

A Year Later--The September 11th Victim Compensation Fund

By Kenneth P. Nolan and Jeanne M. O'Grady

In an immediate response to the terror attacks of September 11, 2001, Congress created an unprecedented airline bailout package to assist the aviation industry with \$15 billion in loans and guarantees. The fear of civil lawsuits from the devastation also prompted the drafting of the "Air Transportation Safety and System Stabilization Act." In addition to limiting the exposure of the airlines (and other defendants in a later amendment) to their insurance coverage, the statute also created the September 11th Victim Compensation Fund of 2001. Many families believe that Congress' initial reaction was to assist the business community with the victims' interests an afterthought.

The Victim Compensation Fund is a no-fault alternative to litigation, with a stated purpose of providing compensation to the victims of the terrorists. In return, it bars lawsuits against all except the terrorists and their organizations. Therefore, the Fund and how it's administered has the very real potential to become a model for future large tort matters. As we write this article shortly after the first anniversary of the attack, there have been only a handful of awards announced. Therefore, we will focus on whether the Fund as written is fair and equitable and whether it is a substitute for contentious and often lengthy litigation.

The hastily-drawn statute that creates the Fund provides for recovery through a claim system of economic damages as provided by State law and an extensive list of elements of non-economic damages. It also requires the deduction from any Fund award of monies received by claimants from other sources such as life insurance, death benefits, pensions and government benefit programs. These deductions, unheard of in tort litigation, are rumored to be a late night

tradeoff for the elimination of caps on attorney's fees for lawyers retained to represent claimants in the Fund.

The statute provides for the appointment of a Special Master, and the promulgation of regulations by the Special Master for the administration of the Fund. Shortly after the statute was signed, Attorney General John Ashcroft appointed Kenneth R. Feinberg Special Master, and the interim regulations were released in December 2001. These provided an explanation of who was eligible to make a claim, how economic damage awards would be calculated and present valued, and what would (or more precisely what would not) be offset from the awards. These regulations made it clear that the charitable contributions to the September 11th families by the loving and supportive American people would not be deducted from Fund awards. Initially the Special Master considered deducting charitable contributions, but both charities and families objected and he backed off.

The reason for the relatively slow progress of the Fund is partially based on the complex issues—can domestic partners recover, what to do about workers' compensation benefits, how to value predeath pain and suffering, what constitutes a "death benefit"—and the sophistication of the families, most of whom were educated and who were extremely skeptical of a government which failed them on September 11th. The families did not view the Fund as a gift from their government, but many believed it was created to prevent lawsuits and the resulting discovery of the catalogue of failures from a plethora of agencies from the CIA to the FAA to the Port Authority to the military.

A most controversial aspect of the interim regulations was the non-economic damage awards, a flat-rate \$250,000 award, plus a \$50,000 award for the spouse and each dependent of a victim killed. This despite the clear language in the Stabilization Act providing for various

elements of non-economic damages, such as “mental anguish, loss of enjoyment of life, loss of society and companionship, and all other nonpecuniary losses of any kind or nature,” elements that under the tort system, would warrant awards in the millions. For those who received phone calls from their loved ones who told them that the Port Authority announced that it was safe to stay in Tower 2, or who were told that “It doesn’t look good, I don’t know if I’m going to make it. I love you. Tell Susie and Jackie that I love them,” the \$250,000 award was considered an insult.

In response to tremendous public outcry, the Special Master, in his final Regulations released in March 2002, increased the non-economic award for spouses and dependent children to \$100,000 from \$50,000. To a 35 year old widow who now has 3 young children to raise alone, these numbers only make them fearful and angry especially since most had storybook marriages and lives. The families felt that these awards are so far from typical tort values that it was another example of governmental failure and the preference of business interests ahead of the victims. “\$15 billion for the airlines and what...for the families,” said one widow. “How is that fair?”

Clearly the most controversial aspect of the program, and the most damaging to potential claimants, is the requirement of collateral sources offsets. The Fund is touted as an unprecedented demonstration of support and generosity by the American people – and yet it gives with one hand and takes away with the other. The original list of collateral offsets has been modified somewhat, in response to the persuasive arguments of families that many of the offsets were patently unfair. Among the concessions made by the Special Master in the final Regulations involve life insurance, pensions and social security and workers’ compensation benefits.

With respect to life insurance, universally the largest collateral offset for claimants, the final regulations concede premium payments--these will not be deducted as collateral offsets. In reality, this concession is meaningless, since the premiums paid by the victims is miniscule in relation to the benefits paid, and since many victims' life insurance policies were provided by their employers. Similar treatment is given to pension plans. Employee contributions are not offset, while employer contributions are. Traditional pensions, defined benefit plans, will be offset entirely since employees contribute little or nothing to these plans.

Those who planned and used after-tax dollars to purchase life insurance are penalized by the Fund. In some cases, the life insurance payments are much greater than the potential Fund award. In response, Mr. Feinberg has stated that each family will receive a minimum award of \$250,000, but those in this situation are exploring whether litigation where life insurance payments are not deducted is a better path.

There is an exception, however, to some collateral source offsets. After much highly publicized protest, the Special Master redefined pension and death benefits, but only as applied to the Firefighters and Police who were killed in the attacks. Neither their line of duty death benefit (an employer-like provided life insurance) nor their vested pension will be offset. Indeed, the vested pension has been redefined as lost income. This concession made by the Special Master demonstrates quite clearly that he is not bound by the terms of the Stabilization Act, as both benefits are specifically required to be offset by the Act. While no one begrudges the families of the fire and police victims any benefit, it is also fair to request that what the Special Master does for one he must do for all. He has not made similar concessions to the civilian families which has added to the perception of a callous governmental Fund.

One change to the collateral offsets that was made as a peace offering to all spouses involved Social Security and Workers' Compensation benefits. The Special Master conceded the spouses' benefits because of their contingent nature (both benefits cease upon remarriage). Calling the likelihood of such a contingency impossible to calculate, instead, the Special Master has refused to offset the entire spousal portion of these benefits, choosing to offset only the children's portions. While this seems to be a huge benefit to the families, for many (if not all with very young children), it is a modest offering. The present value of the Social Security benefits of the children are deducted. Since the noneconomic award to a child is a mere \$100,000, the Social Security deduction often exceeds this amount. Therefore, if a widow has two children, aged 1 and 3, the noneconomic award for these children is \$200,000 (\$100,000 each). The present value of the future Social Security payments for these infants would be approximately \$250,000. Therefore, the more children you have and the younger they are, the less money you receive from the Fund. Since most of those killed were young with young children, this particular offset is terribly egregious especially for the hundreds who gave birth after September 11th.

One aspect of the Fund that has not changed since the earliest rules promulgated by the Special Master is the perception that there is an apparent cap on awards. Even after one year, presumed award calculations posted on the Department of Justice's website dedicated to the Fund stopped at an income level of \$231,000. Special Master Feinberg has stated time and again that extraordinary proof would be needed to obtain an award higher than this level, and further, that such an award would "rarely" be necessary to ensure that these families' economic needs would be met. Nowhere in the statute is such a requirement suggested, or is "need" mentioned. It is particularly distressing, therefore, that the Special Master has determined that these families

are less deserving of compensation, and an opportunity to preserve their own sense of normalcy, than their lower earning counterparts. Indeed, many families of those successful securities traders believe that the Towers were targeted because they symbolized American financial success. It is sadly ironic that these victims, who left their homes at 5:30 each morning and worked diligently at demanding jobs, are being shortchanged.

Despite a year of examination, debate and “clarification” (a term the Special Master’s office uses when referring to changes made to the Fund regulations after the Final Rule was released in March 2002), most families are still unsure of what they can expect from the Fund. Whatever the result, the experience has burdened and exasperated the families. The law, the regulations, the public statements by the Special Master and the “clarifications” have added to the emotional toll of the tragedy. As of the one year anniversary, very few families had entered this “unprecedented,” “no-fault,” easy-as-pie system of compensation.

And so, a year later, as the deadline for filing suit against the Port Authority of New York and New Jersey (the owner of the WTC and owner/operator of Newark Airport) approached, Judge Alvin K. Hellerstein of the Southern District of New York, before whom all WTC related litigation has been consolidated, ordered that victims’ families be permitted to file suit against the Port without waiving their rights to enter the Fund. The Special Master’s office agreed to be bound by this Order which allows families to file a lawsuit and suspend the suit until such time as they choose to enter the Fund, actively pursue litigation or December 23, 2003 (the day after the deadline to enter the Fund), whichever is earliest. Judge Hellerstein’s order effectively bought the families an additional year during which they can continue to weigh the options of entering the Fund and pursuing litigation.

With the passing of the one-year anniversary of these horrific attacks, the majority of victims still unidentified, and the wounds still bleeding, it is clear that the stated goal of the Fund, compensating families for losses suffered, falls far short of what the program must do. It must recognize and validate the lives of those killed, and the losses suffered by those who loved them. In this respect, the Fund is failing. Special Master Feinberg and the Department of Justice must recognize that this program is as much about emotional healing as it is about financial compensation and administer the program in a manner that will help close the wounds, rather than in a manner that merely minimizes spending. This lofty goal is certainly attainable. Compassion, understanding and flexibility are all that is necessary. Our government which failed so horribly on September 11th owes it to the families and to the memories of those honorable and brave individuals who died because they were Americans.

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