of Ms. Freilich, she has lost part of her foot, her medical bills are enormous, and her ability to do her job, and thus her earning capacity, is diminished.

In the case of Dr. Mollura, he lost his life, and his wife lost his income and companionship.

It is also clear that someone always must pay the bill for this. In Ms. Freilich's case, it is her employer, who pays for her insurance, the hospital for uncompensated care rendered in the emergency and its aftermath, and Ms. Freilich and her family for the rest. She is likely facing bankruptcy given the past, current, and future cost of her medical care.

In Dr. Mollura's case it is the private testing company that is least responsible for the situation.

In the case of Ms. Perini, the financial loss was significant enough to require deferment of retirement.



# SECTION V

## LOCAL GOVERNMENT ENTITY SURVEY



### Fast Facts...

- ❖ *A total of 253 local government entities responded to the Local Government Entity Survey: with a response rate of 5.4 percent.*
- ❖ *76.3 percent of survey respondents were from municipal governments.*
- ❖ *57.3 percent of respondents have commercial property and liability (insurance) coverage.*
- ❖ *Over 90 percent of local government entities that responded to the survey, agree, or strongly agree that liability coverage will become prohibitively expensive if damage caps were eliminated and/or adjusted for inflation.*

## Overview

In February 2022, the LBFC distributed a survey to local government entities to determine the impact changes to limitations on liability would have on these entities. The survey objectives were: (1) to highlight factors related to limitations on liability, and (2) to describe the impact an increase in damage caps could have on local government entities. Within the Commonwealth's 67 counties there are 2,560 municipal corporations,<sup>87</sup> 56 cities, 956 boroughs, one incorporated town, 93 first-class townships, and 1,454 second-class townships. In addition, Pennsylvania has 500 school districts and 1,532 active authorities.

The overall response rate to the local government entities survey was 5.4 percent (253 respondents). The Center for Rural Pennsylvania and the Local Government Commission's (LGC), *Survey of Pennsylvania Elected Officials, 2021*, states the feedback they received from municipal associations indicated "members were experiencing 'survey fatigue' as there were numerous requests from many organizations seeking information on issues primarily related to the COVID-19 pandemic."<sup>88</sup> Therefore, we attribute our low response rate to possible survey fatigue. However, we compare favorably to the response rate (7 percent) of LGC's most recent *Survey of Pennsylvania Elected Officials, 2021*.

The sections that follow provide an overview of our survey methodology and results using descriptive statistics.

We found that for the local entities responding to our survey:

1. Over 50 percent of local government entities have property and liability (insurance) coverage through a commercial insurer.
2. Over 90 percent of local government entities agree or strongly agree that (insurance) coverage will become prohibitively expensive in Pennsylvania if damage caps are eliminated or increased based on inflation.

<sup>87</sup> Pennsylvania Local Government Commission, General Assembly of the Commonwealth of PA. *Pennsylvania Legislator's Municipal Deskbook*, Sixth Edition, 2020.

<sup>88</sup> The Center for Rural Pennsylvania and Local Government Commission. *Survey of Pennsylvania Elected Municipal Officials, 2021 (January 2022)*.

3. If damage caps were eliminated or increased based on inflation, over 80 percent of local government entities agree or strongly agree that it is likely there will be a negative impact on services provided to the community.
4. If damage caps were eliminated or increased based on inflation, local government entities indicated that general government, highways and streets, and culture and recreation as the three budget areas that would be affected.
5. If damages caps were eliminated or increased based on inflation, over 75 percent of local government entities agree or strongly agree their municipality will likely have to increase taxes/fees.

## **A. Methodology**

Initially, we spoke to associations that represent school districts, municipal authorities, local governments, and transit authorities. Thereafter, we spoke to risk pools, an association that represents the commercial insurance industry, a risk-pool reinsurer, a regional transportation authority, a First-class city, the Pennsylvania Department of General Services, and the Office of Attorney General.

The survey was made available from February 4, 2022, through March 11, 2022. A series of emails were sent to local government entities and associations, which included the purpose of the survey, how long it would be open for responses, and a direct link to the survey. There was a total of twenty-two questions. Part I of the survey (questions 1-7) included demographic questions that provided the name/title of the individual completing the survey, type of municipality, class (if applicable), population, annual budget, the entity's type of property and liability (insurance) coverage, and cost of coverage.

Part II of the survey included both quantitative and qualitative questions. The questions could be summarized into six categories: (1) liability coverage, (2) local services, (3) budget, (4) taxes/fees, (5) risk management, and (6) contracted services. We used a 5-point Likert Scale<sup>89</sup> in a series of questions as they pertain to the current limitations on liability and the possible impact changes to the current limitations could have on local government entities. In addition, open-ended questions allowed LBFC to gain insight into the concerns of local government entities about

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<sup>89</sup> Preedy V.R., Watson R.R. (eds) Handbook of Disease Burdens and Quality of Life Measures. Springer, New York, NY. [https://doi.org/10.1007/978-0-387-78665-0\\_6363](https://doi.org/10.1007/978-0-387-78665-0_6363). A type of psychometric response scale in which responders specify their level of agreement to a statement typically in five points: (1) Strongly disagree; (2) Disagree; (3) Neither agree nor disagree; (4) Agree; (5) Strongly agree.

changing the limitations on liability. Exhibit 14 below provides a breakdown of responses by type of local government and the corresponding rate of response.

Exhibit 14

**Local Government Entity Survey – Total Responses by Type of Local Government Entity**

	No. of Local Government Entities	No. of Survey Responses	Response Rate
<b>County</b>	67	27	40.3%
<b>Municipal Corporations</b>	2,560	195	7.6%
<b>School Districts</b>	500	18	3.6%
<b>Active Authorities</b>	1,532	13	0.85%
<b>Total:</b>	4,659	253	5.4%

Source: Developed by LBFC staff with information from the following: (1) Local Government Commission Legislator's Deskbook, 2020. <<https://www.lgc.state.pa.us/deskBook.cfm>>, and (2) U.S. Census Bureau, Governments – State Descriptions, Pennsylvania. <<https://www2.census.gov/govs/cog/gc0212pa.pdf>>

In the sections that follow we provide descriptive statistics from the Local Government Entity Survey. The survey results are not a representative sample and cannot be generalized to all local government entities. Therefore, the results of this survey should be carefully interpreted.

## **B. Survey Findings**

The sections that follow provide descriptive statistics from the local government entity survey. Although not a representative sample, we think it provides a local government perspective on changes to the current limitations on liability.

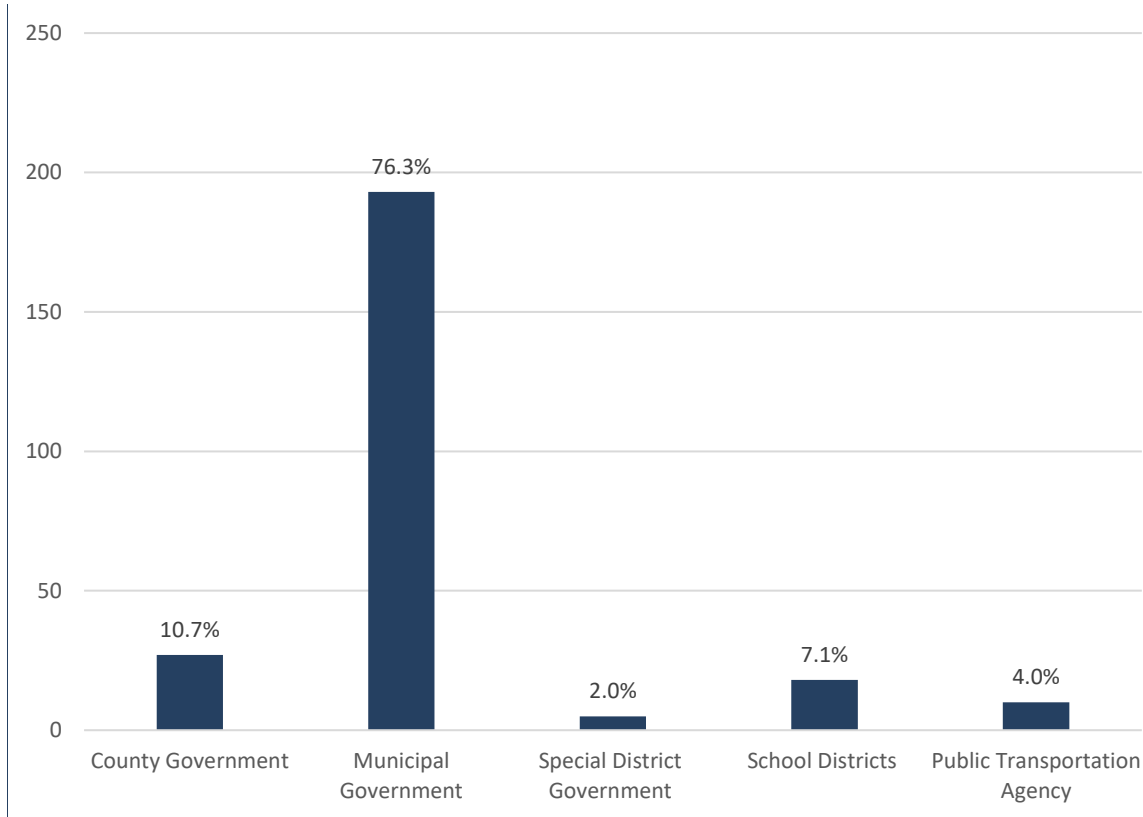
**Demographics.** In Part I of the survey questions, we asked respondents to identify their entity using the six types of local governments: (1)

county government, (2) municipal government, (3) township government, (4) special district government (i.e., water districts, fire protection districts, irrigation districts, etc.), (5) school districts (including independent), and (6) public transportation.<sup>90</sup> Exhibit 15 below shows the percentage of responses by type of local government entity.

Exhibit 15

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**Overall Survey Responses by Type of Local Government Entity**



Source: Developed by LBFC staff from the Local Government Entity Survey Responses.

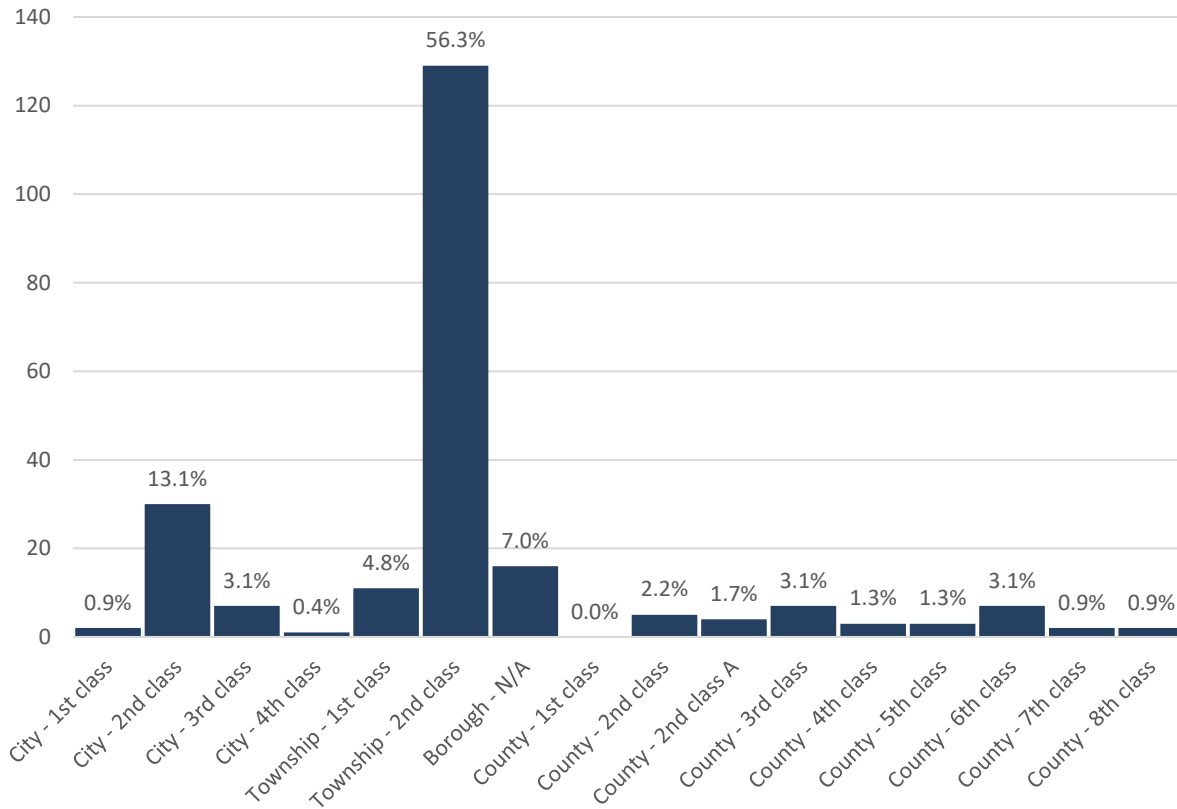
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<sup>90</sup> U.S. Census Bureau, Governments – State Descriptions, Pennsylvania. < <https://www2.census.gov/govs/cog/gc0212pa.pdf>>

Survey responses were most heavily weighted among municipal governments, at 76.3 percent (193). Exhibit 16 shows each of the responding local government entities' municipality classification.<sup>91</sup>

Exhibit 16

**Local Government Entity Survey – Municipality Classification**



Source: Developed by LBFC staff from the Local Government Entity Survey.

Of the local government entities that responded, 56.3 percent (129) were from second-class townships.

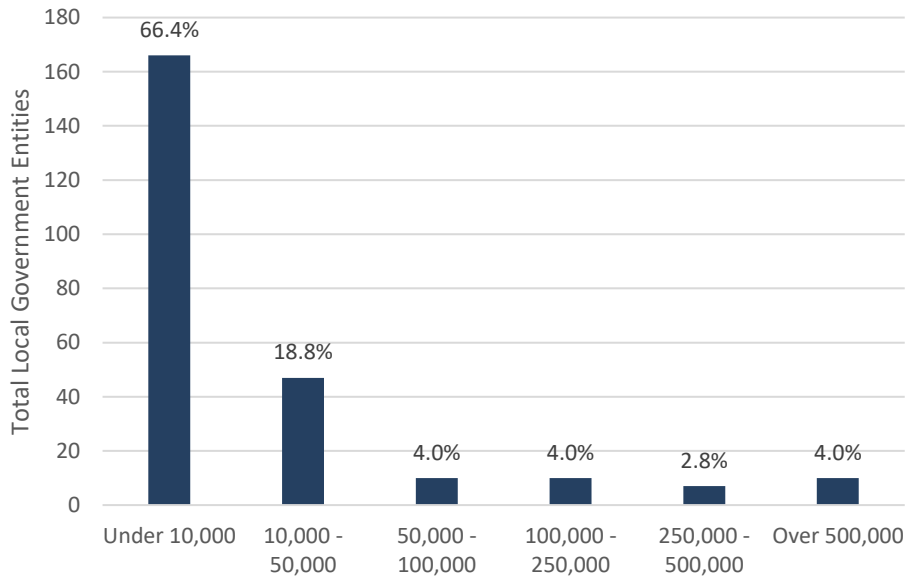
The next series of survey questions focused on population, annual budget(s), type of liability (insurance) coverage, and the associated cost of coverage.

<sup>91</sup> Municipal classes are not applicable to boroughs; the question was not answered by 24 respondents.

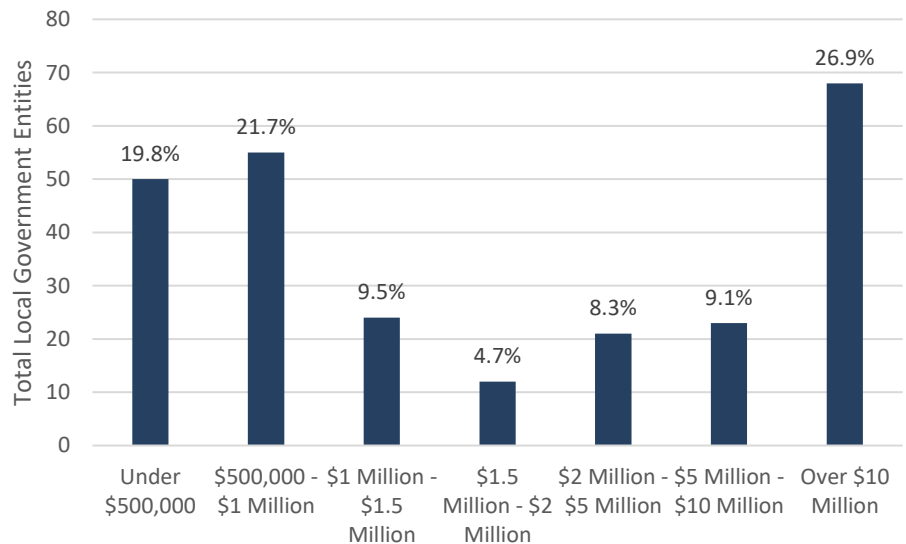
Exhibit 17 below shows the total population and annual budget(s) of the local government entities that completed the survey.<sup>92</sup>

Exhibit 17

**Local Government Entity Survey - Population**



**Local Government Entity Survey - Annual Budget**



Source: Developed by LBFC staff from the Local Government Entity Survey responses.

<sup>92</sup> Question was not answered by three respondents.

Of the survey respondents, 66.4 percent had a population of fewer than 10,000 residents. Annual budgets varied among respondents, with 26.9 percent having an annual budget of more than 10 million dollars, 21.7 percent between \$500,000 to \$1 Million, and 19.8 percent under \$500,000.

We asked each respondent to indicate the type of property and general liability (insurance) coverage they currently have in place. Exhibit 18 provides a breakdown of liability insurance by type of coverage and the annual cost of coverage.

Exhibit 18

**Type of Property and Liability (Insurance) Coverage and Annual Cost of Coverage**

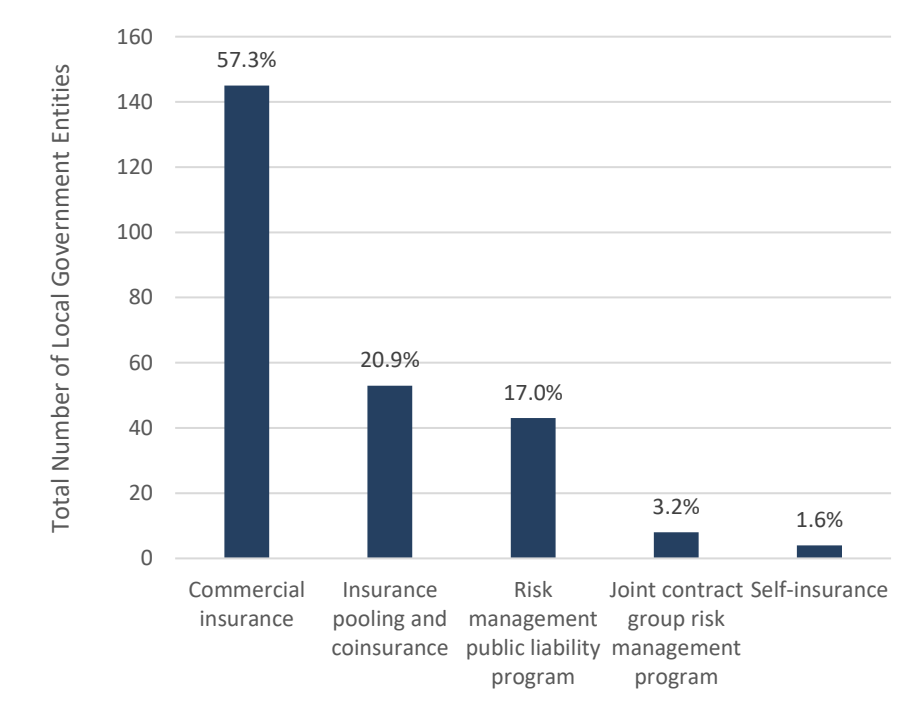
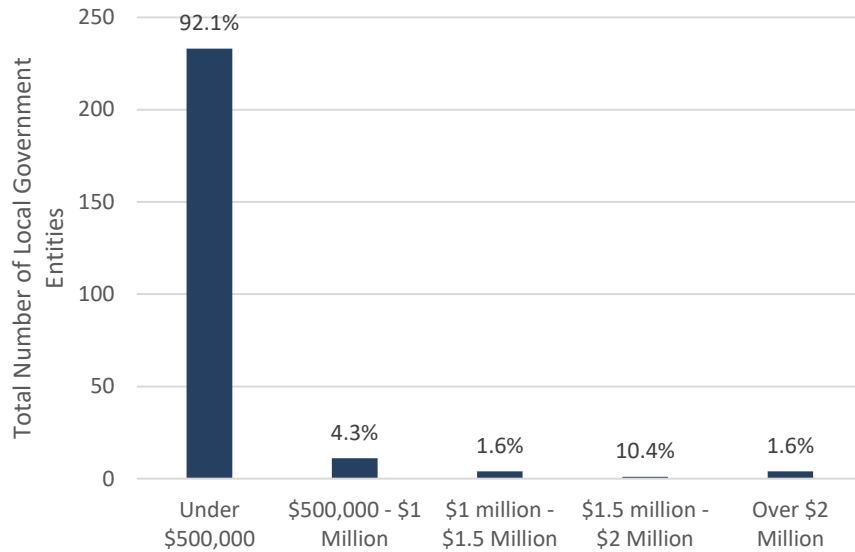


Exhibit 18 Continued

**Annual Cost of Property and Liability (Insurance) Coverage**



Source: Developed by LBFC staff from the Local Government Entity Survey responses.

Among all respondents, the most common types of liability (insurance) coverage held were commercial insurance (57.3 percent) and insurance pooling/coinsurance (20.9 percent).<sup>93</sup> The annual cost of coverage was under \$500,000 for 92.1 percent of local government entities.<sup>94</sup>

**Limitations on liability.** A series of questions surrounding the cost of liability insurance and how changes to the limitations on liability may affect local government entities were asked to gain a better understanding of what local government entities think would happen (hypothetically) if damage caps were eliminated or increased.

We provided two scenarios, one where damage caps were eliminated and one where they were increased based on inflation and asked the local government entities to select a response concerning<sup>95</sup> what impact

<sup>93</sup> Total local government entities that responded to the survey had commercial insurance (145), insurance pooling and coinsurance (53), risk management public liability program (43), joint contract group risk management program (8), and self-insurance (4).

<sup>94</sup> Total local government entities that responded to the survey had an annual cost of liability (insurance) coverage under \$500,000 (233), \$500,000 to \$1 million (11), \$1 million to \$1.5 million (4), \$1.5 million to \$2 million (1), and over \$2 million (4).

<sup>95</sup> U.S. Bureau of Labor Statistics, Consumer Price Index (CPI) Inflation calculator (January 1979 to December 2020). Accessed: 12/20/21.



such change would have on the local government entity's cost of liability (insurance) coverage, public services, budget, and taxes/fees.

**Cost of Liability (insurance) coverage.**

**Scenario 1**

(8) *If damage caps are eliminated, liability coverage in Pennsylvania will become prohibitively expensive.*<sup>96</sup>

(9) *If damage caps are eliminated, liability coverage in Pennsylvania will become unavailable at any price.*<sup>97</sup>

**Results:**

- 94.8 percent (239) of local government entities agree or strongly agree that liability coverage will become prohibitively expensive if damage caps were eliminated. In addition, 5.2 percent (13) neither agree nor disagree and/or disagree that liability coverage will become prohibitively expensive if damage caps were eliminated.
- 65.3 percent (164) agree or strongly agree that liability coverage will become unavailable at any price if damage caps were eliminated. In addition, 34.3 percent (86) neither agree nor disagree and/or disagree and 0.4 percent (1) strongly disagree that coverage will become unavailable at any price if damage caps were eliminated.

**Scenario 2:**

(10) *If the current \$500,000 (\$250,000) damage cap was increased based on inflation to \$1.9 million (\$953,419), liability coverage in Pennsylvania will become prohibitively expensive.*

(11) *If the current \$500,000 (\$250,000) damage cap was increased based on inflation to \$1.9 million (\$953,419), liability coverage in Pennsylvania will become unavailable at any price.*<sup>98</sup>

**Results:**

- 91.3 percent (231) of local government entities agree or strongly agree that if the current damage cap was increased based on inflation, liability coverage will become prohibitively expensive. In addition, 8.7 percent (22) neither agree nor disagree and/or disagree that if the current damage cap was increased based on inflation, liability coverage will become prohibitively expensive. No local government entities strongly disagreed with this statement.

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<sup>96</sup> Statement was not addressed by one respondent.

<sup>97</sup> Statement was not addressed by two respondents.

<sup>98</sup> Statement was not addressed by two respondents.

- 61.0 percent (153) of local government entities agree or strongly agree that if the current damage cap was increased based on inflation, liability coverage will become unavailable at any price. In addition, 39.0 percent (98) neither agree nor disagree and/or disagree that if the current damage cap was increased based on inflation liability coverage will become prohibitively expensive. No local government entities strongly disagreed with this statement.

**Impact on Public Services.**

**Scenario 1:**

*(12) If damage caps are eliminated, it is likely there will be a negative impact on services provided to the community.*

*(13) If the current \$500,000 (\$250,000) damage cap was increased based on inflation to \$1.9 million (\$953,000), it is likely there will be a negative impact on services provided to the community.<sup>99</sup>*

**Results:**

- 87.4 percent (221) of local government entities agree /or strongly agree that there will be a negative impact on services provided to the community. In addition, 12.7 percent (32) neither agree nor disagree and/or disagree that there will be a negative impact on services provided to the community. No local government entities strongly disagreed with this statement.
- 86.9 percent (218) of local government entities agree or strongly agree that if the current damage cap was increased based on inflation there will be a negative impact on services provided to the community. In addition, 12.4 percent (31) neither agree nor disagree and/or disagree that if the current damage cap was increased based on inflation there will be a negative impact on services provided to the community. Lastly, 0.8 percent (2) strongly disagree that if the current damage cap was increased based on inflation there will be a negative impact on services provided to the community.

The questions that follow pertain to local government entities' foreseeable change in public services. The choices ranged from (1) ≥10% decrease in services, (2) 8-10% decrease in services, (3) 4-8% decrease in services, (4) <4% decrease in services, (5) No service adjustments needed, and (6) Other. Exhibits 19 and 20 show survey responses on the possible impact on services if damage caps are eliminated or increased based on inflation.

**Questions:**

*(14) What impact on services do you foresee if damage caps are eliminated?<sup>100</sup>*

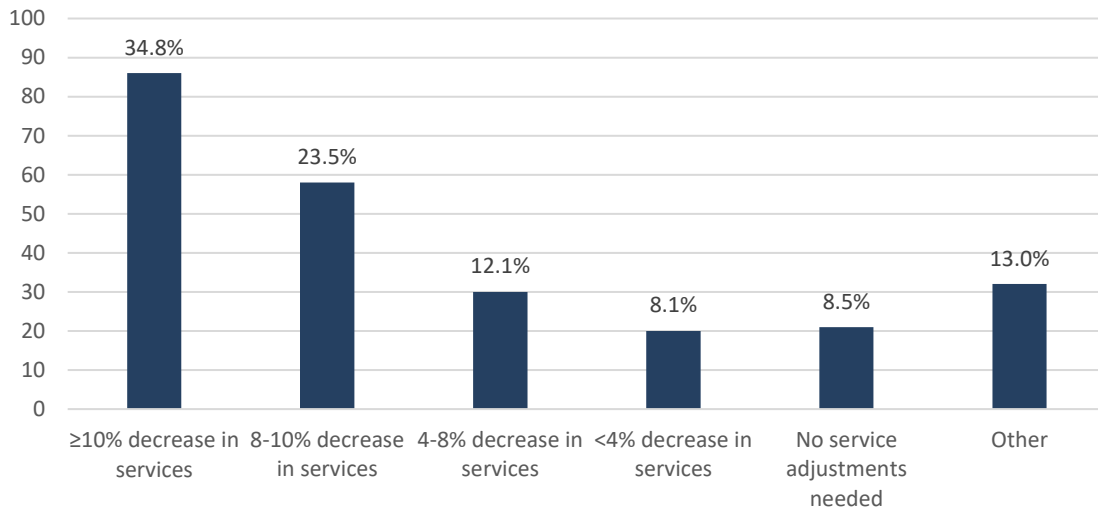
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<sup>99</sup> Statement was not addressed by two respondents.

<sup>100</sup> Responses shown on Exhibit 19 Question was not answered by six respondents.

Exhibit 19

**Impact on Services if Damage Caps are Eliminated**



Source: Developed by LBFC from Local Government Entity Survey responses.

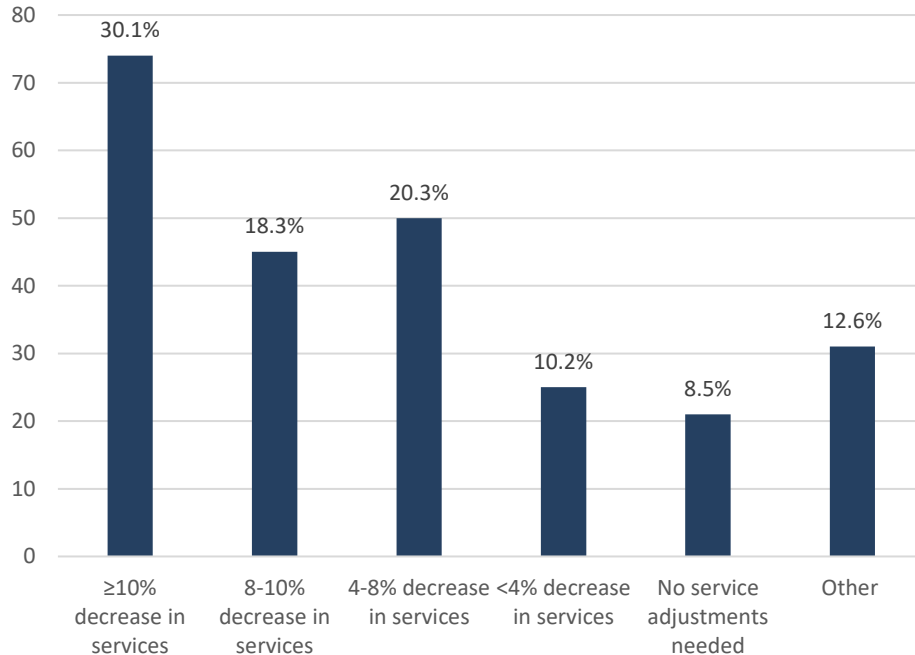
Of the local government entities that responded, 34.8 percent (86) foresee a 10 percent or greater decrease in services if damage caps are eliminated.

*(15) What impact on services do you foresee if the current \$500,000 (\$250,000) damage cap was increased based on inflation to \$1.9 million (\$953,000)?<sup>101</sup>*

<sup>101</sup> Responses shown on Exhibit 20 Question was not answered by seven respondents.

Exhibit 20

**Impact on services if the current \$500,000 (\$250,000) damage cap was increased based on inflation to \$1.9 million (\$953,000)**



Source: Developed by LBFC from Local Government Entity Survey responses.

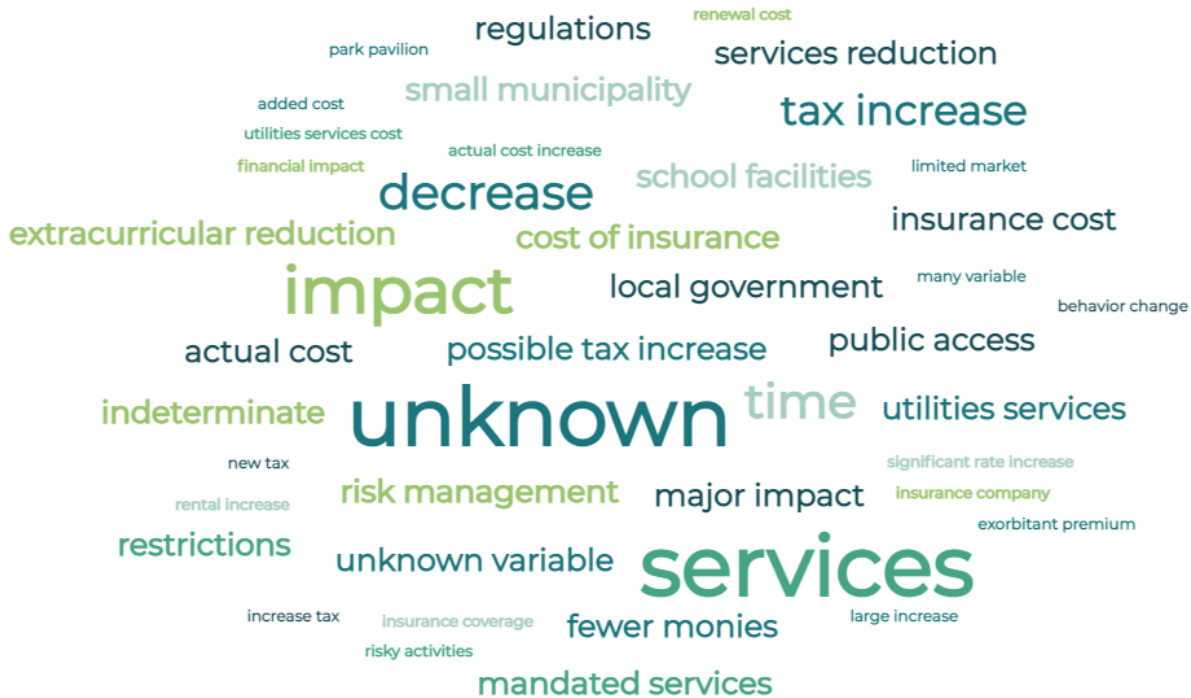
Of the local government entities that responded, 30.1 percent (74) foresee a 10 percent or greater decrease in services if the current damage caps increased based on inflation.

In addition, of those that responded "other," further explanations were provided on the foreseeable impact on services if damage caps were eliminated or increased based on inflation. Exhibit 21 below shows a word cloud as a visual representation of the most frequently used terms pertaining to impact on services.<sup>102</sup>

<sup>102</sup> A word cloud (also known as a tag cloud) is a visual representation of words. Cloud creators are used to highlight popular words and phrases based on frequency and relevance. They provide you with quick and simple visual insights that can lead to more in-depth analyses. <<https://monkeylearn.com/word-cloud>>

Exhibit 21

**Local Government Survey - What impact on services do you foresee if damage caps are eliminated or increased based on inflation?**



Source: Developed by LBFC staff from the Local Government Entity Survey responses.

**Impact on services.** The responses varied, and several responses from local government entities indicated that the overall impact on services was unknown. The following are a small subset of responses from those who selected other:

- *Service reductions may occur under this scenario, although the city cannot quantify impacts to this degree of specificity. It is difficult to anticipate behavior change(s) stemming from the elimination of the cap that might affect the scale of impact(s). In addition, when the city budget is developed each year, the city makes trade-offs and City Council is responsible for approving the budget before it is adopted. The financial impacts of eliminating the cap are likely greater than the impacts of an increase to the cap, although the extent of the variance in impact is not quantifiable, at this time.*
- *Possible tax increase or new taxes to support services, parks pavilion rental increases.*
- *Too many variables and unknowns to determine.*

- *Water utility services cannot decrease, but the cost of these services will increase.*
- *Tax increase, limited markets available for purchasing insurance.*
- *It is hard to assess that at this time with unknown variables. The more regulation and restriction placed on local government strangles small municipalities.*
- *Unfortunately, we will have to pay the exorbitant premium, as we must provide services. This will increase the taxes of our residents to cover the higher premium.*
- *In order to maintain mandated services, cuts will need to be made, be it staffing and materials to provide the service.*
- *There will be a decrease in service as funds are diverted to cover risk. This is unknown until we know more about the risk management/insurance costs.*

**Budget Areas.** A series of questions addressed local government budgets. The questions sought to understand which specific budget areas may be affected by changes to the limitations on liability. Respondents were allowed to select all that apply.

**Questions:**

*(16) What specific budget area(s), if any, would be impacted if damage caps are eliminated? (Please select all that apply)?*

*(17) What specific budget area(s) if any would be impacted if the current \$500,000 (\$250,000) damage cap was increased based on inflation to \$1.9 million (\$953,000)?*

Exhibit 22 below shows the number of responses for each budget area and the percentage of respondents that selected the budget area.

Exhibit 22

**Local Government Survey – What specific budget area(s) if any would be impacted if damage caps are eliminated and/or increased based on inflation?**

What specific budget area(s) if any would be impacted if damage caps are eliminated? (Please select all that apply).	% Of Responses	No. Of Responses <sup>a/</sup>	What specific budget area(s) If the current \$500,000 (\$250,000) damage cap was increased based on inflation to \$1.9 million (\$953,000)?	% Of Responses	No. Of Responses <sup>b/</sup>
<b>General Government<sup>103</sup></b>	74.7%	186	<b>General Government</b>	74.6%	182
<b>Police</b>	28.5%	71	<b>Police</b>	28.3%	69
<b>Fire</b>	30.9%	77	<b>Fire</b>	29.5%	72
<b>UCC and Code Enforcement</b>	21.3%	53	<b>UCC and Code Enforcement</b>	18.9%	46
<b>Other Public Safety</b>	26.1%	65	<b>Other Public Safety</b>	26.6%	65
<b>Health and Human Services</b>	24.9%	62	<b>Health and Human Services</b>	24.6%	60
<b>Highways and Streets</b>	58.6%	146	<b>Highways and Streets</b>	58.2%	142
<b>Public Works (sewer, water, solid waste, electrical system, gas system, and other public works)</b>	37.8%	94	<b>Public Works (sewer, water, solid waste, electrical system, gas system, and other public works)</b>	35.2%	86
<b>Culture and Recreation</b>	43.8%	109	<b>Culture and Recreation</b>	38.9%	95
<b>Libraries</b>	24.1%	60	<b>Libraries</b>	23.8%	58
<b>Community Development</b>	35.3%	88	<b>Community Development</b>	34.0%	83
<b>Debt Service</b>	13.7%	34	<b>Debt Service</b>	13.5%	33
<b>Other Expenditures (unclassified operating expenditures, other financing uses)</b>	35.3%	88	<b>Other Expenditures (unclassified operating expenditures, other financing uses)</b>	32.8%	80
<b>Total Local Government Entities- Answered</b>		249	<b>Total Local Government Entities- Answered</b>		244

**Note:**

a/ Question was not answered by four respondents.

b/ Question was not answered by nine respondents.

Source: Developed by LBFC staff from the Local Government Entity Survey responses.

<sup>103</sup> For municipal governments this may include categories such as "Legislative (Governing) body, Executive (Manager or Mayor), Auditing Services/Financial Administration, Tax Collection, Solicitor/Legal Services, Secretary/Clerk, Other General Government Administration, IT-Networking Services-Data Processing, Engineering services, and General Government Buildings and Plant. <<http://munstats.pa.gov/Public/Default.aspx>>

Responses were almost identical among the two questions asked about the budget areas that would be impacted if damage caps are eliminated or increased based on inflation. The top three budget areas that local government entities indicated would be impacted by changes to the limitations on liability were General Government, Highways and Streets, and Culture and Recreation. Exhibit 23 below shows a hierarchy based on survey responses of the possible budget areas most to least affected.

Exhibit 23

**Local Government Entity Survey - Budget Areas Affected if Damage Caps were Eliminated**

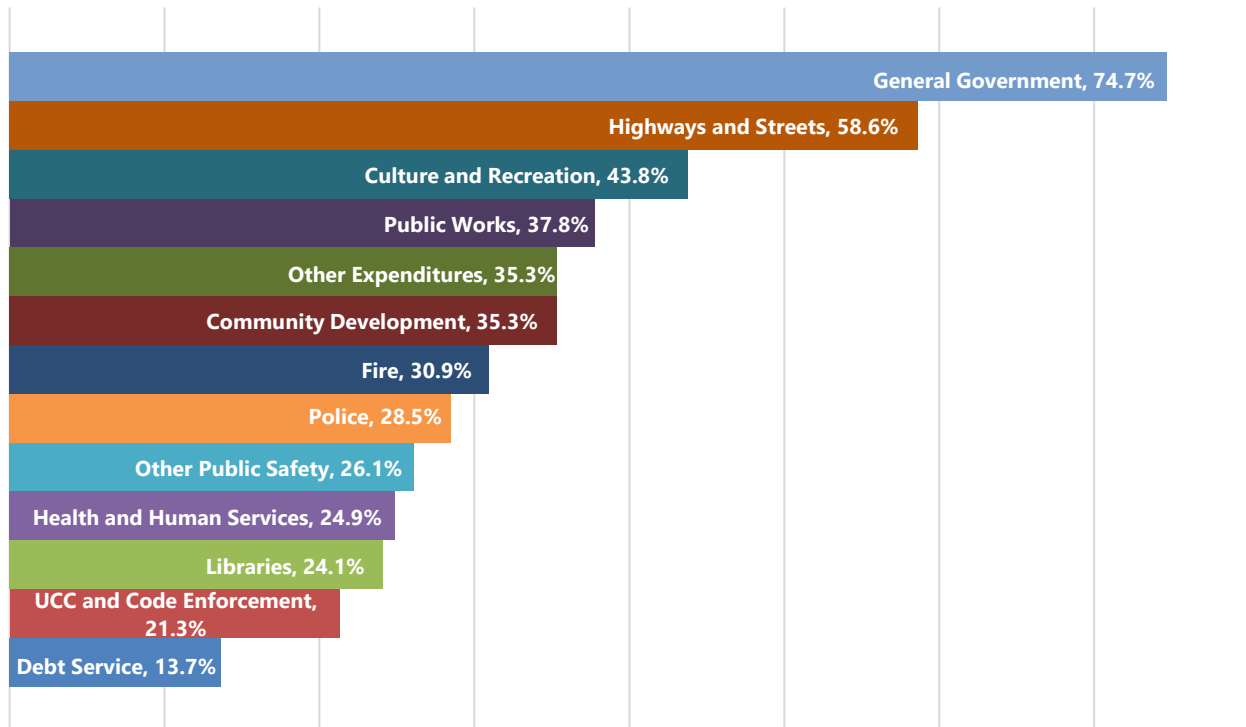
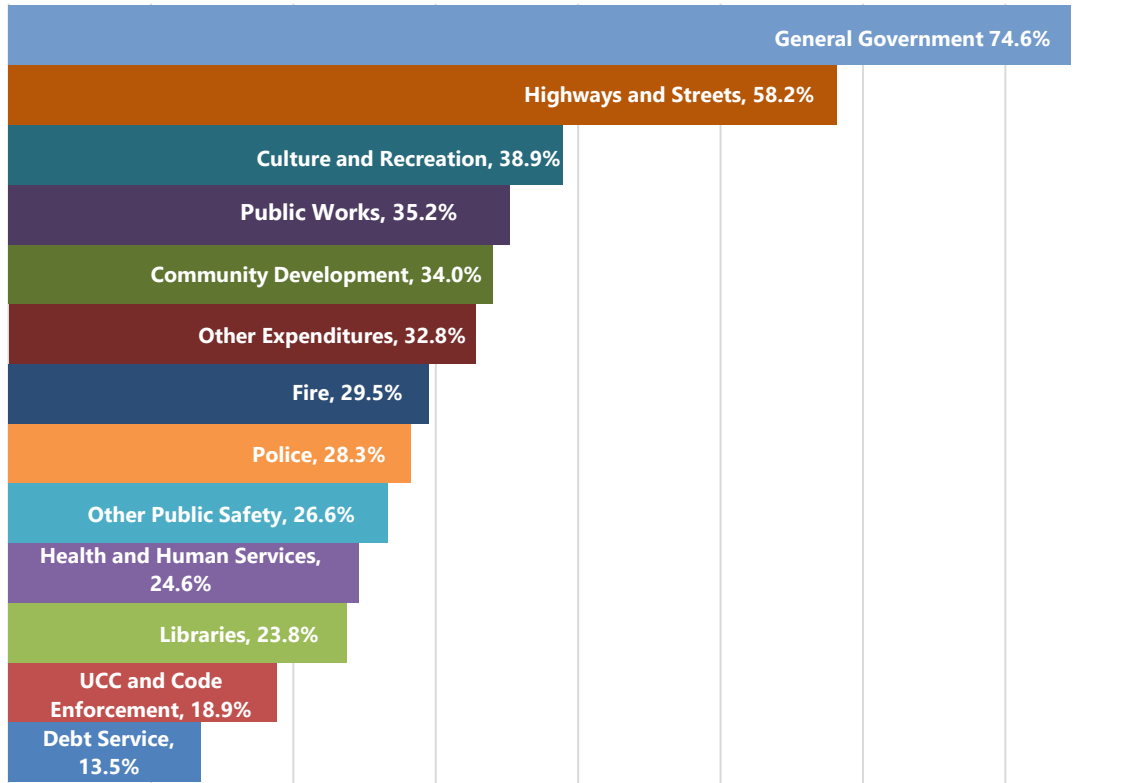




Exhibit 23 Continued

**Local Government Entity Survey - Budget Areas Affected if Damage Caps were Adjusted for Inflation.**



Source: Developed by LBFC staff from the Local Government Entity Survey responses.

The top three budget areas selected by local government entities that would be adjusted if the liability caps were adjusted for inflation were General Government, Highways and Streets, and Culture & Recreation. In sum, all budget areas (to varying degrees) may become an area of concern for local government entities if there are changes to the limitations on liability.

**Taxes and Fees.**

**Statements:**

(18) *If damage caps are eliminated, our municipality will likely have to increase taxes/fees.*<sup>104</sup>

(19) *If the current \$500,000 (\$250,000) damage cap was increased based on inflation to \$1.9 million (\$953,000), our municipality will likely have to increase taxes/fees.*<sup>105</sup>

**Results:**

- 81.8 percent (201) of local government entities indicated that if damage caps are eliminated, it is likely that their municipality will have to increase taxes and fees. In addition, 18.3 percent (45) neither agree nor disagree and/or disagree that the municipality would have to increase taxes and fees. No, local government entities strongly disagreed with this statement.
- 76.6 percent (190) of local government entities indicated that if damage caps were increased based on inflation, their municipality will have to increase taxes and fees. In addition, 23.4 percent (58) neither agree nor disagree and/or disagree that the municipality would have to increase taxes and fees. No local government entities strongly disagreed with this statement.

**Question:**

(20) *What impact, if any, on taxes/fees do you foresee if damage caps are eliminated?*<sup>106</sup>

Exhibit 24 below shows the foreseen impact on taxes/fees if damage caps are eliminated.

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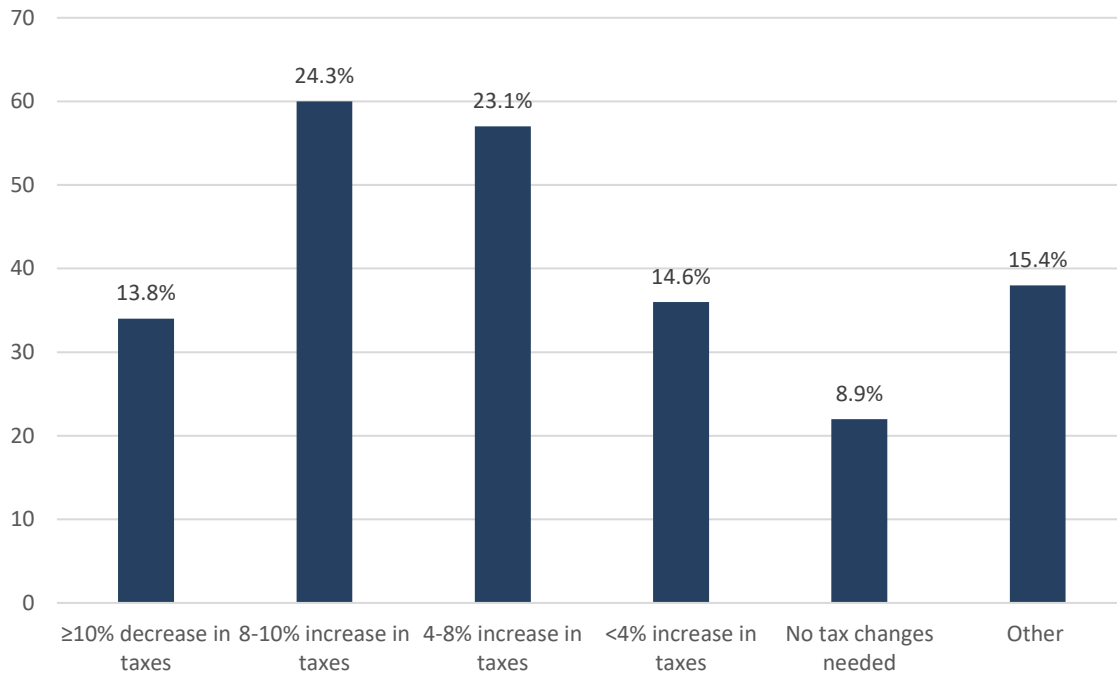
<sup>104</sup> Statement was not answered by seven respondents.

<sup>105</sup> Statement was not addressed by five respondents.

<sup>106</sup> Question was not answered by six respondents.

Exhibit 24

**Impact on taxes/fees if damage caps are eliminated**



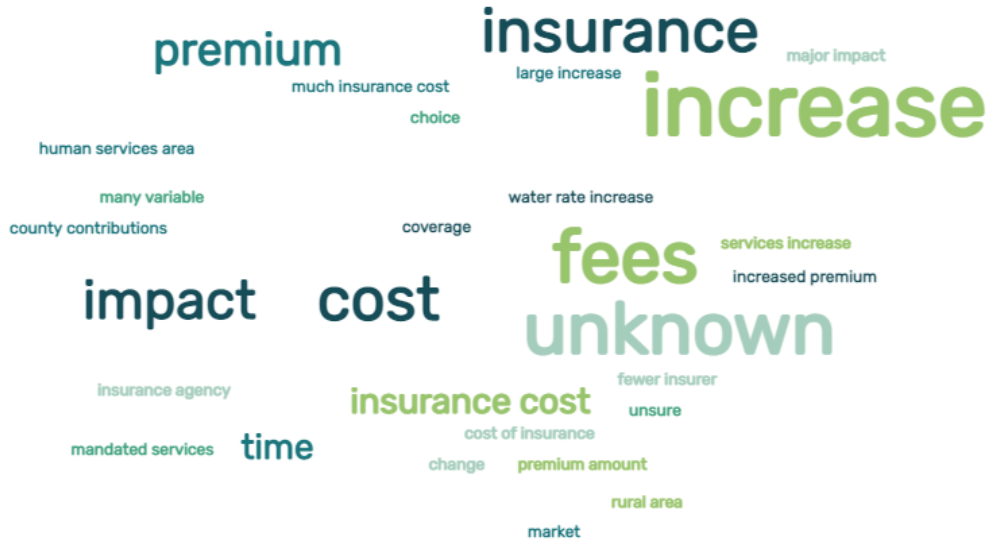
Source: Developed by LBFC Staff from the Local Government Entity Survey responses.

Of the local government entities that responded, 24.3 percent (60) foresee an 8-10 percent increase in taxes/fees.

In addition, of those that responded "other," further explanations were provided on the foreseeable impact on taxes/fees if damage caps were eliminated or increased based on inflation. Exhibit 25 below shows a word cloud as a visual representation of the most frequently used terms pertaining to taxes/fees.

Exhibit 25

**Local Government - What impact, if any, on taxes/fees do you foresee if damage caps are eliminated?**



Source: Developed by LBFC staff from the Local Government Survey responses.

The responses made in the "other" field of the survey varied as it pertains to the impact on taxes and fees, such as, too soon to predict, unknown cost of insurance, major impact on a rural area, increase in the cost to local government entities, changes in human service areas, cost shift to residents, and utility rate increases. What was also reiterated is that the number of variables a local government entity must consider makes it difficult to determine what the overall impact would be with any certainty.

**Impact on Taxes/Fees.** The responses varied, and an overwhelming number of responses from respondents indicated that the overall impact on taxes/fees was unknown or could not be determined with any certainty. The following is a small subset of responses from those who selected other:

- *Can't speculate on impact -- impact not known at this time.*
- *In order to maintain mandated services, changes in staffing to the Human Service areas would not be feasible but the County's contribution for these services would increase.*
- *Would depend on what our insurance increase.*
- *More than a 10 percent increase in fees.*
- *The impact cannot be estimated until we know more about cost increases associated with the elimination of damage caps.*

- Major impacts would ruin rural areas.
- Concomitant with the increased premiums.

The final two questions in the survey were qualitative questions that provide insight into the risk management strategies local government entities currently utilize, and which public services are contracted out. Exhibit 26 below shows a word cloud as a visual representation of the most frequently used terms pertaining to risk management strategies.

Exhibit 26

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**Local Government Survey - What Risk Management strategies do your municipality utilize? (Please specify)**



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Source: Developed by LBFC staff from the Local Government Entity Survey responses.

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Respondents provided a variety of risk management strategies currently employed by local government entities. Risk management strategies include training and education, risk managers, internal and external controls, safety committees, hazard mitigation plans, safeguards, risk-sharing, audits and inspections, best practices, and contractual risk transfer. In the final survey question, we asked local government entities about public services that were outsourced. Exhibit 27 below shows a word

cloud as a visual representation of the most frequently used terms pertaining to types of services contracted out.<sup>107</sup>

Exhibit 27

**Local Government Survey - Does your municipality contract out any public service(s)?**



Source: Developed by LBFC staff from the Local Government Entity Survey responses.

Based on the survey responses, public services are contracted out by 47.6 percent (117) of local government entities responding to this question. In addition, 46.3 percent (114) do not contract out public services and 6.1 percent (15) were not sure what service(s) if any, were contracted out.

<sup>107</sup> Question was not answered by seven respondents.

## SECTION VI OTHER FACTORS



### **Fast Facts...**

- ❖ *More than half of the states have damage caps.*
- ❖ *A statewide database for claims made against local government entities does not exist.*
- ❖ *Increased transparency is needed in claims made against local governments.*
- ❖ *Of the insurance carriers authorized to write policies in Pennsylvania, it is unknown which of those insurers are writing policies for local government entities*

### **Overview**

As directed in Senate Resolution 2021-146, the Legislative Budget and Finance Committee (LBFC) identified other factors the General Assembly may consider as part of its evaluation of the limitations on liability. The sections that follow highlight other factors, such as recent changes in other states, transparency, and additional reporting that the General Assembly may want to consider when evaluating the need to increase the liability limits.

#### We found:

1. North Dakota, Maryland, and Colorado have recently enacted varied approaches to their sovereign immunity laws and damage caps, such as occurrence caps (single and two or more), damage caps adjusted for inflation, and annual provisions.
2. Pennsylvania does not have a reporting requirement for local government entities' liability claims data.
3. There is a lack of transparency in the methods local government entities use to insure against liability.
4. The City of New York produces a web-based annual claims report, which is used to identify areas with high claims costs to reduce those costs and work closely with city agencies to manage risk.
5. The damage caps set in 1978 (\$250,000, \$500,000, and \$1,000,000) would be equal to \$1.04 million, \$2.09 million, and \$4.18 million in today's dollars.

### **Issue Areas**

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#### **A. Other States**

We reviewed other states' Sovereign Immunity statutes and found that more than half of the states have damage caps. We chose to highlight states based on the most recent changes to their respective sovereign immunity laws and damage cap structure; with an understanding, there are different nuances among states.

North Dakota recently made changes (March 2021) to its damage cap, structure, and phased approach. Claims against the state or political subdivision are limited to a total of \$250,000 per person and one million dollars for any number of claims arising from any single occurrence. The damage cap will be adjusted annually, as follows:<sup>108</sup>

- July 1, 2022, limited to \$375,000 per person and one million dollars for any number of claims arising from any single occurrence.
- July 1, 2023, limited to \$460,250 per person and \$1,625,000 for any number of claims arising from any single occurrence.
- July 1, 2024, limited to \$437,500 per person and \$1,750,000 for any number of claims arising from any single occurrence.
- July 1, 2025, limited to \$468,750 per person and \$1,875,000 for any number of claims arising from any single occurrence.
- July 1, 2026, limited to \$500,000 per person and \$2,000,000 for any number of claims arising from any single occurrence.
- fixed dollar amount with a final increase on July 1, 2026.
- After, July 31, 2027, the damage cap will revert to the prior limits of \$250,000 per person and one million dollars for any number of claims arising from any single occurrence.

Maryland's most recent changes (October 2015) to its damage cap and structure, for actions against the state and local government effective October 1, 2015, are:<sup>109,110,111</sup>

- \$400,000 to a single claimant for injuries arising from a single incident or occurrence for the State and its units.
- \$400,000 per individual claim and \$800,000 per total claim that arises from the same occurrence for local governments.

Colorado's most recent changes (April 2013 and January 2020) to their damage cap, structure, and annual inflationary adjustments are:<sup>112</sup>

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<sup>108</sup> North Dakota Century Code, N.D.C.C. § 32-12.2-15. Liability of the state – Limitations – Statute of Limitations (Effective after June 30, 2022, and through July 31, 2027).

<sup>109</sup> Maryland Tort Claims Act. Md. Code Ann., State Gov't §§ 12-101 - 12-110. The State and its officers and units are not liable for punitive damages. Md. Code Ann., Cts. & Jud. Proc. § 5-522.

<sup>110</sup> Local Government Tort Claims Act. Md. Code Ann., Cts. & Jud. Proc. § 5-301 *et seq.* Local government not immune to tort claims unless exception set forth in statute ("indirect statutory qualified immunity"). Md. Code Ann. § 5-303.

<sup>111</sup> Date of loss prior to September 30, 2015, \$200,000 per person and \$500,000 per occurrence.

<sup>112</sup> Colorado Governmental Immunity Act (CGIA). C.R.S. §§ 24-10-114.



For all claims before January 1, 2018, the adjusted limitation is:

- \$350,000 for any injury to one person in any single occurrence.
- \$990,000 for any injury to two or more persons in any single occurrence; except that, in such instance, no person may recover more than \$350,000.

For all claims on or after January 1, 2018, and before January 1, 2022, the adjusted limitation is:

- \$387,000 for any injury to one person in any single occurrence.
- \$1,093,000 for any injury to two or more persons in any single occurrence; except that, in such instance, no person may recover more than \$387,000.

For all claims on or after January 1, 2022, and before January 1, 2026, the adjusted limitation is:

- \$424,000 for any injury to one person in any single occurrence.
- \$1,195,000 for any injury to two or more persons in any single occurrence; except that, in such instance, no person may recover more than \$424,000.

In sum, of the three states highlighted, damage cap and structure vary widely, although all three (currently) have caps higher than those in Pennsylvania. However, given the significant differences, a more in-depth analysis of each state's sovereign immunity statutes is warranted.

## **B. Transparency and Reporting**

### **Transparency.**

Transparency can be described as "the active disclosure of information by an organization with the intent of allowing external actors to monitor and assess the internal workings or performance of an organization."<sup>113</sup> It can be defined as "open, honest, and accessible communication, with three main purposes: (1) to provide information to publics, (2) increase participation, and (3) hold organizations accountable."<sup>114</sup>

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<sup>113</sup> Yao Krahn, R.D. and Mertens, G. (2020). Transparency in Local Governments: Patterns and Practices of Twenty-first Century. *State and Local Government Review* 2020, Vol. 52(3) 200-213.

<https://journals.sagepub.com/doi/10.1177/0160323X20970245>

<sup>114</sup> Brunner, B. and Hickerson, C. (2020) The Arthur W. Page Center, Public Relations Ethics Training, *Module 7 – Transparency*. <https://www.pagecentertraining.psu.edu/public-relations-ethics/transparency/transparency/transparency>

During our research, we found a need for greater transparency of claims made against state and local governments. As Sections II and III highlight, most claims made against state and local government remain well under the current \$250,000 (\$500,000) damage cap.

The process to obtain claims data among local government entities was complicated and arduous. A statewide reporting system for local government claims data would have allowed for a more in-depth statistical analysis of governmental immunity and its effect on government. Additionally, statewide reporting would allow policymakers to know and understand areas for improving operations to reduce risk.

Currently, the City of New York produces a web-based annual claims report to assist the city's comptroller's office in identifying high claims areas to reduce claims costs and working closely with city agencies to manage risk.<sup>115</sup>

Stakeholders expressed to us that the ultimate cost of claims is borne by the taxpayer. A database that allows taxpayers the ability to see how their municipality is managing risk and how the ultimate cost of claims translates into increased cost and/or a reduction in public services, could increase transparency. In addition, this single form of data collection could aid the General Assembly in making informed public policy decisions.

### **Reporting.**

We learned through our interviews with key state agencies, local governments, and affiliate associations that the (total) number of insurance companies that have written policies with local government entities is largely opaque. Currently, the (total) number of insurers that are authorized to write policies in Pennsylvania can be quantified, but it is unknown which of those insurers are writing policies for local government entities.

However, we were able to gain limited insight as to the type of property and liability (insurance) coverage of local government entities through our Local Government Entity Survey. Of those that responded to our survey, over half of local government entities indicated "commercial insurance" as their type of coverage.

We suggest using a reporting database that currently exists within the state to capture this data. The Pennsylvania Department of Community and Economic Development (DCED) currently captures annual municipal statistics and publishes this information in a series of online databases

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<sup>115</sup> Office of The NYC Comptroller, Scott M. Stringer, Claims Report, April 2021, <https://comptroller.nyc.gov/reports/annual-claims-report/>.

and reports.<sup>116</sup> In addition to their current data reporting requirement(s), this information, if added, could be useful in analyzing the insurance market within the state for local governments.

## **C. Inflation**

Inflation is the general increase in the prices of many goods and services over time and at the same time in an economy. As prices rise, each dollar purchases fewer goods and services. As inflation increases, there is a reduction in an individual's purchasing power.

As noted earlier, in 1978 the General Assembly of Pennsylvania reestablished sovereign immunity for the Commonwealth and governmental immunity for local government entities through Act 1978-152 and Act 1978-330 respectively. These statutes also waived immunity for the Commonwealth and local governments under certain circumstances.

The liability limits for the Commonwealth were set at \$250,000 per plaintiff and \$1 million per event or occurrence. The limit for local government was set at \$500,000 per event or occurrence. The limits on damages have not been changed.

Policymakers at the United States Federal Reserve Bank evaluate changes in inflation by monitoring several different price indexes. The Federal Open Market Committee (FOMC) of the Federal Reserve Bank has determined that an annual increase in inflation of two percent in the price index for personal consumption expenditures is most consistent over the longer run with the Federal Reserve's mandate for maximum employment and price stability.

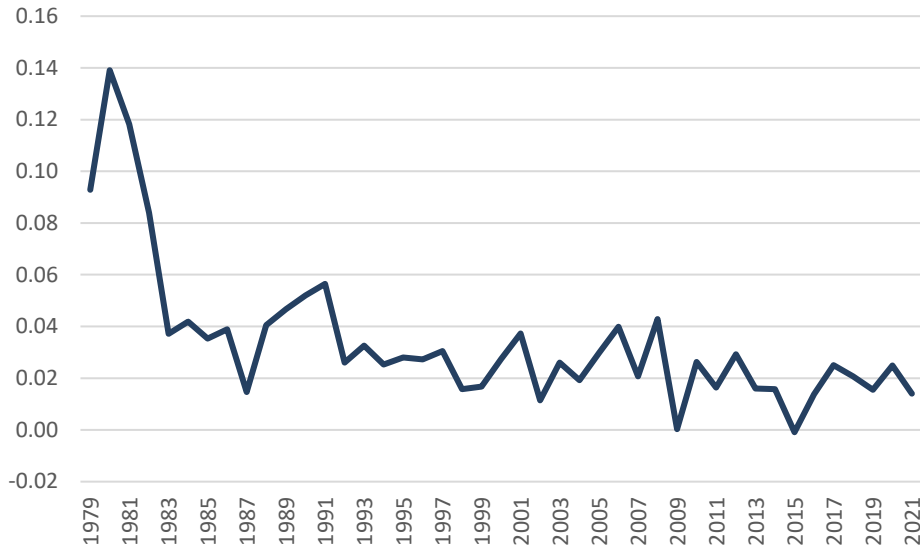
Yet, the Federal Reserve has only met their two percent target ten times since 1978. Six of those occurrences took place from 2011 to 2021. Inflation has been at or below the two percent target 16 times from 1978 to 2021. See Exhibit 28 for additional details.

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<sup>116</sup> Pennsylvania Department of Community and Economic Development (DCED), *Municipal Statistics*, Data collection and reporting via mandatory municipal e-Filing forms, <https://dced.pa.gov/local-government/municipal-statistics/>.

Exhibit 28

**Percent Change in Inflation  
1979 – 2021**

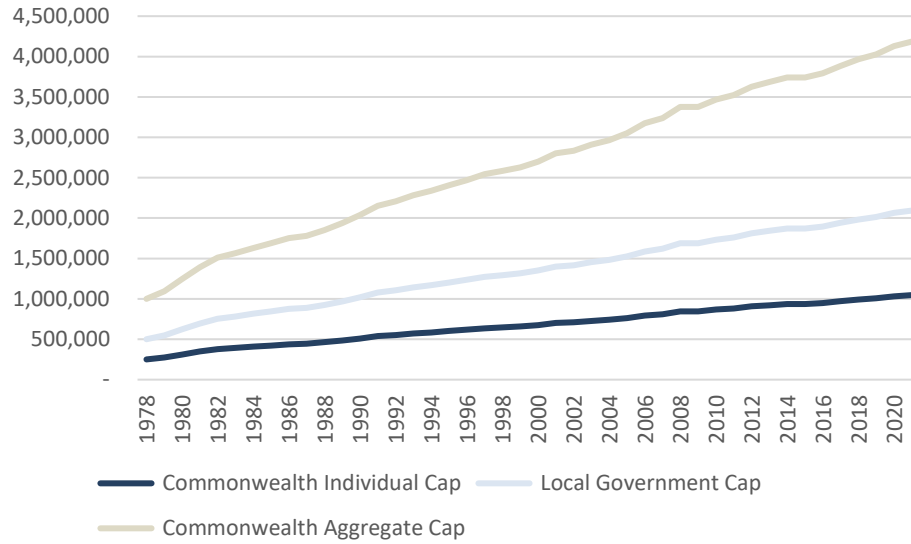


Source: Developed by LBFC staff using data obtained from the United States Department of Labor, Bureau of Labor Statistics.

Since 1978, inflation has eroded the purchasing power of certain claimants who suffer "catastrophic injury" or "devastating loss." For example, in 1978, \$250,000 – the statutory cap for an individual claim against the Commonwealth – purchased a certain amount of goods and services. Today, the same amount of goods and services would cost roughly \$1.04 million. Exhibit 29 shows what the caps would need to be today to purchase the same level of goods and services as they did in 1978.

Exhibit 29

**Purchasing Power of Statutory Caps  
1978 – 2021**



Source: Developed by LBFC staff with information from the US Department of Labor, Bureau of Labor Statistics

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## SECTION VII BACKGROUND INFORMATION



### **Fast Facts...**

- ❖ *Sovereign Immunity is a legal concept derived from British Common Law, which asserts that a government cannot be sued without its consent.*
- ❖ *During the 1970s, the doctrine of Pennsylvania's Sovereign Immunity was briefly abrogated. A JSJC task force released a report which advocated retaining sovereign immunity but with specific waivers and exemptions.*
- ❖ *Pennsylvania currently has a \$250,000 per person cap, aggregated to \$1,000,000 per occurrence, for claims against the state. PA also has a separate aggregate cap for its local governmental entities set at \$500,000.*

Senate Resolution 2021-146 directs the Legislative Budget and Finance Committee to conduct a study and prepare a report concerning sovereign immunity – specifically, the limitations on state and local government liability under Title 42, Judiciary and Judicial Procedure (42 Pa.C.S. §§ 8528 and 8553).

Sovereign immunity refers to the idea that a government (the sovereign) cannot be sued without its consent. Sovereign immunity protects sovereign states and their state officers and agencies. Similarly, governmental immunity provides immunity for municipal subdivisions within the state, such as cities and townships.

The origins of sovereign immunity can be traced to the British common law doctrine based on the idea that the King could do no wrong. Prior to any formal legislation at the state or federal level, issues regarding sovereign immunity in America were observed and resolved through the enforcement of common law. Common law can be defined as law derived from custom and judicial precedent rather than statutes. The authority of these principles is not dependent on legislative enactment, but rather by judicial decisions as necessities arise from time to time demanding the application of those principles to cases in the administration of justice.

In the United States, sovereign immunity typically applies to the federal government and state government. Federal and state governments also possess the ability to waive their sovereign immunity if they so choose. Governmental immunity provides immunity for subdivisions within the state, such as local government entities.

### **A. History of Sovereign Immunity in the United States**

In 1792, Alexander Chisholm attempted to sue the State of Georgia in the U.S. Supreme Court over payments owed to the estate of Robert Farquhar, who supplied goods to Georgia during the American Revolutionary War. The defendant in the case, the State of Georgia, refused to appear, claiming that as a sovereign state, it could not be sued without consenting to the suit and, therefore, the court lacked jurisdiction. The Court ruled for the plaintiff in a 4-1 decision, citing Article 3, Section 2, of the U.S. Constitution, which grants the federal judiciary the power to decide

cases between, “a State and Citizens of another State...” Justice Iredell, the only dissenting vote, asserted that every state was “completely sovereign” other than where its powers had been delegated to the federal government. According to Iredell, no suit by private citizens against a state could proceed without the state’s consent unless there was English common-law precedent to support such an action.<sup>117</sup>

Iredell’s dissent was particularly popular among Southern states because they also believed no provision of the Constitution allowed individuals to sue states in federal court where there was no federal concern. As the sectional division over slavery widened, many southern states began to adopt John C. Calhoun’s state’s rights theory, which insisted the federal government’s power was superseded by each state’s sovereignty, closely aligning with the philosophy of Iredell’s dissent.

Southern states began lobbying for Congress to respond. Congress reacted swiftly by drafting the 11th amendment to the U.S. Constitution, which was proposed on March 4, 1794, and ratified on February 7, 1795. The 11th amendment states, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>118</sup>

While the Supreme Court issued a judgment in favor of Chisholm in 1794, the judgment was never enforced. After ordering an inquiry to determine the amount of damages Georgia should pay, the Court granted several continuances of the case. In 1798, after the 11th amendment took effect, the Court removed all suits against states by individual plaintiffs, including Chisholm, from its docket.

There would be few changes to America’s sovereign immunity laws for nearly 100 years after the passage of the 11<sup>th</sup> amendment. In 1887, Congress implemented the Tucker Act, which added greater clarity to the types of claims in which the United States could waive its sovereign immunity. Specifically, the government consented to be sued over contractual claims, noncontractual claims where the plaintiff seeks the return of money paid to the government, and noncontractual claims where the plaintiff asserts that he is entitled to payment by the government.

In 1946, the United States passed a landmark bill that would change the landscape of the nation’s sovereign immunity code with the Federal Tort Claims Act (28 U.S.C. §2674).<sup>119</sup> The FTCA came as a result of the 1945 B-

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<sup>117</sup> *Chisholm v Georgia*, 2 U.S. (2 Dall.) 419 (1793). (n.d.). Retrieved from Federal Judicial Center. <https://www.fjc.gov/history/cases/cases-that-shaped-the-federal-courts/chisholm-v-georgia>

<sup>118</sup> Clark, B.R. (n.d.). The Eleventh Amendment. Retrieved from Constitution Center: <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xi/interps/133>

<sup>119</sup> A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong (other than breach of contract) for which courts may impose liability.



25 Empire State Building crash. On July 28, 1945, United States Army Colonel William Smith Jr. was piloting a B-25 Mitchell bomber during heavy fog and crashed into the Empire State Building. The accident left 14 people dead and led to some of the victims' families initiating lawsuits against the federal government. The passage of the Federal Tort Claims Act was a watershed moment that allowed citizens to bring tort suits against the government.<sup>120</sup>

## **B. Sovereign Immunity in Pennsylvania**

Article I, Section 11 of the Pennsylvania Constitution states, "Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."<sup>121</sup> This provision first appeared in the Pennsylvania Constitution in 1790 and was later adopted verbatim in the Commonwealth's 1838, 1873, and 1968 constitutions.

The doctrine of sovereign immunity of Pennsylvania was first accepted by the Commonwealth's courts in the decision in the *O'Connor v Pittsburgh* case of 1851. Michael O'Connor was a Catholic Bishop of St. Paul's church in Pittsburgh built in 1829. Over the years, Pittsburgh's city council passed an ordinance reducing the grade at the intersection of Grant and Fifth streets, where the church was located. In 1847, the grade was reduced again. O'Connor filed a suit against Pittsburgh alleging that the new ordinances impaired the safety of the church, and the city would be liable for any damages resulting from it having to be rebuilt. When the case reached the Pennsylvania Supreme Court, the Court ruled in favor of Pittsburgh, citing the city's sovereign immunity protected it from being held liable to any consequential damages.<sup>122</sup>

In 1969, the Pennsylvania General Assembly proposed to waive immunity in personal injury cases; however, the proposal was vetoed by Governor Raymond P. Shafer in the following year. Shafer noted the proposal was "defective in so many respects that it would create more problems than it would solve."<sup>123</sup> Two seminal cases during the 1970s would lead to the brief abrogation of Pennsylvania's governmental immunity for its municipalities, and subsequently the doctrine of sovereign immunity.

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<sup>120</sup> Federal Tort Claims Act. (n.d.). Retrieved from LawAspect.com: <https://lawaspect.com/federal-tort-claims-act-1946/>.

<sup>121</sup> Pa. Const. art. I, sec. 11. Law, D.U. (n.d.). *Constitution of the Commonwealth of Pennsylvania 1968*. Retrieved from PAConstitution.org: <https://www.paconstitution.org/texts-of-the-constitution/1968-2/>. As discussed later in this section, the Pennsylvania Supreme Court, in abolishing the common law doctrine of sovereign immunity, ruled that Article I Section 11 was neutral on the presence or absence of the doctrine of sovereign immunity.

<sup>122</sup> *O'Connor v Pittsburgh*, 18 Pa.187 (Pa. 1851)(Pennsylvania Supreme Court decision issued November 24, 1851). Retrieved from <https://cite.case.law/pa/18/187/>.

<sup>123</sup> Commission, J.S.G.C. (1978). *Sovereign Immunity*, 1. Harrisburg.

***Ayala vs Philadelphia Board of Education (1973)***. William Ayala and his fifteen-year-old son William Ayala Jr. brought a suit against the Philadelphia Board of Education after Ayala Jr's arm was severely injured in a shredding machine during an upholstery class. The injury required Ayala's arm to be amputated and his family sought damages on the grounds of negligence against the school board.<sup>124</sup>

The plaintiff alleged Ayala Jr. was supplied a defective machine without a proper safety device and that his teachers failed to supervise the classroom at the time of the accident. The Philadelphia School District objected by claiming an immunity defense as a public institution and municipal subdivision of the government. The Superior Court of Pennsylvania affirmed the school district's defense.

Ayala appealed the decision to the Pennsylvania Supreme Court, which ruled in favor of Ayala. Writing for the majority, Justice Samuel Roberts proclaimed, "We now hold that the doctrine of governmental immunity — long since devoid of any valid justification — is abolished in this Commonwealth. In so doing, we join the ever-increasing number of jurisdictions which have judicially abandoned this antiquated doctrine."<sup>125</sup> The courts believed they had authority over governmental immunity because the doctrine was judicially mandated and not constitutionally mandated like sovereign immunity. The reason for this is because municipal corporations and quasi-corporations are not included under the term "Commonwealth" in Article 1, Section 11.<sup>126</sup>

Therefore, while the decision of *Ayala v Philadelphia* led to the abrogation of governmental immunity covering Pennsylvania's municipalities, it did not affect the sovereign immunity of the Commonwealth itself. The judiciary would not abrogate the doctrine of sovereign immunity until 1978.

***Mayle v Pennsylvania Department of Highways (1978)***. In 1978, Jimmy Mayle sued the Pennsylvania Department of Highways in Commonwealth Court following an accident resulting in injuries that were a direct result of negligent maintenance on Pennsylvania's Legislative Route 79.<sup>127</sup>

As an agency of the Commonwealth, the Department of Highways asserted their defense under the doctrine of sovereign immunity. The

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<sup>124</sup> *Ayala v Philadelphia Board of Education*, 453 Pa. 584 (1973)(Pennsylvania Supreme Court decision issued May 23, 1973). Retrieved from Harvard Law: <https://h2o.law.harvard.edu/cases/248>

<sup>125</sup> *Ibid*, (878)

<sup>126</sup> Loughran, J.D. (1987). *Pennsylvania's Political Subdivision Tort Claims Act: Damage Limitations Upheld*. Villanova Law Review, 32(5), 16. Retrieved from: <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2674&context=vlr>

<sup>127</sup> *Mayle v Pennsylvania Department of Highways*, 479 Pa. 384 (1978)(Pennsylvania Supreme Court decision issued July 14, 1978). Retrieved from: <https://casetext.com/case/mayle-v-pennsylvania-dept-of-hwys>

Commonwealth Court dismissed the complaint on these grounds; however, upon appeal, Pennsylvania's Supreme Court reversed the decision and ultimately ruled in favor of Mayle. In so doing, the court abolished the doctrine of sovereign immunity.

Whereas the court in the *Ayala* case believed the issue of sovereign immunity was constitutionally and not judicially mandated, the Supreme Court determined sovereign immunity was part of the common law and not constitutionally mandated. The court ruled that Article 1, Section 11 did not prohibit the judiciary from abolishing the doctrine of sovereign immunity, and the constitution's view on the presence or absence of the doctrine was neutral. Therefore, in the Pennsylvania Supreme Court's view, they possessed the authority to abolish the doctrine.<sup>128</sup>

Justice Roberts stated in his majority opinion, "We today abrogate this doctrine of 'sovereign immunity.' We conclude that the doctrine is unfair and unsuited to the times and that this Court has power to abolish the doctrine." He went on to say, "Under the doctrine, plaintiff's opportunity for justice depends, irrationally, not upon the nature of his injury or of the act which caused it, but upon the identity or status of the wrongdoer."<sup>129</sup> The court rejected all the Commonwealth's arguments that abolishing the sovereign immunity doctrine would be financially threatening to the state and lead to an unbearable flood of litigation on the judicial system.

The Pennsylvania General Assembly responded to the court's repeal of both sovereign and governmental immunity, by enacting Act 1978-330 (Political Subdivision Tort Claims Act) and Act 1978-152 (Implementation of Constitutional Provisions).<sup>130</sup> Amendments to Title 42 repealed and replaced Act 1978-330 and gave force to Act 1978-152.

Another reason for the swift response by the Pennsylvania Legislature was the external impact of the insurance crisis during this same period. The crisis affected the availability and affordability of commercial liability insurance throughout the United States and was exacerbated by rising inflation. This led to the cost of purchasing liability insurance becoming prohibitively expensive. One estimate suggests that from 1975 to 1984,

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<sup>128</sup> The court stated, "The Constitution...is neutral – it neither requires nor prohibits sovereign immunity. It merely provides that the presence or absence of sovereign immunity shall be decided in a non-constitutional manner...It is an unwarranted conclusion to assume from the grant of the power of consent [to suit] to the legislative branch that this was implicitly an abrogation of the court's traditional powers to abolish common law principles when they no longer meet the needs of the time.

Ibid. (399)

<sup>129</sup> Ibid, (387)

<sup>130</sup> Act 152-1978 added Chapter 23 of Title 1 (General Provisions) of the Pennsylvania Consolidated Statutes. Section 2310 specifically declared to be the intent of the General Assembly, in its exclusive authority, that the "Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity..."

the cost of liability insurance increased by approximately 100 percent. Unable to afford liability coverage, local governmental entities would be left vulnerable to costly suits.

## **C. Insurance Crisis - Availability and Affordability**

A crisis emerged in the late 1970s and early 1980s, affecting the availability, and affordability of commercial liability insurance in the United States. During this period the cost of liability insurance became prohibitively expensive, companies refused to underwrite certain lines of coverage, and for certain segments of the market insurance was unavailable at any price. The liability insurance crisis extended across commercial lines and affected numerous sectors, which included: municipalities, transportation, nurse-midwives, architects and engineers, daycare centers, general manufacturing, and oil and gas drilling.

Those most affected in both availability and affordability were within the specialty commercial insurance lines, such as pollution, daycare, municipal, liquor, motor carrier, and Directors and Officers Liability (D&O).

Several reasons have been suggested for the cause(s) and extent of the liability insurance crisis, which include:

- insurance industry underwriting losses
- interest rates and premiums (inverse relationship)
- prolonged periods of premium underpricing, followed by an increase due to rapidly growing risk
- insurer insolvencies
- foreign reinsurers exiting the U.S. property/casualty market, due to profit decline, and those that remained were less willing to take on additional risk
- disruption in the supply of reinsurance
- uncertainty, the unpredictability of risk within the market
- changes in the size of the property/casualty market
- decrease in liability coverage and higher deductibles
- competitively determined insurance prices
- underwriting cycle, with alternating periods of soft markets (low premium) and hard markets (high premium)
- reduced investment returns

- inability to cover growing underwriting losses
- inflation
- state insurance reserve requirements
- increase in the number of lawsuits and average awards
- tort law reform and rapidly expanding tort liabilities

In 1986, the U.S. Department of Justice (DOJ) released a report entitled, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*. The DOJ found the "crisis in affordability and availability was not a major threat to the industry itself, but rather a crisis among the insured and their inability to obtain or afford liability insurance." During this period premiums increased significantly, but the DOJ found little to suggest the increase in premiums was related solely to losses. However, the affordability and availability of liability insurance among businesses, professionals, and municipalities appeared to be compounded by the industry's "inability to assess risk with any degree of confidence."

In Pennsylvania, the issues were parallel to what was happening throughout the United States, where general liability insurance rates were excessive and unaffordable, policies were canceled without reason or notice, policies were not being renewed, and there were increases in deductibles and a reduction in coverage. A hearing was held by the Local Government Commission (LGC) to determine the nature, scope, and extent of the municipal liability insurance problem within the state. The hearing included testimony from interest groups within local government, the insurance industry, and the legal profession.

From the testimony, survey statistics, and public reports, LGC concluded, "general liability insurance coverage was either prohibitively expensive or not available for purchase at any price; cost and availability have a significant financial impact upon municipalities; and further that because of such costs and availability, services necessary and essential to the public health, safety and welfare are subject to curtailments or elimination."<sup>131</sup> However, the actual effects on municipalities in Pennsylvania was not substantiated through any data. LGC concluded that "no one single factor is the exclusive cause of the (then) current insurance market crunch."

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<sup>131</sup> Survey data and reports referenced during the Hearing on Municipal Liability Insurance provided insight that helped define the problem currently facing municipalities in Pennsylvania. "No witness produced any data to substantiate any possible affects (reduce public services to reduce their exposure to risks of loss and/or to use available revenue savings from service cut-backs to pay increased premiums; maintain current levels of public services and increase revenues (taxes) to pay premiums; or self-insure by use of the municipal budget, and risk exposure to substantial loss or possible insolvency) these market changes other than survey data, which implicitly substantiates choice by some local governments of the Commonwealth to keep their same level of services, insurance coverage, and pay the increased cost of coverage."

The possible cause(s) and extent of the crisis are vast and are heavily debated throughout the literature.

## **D. Title 42 Amendments (Reaffirmation of Sovereign Immunity)**

Following the Pennsylvania Supreme Court's decision to abrogate governmental immunity, the Pennsylvania House of Representatives adopted House Resolution 1974-226. The resolution directed the Joint State Government Commission (JSGC) to establish a task force to "conduct a thorough review and analysis of the benefits and costs accruing from a statutory revision or abolition of the sovereign immunity defense." The task force concluded that retaining sovereign immunity was essential but advocated specific waivers and exemptions to be included. The task force was concerned about the cost of a general waiver to the taxpayers of the Commonwealth.

Because the scope of government is so wide and the state is involved in so many matters that impact daily life, the government's exposure to suit is equally wide. According to the JSGC, from a risk management perspective, there would be no way to budget for all the uncertainties in the present and future on all matters in which the government could be held liable for damages. The JSGC report was a major catalyst for driving the retainment of immunity in Pennsylvania. The report served as a blueprint for the Pennsylvania General Assembly when it passed Act 1980-142.

Title 42 Pa.C.S. § 8521 followed the JSGC's report recommendation to create exceptions in which those protections could be waived and established monetary limits for liability payouts. Title 42, Section 8522 listed exceptions for cases in which a person or agency might be held liable. Today, there are ten exceptions, to the Commonwealth's general sovereign immunity. The exceptions granted include the following:

1. Vehicle liability: Acts involving the operation of any motor vehicle owned or used by the Commonwealth.
2. Medical-professional liability: Acts involving any Commonwealth employee in the field of healthcare.
3. Care, custody, or control of personal property: The care, custody, or control of personal property in the possession or control of Commonwealth parties.
4. Commonwealth real estate, highways, and sidewalks: Dangerous conditions of infrastructure built by the commonwealth or real estate owned by the Commonwealth.

5. Potholes and other dangerous conditions: Dangerous conditions of highways under Commonwealth jurisdiction caused by natural elements.
6. Care, custody, or control of animals: The care, custody, or control of animals in the possession or control of Commonwealth parties.
7. Liquor store sales: The sale of liquor at Pennsylvania liquor stores by employees of the Pennsylvania Liquor Control Board.
8. National Guard activities: Acts involving of a member of the Pennsylvania military forces.
9. Toxoids and vaccines: The administration, manufacture and use of any toxoid or vaccine not manufactured in the Commonwealth under specific conditions.
10. Sexual abuse: Any acts deemed in violation of Section 5551 (7) of the Commonwealth's judicial code including any injuries to a plaintiff caused by negligent or omissive acts of a Commonwealth party.

Act 1980-142 only included the first 8 exceptions. The ninth exception regarding toxoids and vaccines was added in 1986. The tenth was added in 2019 when the General Assembly enacted Act 2019-87 with the intent of increasing the criminal liability of sexual predators and to increase the civil remedies available to victims.

## **E. State and Local Tort Laws in Other States**

As of 2021, more than half of all states limit, or "cap" monetary damages from judgments against them and their local municipalities. Often, the set damage cap for a local municipality within a state mirrors the cap set for the state itself, however there are exceptions. Some states choose to cap one but not the other. For example, Alaska does not set a cap for its local governments but has a statutory limit for claims against the state set at \$400,000 per occurrence and \$1,000,000 for occurrences resulting in severe disfigurement or impairment.<sup>132</sup>

Delaware does the opposite, imposing a \$300,000 per occurrence cap for its municipalities while remaining uncapped at the state level.<sup>133</sup> Some states have caps for both state and local governments with separate monetary limits at each level, similar to Pennsylvania's structure. New Hampshire, for example, has a state level cap of \$475,000 per person

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<sup>132</sup> A.S. § 09.17.010.

<sup>133</sup> 10 Del. C. § 4013

aggregated to \$3,750,000 per occurrence. New Hampshire's municipal tort cap is limited to \$275,000 per person or \$925,000 per occurrence.<sup>134</sup>

There are other unique provisions for tort laws amongst states. Oklahoma stratifies its municipal liability damage caps by population. The state limits \$125,000 per person per single occurrence, but for claims filed against any city or county with a population of up to 300,000 people, that cap is raised to \$175,000 per person per single occurrence.<sup>135</sup>

Oregon has rolling damage caps for both the state and local governments that are readjusted year to year based on inflation. Since 2015, Oregon's State Court Administrator uses changes in the Consumer Price Index published by the Bureau of Labor Statistics to determine the percentage increase or decrease in the cost of living from the previous calendar year.<sup>136</sup> Any adjustment may not exceed three percent a year. Beginning this year, North Dakota will implement a similar policy that will increase state and local damage caps gradually over a 5-year period. Ultimately the per person cap will rise to \$500,000 and the per occurrence cap will rise to \$2,000,000. However, effective July 31, 2027, the cap increases will sunset and return to the current \$250,000 per person and \$1,000,000 per occurrence levels.<sup>137</sup>

## F. Recent State Cases That Challenged Cap

In recent years, the debate over Pennsylvania's sovereign immunity has reignited, calling into question if existing laws, specifically those regarding liability damage caps need to be reformed. Two Pennsylvania cases that reached the state Supreme Court are largely to credit for this.

**Zauflik vs Pennsbury (2014).** Plaintiff Ashley Zauflik filed a negligence action against the Pennsbury School District in 2014 after sustaining severe and traumatic injuries including a crushed pelvis and the amputation of her left leg above the knee when a school bus owned by the school district and operated by one of its employees accelerated out of control and swerved onto the sidewalk. In addition to Ms. Zauflik, the bus also struck 20 other students. Pennsbury School District had \$11 million in liability and excess insurance coverage at the time of the accident and accepted accountability for its employee's negligent behavior. Pennsbury, however, argued that its liability was limited to \$500,000, which was the statutory limit on damages recoverable against a local government agency under 42 Pa.C.S. § 8553.

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<sup>134</sup> RSA. §541-B:14 and RSA. §507-B:4

<sup>135</sup> 51 OK Stat. §154

<sup>136</sup> 30 ORS § 30.271

<sup>137</sup> N.D.C.C. §32-12.2-02



Pennsbury moved to pay the entire \$500,000 and forego a trial, but the Zauflik family denied the request, claiming the statutory damages cap was unconstitutional. Thus, the matter proceeded to court, and following a four-day trial, the Bucks County jury returned a verdict against Pennsbury in the amount of \$14,036,263.39, which included \$338,580 for past medical expenses, \$2,597,682 for future medical expenses, and \$11.1 million for past and future pain and suffering. Pennsbury filed an appeal which Judge Robert Mellon of Bucks County would mold to meet Pennsylvania's \$500,000 cap. Judge Mellon ruled in favor of Pennsbury because of the court's prior legal precedent regarding 42 Pa.C.S. § 8553. In his decision, he remarked, "There is no dispute that the circumstances of this case create an unfair and unjust result. Despite the inherent injustice that appears in this case, this court is constrained by precedent."

The Zauflik family appealed Judge Mellon's decision to the Pennsylvania Commonwealth Court and then the state's Supreme Court, both of which upheld the lower court's ruling regarding the constitutionality of the statutory cap. In its Memorandum Opinion, the trial court called on the Pennsylvania Supreme Court to consider changing the language of the existing law, stating, "This Court is of the opinion that a reevaluation of the constitutionality of the statutory cap on damages on equal protection grounds is necessary. It is this Court's belief that an individual's right to a full compensatory recovery in a tort suit is decidedly *not* outweighed by the governmental interest of 'preservation of the public treasury as against the possibility of unusually large recoveries in tort cases.'"<sup>138</sup> While the Supreme Court upheld the Section 8553 liability cap, it concluded as follows: the lower courts did not err in relying on our prior cases to uphold the legislation at issue, as against the present constitutional challenges. It stated "[w]hat is most important is that the right to a jury trial 'must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.'" Moreover, the conclusion that the General Assembly is in the better position than this Court to address the complicated public policy questions raised by the larger controversy has substantial force.<sup>139</sup>

***Grove vs Port Authority of Allegheny County (2019)***. A similar case also challenged the Commonwealth's liability damage cap. On June 16, 2014, Joan P. Grove was walking down a sidewalk on Sixth Avenue in Pittsburgh, PA. She came to a crosswalk which was blocked by a stationary car. As she maneuvered around the car, she was struck by a Port Authority bus driven by a Port Authority of Allegheny County employee, Betty Cunningham. The bus knocked Grove to the ground and drove over her right leg. Cunningham was unaware she had struck a pedestrian

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<sup>138</sup> *Zauflik v Pennsbury School District*, 104 A.3d 1096 (Pa. 2014)(Pennsylvania Supreme Court decision issued November 19, 2014)). Retrieved from: <https://casetext.com/case/zauflik-v-pennsbury-sch-dist-1>

<sup>139</sup> *Zauflik v. Pennsbury School District*, 104 A. 3d 1096 at 1133 (Pa. 2014)(Pennsylvania Supreme Court decision issued November 19, 2014) . Retrieved from: <https://casetext.com/case/zauflik-v-pennsbury-sch-dist-1>

until a passenger on the bus alerted her and yelled that someone had been hit. As a result of the accident, Grove underwent several surgeries, and ultimately had her right leg amputated from the knee down. Grove filed a suit against the Port Authority claiming negligence and the Port Authority challenged the suit denying liability and claiming sovereign immunity pursuant to 42 Pa.C.S. § 8528.

The Port Authority also claimed it was negligence on the part of Joan Grove which caused the accident and consequently, her injuries. In the instance that negligence was shared between both parties, the jury would have to establish how much of the factual cause was initiated by each party. If the jury decided that Joan Grove's negligence was greater than 50 percent, then the plaintiff could not recover any damages. If they ruled that Joan Grove's negligence was less than or equal to the Port Authority of Allegheny County's then the plaintiff could recover for her injuries, and the jury would need to decide the dollar amount of Joan Grove's damages. On September 28, 2016, the jury reached a verdict, finding Grove and Port Authority each 50 percent negligent. The jury awarded damages of \$2,731,000 to Joan Grove, which was then reduced by half to \$1,365,500 by the trial court when considering Grove's 50 percent contributory negligence. Due, however, to Pennsylvania's statutory cap on Port Authority's liability as a Commonwealth agency per Title 42, the verdict was eventually reduced to \$250,000.<sup>140</sup> It was in his concurring opinion of the *Grove* case where Pennsylvania Supreme Court Justice Baer issued a call to action to the General Assembly to review the Commonwealth's tort caps.<sup>141</sup>

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<sup>140</sup> *Grove v Port Authority of Allegheny County*, 218 A.3d 877 (Pa. 2019)(Pennsylvania Supreme Court decision issued October 31, 2019). Retrieved from: <https://casetext.com/case/grove-v-port-auth-of-allegheny-cnty-9>

<sup>141</sup> *Grove v Port Authority of Allegheny County*, 218 A.3d 877 (Pa. 2019)(Pennsylvania Supreme Court decision issued October 31, 2019). [218 A.3d 892]. Retrieved from: <https://casetext.com/case/grove-v-port-auth-of-allegheny-cnty-9> Justice Baer stated: "I [Justice Baer] envisioned [in *Zauflik*] a scenario whereby a personal injury victim, based upon a developed record, could establish that the statutory cap on damages (\$500,000.00 in *Zauflik* as the case was against a local agency; \$250,000.00 here [in *Grove*] as the case is against a Commonwealth agency) violates the plaintiff's constitutional right to a jury trial by creating an onerous procedural barrier to that right.Ibid. (891)

# APPENDICES



## Appendix A – Senate Resolution 2021-146

PRIOR PRINTER'S NO. 939

PRINTER'S NO. 956

THE GENERAL ASSEMBLY OF PENNSYLVANIA

# SENATE RESOLUTION

No. 146 Session of  
2021

INTRODUCED BY AUMENT AND MENSCH, JUNE 22, 2021

SENATOR BAKER, JUDICIARY, AS AMENDED,  
JUNE 24, 2021

### A RESOLUTION

Directing the Legislative Budget and Finance Committee to conduct a study of the current limitations on liability under 42 Pa.C.S. ~~§ 8528~~ §§ 8528 AND 8553 and issue a report of its findings and recommendations to the Senate.

WHEREAS, In May 1978, the Joint State Government Commission issued a report of the recommendations of the Task Force on Sovereign Immunity in light of the Pennsylvania Supreme Court's holding in *Brown v. Commonwealth*, 453 Pa. 566 (1973), suggesting that the General Assembly provide for waiver of sovereign immunity; and

WHEREAS, The Task Force on Sovereign Immunity, upon completing its review, reaffirmed and resolved to retain the Commonwealth's sovereign immunity and to allow for specific limited waivers; and

WHEREAS, The Task Force on Sovereign Immunity recommended that the maximum recovery for any plaintiff ~~under the eight aforementioned areas of liability~~ be limited to \$250,000 and that the maximum liability exposure for the Commonwealth be limited to \$1 million per event or occurrence and recommended that recovery be limited to specific types of damages; and

WHEREAS, The Task Force on Sovereign Immunity found both constitutional authority and strong public policy in favor of the proposed limitations on liability; and

WHEREAS, Among other things, the Task Force on Sovereign Immunity stated that "in the case of a suit against an individual or a corporation, recovery in most instances is effectively limited by the insurance coverage of the defendant; where the ultimate recovery exceeds insurance coverage, a further practical limitation exists to the extent of any defendant's resources. In the case of a sovereign with public taxing powers, the

absence of a statutory limitation on recovery would make the liability exposure in each individual case theoretically unlimited"; and

WHEREAS, On April 19, 1978, the Task Force on Sovereign Immunity's recommendations were introduced in the House of Representatives as House Bill No. 2437, Printer's No. 3135; and

WHEREAS, In 1978, the General Assembly enacted Act 330 of 1978 waiving the Commonwealth's sovereign immunity in certain limited circumstances and limiting its liability under 42 Pa.C.S. §§ 8522 and 8528; and

WHEREAS, IN 1980, THE GENERAL ASSEMBLY ENACTED ACT 142 OF 1980, WHICH PLACED SIMILAR LIMITATIONS ON TORT LIABILITY FOR LOCAL GOVERNMENT ENTITIES BY LIMITING THE LIABILITY TO \$500,000 PER EVENT OR OCCURRENCE AND LIMITING RECOVERY TO SPECIFIC TYPES OF DAMAGES UNDER 42 PA.C.S. §§ 8542 AND 8553; AND

WHEREAS, These limits have not been altered since 1978 and in a series of cases, including *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1100 (2014) and *Grove v. Port Auth. of Allegheny County*, 218 A.3d 877 (Pa. 2019), the Pennsylvania Supreme Court questioned whether the current statutory limitations on liability infringe on

the constitutional right to a jury trial guaranteed by section 6 of Article I of the Constitution of Pennsylvania; and

WHEREAS, The Pennsylvania Supreme Court has also affirmed the greater capacity of the Legislature to evaluate complex questions of public policy to establish limits on the liability of local governments and the Commonwealth in negligence cases; and

WHEREAS, Section 11 of Article I of the Constitution of Pennsylvania vests the Legislature with the sole authority to waive the Commonwealth's sovereign immunity and with that the sole authority to determine the scope of any waiver; and

WHEREAS, The Senate believes that it is important, having agreed to waive the Commonwealth's liability in certain limited circumstances, to revisit and reexamine whether it is in the interests of this Commonwealth's residents for the limitations on liability originally enacted, and as amended, to remain in place or be again altered, taking into account the interests of litigants, the public and the impact that any change may have upon the Commonwealth's budget and the services, benefits

and programs the Commonwealth offers and provides to its residents; therefore be it

~~RESOLVED, That the Senate direct the Legislative Budget and Finance Committee to conduct a study of the current limitations on liability under 42 Pa.C.S. § 8528 and issue a report of its findings and recommendations to the Senate; and be it further~~

~~RESOLVED, That the Legislative Budget and Finance Committee's study and report take into account the interests of litigants, the public and the impact any changes may have upon the Commonwealth's budget and the services, benefits and programs it offers and provides to its residents; and be it further~~

RESOLVED, THAT THE SENATE DIRECT THE LEGISLATIVE BUDGET AND FINANCE COMMITTEE TO CONDUCT A STUDY AND PREPARE A REPORT CONCERNING THE LIMITATIONS ON LIABILITY UNDER 42 PA.C.S. §§ 8528 AND 8553; AND BE IT FURTHER

RESOLVED, THAT THE STUDY INCLUDE ALL OF THE FOLLOWING:

(1) AN EXAMINATION OF THE IMPACT ON LITIGANTS, INCLUDING INFLATION AND OTHER FACTORS AFFECTING THE APPROPRIATENESS OF THE CURRENT LIMITATIONS ON LIABILITY.

(2) AN EXAMINATION OF THE IMPACT OF CHANGING THE LIMITATIONS ON LIABILITY ON STATE AND LOCAL GOVERNMENT ENTITIES, INCLUDING THE ABILITY OF STATE AND LOCAL GOVERNMENT ENTITIES TO RAISE REVENUES AND PROVIDE SERVICES, BENEFITS AND PROGRAMS.

(3) A REVIEW OF THE FACTORS CONTAINED IN THE JOINT STATE GOVERNMENT COMMISSION'S 1978 REPORT ON THE RECOMMENDATIONS OF THE TASK FORCE ON SOVEREIGN IMMUNITY AS THEY RELATE SPECIFICALLY TO CAPS ON RECOVERY AND WAIVERS OF SOVEREIGN AND GOVERNMENTAL IMMUNITY.

(4) A CONSIDERATION OF ANY OTHER FACTORS THAT WILL ALLOW THE GENERAL ASSEMBLY TO EVALUATE AND DETERMINE WHETHER THE LIMITATIONS ON LIABILITY SHOULD BE INCREASED; AND BE IT FURTHER

RESOLVED, That the Legislative Budget and Finance Committee report its findings to the General Assembly no later than ~~June~~ APRIL 30, 2022.



## Appendix B - Frequently Used Abbreviations and Definitions

Throughout this report, we use several abbreviations for government-related agencies, terms, and functions. These abbreviations are defined as follows:

Abbreviation	Name	Definition
ALSIP	The Auto Liability Self Insurance Program	Commonwealth self-insurance fund under the management of DGS used to pay settlement for claims arising from the use of a vehicle owned by the Commonwealth.
D&O	Directors and Officers Insurance	Liability insurance coverage intended to protect individuals from personal losses if they are sued because of serving as a director or an officer of a business or other type of organization. It can also cover the legal fees and other costs the organization may incur because of such a suit.
DCED	Pennsylvania Department of Community and Economic Development	Cabinet level state agency responsible for enhancing investment opportunities for businesses and to improving the quality of life for Commonwealth residents
DGS	Department of General Services	Commonwealth agency created by Act 1975-45 through the merger of the Department of Property and Supplies and the General State Authority. DGS provides services to support business and operational functions for all other Pennsylvania agencies.
DOJ	Department of Justice	Federal executive department of the United States government tasked with the enforcement of federal law and administration of justice in the United States.
ELSIP	The Employee Liability Self Insurance Program	Commonwealth self-insurance fund under the management of DGS used to pay settlements or judgements against the state and its employees for claims of personal injury resulting from negligence, employment discrimination, wrongful discharge, sexual harassment, assault, false arrest, defamation, invasion of privacy, errors or omissions, or violation of any other civil rights.
FARM	Bureau of Finance and Risk Management	Under the purview of DGS, FARM is a state agency tasked with managing claims against the Commonwealth as well as Pennsylvania's self-insurance programs.
FTCA	Federal Tort Claims Act	Federal legislation enacted in 1946 which provides a legal means for compensating individuals who have suffered personal injury, death, or property loss or damage caused by the negligent or wrongful act or omission of an employee of the federal government.
GTCSIP	The General Tort Claims Self Insurance Program	A fund used to pay settlements for all other claims not covered under ELSIP and ALSIP caused by any agency except PennDOT. Currently, this fund covers claims up to \$20,000 per occurrence, and any outstanding total remaining beyond must be paid for by the agency for which the claim is against.

**Appendix B (Continued)**

<b>Abbreviation</b>	<b>Name</b>	<b>Definition</b>
JSGC	Joint State Government Commission	Non-partisan research organization that serves the General Assembly. It provides the legislature with a readily available mechanism for conducting interdisciplinary studies.
LBFC	Legislative Budget & Finance Committee	A bipartisan, bicameral legislative service agency consisting of 12 members of the PA General Assembly. The studies conducted and published by LBFC primarily focus on the scope and scale of the commonwealth's expenditures and economy, seeking to create a more impactful and efficient state government.
LGC	Local Government Commission	Bicameral, bipartisan legislative service agency of the Pennsylvania General Assembly specializing in inquiries, issues, legislation, and providing objective expertise in many facets of local government.
MLF	Motor License Fund	The Motor License Fund is managed by DGS and was created to receive revenue from transportation user fees, including taxes on liquid fuel, license and registration fees, and some fines.
MTCA	Maryland Tort Claims Act	Maryland state law which sets liability limitations and procedural requirements for victims and insulates State employees from general tort liability, provided their actions are within the course of employment and without malice or gross negligence.
NID	Neighborhood Improvement District	Statutorily created privately managed agency with the power to impose additional property taxes on those within the created district for the purpose of extending public services or securing capital improvements.
OAG	Office of the Attorney General	The office of Pennsylvania's top law enforcement official. OAG is divided into four separate sectors which include the Criminal Law Division, Public Protection Division, Civil Law Division, and the Office of Public Engagement.
PennDOT	Pennsylvania Department of Transportation	Commonwealth agency tasked with overseeing programs and policies affecting highways, urban and rural public transportation, airports, railroads, ports, and waterways.
PSTCA	Political Subdivision Tort Claims Act	Pennsylvania statute under 42 Pa.C.S. §8542 and 42 Pa.C.S. §8553 which protects local governmental entities from specific legal actions and sets \$500,000 limit on recoverable damages.

**Appendix B (Continued)**

<b>Abbreviation</b>	<b>Name</b>	<b>Definition</b>
SEPTA	Southeastern Pennsylvania Transportation Authority	The largest regional public transportation authority in Pennsylvania. SEPTA operates in five counties across the Greater Philadelphia area and connects to transit systems in Delaware and New Jersey. Its services include regional rail, buses, trolleys, subway, and a high-speed line to western suburbs. As a regionally operating authority, SEPTA falls under the designation of a local governmental entity under the Political Subdivision Tort Claims Act.
SR	Senate Resolution	Non-binding bills passed by the Pennsylvania Senate to address issues of collective interest or concern.

## Appendix C - State Tort Caps

The following table illustrates the sovereign immunity damage cap at the state and local government entity levels for all 50 states as well as their corresponding statutes as of March of 2022.

### State and Local Tort Caps for All 50 States

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
Alabama	Yes (local)	N/A	\$100,000 for occurrence involving one person, \$300,000 aggregate, \$100,000 property damage	Ala. Code §§ 11-93-1 through 11-93-3.
Alaska	Yes (state – noneconomic damages only)	Noneconomic damages: \$400,000 or the injured person’s life expectancy in years multiplied by \$8,000 (whichever is greater) for occurrence involving one person except for claims resulting in severe permanent physical impairment or serve disfigurement which may not exceed \$1,000,000 or the person’s life expectancy in years multiplied by \$25,000 (whichever is greater). There are no limits on economic damages.	N/A	Alaska Stat. § 09.17.010.

Appendix C (Continued)

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
Arizona	No	N/A	N/A	Ariz. Const. Art. II, § 31. N.
Arkansas	Yes (state)	The state constitution states, "The State of Arkansas shall never be made defendant in any of her courts." Therefore, this is a de facto cap of \$0.	N/A	AR Const. Art 5 § 20.
California	No	N/A	N/A	No mention of monetary limitations in claims against government in statute.
Colorado	Yes	\$424,000 per person, \$1,195,000 per occurrence involving multiple claims (with one person receiving more than \$424,000); Secretary of State can adjust amounts with consumer price index every four years.	\$424,000 per person, \$1,195,000 per occurrence involving multiple claims (with one person receiving more than \$424,000); Secretary of State can adjust amounts with consumer price index every four years.	Colo. Rev. Stat. § 24-10-114
Connecticut	No	N/A	N/A	No mention of monetary limitations in claims against government in statute.

**Appendix C (Continued)**

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
Delaware	Yes (local)	N/A	\$300,000 per occurrence. If local government entity purchases liability insurance in excess of \$300,000, then recovery cannot exceed the amount of insurance coverage.	10 Del.Laws c. § 4013.
Florida	Yes	No more than \$200,000 per person or \$300,000 aggregate for any claim arising out of the same incident or occurrence. However, a judgement or judgments may be claimed and rendered in excess of these amounts and that portion of the judgment that exceeds these amounts may be reported to the Legislature but may be paid in part or in whole only by further act of the Legislature.	No more than \$200,000 per person or \$300,000 aggregate for any claim arising out of the same incident or occurrence. However, a judgement or judgments may be claimed and rendered in excess of these amounts and that portion of the judgment that exceeds these amounts may be reported to the Legislature but may be paid in part or in whole only by further act of the Legislature.	Fla. Stat. Ann. §768.28.

Appendix C (Continued)

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
Georgia	Yes	\$1 million per person and an aggregate limit of \$3 million per occurrence regardless of the number of claimants.	Motor vehicle: \$500,000 one person, \$700,000 aggregate, \$50,000 property. Local government may adopt a higher waiver, or if insurance coverage is in excess of waiver	Ga. Code § 50-21-29 and 36-92-2.
Hawaii	Yes	Non-economic damages capped at \$375,000.	Non-economic damages capped at \$350,000.	Haw. Rev. Stat. § 663-8.7.
Idaho	Yes	\$500,000 limit per single occurrence or the limit of insurance coverage.	\$500,000 limit per single occurrence or the limit of insurance coverage	Idaho Code §6-926.
Illinois	Yes (state)	\$100,000 per incident, unless the incident involves the operation of a state-owned motor vehicle by a state employee, in which case the limit is removed.	N/A	Ill. Ann. Stat. ch. 705, § 505/8 (state) and 745 ILCS 10 (local).
Indiana	Yes	\$700,000 single claimant, \$5,000,000 for a single occurrence involving multiple people.	\$700,000 single claimant, \$5,000,000 for a single occurrence involving multiple people.	Ind. Code § 34-13-3-4.

Appendix C (Continued)

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
Iowa	No	N/A	N/A	No mention of monetary limitations in claims against government in statute.
Kansas	Yes	\$500,000 for claims arising out of a single occurrence or accident.	\$500,000 for claims arising out of a single occurrence or accident.	Kan. Stat. Ann. § 75-6105
Kentucky	Yes	A single claim may not exceed \$200,000. Aggregated to \$350,000 for multiple claims from single occurrence.	A single claim may not exceed \$200,000. Aggregated to \$350,000 for multiple claims from single occurrence.	Ky. Rev. Stat. § 49.040.
Louisiana	Yes	Non-economic damages: \$500,000 total limit (excludes property damages, medical care and related benefits, loss of earnings and future earnings).	Non-economic damages: \$500,000 total limit (excludes property damages, medical care and related benefits, loss of earnings and future earnings).	La. Rev. Stat. Ann. § 13:5106.
Maine	Yes	\$400,000 for all claims arising out of a single occurrence. \$10,000 limit on the personal liability of an employee of a governmental entity for negligent acts or omissions within the course and scope of employment.	\$400,000 for all claims arising out of a single occurrence. \$10,000 limit on the personal liability of an employee of a governmental entity for negligent acts or omissions within the course and scope of employment.	Me. Rev. Stat. Ann. tit. 14, § 8104D-8105.



Appendix C (Continued)

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
Maryland	Yes	\$400,000 per person for a single incident/occurrence	\$400,000 per individual claim, \$800,000 aggregate. Limits do not include interest accrued on a judgement	Md. State Government Code Ann. § 12-104 (state) and § 5-303 (local).
Massachusetts	Yes	Public employers shall not be liable for any amount in excess of \$100,000.	Public employers shall not be liable for any amount in excess of \$100,000. Limit does not apply to Massachusetts Bay Transportation Authority	Mass. Gen. Laws Ann. ch. 258, §2
Michigan	No	N/A	N/A	No mention of monetary limitations in claims against government in statute (M.C.L. § 691.1407)
Minnesota	Yes	\$500,000 per person, \$1,500,000 for all claims arising out of a single occurrence, or maximum recovery allowed by insurance coverage.	\$500,000 per person, \$1,500,000 for all claims arising out of a single occurrence, or maximum recovery allowed by insurance coverage.	Minn. Stat. Ann. §3.736 (state), 466.04 and 466.06 (local).
Mississippi	Yes	\$500,000 for all claims arising out of a single occurrence	\$500,000 for all claims arising out of a single occurrence	Miss. Code Ann. §11-46-15.

**Appendix C (Continued)**

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
Missouri	Yes	\$300,000 per person for a single occurrence or aggregated to \$2,000,000 limit for all claims arising out of a single occurrence.	\$300,000 per person for a single occurrence or aggregated to \$2,000,000 limit for all claims arising out of a single occurrence.	Mo. Ann. Stat. §537.610
Montana	Yes	\$750,000 for each claim and \$1,500,000 for all claims arising out of each occurrence	\$750,000 for each claim and \$1,500,000 for all claims arising out of each occurrence	Mont. Code. Ann. §2-9-108
Nebraska	Yes (local)	N/A	\$1,000,000 per person and \$5,000,000 per occurrence	Neb. Rev. Stat. § 13-926
Nevada	Yes	\$150,000 limit for all claims	\$150,000 limit for all claims	Nev. Rev. St. §41.035
New Hampshire	Yes	\$475,000 per person, aggregated to \$3,750,000 limit for a single incident involving multiple claimants, or the proceeds of any insurance policy, whichever amount is greater.	\$275,000 per Person, and \$925,000 per occurrence.	N.H. Rev. Stat. Ann. §541-B:14 (state) and N.H. Rev. Stat. §507-B:4 (local)

Appendix C (Continued)

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
New Jersey	Yes (non-economic only)	No damages awarded for pain and suffering unless there is permanent loss of a bodily function, permanent disfigurement where medical expenses are in excess of \$3,600.	No damages for pain and suffering unless permanent loss of a bodily function, permanent disfigurement where medical expenses are in excess of \$3,600.	N.J. Rev. Stat. § 59:9-2.
New Mexico	Yes	Liability should not exceed (1) \$200,000 property, (2) \$300,000 for all past and future medical expenses and, (3) \$400,000 per person for all other damages (other than property and medical expenses); but the total liability for all claims cannot exceed \$750,000.	Liability should not exceed (1) \$200,000 property, (2) \$300,000 for all past and future medical expenses and, (3) \$400,000 per person for all other damages (other than property and medical expenses); but the total liability for all claims cannot exceed \$750,000.	N.M. Stat. Ann. §41-4-19
New York	No	N/A	N/A	No mention of monetary limitations in claims against government in statute.
North Carolina	Yes	\$1,000,000 per occurrence, less any liability insurance purchased.	Immunity is waived by the purchase of insurance, up to the amount purchased. Cities with more than 500,000 people can become subject to the state Tort Claims Act	N.C. Gen. Stat. § 143-299.2 (state), §163A-435 (counties), §160A-485 (cities), §115C-42 (school boards), and §160A-485.5 (cities with population over 500,000).

Appendix C (Continued)

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
North Dakota	Yes	\$250,000 per person aggregated to \$1,000,000 for any number of claims arising from any single occurrence. <sup>142</sup>	\$250,000 per person aggregated to \$1,000,000 for any number of claims arising from any single occurrence	N.D. Cent. Code §32-12.2-02. And § 32-12.1-03.
Ohio	Yes (local)	N/A	No limit on economic damages (medical, lost wages, etc.). Non-economic damages capped at \$250,000.	Ohio Rev. Code § 2744.05

Notes:

<sup>142</sup> Pursuant to legislation enacted in 2021, these caps will be increased and phased in gradually over a 5-year period. Ultimately the per person cap will rise to \$500,000 and the per occurrence cap will rise to \$2,000,000. However, effective July 31, 2027, the cap increases will sunset and return to the current \$250,000/\$1,000,000 levels.

Appendix C (Continued)

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
Oklahoma	Yes	\$125,000 per person per single occurrence rising to \$175,000 person if claim is filed against any city or county with a population of 300,000. \$1,000,000 aggregate cap for a single occurrence involving any number of claims. Property claims: \$25,000	\$125,000 per person per single occurrence rising to \$175,000 person if claim is filed against any city or county with a population of 300,000. \$1,000,000 aggregate cap for a single occurrence involving any number of claims. Property claims: \$25,000	Okla. Stat. tit. 51, §154
Oregon	Yes	\$2,347,700 per person, aggregated to \$4,695,300 per occurrence involving multiple claims. <sup>143</sup> Property damage or destruction (single) \$128,400, (multiple) \$641,800	\$782,600 per person aggregated to \$1,565,100 per occurrence.	O.R.S. § 30.271 through O.R.S. § 30.273 <sup>144</sup>
Pennsylvania	Yes	\$250,000 per person, aggregated to \$1,000,000 per occurrence.	\$500,000 cap in the aggregate on claims against local government agencies	42 Pa.C.S. § 8528 (state) and 42 Pa.C.S. § 8553 (local)

**Notes:**

<sup>143</sup> Department, O. J. (n.d.). TORT CLAIMS TABLE OF LIABILITY LIMITS. Retrieved from courts.oregon.gov: <https://www.courts.oregon.gov/Documents/Table-of-Liability-Limits.pdf>

<sup>144</sup> New limitations became effective on July 1, 2021, and apply to all causes of action arising on or after July 1, 2021, and before July 1, 2022. Adjusted annually, as required by ORS 30.271(4), 30.272(4), and 30.273(3).

Appendix C (Continued)

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
Rhode Island	Yes	\$100,000 limit per occurrence	\$100,000 limit per occurrence	R.I. Gen. Laws §9-31-2 and §9-31-3.
South Carolina	Yes	\$300,000 per person aggregated \$600,000 per occurrence involving multiple claims	\$300,000 per person aggregated \$600,000 per occurrence involving multiple claims	S.C. Code Ann. §15-78-120
South Dakota	No	N/A	N/A	No mention of monetary limitations in claims against government in statute.
Tennessee	Yes	\$300,000 per person aggregated to \$1,000,000 per single occurrence	\$300,000 per Person and \$600,000 per occurrence	Tenn. Code Ann. §9-8-307 (state) and Tenn. Code § 29-20-311 (local)
Texas	Yes	\$250,000 per person; \$500,000 per occurrence. Property Damage: \$100,000 per occurrence	\$100,000 for each person aggregated to \$300,000 for each occurrence; Municipality: \$250,000 for each person and \$500,000 for each occurrence; Emergency Service Organization: \$100,000 for each person and \$300,000 for each single occurrence; AND \$100,000 for each single occurrence for injury to or destruction of property.	Tex. Civil Practice and Remedies Code Ann. §101.023

**Appendix C (Continued)**

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
Utah	Yes	\$583,900 limit per person aggregated to \$3,000,000 limit per single occurrence involving multiple claimants	\$583,900 limit per person aggregated to \$3,000,000 limit per single occurrence involving multiple claimants	Utah Code Ann. §63G-7-604(1)c; §63G-7-604(1)(a), and §63G-7-604(1)(d)
Vermont	Yes (state)	\$500,000 to any one person and maximum aggregate liability is \$2,000,000 to all persons arising out of single occurrence.	Damages against a town for insufficiency of bridge or culvert is \$75,000 or the limits of liability insurance, whichever is greater.	Vt. Stat. Ann. tit. 12, §5601 Vt. Stat. Ann. 19, § 985. Vt. Stat. Ann. 29, § 1403.
Virginia	Yes	\$100,000 per occurrence for causes of action accruing on or after July 1, 1993, or (ii) the maximum limits of any liability policy maintained to insure against such negligence or other tort, if such policy is in force at the time of the act or omission complained of, whichever is greater, exclusive of interest and costs.	No mention of monetary limitations in claims against local governments in statute, however, there is a de facto cap in some instances.	Va. Code §8.01-195.3 (state) and Va. Code § 15.2-1405.
Washington	No	N/A	N/A	R.C.W.A. § 4.92.090. (State) R.C.W.A. §§ 4.96.010 to 50 (1967). (Local)

**Appendix C (Continued)**

State	Monetary Liability Limitation	State Cap Limit	Local Government Cap Limit	Statute
West Virginia	Yes (local)	N/A	No limit on economic damages. Non-economic damages limited to \$500,000 per occurrence	W. Va. Code §29-12A-76.
Wisconsin	Yes	\$250,000 limit per occurrence	\$50,000 limit per occurrence	Wis. Stat. § 893.82.6 (state) and Wis. Stat. § 893.80.3 (local)
Wyoming	Yes	\$250,000 per person aggregated to \$500,000 per single occurrence	\$250,000 per person; \$500,000 per occurrence; Property Damage: claims must be less than \$500.	Wyo. Stat. §1-39-118(a) and Wyo. Stat. § 1-39-118(f).

Source: Developed by LBFC Staff with information obtained from the statute in each state.