The 9/11 Victim Compensation Fund: Overview and Comment

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By

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Introduction

Beginning most notably with Davy Crockett, statesmen throughout United States history have argued that it is unjust for Congress to finance purely charitable projects with tax revenues. Spokesmen for high principles, they have been largely ignored and sometimes vilified. In America–the most generous country in the world–to speak out against charity is simply *not done.*

Nonetheless, the moral problem inherent in tax-funded charity is serious enough to have generated controversy in connection with one of the most emotionally compelling compensation programs ever enacted by Congress. Profuse, critical, even bitter public comments followed the Government's publication in December of the interim rules by which the Victim Compensation Fund would be administered. Protesters chafed under the realization that Congress was using their tax dollars–as one put it–"to make millionaires out of the 9/11 victims."

In abstract theory, these protests strike a common chord with many on the Right. In point of fact, however, they misperceive this law. The 9/11 Victim Relief Fund statute does not devote tax revenues to purely charitable purposes; no claimant gets something for nothing. Instead, every Fund claimant strikes a bargain: He accepts Fund compensation in exchange for surrendering his right to sue for damages. This is bargain hard enough and close enough that some eligible claimants certainly will refuse to strike it.

How many 9/11 victims decline the Government's bargain, and how successfully those victims pursue their litigation alternatives, will be important factors in history's assessment of this unique Congressional enactment. So will resolution of the constitutional challenges that will probably be leveled against the law, and Congress's eventual treatment of it as a precedent for industry relief and victim compensation in time of war.

Below is an overview of the statutory and regulatory provisions relating to the Fund, followed by a discussion of the Fund law's more problematic or controversial aspects.

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The Statute

"The September 11th Victim Compensation Fund of 2001" is one of three key features of the Air Transportation Safety and System Stabilization Act of 2001 ["ATSA"], Title IV of Pub. L. 107-42, 115 Stat. 230, 49 U.S.C. Section 40101. The other two features are financial aid to the airline industry and creation of an exclusive Federal cause of action for damages arising out of the terrorist attacks.

Loan Guarantees and Cash:

The Act's opening provision, 115 Stat. 230, Section 101, provides that:

> The President shall take the following actions to compensate air carriers for losses incurred by the air carriers as a result of the terrorist attacks on the United States that occurred on September 11, 2001:
>
> (1) ...issue Federal credit instruments to air carriers that do not, in the aggregate, exceed $10,000,000,000....
>
> (2) Compensate air carriers in an aggregate amount equal to $5,000,000,000 for...(A) direct losses incurred...as a result of any Federal ground stop order...and (B) the incremental losses incurred beginning September 11, 2001 and ending December 31, 2001, by air carriers as a direct result of such attacks.

Thus, ATSA makes available to distressed air carriers an aggregate amount of $15 billion in loan guarantees and cash to assist them in coping with direct and incremental resulting from the terrorist attacks. It also creates an Air Transportation Stabilization Board with broad discretion to review and decide aid applications received before June 28, 2002. Factors the Board will consider in evaluating applications include the carrier's ability to repay the loan; protection of the Government's financial interest; and the loan-administration ability of the lender (preferably private rather than Federal entities). In a bow to public perceptions, the statute also conditions loans on a carrier's agreement to limit pay raises to employees or officers whose total compensation exceeds $300,000.[2]

Exclusive Federal Damages Action

ATSA further provides that 9/11 victims who do not seek compensation from the Victim Relief Fund may bring in U.S. District Court for the Southern District of New York an exclusive Federal cause of action for damages based upon "the substantive law,

[2] Regulations implementing the industry-related provisions of ATSA appear at 14 CFR 201ff.

including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law." Section 408(b); 115 Stat. 240-241.

> notwithstanding section 40120(c) of title 49, United States Code, this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of...flights [American Airlines flights ll and 77, and United Airlines flights 93 and 175 on September 11, 2001].

Section 408(b)(1).

ATSA restricts "liability for all claims, whether for compensatory or punitive damages" against any air carrier to the "limits of the liability coverage maintained by the air carrier." Section 408(a); 115 Stat. 240. This provision has already elicited Constitutional concern.[3] Congress forearmed ATSA against a Constitutional challenge by enacting a savings clause: Section 601 states that "if any provision of this Act...or application thereof...is held invalid, the remainder...shall not be affected thereby." Section 601; 115 Stat. 241.

Victim Compensation Fund

The Fund itself is addressed in a title of the Act whose purpose is to "provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes...." Section 403; 115 Stat. 237.

The Fund statute instructs applicants for such compensation to file a form developed by the Fund's Special Master, who is Kenneth R. Feinberg, appointed by the Attorney General on November 26, 2001 and serving, it should be noted, *pro bono*. The claim form sets forth the applicant's economic and noneconomic losses, and information regarding any available, collateral sources of compensation for such losses. 115 Stat. Section 238. The claim must be filed within two years of December 22, 2001, the date on which the Special Master's regulations are promulgated. Section 405(a)(3); 115 Stat. 239.

Eligibility for compensation depends upon an individual's personal presence at the World Trade Center, the Pentagon or Shanksville, Pennsylvania crashes, "at the time, or in the immediate aftermath." Section 405(c)(2)(A)(i); 115 Stat. 239 (terrorists excepted, of

[3] In presentations made before the Aviation Committee of the International Bar Association during a conference held in late October, some stated that this limitation of liability provision may constitute an impermissible taking. *See* Rosenman Aviation Bulletin issued by Rosenban & Colin LLP, New York. The possibility also has been raised that international law proscribes application of the limitation provision to wrongful death actions brought on behalf of airline passengers, to whom the airlines owed a public carrier's duty of care.

course). Eligibility also requires the claimant's "physical harm or death" as a result of the crash, or his status as the personal representative of a deceased victim of the crashes. Section 405(c)(2); 115 Stat. 239.

Importantly, of course, the award of compensation is contingent upon waiver of the right to file, or to be a party to, a civil damages action in Federal or State court "for damages sustained as a result" of the 9/11 crashes. Section 405(C)(B)(i); 115 Stat. 240. It is "the claimant" who waives the right, and ATSA defines "claimant" narrowly, to be "the individual filing a claim for compensation...." Section 402(3). As noted above, ATSA creates an exclusive Federal civil damages cause of action (apart from suits against knowing terrorist perpetrators, Section 408(c)). It is this cause of action that a Fund claimant must waive. A claimant nonetheless preserves the right to bring actions to recover collateral source obligations, Section 405(c)(3)(B)(i) and 115 Stat. 240, as well as actions against persons responsible for the crashes. Section 408(c); 115 Stat. 241.

Interestingly, the waiver of a claimant's right to file suit does not become effective upon a claimant's receipt of an award or even the Special Master's determination of the claimant's eligibility. It takes effect "[u]pon submission of a claim." Section 405(c)(3)(B)(i); 115 Stat. 240. A person with an already-pending civil action under this title may indeed file a claim for compensation from the Fund, but only if he withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 407." *Id.* The statute is silent on the waiver obligation, if any, of a claimant who seeks–but ultimately is denied–Fund compensation.

The Special Master's award is "based upon on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant." Section 405(b)(1)(B)(ii); 115 Stat. 238. "[T]he Special Master shall not consider negligence or any other theory of liability" when processing claims, and his written determination "shall be final and not subject to judicial review." Section 405(b)(3); 115 Stat. 239.[4] The statute also prohibits the Special Master from considering "negligence or any other theory of liability," or from including punitive damages in any compensation award. Section 405(b)(2) and (5). It also mandates that the "Special Master shall reduce the amount of compensation...by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes...." Section 405(b)(6); 115 Stat. 139.

Congress took pains to expressly define certain points regarding valuation of awards from the Fund. For example, regarding other sources of compensation by which any award must be offset, the statute states that:

> The term "collateral source" means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by

[4] The Special Master has rather creatively softened this no-appeal rule by stating that he personally will perform a *de novo* administrative appeal of a challenged award when a claimant requests it. Tr. p10.

> Federal, State, or local government related to the terrorist-related aircraft crashes....

Section 402(4). The term "economic loss" is defined as pecuniary loss resulting from harm "to the extent recovery for such loss is allowed under applicable State law. Section 402(5). By contrast, the term "noneconomic losses" means not only physical or emotional pain and suffering, but also "all other nonpecuniary losses of any kind or nature." Section 402(7).

A model of expedited relief, the Fund statute requires the Special Master to rule on each claim within 120 days of its filing–a rather daunting responsibility given claimants' statutory entitlement "to be represented by an attorney...to present evidence, including...witnesses and documents," as well as "any other due process rights determined appropriate by the Special Master." Section 405(b)(3); 115 Stat. 239. And the Master also must authorize payment of every award within 20 days of determining entitlement. 115 Stat. 240.

Finally, the Fund statute explicitly preserves the "liability of any person who is a knowing participant" in any of the hijackings, and reserves to the United States a right of subrogation with respect to any claim authorized by the Special Master and paid by the United States. Sections 408(c) and 409; 115 Stat. 241.

The Victim Fund Regulations

The Act gives the Attorney General, "in consultation with the Special Master," 90 days to promulgate procedural regulations respecting Victim Fund claims, evidence and hearings, and any "other matters determined appropriate by the Attorney General." Section 407; 115 Stat. 240. Accordingly, On November 5, 2001, the Justice Department published a "Notice of Inquiry and Advance Notice of Rulemaking," which was duly followed by the Attorney General's November 26, 2001 appointment of Kenneth R. Feinberg as Special Master. Section 404(a); 115 Stat. 239. On December 21, 2001, Mr. Feinberg released his Interim Final Rule, and on March 7, 2002, his Final Rule.

Both the Notice of Inquiry and the Interim Final Rule invited and received considerable comment from the members of the public, including prospective eligible claimants. The Special Master's consideration of these many hundreds of comments is reflected in rather lengthy Statements that he issued contemporaneously with releasing the Interim and Final regulations. Despite considerable criticism that the Fund was overly generous, a matter that is further discussed in the Discussion section below, the Special Master responded to public input with an open palm: Generally speaking, his amendments to the Interim rule have the effect of enlarging the pool of eligible claimants and increasing the amounts typically awarded to each eligible claimant.

The "Statement by the Special Master" on the Final Rule (hereafter "Final Statement") highlights the following relatively controversial regulations, and the effect public comments had on amendments he made to the interim rules.

Eligibility

The seemingly straightforward issue of eligibility has three aspects: the requirements for any individual to be considered "eligible" to recover from the Fund; the requirements for any individual to be deemed the "personal representative" of an eligible decedent; and the requirements for any individual to qualify as a "beneficiary" of an award from the Fund.

Eligible Victims: As to the first, core aspect of eligibility, except for enlarging from 24 to 72 hours the time period for certain claimants to seek medical care for physical injury, the final rule exactly adopts the interim regulation's criteria for eligibility. These, in turn, mirror the statutory criteria: personal presence at the terror sites coupled with physical injury or death or, in the case of death, status as the personal representative of a decedent. 28 CFR 104.2.

Eligible Personal Representatives: As to a decedent's personal representative, the Special Master anticipates that "in many or most cases," the PR's identity will not be in dispute. Where there is a dispute, the final rule preserves the interim rule's dictate that the personal representative will be:

> An individual appointed by a court of competent jurisdiction as the Personal Representative of the decedent or as the executor of administrator of the decedent's will or estate.

28 CFR 104.4(a)(1). Thus, the regulations both provide that state law of the domicile of the deceased[5] controls one's status as a personal representative, and relieve the Special Master of any obligation to adjudicate the issue himself. In situations where no court has appointed an executor or administrator, and "such issue is not the subject of pending litigation or other dispute," the regulations permit the Special Master to name as the PR whatever individual a deceased victim named in his will as executor/administrator. 28 CFR 104.4(a)(2). Where the victim left no will, the Master may name as representative "the first person in the line of succession established by the laws of the decedent's domicile governing intestacy." *Id.*

Any "purported" PR must certify that he has given advance written notice of the claim to not only the victim's family and agents, but also "to any other persons who may reasonably be expected to assert an interest in an award or to have a cause of action to recover damages" for the wrongful death. 28 CFR 104.4(b). The Special Master may

[5] Tr. Feinberg December 20, 2001 News Conference (hereafter "Tr."), p8.

himself provide public notice of names of those seeking PR status. *Id.* If, within 30 days, a person with a financial interest in the award objects to the PR, 28 CFR 104.4(c), the Master may either suspend the claim adjudication, or proceed and pay the award into escrow, pending resolution of the dispute. 28 CFR 104.4(d). Alternatively, disputing parties may agree in writing on a PR to act in their behalf, pending resolution of their disagreement. *Id.*

Eligible Beneficiaries: Public comments on the interim rule evidently induced the Special Master to significantly change the regulatory definition of "beneficiary" to a Fund award. The interim rule originally defined "beneficiary" to mean "a person entitled under the laws of the decedent's domicile to receive payments or benefits from the estate of or on behalf of the decedent...." 28 CFR 104.3(a). The final rule removes the local law standard and amends the definition to provide that the "term beneficiary shall mean a person to whom the Personal Representative shall distribute all or part of the award under Section 104.52...." That subsection contains a concomitant amendment to the effect that:

> Notwithstanding any other provision of these regulations or any other provision of state law, in the event that the Special Master concludes that the Personal Representative's plan for distribution does not appropriately compensate the victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse, children, or other relatives.

Advance Benefits

In bureaucratic action that must set a record for alacrity, the Special Master's interim rule authorized advance payment of small Fund awards ($50,000 for decedents, and $25,000 for injured victims) to eligible individuals facing immediate financial crises related to the terrorist attacks. Interim Statement, p. 66277; 28 CFR 104.22. But, filing for advance benefits necessarily triggers the statutory waiver of litigation rights. For this reason some critics, *e.g.*, as members of the plaintiffs bar, have faulted the advance benefit provisions as an unfair inducement to participation in the Fund.

Collateral Source Compensation

As noted above, the Fund statute mandates that the "Special Master shall reduce the amount of compensation...by the amount of [available]...collateral source compensation," and defines the term "collateral source" to mean "all collateral sources," and specifically enumerates some that are "includ[ed]" such as life insurance. Sections 405(b)(6) and 402(4), respectively (emphases added). Nonetheless, the Special Master "did find ambiguity in the statute" on this point, and resolved it by deciding to exclude "gifts provided to victims and their families by private charities...[i.e.], private charitable assistance." Statement of the Special Master in the Interim Rule (hereafter "Interim Statement"), Fed. Reg. Vol. 66, No. 246, p. 66274. Thus, the interim regulations exclude "charitable donations distributed...by private charitable entities," yet preserve the Special

Master's discretion to find any particular donation to be, after all, a collateral source. 28 CFR 104.47(b)(2).

Public comments on this interim rule induced the Special Master to further enlarge his charity exception to collateral source compensation by diluting the statutory mandate that 9/11-related government payments be considered collateral source compensation. The Act expressly dictates that collateral source compensation includes "payments by Federal, State, or local government related to the terrorist-related aircraft crashes...." Section 405(b)(6). By contrast, the "final rule clarifies that benefits from charities disbursing private donations will not be treated as collateral source compensation, even if such charities were created or managed by governmental entities." Final Statement, p3. Furthermore, in the final rule, the Special Master "clarifies the definition of collateral source compensation by expressly stating that certain government benefits, such as tax relief, contingent Social Security benefits, and contingent workers' compensation benefits (or comparable contingent benefits for government employees) need not be treated as collateral source compensation." *Id.; see* new subsection 28 CFR 104.47(b)(3), which exempts from offset "[t]ax benefits received from the federal government as a result of the enactment of the Victims of Terrorism Tax Relief Act."

Presumed Award Methodology

By statutory dictate, a claimant permanently waives his right to file the exclusive Federal civil action not upon receipt of an award, but upon the filing of a claim with the Special Master. Section 405(c)(3)(B)(i). One effect of this hair-trigger waiver was to persuade the Special Master to issue precise presumed award charts in order to permit prospective claimants–at the outset–to weigh their expected Fund compensation against the likely yield of pursuing their civil action options. Toward this end, on December 20, 2001, the Special Master published an award chart that illustrated "presumptive, non-binding estimated awards available to those eligible claimants filing on behalf of certain deceased victims." Final Statement, p8. The Special Master derived many of the chart's figures from national economic statistics produced primarily by the Bureau of Labor Statistics. Tr. Feinberg December 20, 2001 News Conference (hereafter "Tr."), p4.

The Special Master emphatically stated that the award chart figures were not "caps," but merely estimates that individual claimants could challenge–if they chose to do so–by submitting evidence or even testimony demonstrating special circumstances that warrant a higher award. Even though not 'caps,' however, the Special Master noted "the amount of compensation reflected on those charts received more public comments than any other subject." *Id.*

Perhaps the single most provocative interim regulation promulgated by the Special Master was his election to award a flat figure of $250,000 for pain and suffering. That figure "is roughly equivalent to the amounts received under existing federal programs by public safety officers who are killed...or members of our military....killed in the line of

duty...." Interim Statement, Fed. Reg. Vol. 66, No. 246, p. 66279. These payments "include a noneconomic component of 'replacement services loss.'" *Id.*

As Mr. Feinberg later explained, "we do not make distinctions between claimants on the basis of pain and suffering and emotional distress." * * * I will not play Solomon. I cannot make those distinctions and I won't make those distinctions. Every life is valuable." Tr. p13. To each claimant's noneconomic damage award of $250,000, an additional award of $50,000 would be made for each for the decedent's spouse and every dependent child. Finally, the Special Master identified *pre-offset* award floors: "In no event shall an award...be less than $500,000 in any case brought on behalf of a deceased victim with a spouse or dependent, or $300,000 in any case brought on behalf of a deceased victim who was single with no dependents." 28 CFR 104.41.

The public comment on expected award amounts "varied greatly," *id.,* but the Special Master's response to it was uniform: Almost all his amendments to the interim rules increased both the number and the size of estimated awards. While he maintained the flat $250,000 flat award for victim's pain and suffering, and his *pre-offset* award floors, *supra,* the final regulations not only pared the definition of "collateral source compensation" that had to be offset from the award, but also doubled the $50,000 added payment he had authorized for a decedent's spouse and each of decedent's dependent children. 28 CFR 104.44; Interim Statement, Fed. Reg. Vol. 66, No. 246, p. 66274.

The micro-economic result of these enhancements to the interim rules was an approximate 12% increase in the average, pre-offset, tax-free award–from $1.65 million to $1.85 million.[6] The enhancements did not necessarily mean, however, that Congress would have to enlarge the appropriation needed to finance the Fund: The Fund's originally-estimated total cost, $6 billion, remained sound despite the enhanced expected awards because the post-attack estimated death toll, over 5,000, had fallen significantly–to just over 3,000. Wash. Post, Sun, Lena H., March 8, 2002, pp. A1 and A18.

Despite the Special Master's determination to minimize disparity among awards, the range of anticipated awards is wide–from a *pre-setoff* low of about $384,000 to a high of $4.5 million. *Id.*[7] The Special Master has publicly stated that payments higher than $3 to $4 million will be rare, even for victims with substantial incomes. *Id.*

The Special Master's computation method first takes note of the decedent's income, including the value of his employment benefits, then subtracts "the average, effective combined" tax rate for that income bracket. "Explanation of Process for

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[6] The Special Master anticipated that the median award, *e.g.,* for the family of a deceased, married 41-year-old claimant with two children and an $80,000 income, would be about $1.58 million. Tr., p.4.

[7] *N.b.,* the Special Master concedes that it is "absolutely" possible, but unlikely, that after required setoffs, a wrongful death claimant would get nothing at all. Tr., p.8.

Computing Presumed Economic Loss" (hereafter "Explanation"), paras. 1-2. On this basis, the Special Master then projects decedent's income through his estimated work life, corrects for inflationary and productivity changes, accounts for risk, subtracts decedent's and his family's projected consumption, and calculates the present value of projected compensable income and benefits using discount rates based on current yields on mid- to long-term U.S. Treasury securities. Explanation, paras. 3-8. All these values appear on publicly-available charts.

The watchword for the Special Master's computation of economic loss is largesse (except at the extreme high highest end of the income bell curve[8]). For example, in response to criticism of his interim rule, the Special Master removed real-world race and gender income disparities from the formula:

> ...[I]n order to increase awards for all claimants by maximizing the duration of expected foregone earning and accommodating potential increases by women in the labor force, the Special Master's revised presumed economic loss methodology uses the most general data available. Specifically, *the new methodology used the All Active Males table for all claimants*. The methodology is gender and race neutral.

DOJ Victim Compensation Fund Website Frequently Asked Question [FAQ} 5.34 (emphasis added).

The Special Master's methodology also

> ...adopts a number of assumptions implemented to facilitate analysis on a large scale. When viewed in total, these assumptions are designed to benefit the claimants and are more favorable than the standard assumptions typically applied in litigation.

Explanation, para. 9. For example, regarding an assumption beneficial to high-income earners' families, "whatever income tax rate corresponded to the victim's determined compensable income bracket as of date of death was assumed to apply for the remainder of the victim's career, without increase." *Id.* At the other end of the income scale, "...where total expenditures [for consumption] exceed income, expenditures [would be] scaled to income...to avoid a penalty to the claimant." Explanation, para. 7. The Special Master

[8] The Special Master's charts omit figures for annual incomes exceeding $225,000– incomes earned by the top two percent of the general population. The Special Master said he "simply stopped" at about $240,000 in order to minimize award disparity. Tr. p7. The award for a decedent having earned a million dollars annually, therefore, would be computed at the income rate of $240,000, unless his claimant successfully demonstrated to the Special Master that a higher award was warranted. *Id.*

> ...determined that the net effect of these and other facilitating assumptions was to increase the potential amount of presumed economic loss to the benefit of the claimant.

Explanation, para. 9. [9]

It is unlikely that any of the Special Master's discretionary upward adjustments in award methodology would apply in a court's civil damage judgment against the airlines. They are a 'bonus' for Fund claimants alone.

Discussion

The Statutory *Quid Pro Quo*

Reference was made at the outset of this paper to the weighty bargain that lies at the heart of the Victim Relief Fund statute. In a nutshell, that *quid pro quo* is this: In exchange for immediate, certain and *relatively* generous compensation from the Fund, claimants surrender the option of pursuing future, uncertain and statutorily-limited compensation from United or American Airlines. Complicating a potential claimant's decision whether to strike this bargain is the uncertainty of litigation, particularly as respects liability and damages.

The liability problem has to do with factual proof: It is generally perceived that the 9/11 crashes involved no significant negligence by airport security personnel or members of the planes' crews. Of course, it has been many decades in America since the absence of fault served to immunize a defendant from tort liability. Where victims are sympathetic and the defendant is liquid, tort liability has been known to spontaneously materialize. Moreover, litigation discovery ultimately may disclose hard evidence of contributory negligence in one form or another–most probably having to do with breach of a public carrier's duty to safeguard his passengers by, for example, reasonably providing to secure the cockpit from forced entry.

If plaintiff solves the liability/fault problem, however, he faces a hard damages problem, one with both factual and statutory components: In the typical aircrash lawsuit, the corporate defendant's capacity to pay even a very large judgment is preordained. The

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[9] The gist of the presumed award methodology is reflected in two examples from the awards chart. The chart demonstrates presumed economic and noneconomic loss for a married, 35-year-old decedent with two dependent children who were newborn and age 9 when the victim died. Assuming decedent had an income of $35,000, the award would be about $1.3 million. Assuming an income of $125,000, the result would be over $4.7 million. From these figures, of course, the Special Master would still have to subtract collateral source compensation.

huge scale of the 9/11 air crashes and the provisions of ATSA, however, have produced an atypical scenario that cannot but strike doubt in any plaintiff's heart.

First, the victim class numbers far more than the several hundred unfortunates who were passengers on the doomed flights. It includes not only all the on-the-ground dead and injured who forego Fund compensation and elect to sue, but also *all other potential plaintiffs*, including an unknown number of plaintiffs who cannot qualify as Fund claimants, e.g., 9/11 victims who suffered "only" property damage in the collapse of the Twin Towers.

Second, all these victim-plaintiffs must collect damages (including punitive and exemplary damages) from a statutorily-limited source–the collective insurance coverage of the four planes. Section 408(a) and (b)(1). If each of the four aircraft carried the reportedly-standard insurance coverage of $500,000,000, all plaintiffs will have only $2 billion to share among themselves. Compared with this sobering limitation on collectible damages, many supposed advantages of opting to sue (such as heavily-insured plaintiff's ability to evade the Fund law's life insurance offset) pale dramatically.

The Special Master has candidly expressed his personal view on the *quid pro quo* bottom line. He said:

> ...[T]he way this statute is written...the litigation system – is ill advised. It is a mistake, in my opinion, to opt out of this quick, efficient system and instead decide to litigate.... [T]he litigation option...is unwise. The statute is written in such a way that if [claimants] decide to litigate, the likelihood of success, the likelihood of receiving a substantial award in court, is substantially diminished....

Tr. p5.

Other commentators, including members of the aviation disaster plaintiff's bar and critics of industry bail-outs *vel non*, have described the Fund law's bargain in more passionate, even incendiary terms. But, in the last analysis, whether they praise or condemn Congress's proposed bargain, thoughtful observers will recognize that the Fund law is no windfall for victims.

<u>The Fund's Public Perception Challenge</u>

The Special Master's publication of his presumed awards chart rapidly flushed out a vein of public misunderstanding–and perhaps also of latent resentment–regarding the Fund law.

In his March 7, 2002 Final Statement, Mr. Feinberg observed that his $1.65 million "average" expected award, reflected in an estimated award chart he published with the interim regulations, "received more public comments than any other subject." "Many"

of the commenters identified themselves as individuals who had contributed to charities for 9/11 victims. Interim Statement, p. 66276. Enough of their comments and others' comments were heatedly negative to produce a spate of startling news reports, and eventually to draw from the Special Master an explicit rebuke.

In one of many news stories on the subject, an Associated Press report that was issued about five weeks after posting of the presumed awards chart, stated that "[f]our of the largest victim advocacy groups say they have received dozens of critical e-mails and phone calls in recent weeks. The criticism intensifies each time [victims] complain about the fund." Nation/World, Jan. 26, 2002, McCaffrey, Shannon. They ranged in tone from measured ("I am very bothered by what I perceive as greedy people when it comes to the distribution of fund to the victims of Sept. 11."), to hyperbolic ("[y]ou're disgusting trying to profit from your loved one's death."), to entirely intemperate ("If $1.6 million isn't enough, you should rot in hell."). *Id.*

Rather than heed this line of criticism and reduce the average award, the Special Master heeded hundreds of other comments–submitted by potential Fund claimants and others–that pushed him in the opposite direction. By amending his across-the-board pain and suffering calculation and a few other computations, he raised the average Fund award from $1.65 million to $1.85 million. By comparison to typical pain and suffering recoveries in tort lawsuits, these upward amendments simply were not an unreasonable adjustment to the *quid pro quo.*

But, in addressing these critical comments, the Special Master also publicly termed "unfair" anyone's characterization of the victims and their families as "greedy." As he put it in his Final Statement:

> This Fund and the [critical] comments of distressed family members, are not about "greed...." I believe the American people...in no way associate the efforts of family members to secure compensation with any characterization of greed.

The record shows that the Special Master is no naïf on the subject of human nature,[10] and his comments were politic and appropriately sympathetic to the 9/11 victim-claimants. Not only have those victims suffered greatly, but also their grief has–with passage of the Victim Compensation Fund–taken a very public and political turn, doubtless compounding some aspects of their grief (*e.g.*, reducing the sympathy of some of their friends and relatives), even while alleviating others (*e.g.*, relieving short-term financial crises).

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[10] Indeed, Mr. Feinberg recognizes that a fraction of claimants against the Fund are greedy (as is a comparable fraction of the rest of the human race), and has addressed the fact by promulgating reasonable regulatory safeguards to prevent and detect fraud. *See* 28 CFR 104.71.

Nonetheless, as public comment on the Interim Rule conclusively demonstrated, some American people do "associate" complaints about the Fund with greed. Government officials implementing the Fund program should cautiously temper their response to these Fund critics. These outspoken critics, and other taxpayers who silently resent legislated charity projects, are not social pariahs: To the contrary, they are the taxpaying income-earners upon whose industry and productivity Congressional wealth transfers entirely depend. When, as in this case, their criticism arises from an incomplete understanding of the Fund law, the wise response is education.

The Waiver Problem

Lurking in ATSA's interlaced dictates is a problem of potentially large proportion. While Congress logically could intend that every Fund beneficiary waive his right to file ATSA's exclusive civil damages action, Congress's statute does not say that. On the contrary, it says something quite different and odd.

By narrowly defining "claimant" as "the individual filing" the claim, and mandating that "[u]pon submission of a claim...the claimant waives the right to file," ATSA apparently excuses Fund beneficiaries from a waiver obligation provided someone else files the claim for them. Thus, for example, ATSA permits one member of decedent's family of four to file a Fund claim and distribute the award among all four family members, and leaves the remaining three family members free to seek additional damages from the airlines in Federal court.

Since Fund beneficiaries will no doubt outnumber Fund claimants, this could prove to be a deep chink in the armor of ATSA's *quid pro quo.* The regulations do not address the point. But the claim form does, as does one of the Frequently Asked Questions that were posted on DOJ's Victim Fund website after the final rule issued.

FAQ 9.1, updated March 13, 2002, answers the question "What does it mean to waive rights to file a lawsuit?" Regarding deceased victims, the answer includes this warning: "The statute may be interpreted to mean that the submission of a claim for a deceased victim will waive the rights of other beneficiaries of that victim to file a lawsuit."

This warning is echoed on the Special Master's 33-page claim form, which states on the first page of the "Instructions" that: "The waiver of rights could apply to the rights of individuals other than the personal representative." Elsewhere in the form, readers are cautioned that the Special Master will require from a claimant and/or "the victim's spouse or any of the victim's beneficiaries or dependents" proof that any civil damage action they may already have filed is, indeed, nonsuited before their Fund claim is presented.

Thus, the Special Master, *sua sponte* as it were, will treat beneficiaries and dependents (as well as claimants) as if ATSA's waiver provision applies to them, at least so

far as the statutory language permits him to do so. That language does not permit him to either redefine "claimant" to include beneficiaries and dependents. And prudence does not permit him to predict exactly how a future court might eventually interpret the statute vis a vis the scope of waiver.

Until a court decides the point, however, Fund beneficiaries and dependents regrettably are left in the dark on a crucial aspect of their decision to accept a Fund award.

Eligibility

One portion of the public comment on the Special Master's eligibility criteria reflected the misperception problem discussed above. Specifically, a considerable number of earnest commenters complained that it is unjust to exclude from the class of eligible Fund claimants any number of other deserving persons as, *e.g.*, members of the military who suffer injury or death while fighting terrorism, or victims of other domestic terrorism such as the Oklahoma bombing. These protests are unfortunate because, while certainly heartfelt, they are misdirected and unnecessary. ATSA excludes servicemen and others not because they are undeserving, but because they do not qualify as parties to the statutory *quid pro quo*.

Regarding other eligibility criteria, some commenters objected to the Fund regulations' *de jure* or *de facto* exclusion of various 9/11 victim groups such as victim aliens (who might forego filing claims against the Fund out of fear of prosecution for violation of immigration laws), and decedents' "domestic partners."

The Special Master stated in December that the biggest problem regarding victims who are undocumented workers or illegal aliens is the difficulty of obtaining sufficient documentary evidence (tax returns, income statements, profit-and-loss statements, etc.) on which to base an award. Tr. p12. He also expressed hope in December that a promise of amnesty would issue from the Justice Department for undocumented claimants. *Id.* The final regulations, published in March, do not mention the subject, however. But, in late March, spokesperson Jill Rogers on the Justice Department's 9/11 Victim Fund information line confirmed that "it is the announced policy of the Special Master that illegal claimants to the Fund need not fear prosecution for violations of immigration law."

At his December news conference, the Special Master acknowledged the arguments of Governor Pataki and Mayor Giuliani for creation of a Federal rule that would supercede any state laws prohibiting one's "domestic partner" from acting as his personal representative for purposes of bringing a claim against the Fund. Tr. p12. "I understand from the governor," he said, "they're going to take appropriate steps at the local level [in New York] to make sure that the same-sex partners are eligible." *Id.* He nevertheless flatly declined to "become an arbiter over that issue," observing that, under ATSA, state probate and estate laws govern the qualifications of personal representatives. Moreover, he said,

personally adjudicating such issues was impractical given the Victim Fund's statutory time constraints; "I can't efficiently implement my program and do that." *Id.*

The Master recognized that–for claims involving intestate decedents–the regulation's reliance on state law could "preclude recovery by particular individuals who lost loved ones," or produce non-uniform results among similarly-situated claimants. The Special Master also observed that "one of the topics receiving the most comments was the eligibility of certain domestic partners," such as common-law spouses, fiancees or others "'in longstanding stable relationships.'" Final Statement, p19. Yet, he declined to promulgate any regulatory criteria defining "personal representatives" that would displace state law, an act that earned Mr. Feinberg–a consistently open-handed man–the ironic sobriquet "Dr. No."

But the Special Master's decision was nevertheless sound. The statutory scheme provides Fund compensation in *lieu* of a Federal civil damages action. If any domestic partner could qualify to sue for damages as a 9/11 decedent's representative, he would do so only by dint of applicable state law. Thus the Special Master's decision, to adhere to state law regarding a domestic partner's PR status, perfectly complemented the ATSA statutory scheme. Indeed, had he promulgated a Federal regulation that would pre-empt state law on that question, the Special Master would have undermined the statutory scheme: Such a regulation would have qualified as Fund claimants individuals who possess no right to sue, and who thus surrender no *quo* in exchange for their statutory *quid.*

Collateral Source Compensation

The Fund statute's collateral source rule has been a focal point of controversy from several perspectives. Here, the issue is first considered as an exercise in statutory interpretation that, in two respects, went beyond ATSA's plain language.

First, the Special Master speculated about Congressional intent on one point of "collateral source compensation." As he explained, "[b]ecause we do not believe that Congress intended to [offset] a victims' savings accounts or similar investments," those will not be deemed collateral source compensation. Final Statement, p3 Regardless of Congress's intent vis-a-vis victims' savings accounts and such, however, the statutory language would not require an offset for savings accounts because savings accounts are not "compensation" as the word is commonly understood. Compensation is "the act of...making amends;" it is "something given or received as an equivalent or as reparation for a loss; a recompense; an indemnity." American Heritage Dictionary, Houghton Mifflin Co. (1978). A victim's savings account or other investments could not reasonably be construed as reparation for his own future injury or death.

On this point, the final rule ultimately adopts the plain statutory meaning, with the result that the Special Master will require no offset for victim's savings accounts and

investments. However, the final rule's "charity exception" to the offset mandate diverges from plain meaning, and does so on a matter of considerable import.

The charity exception arose from the Special Master's resolution of an ambiguity that he discerned in the statute. But he did not identify that ambiguity, and it is not apparent on the face of the Fund law.[11] The Fund law simply requires that the Special Master "shall reduce" every Fund award "by the amount of collateral source compensation." It also plainly states that the term "collateral source" means "all collateral sources," including 9/11-related "payments by Federal, State, or local government."

This offset dictate is clear enough as written, but reference to standard legal authorities make it even clearer: Black's, for example, indicates that collateral source compensation is "compensation for...injuries from a source independent of the [presumed] tortfeasor, such as insurance proceeds...." And hornbook law indicates that the standard "collateral source rule" is exactly what Congress rejected when crafting the Fund law. The collateral source rule is:

> Where a plaintiff is compensated for his injuries by some source independent of the tortfeasor–insurance, for example–the general rule is that the plaintiff is still permitted to make a full recovery against the tortfeasor himself, even though this gives the plaintiff a double recovery or even a recovery for posses he never had at all.

Remedies, Dobbs, Dan B., Section 8.10 (West Pub. Co. 1973).

The collateral source rule is followed by the majority of states in the union. *Id.* Interestingly, however, the United States government does not *itself* follow the rule when defending civil damages actions bought pursuant to the Federal Tort Claims Act, 28 U.S.C. Section 1346(b), *et seq.* As stated in the Justice Department's FTCA "Damages"

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[11] In fact, the Special Master's statutory interpretation may have been more strategic than semantic. In the news conference convened upon his release of the interim rules, Tr. p7, Mr. Feinberg stated that:

> I will tell you, the reason that we're not offsetting charitable contributions is a very practical reason. When we meet with the charities and tell the charities that we're thinking about offsetting charitable deductions (sic), even considering it–no decision was made–they made it very clear to me that if we decided to offset charitable contributions they'd delay further the distribution of their money until we cut our checks, so that that money [would not be] distributed and offset. * * * Accordingly, it made a lot of sense simply to remove charities from our equation. What they do is their business.... I have no control whatsoever over what they do.

handbook, the Government "resist[s] application of [state collateral source rules] whenever it is feasible to do so." *Id.*, p.4 (Sep. 1992).

Even more interestingly for potential Fund claimants, New York leads the small minority of states that do not follow the collateral source rule "across the board." New York is important because ATSA provides that New York law governs the civil damage actions brought by great majority of 9/11 victims, those injured or killed in the Twin Towers attacks. Section 408(b)(2).[12]

New York and the minority of states who follow her offset *only* charitable compensation, not compensation such as insurance proceeds. *Id.* Thus, the Special Master's charity exception to Congress's offset mandate puts a limit on the collateral source rule that is unprecedented in American jurisprudence. And his novel new rule has the added fillip of an unprecedented side effect: It makes some taxpayers, in effect, compensate 9/11 victims twice, first by voluntarily contributing to 9/11 charities, and second by funding with their taxes all the Special Master's compensation awards through. This effect contrasts with a major precept of the collateral source rule–the payer is "never required to pay twice." [13]

The Special Master's creation of a charity exception to the offset mandate has a significant fiscal effect. If, indeed, he erred in interpreting the law, he enlarged the net amount awardable from the Fund beyond Congress's will. And, he may have enlarged it significantly.

Consider, for example, that the Red Cross alone received almost a *billion* dollars in 9/11-targeted contributions. American Red Cross Website, KPMG Opinion on Liberty

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[12] This *may* mean, but does not preordain, that New York law will control set off issues raised in the lawsuits. ATSA provides that New York's conflict of laws principles will apply as well as its other rules. New York conflicts rules may require the court to resolve set off issues by reference to another state's law, *e.g.*, the state of incorporation of the company that owned the aircraft. Also, Pennsylvania law and District of Columbia law will govern damage actions arising from the Shanksville and Pentagon crashes, including those two states' conflicts rules.

[13] As stated in Dobbs, *supra*, at 583 (citations omitted; emphasis added), regarding the "collateral source" rule:

> [T]hough the plaintiff is permitted to recover twice–once from the defendant and once from the collateral source–<u>the defendant is never required to pay twice</u>. Thus, if the defendant-tortfeasor pays the plaintiff's hospital expenses, this payment is to be deducted from any later recovery based upon such expenses.

Fund Audit, Mar. 15, 2002 [Of a total $930,000,000 in contributions, $558,000,000 already disbursed as of that date]. Red Cross 9/11 contributions alone thus equal nearly one-sixth of the total anticipated cost of the Fund.

Of course, the charity exception will also have political or social ramifications related to the precedent set by the Fund for taxpayer-supported relief from acts of war. One lesson that may be gleaned from the Fund and the charity exception is that, no matter how generous the American people may be in voluntarily contributing to victims of war crimes, their munificence will not reduce the tax debt Congress might ultimately impose on them in order to finance victim compensation. If past is prologue, they will, *per* Dobbs, *supra*, "pay compensation twice." Indeed, perhaps apprehension of this outcome is what induced Congress to offset "all" collateral sources in the first place.

It is possible, perhaps likely,[14] that one repercussion of the charity exception will be a reduction in voluntary donations for the relief of victims of future terrorist attacks. If so, it could set a legislative watermark for "unintended consequences."

Conclusion

The 9/11 Victim Compensation Fund, and the statutory bail-out scheme to which it is married, constitutes unique legislation addressing unprecedented crimes by foreign enemies on United States soil. Like many other observers all along the political spectrum, conservatives regard it with mixed reactions–legal, moral and economic.

On one hand, conservatives are apprehensive about ATSA's constitutionally-dubious, retroactive limitation on private common law rights of action for tort damages–particularly the rights of countless 9/11 victims who cannot qualify for Fund awards. On the other hand, conservatives generally prefer that tort liability be predicated on actual fault, and they wonder whether any contributory negligence by the airlines could justly warrant liability for damages that were primarily caused by the terrorists' own criminality.

Also, while realizing that the Fund law is not a federal give-away, many conservatives doubt the wisdom of using tax revenues to compensate personal injuries the government did not cause. On the other hand, no conservative feels entirely complacent about leaving 9/11 victims–some of whom face immediate financial crises–with only the

[14] Evidence supports the likelihood. The Special Master's Appendix to the Interim Rules states at p. 66291 that:

> ...[A] number of comments from those who contributed money to various charities viewed the purposes of the charities and the Fund as one and the same; namely, compensating the victims. These commenters asserted that they had not intended making contributions to unjustly enrich the families, and *would hesitate to make such contributions in the future* if their help turns out only to ensure persons maintain a certain lifestyle.

numbingly slow, uncertain litigation process as a means of redress and relief. Then, too, there is the nagging question whether a Fund claimant's lost right to sue might qualify as "property" "taken" by the government, requiring "just compensation" to be paid for it.

Finally, conservative reservations about Federal industry bail-out schemes are not allayed by the cruelty and gravity of United's and American's fiscal catastrophe. Still, conservatives may recoil–as might all Americans–from allowing the crimes of a few foreign terrorists to permanently erase two established air transport giants from the American scene.

Afloat on this churning sea of conflicted impressions is conservatives' perennial nemesis: Congress's preternatural compulsion to Do Something in response to every crisis.

Would it have been better if the billion dollars in charitable contributions had simply been distributed promptly, *pro rata*, giving each decedent's family about $300,000? Would it have been better if the remainder of work intended to be accomplished by ATSA was instead accomplished by a carefully-drawn scheme of tax relief for victims, and tax incentives for those who assist victims?

Congress drafted, debated and enacted ATSA in just eleven days, but its ramifications will unfold for decades. There will be plenty of time to ponder what Congress might have done–or not done–instead.

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