Collateral Damage: An Examination of Tort Liability Post 9/11

Prepared by:

David W. Simon, Attorney at Foley & Lardner, Milwaukee, WI
The Honorable Robert A. McConnell, Vice President, Hawthorne and York International, Chairman, Litigation Practice Group
Alex Ray, Carrington, Coleman, Sloman, & Blumenthal, Dallas, TX
Thomas Swett, Federalist Society Law Clerk, McGeorge School of Law, Sacramento, CA

The Federalist Society
for Law and Public Policy Studies

The actors who are primarily responsible for a terrorist attack are unlikely to be defendants in a civil trial. The terrorists themselves may be dead, otherwise beyond the effective reach of the civil court system, or judgment-proof. Thus, it is quite predictable that plaintiffs and their lawyers will seek recompense against domestic third-party defendants whose liability is, at best, far more attenuated, but whose amenability to a civil suit, and financial resources, are far greater. For a discussion of suits against terrorists and their supporters, see Hamish Hume & Gordon Dwyer Todd, *Ambulance Chasing for Justice: How Private Lawsuits for Civil Damages Can Help Combat International Terror* (Federalist Society, 2002).

The number of domestic third parties who could be made defendants in the 9/11 or any future terrorist attack is enormous, and the potential aggregate liability these defendants face is staggering. Part I of this paper explores the potential civil claims that plaintiffs might bring in the wake of a terrorist attack and the potential defendants to such claims. Part II summarizes the efforts of Congress to limit the potential liability that could result from the terrorist attack of 9/11 or similar incidents. Finally, Part III outlines suggestions that might be incorporated into any legislation meant to address the issues raised in this paper.

I. Potential Liability For Terrorist Attacks

It is important to recognize that in the American legal system as it currently exists, the list of potential claims and defendants described below is not exaggerated. If anything, what follows is an under-inclusive characterization.

A. Run-Away Tort Liability: The San Juan Hotel Fire Experience

There is historical precedent for tort claims that give rise to huge liabilities against multiple third-parties even though the plaintiffs' losses are plainly caused by the intentional -- even criminal -- acts of other persons. On December 31, 1986, the DuPont Plaza Hotel in San Juan, Puerto Rico was set ablaze by three arsonists. This crime resulted in the deaths of ninety-seven people and injuries to hundreds of others. Eventually, more than 2,000 plaintiffs brought claims against more than 250 defendants whose alleged culpability was obviously far less than that of the arsonists, but whose financial resources made them attractive targets for a tort suit. The builder of the hotel, and the current and former owners were some of the more obvious defendants named. But the plaintiffs' attorneys also named the manufacturers of the hotel's fire alarm, the manufacturers of the hotel's furniture, and even the manufacturers of the hotel's casino slot machines. Plaintiffs' theory against the slot machine manufacturers was that the machines emitted toxic fumes during the fire and thereby injured the plaintiffs. The slot machine defendants, rather than face a jury, eventually settled for $2.1 million. If the manufacturer of a slot machine can be subjected to legal jeopardy due to the criminal act of a trio of arsonists, it is not hard to imagine that, for example, an air conditioning manufacturer could face substantial losses for claims based on a terrorist attack utilizing air-borne pathogens.

B. The Legal Bases For Liability

The most obvious theoretical sources of liability for domestic third-party defendants are the common law theories of negligence and products liability. Also, a claim might possibly be based upon the ultra-hazardous activity doctrine.

(1) Negligence

The primary theory of liability will no doubt be negligence. A defendant is subject to liability under this theory if it owes a duty to the plaintiff, and acts negligently in such a way as to cause the plaintiff an objectively foreseeable injury. Proving that the defendant's conduct was unreasonable, and that the resulting injury was foreseeable, are the principal hurdles to establishing liability under a common-law negligence theory.

It is important to recognize that common-law negligence incorporates a very fluid concept of what behavior is reasonable under the circumstances (the "reasonable man" standard). It is well known that the attitudes and expectations of the general public have changed radically in the aftermath of the 9/11 attacks. Moreover, there is no prior occurrence in the history of American jurisprudence that is truly analogous to the situation we now face. Today's legal reality, simply put, is that what was foreseeable to the "reasonable man" on September 10, 2001 was permanently changed on September 11th. Thus, from September 12th forward, our worst nightmares are, in a legal sense, foreseeable. Indeed, further terrorist attacks, in a myriad of forms, are not just foreseeable, they are positively expected. Periodically, the nation as a whole is put on notice by the federal government that another terrorist attack may be imminent and that the public should take the necessary precautions. Consequently, a customary course of conduct which previously would not have resulted in liability may in the future be regarded by a jury as "unreasonable," and thereby subject a wide variety of defendants to liability.

For example, consider a company providing security for a football stadium. Prior to 9/11, the security company would be acting reasonably in focusing its activities

exclusively on such mundane matters as ticket scalping, gate-jumping, crowd control, prevention of petty theft and assaultive conduct, enforcing alcoholic beverage guidelines, and the like. After the 9/11 attack changed the perception of what events are "reasonably foreseeable," a security company may now be considered negligent if it fails to guard against more exotic risks such as suicide truck bombs, snipers, or deliberate contamination of the stadium's food and drink concessions.

Although it is likely that terrorist-related events will be considered increasingly "foreseeable" in the aftermath of 9/11, this does not mean that conduct pre-dating 9/11 could not be subject to tort liability under pre-existing concepts of legal foreseeability. For example, the designers of the World Trade Center were aware in the 1970s that building such a tall skyscraper in the heart of New York City exposed the building to the risk of an *accidental* collision with a commercial jetliner. The designers accordingly should have and probably did take a variety of steps in response to this then-foreseeable risk. If those actions or omissions were negligent, then from the perspective of tort law it may make little difference that the 9/11 plane crash was actually an intentional act.

There are two additional points about a negligence cause of action that should be borne in mind. First, the fact that the government heavily regulates an industry or activity does not mean that potential liability for negligence is reduced. To the contrary, it is a well-settled principle of negligence law that the existence of widespread regulation can give rise to "per se" negligence if the regulations are violated. But even if these regulations are strictly complied with, it is entirely possible for a defendant to be found liable if it was reasonable under the circumstances to do *more* than what was required under the regulations. Thus, it is a mistake to think that because many of the potential

defendants--including the airlines, building construction firms, hospitals, and the like--are heavily regulated, they are therefore shielded from tort liability by virtue of that regulatory environment.

Second, in most states it is possible for a claimant to recover damages for psychological harm, even though the claimant suffered no physical harm. State law varies widely in this regard, but one common limitation is that the claimant must experience an especially shocking event and suffer objectively severe mental or psychological harm in order to recover. This requirement may serve as a limitation in the ordinary negligence case, but it is unlikely to be a limit in the case of a terrorist attack. By its very nature, a terrorist attack is meant to be a viscerally shocking event that is visible to as many people as possible.

(2) Products Liability

The second common law theory that could be employed is product liability. Typically, liability is imposed for design defects if the risk of a product as it is currently manufactured outweighs its utility when considered in light of any alternative designs. But a jury's evaluation of the risk and utility can change over time, as society changes its perception of both factors. For example, prior to 9/11, probably most people would not have considered a plane equipped with a location transponder with an accessible on-off switch to be a defectively designed plane. The utility of a transponder with an on/off switch is relatively high, and there is apparently very little downside risk to having such a switch be accessible to the crew while the plane is in flight. But in the post 9/11 environment, terrorists may turn off the location transponder, or force the pilot to do so, in order to conceal the plane's location and flight path. Consequently, it is easy to

imagine a manufacturer being held liable for such a "defective" design after 9/11. Product liability claims against the manufacturer of airplanes and building construction companies are likely to be made in connection with the 9/11 attacks, while companies making building components, elevators, fire-suppression devices, safety and detection devices, pharmaceuticals, vaccines and antidotes, and a host of other products are potential tort targets under this theory in the event of future terrorist attacks.

(3) Ultra-Hazardous Activities

The third potential source of liability is the ultra-hazardous activities doctrine, which imposes liability for actors engaged in activities, such as blasting or explosives manufacturing, that is considered so intrinsically dangerous that liability should be imposed, *without regard to fault*, for any injuries directly caused by the activity. Although the ultra-hazardous activities doctrine has historically been narrowly drawn, the theoretical boundaries of this doctrine will likely also be tested as plaintiffs push to have more activities considered ultra-hazardous. For example, consider the manufacturers, distributors, and users of agricultural ammonium-based fertilizers. This is a product that is ordinarily sold in bulk quantities, despite the ease with which it can be converted into a high-yield explosive (McVeigh's bomb was fertilizer mixed with diesel fuel). To analogize, courts have held that both the storage and transportation of commercial qualities of gasoline are ultra-hazardous activities.[1] Plaintiffs might argue that fertilizer manufacturers, and all other parties in the distribution and consumption chain, are engaged in the manufacture and use of a compound that has similar destructive potential and therefore should be subject to the ultra-hazardous activity doctrine. If that were the

1. *Yommer v. McKenzie*, 255 A.2d 138 (MD., 1969) (imposing strict liability for storage of commercial qualities of gasoline); *Siegler v. Kuhlman*, 502 P.2d 1181 (Wash., 1973) (finding transportation of

case, no amount of diligence on the part of those manufacturing, selling or using bulk fertilizers, such as a "know-your-customer" procedure, added security measures, etc., would absolve those entities from liability for any normal damage that that might result from that product. It is important to note that defendants have even been held liable under this doctrine when the damage is the result of the criminal activity of a third party.[2] It is conceivable that similar claims might also be brought against the manufacturers of pesticides and other poisonous chemicals.[3]

C. What are the Limits of This Potential Liability?

Of course, there are likely to be practical and legal difficulties in prosecuting any particular claim under these common-law theories. But whether the defendant is ultimately held liable after a full trial and the exhaustion of appellate remedies is not the point. To the contrary, a plaintiff need only present a *credible* risk of legal liability (or adverse publicity) to be in a position to negotiate a substantial settlement. As the recent tobacco and firearm litigation demonstrates, a plaintiff's attorney does not need an "airtight" case or a wholly conventional legal theory in order to be able to impose significant legal costs on a domestic defendant. This is especially true when a defendant is confronted with multiple plaintiffs who sustained serious injuries and seek punitive damages. Under such circumstances, defendants will often be forced to settle legally questionable claims unless a set of bright-line substantive and procedural rules are put in place to preclude third-party liability for terrorist-related attacks.

---

commercial quantities of gasoline to be an ultra-hazardous activity).

2. *Yukon Equipment, Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206 (AK., 1978) (holding that the criminal detonation of a dynamite magazine was not a superceding cause).

3. *Luthringer v. Moore*, 190 P.2d 1 (Cal., 1948) (finding the use of a pesticide in a structure to be an ultra-hazardous activity).

It might also be thought that despite the availability of viable legal theories, patriotism and a sense of national unity will check the potential for unbounded third-party liability. Unfortunately, for several reasons, it is probably unrealistic to count on the forbearance of the plaintiff's bar or the self-restraint of severely injured civilians.

First, it is too early to tell whether any restraint will be exercised in connection with the 9/11 claims. While some claimants are expected to waive their rights to litigate in exchange for compensation under the Victims' Compensation Fund (discussed *infra*), there may be a significant number of claimants that instead pursue their claims in U.S. courts. In fact, these lawsuits are no longer a theoretical possibility. There are currently suits pending against American Airlines, and at least 1,300 people have put New York City on notice that they may opt out of the federal compensation fund, and instead press forward with up to $7.18 billion in claims against the self-insured city. The New Jersey and New York Port Authority, along with the owner/operators of the World Trade Center, have also been put on notice by over 100 potential claimants. This is just the beginning; the dam is cracking and will surely burst if significant measures are not taken.

Second, even if there is currently some hesitation on the part of potential claimants to bring all possible claims in connection with the 9/11 attacks, if terrorist attacks continue to occur, such events will seem less and less abnormal, and people may well regard them as precisely the sorts of occurrences for which third-party liability should be imposed. After all, there was a time when it was unthinkable to impose liability on an apartment owner for injuries a tenant suffered due to criminal attacks on the premises; today, such "premises liability" claims are considered routine. This transformation in legal doctrine and social expectations occurred even though the

criminal conduct obviously is, and always has been, purely intentional and the primary cause of the loss. The change occurred because the criminal's conduct came to be seen as a sort of background condition for which third parties had a duty to control or ameliorate. If a landlord is today considered to have a common-law duty to provide adequate security in the form of locks, lighting, peep-holes, security guards and the like, it would not take much of a transformation in social attitudes to give rise to a common-law duty to provide security against terrorist attacks. Once this conceptual change takes root, the number and type of potential claims is limited only the ingenuity of the plaintiff's bar.

Third, it is relatively easy to characterize a claim as not being *directly* related to the terrorist attack. Once a claim is portrayed as a more conventional suit, it may not be subject to the same sort of patriotic or national unity limitations. For one example, in the aforementioned lawsuits, claims are already being made in which plaintiffs complain of conduct that occurred *after* the terrorist attack, and which results in injuries less directly connected to the terrorist attacks itself. Some plaintiffs are complaining of lung injuries by alleging that insufficient respirators were dispensed to the workers clearing debris at ground zero. These plaintiffs were not injured as an immediate consequence of the terrorist attack, and the alleged failure to provide respirators was not a but-for cause of the attack itself. Nevertheless, the attacks may spawn significant liability in the form of "aftermath" litigation. Or consider the likelihood that a patriotic limitation on tort claims is probably strongest when the terrorist attack involves personal injury and death in what is essentially a warlike attack. Suppose a future terrorist attack disrupts the nation's computer infrastructure resulting in massive financial losses but no direct personal

injuries. It is plausible to suppose that plaintiffs will be far less reticent in bringing "negligent security" claims against telecommunication companies because such claims will appear more like a conventional claim for commercial damages, rather than an unseemly claim against a domestic third-party for losses caused by a foreign enemy.

D. Potential Defendants After the 9/11 Attacks

The scope of potential tort liability arising out of a terrorist attack is truly staggering. Potential defendants in tort suits arising out of the 9/11 attacks include:

- Airports
- Airlines
- Airport security
- Air traffic controllers (*e.g*. potential liability for failure to timely detect suspicious activity, or failure to alert civil and military authorities)
- Manufacturers and designers of airplanes (*e.g*. potential liability for not designing or including a cabin door lock)
- Manufacturers and designers of airplane components (*e.g*. potential liability for designing an auto-pilot or transponder than can be easily switched off by unauthorized personnel)
- Owners/operators of airports
- Flight schools (*e.g.* potential liability for "negligent flight training")
- New York Port Authority
- World Trade Center architects (*e.g.* potential liability for failure to design a building that would withstand a plane impact, or failure to design a building that would collapse in a more controlled manner, or failure to provide sufficient number of emergency exits)
- Construction companies, and building component makers (*e.g*. potential liability for allegedly inadequate fire suppression devices)
- New York City

- Manufacturers of asbestos, other insulation, and various building materials contained in the structures that were destroyed (for claims of injury and disease caused by exposure to airborne contaminates)

- Private clean-up companies and assorted barge operators, tracking companies and landfill operators (for airborne contaminates or improper disposal of hazardous materials)

- Insurance companies

Moreover, potential defendants in a future terrorist attack could include the following:

- Private security companies in airports, malls, sports stadiums, and other venues[4]

- Owners/operators of parks, stadiums, malls, or other "high-density" targets

- Hospitals, research universities, and businesses for failure to properly monitor or dispose of hazardous materials (*e.g*. potential liability for low level radioactive waste subsequently used in a "dirty" bomb; research grade biological organisms such as small pox or anthrax, poisonous industrial chemicals)

- Hospitals (*e.g*. potential liability for failing to stock sufficient supplies of a vaccine or antidote)

- Physicians who improperly diagnose an infection such as anthrax, small pox, or Ebola virus

- Pharmaceutical companies (*e.g*. potential liability for either for failing to provide effective antidotes or vaccines, or for providing effective drugs with unfortunate side-effects)

- UPS, Fed Ex, or other services that unwittingly convey harmful substances

- Insurance companies

- Public transportation authorities (*e.g*. Japanese subway poison gas attack)

- Ventilation and filtration system manufacturers and designers (*e.g*. potential liability for failure to filter noxious particles or failure to prevent wide-spread distribution of such particles)

---

4. Consider that security agencies can be liable under multiple theories. An agency could be held liable for negligently providing inadequate security, or for negligently hiring a person who turns out to be a terrorist and uses his position in the agency to perpetrate a terrorist act. Conversely, a security agency could be liable for employment discrimination if a rejected applicant considers the agency to have been too zealous in its post 9/11 screening process.

- Manufacturers and designers of anti-terrorist safety equipment (*e.g*. potential liability for irradiation equipment, contamination test kits, Haz-Mat protective suits)

- Electricity, gas, Internet, and other service providers (*e.g*. potential liability for economic losses due to interruption of services)

- Owners and operators of water systems and dams

II. Overview of Existing or Pending Legislation

Congress has taken a few limited steps to address the issue of terrorism-related tort liability through several bills, two of which have been signed into law (the Air Transportation Safety and System Stabilization Act and the Aviation Security Act), and several others, which are under consideration by Congress.

A. Air Transportation Safety and System Stabilization Act of 2001

The Air Transportation Safety and System Stabilization Act ("ATSSSA"), (PL 107-42), attempts to limit tort liability for injuries sustained as a result of the 9/11 attacks in two ways: (1) it creates an optional alternative compensation scheme for those injured or killed in the terrorist attacks; and (2) it limits the liability of the two air carriers whose aircraft were used to carry out the attacks.

(1) The Victim Compensation Fund

Title IV of the ATSSSA established a federally-funded September 11th Victim Compensation Fund (Victim Fund) from which persons physically injured or killed in the events in New York, Pennsylvania, and Virginia (or their representatives) may obtain compensation. Persons who seek compensation from the Victim Fund waive their right to pursue claims through litigation. Persons eligible to make claims to the Victim Fund

are, however, free to forgo access to the Victim Fund and pursue their tort claims through traditional litigation. Further, any person who sustained personal or economic injuries resulting from the September 11th events (claims that are not presently compensable by the Victim Fund) is also free to litigate.

If a person chooses to seek compensation through the Victim Fund, the Special Master, who is charged with administering the Victim Fund, makes only two determinations: (1) whether the claimant is an eligible person (*i.e.* was a victim, either as a passenger or on the ground, of one of the four hijacked aircraft on 9/11); and (2) the extent of the harm suffered by the claimant and the amount of compensation he or she is entitled to recover in light of the circumstances.

The following procedures and limitations apply in claims made for compensation by the Victim Fund:

- All claims must be filed with Special Master within two years after the governing regulations are promulgated.
- The Special Master is to make a determination of eligibility for compensation within 120 days of the filing of the claim. The Special Master is to authorize payment to the claimant within 20 days of the date of the determination.
- The Special Master's determination is not subject to judicial review.
- No punitive damages are recoverable.
- The Special Master shall reduce compensation by any amounts the claimant receives from collateral sources.

The Special Master, Kenneth Feinberg, issued proposed regulations for the administration of the Victim Compensation Fund on December 21, 2001. (Published at 66 FR 66274.) The regulations became final on March 7, 2002. The regulations provide

that the amount of compensation paid to a claimant will depend on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant, including the financial needs or financial circumstances of the claimant or the victim's dependents or beneficiaries. The regulations further provide that the award, not including collateral source reductions, will be no less that $500,000 for victims with a spouse or dependent, and no less than $300,000 for those without spouses or dependents. Special Master Feinberg has estimated that the average award, absent collateral source reductions, will to be approximately $1.6 million. (The U.S. Department of Justice has set up a website at www.usdoj.gov/victimcompensation, which provides additional information on the Victim Fund.)

The collateral source reduction, mandated by the statute, has been a source of substantial controversy. A bill has been introduced in the House, H.R. 3376, to amend the law to clarify that collateral sources do not included money received from charities.

(2) Limitations on Tort Claims Brought Against Air Carriers

Section 408 of the ATSSSA limits the liability of air carriers in connection with the 9/11 attacks. Most significant is the limitation on total liability: the ATSSSA provides that "liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount ***greater than the limits of the liability coverage maintained by the air carrier.***"

In addition, Section 408 creates a federal cause of action for claims arising out of the 9/11 attacks. This cause of action is the exclusive remedy for damages arising out of these events. The U.S. District Court for the Southern District of New York is given

exclusive jurisdiction over all such claims. The applicable substantive law is to be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent or preempted by federal law.

B. Aviation Security Act

Title II of the Aviation Security Act, (P.L. 107-71), includes additional liability limitations on claims arising out of the 9/11 attacks. The act amends the ATSSSA to provide that liability for all claims arising out of the terrorist attacks of 9/11 against any air carrier, aircraft manufacturer, airport sponsor or person with any property interest in the World Trade Center shall not exceed the limits of that person's liability insurance coverage. The act also limits the potential liability of the City of New York to the greater of the city's insurance coverage or $350,000,000.

C. Bills Designed to Provide Protection to the Insurance Infrastructure

The Terrorism Protection Act (H.R. 3210) is designed to have the federal government provide financial assistance to the insurance industry with respect to terrorism losses, so insurers would be able to continue to provide terrorism coverage, and to impose some limits on the liability system to moderate costs that would have to be paid by defendants, insurers and the government. The House bill contemplates the inclusion of the following liability limiting provisions:

- In the event of a triggering determination – a determination that an act or acts of terrorism caused insured losses in excess of certain specified amounts – a federal cause of action would be created that provides the exclusive remedy for damages caused by the terrorist acts.

- The applicable substantive law would be derived from the law, including choice of law principles, of the State in which the act of terrorism occurred, unless such law is inconsistent or preempted by federal law.

- The Judicial Panel on Multidistrict Litigation would determine venue.
- Any recovery by a plaintiff under this provision would be offset by any collateral source payments.
- Punitive damages would not be recoverable.
- Non-economic damages would be allocated to the defendant in direct proportion to its percentage of responsibility.

The Senate passed the Terrorism Risk Insurance Act of 2002 (S. 2600) on May 18. Though similar to the House bill in creating a federal cause of action for suits arising from a terror attack, S. 2600 does not bar punitive damage awards and explicitly excludes these damages from coverage under the program. Also, the bill lacks a provision concerning collateral source payments and non-economic damages. The Senate bill would only be effective for one year with the possibility of an extension for an additional twelve months. During that time, the federal program would provide for cost sharing in the event that a terrorist attack determination is made by the Secretary of the Treasury. This act must be dangerous to life, property or infrastructure, cause damage in excess of $5 million and be committed by or on behalf of a foreign person or interest. After participating insurance companies meet a deductible based on market share, the federal government would pay 80 percent of the first $10 billion in damages and 90 percent of those damages in excess of $10 billion. Under this bill, total insured losses would be capped at $100 billion. Any additional payment by either the government or insurance companies would have to be authorized by congress.

These two bills, H.R. 3210 and S. 2600, are currently in conference. The punitive damage prohibition contained in the House bill will most likely be extremely contentious.

D. The Anthrax Victims Compensation Act

The House has introduced a bill, (H.R. 3228), that would amend the ATSSSA to provide compensation to victims of terrorist-related anthrax infections, under the same terms and conditions of the ATSSSA and supporting regulations. This bill is also still in committee.

III. Surveying The Suggestions For Future Legislation

The ATSSSA and subsequent supplemental legislation seem to have isolated the airlines, municipalities and the World Trade Center from excessive liability. *See* Part II(A-B) *supra*. Presently, Congress has failed to submit to the President any protection for other potential defendants in a suit arising from a future terrorist incident. Also, statements of persons within the current administration predict that another attack similar to that of 9/11 will inevitably take place.[5] Why are there concerns about tort liability stemming from terrorist attacks and what legislation is likely to be proposed to contain resulting lawsuits?

There are three primary stated reasons for concern and purposes for legislative action. One, insurers must have a foreseeable, quantifiable level of liability to balance against risk. In the absence of this predictability, insurers will, to the extent allowed by law, contract around such liability or charge unaffordable premiums so as to insulate themselves from loss.[6] The resulting loss of coverage or insolvency resulting from a large-scale attack could have serious negative effects on the functioning of the business

5. *Officials: Terrorists May Target Tall Apartment Buildings*, CNN.com <http://www.cnn.com/2002/US/05/20/gen.war.on.terror/index.html> (May 20, 2002, Last accessed May 24, 2002).
6. *Terror Insurance Bill Faces Tort Reform Snarl*, Real Estate Journal <http://homes.wsj.com/propertyreport/bricks/20020313-bricks.html> (Mar. 13, 2002; Last accessed May 22, 2002); *Manufacturing Jewelers and Suppliers of America Issue Paper: Property/Casualty Insurance*,

and real estate interests and on the ability of individuals to recover compensation for injuries sustained. Two, potential defendants to a mass tort suit resulting from an attack must be shielded from crushing liability that could not only result in bankruptcy but also in disproportionate or limited recovery from those who are legitimately injured by the negligence of a defendant. And three, there may well be circumstances where, because of a lack of a typical duty or foreseeability, it would be inappropriate as a normative matter to hold defendants liable.

The basic building blocks of any legislation that would address these issues have already been presented in H.R. 3210 and S. 2600. These provisions will be reiterated and supplemented in the following discussion. What follows is by no means an exhaustive list of possible tools that could be incorporated into any given piece of legislation. This section of the paper is merely meant to provide an overview of proposals and to catalyze the debate concerning the form of or provisions included in any law attempting to address liability for terrorist attacks.

A. Determination of Terrorist Attack

Liability legislation is being considered because a large-scale terrorist attack does not involve traditional issues of tort compensation. A traditional, single party tort suit is premised on the theory that the injured party should be made whole with the resources of the culpable party. In the case of another attack similar to 9/11, the primary goal would most likely shift to making sure that those injured are provided with as much compensation as possible from a limited pool.

Consequently, a determination must be made by the executive branch that a

---

MSJA Web Site, <http://msja.polygon.net/frames/government_sub/index.html> (Last accessed May 22, 2002).

terrorist attack has occurred thereby triggering any enacted statue. In doing so, one must determine the identity of the perpetrators and what their motivations are; not all major disasters are intentional acts. The damage should also reach a threshold where liability and the strain on judicial resources would be extraordinary. This should require consideration of potential liability in light of the resources of potential defendants and the number of possible plaintiffs.

B. Establishing a Federal Cause of Action

Some propose that, once a terrorist attack determination is made, it could trigger a federal cause of action that would be the sole means of relief for injured parties. H.R. 3210 would have put the choice of venue in the hands of the Judicial Panel on Multi-district Litigation with the choice of law rules being those of the state in which the attack occurred. Any statute should also allow for nationwide service of process. In combination, a federal cause of action in most cases could bring all suits within the jurisdiction of a single federal court close to the point of attack.

Consolidation of suits would have benefits beyond those of simplification. Using the extensive liability manifested in asbestos litigation as an analogy, it is easy to see the results of a lack of such control. A federal cause of action would help avoid disparate verdicts for similar injuries, multiple punitive damage awards and windfall recoveries for some plaintiffs resulting in reduced resources available for injured parties further down on the docket. A federal cause of action would likely ensure that injured plaintiffs receive adequate and fair compensation and defendants are not subject to irrational or duplicative liability.

C. Limits on Liability Within the Federal Cause of Action

Liability could be restricted in a number of important ways under a federal cause of action.

- First, recovery for pure emotional harm might not be allowed. It is conceivable that many individuals would suffer extraordinary emotional trauma as a result of a large-scale terrorist attack. Nearly every American suffered some level of distress following 9/11 yet our concern should be with providing for those that are tangibly injured by such criminal activity. Regardless of differing views on the validity of pure emotional harm claims, the issue should be characterized as one of protecting and providing for those that are most in need of assistance in the face of a limited pool of resources.
- Second, joint liability could be eliminated. Defendants would only be severally liable for damages in proportion to the harm that they specifically caused. This would protect a minimally culpable defendant with deep pockets from being forced to settle under the threat of excessive joint liability. This is especially appropriate when the acts of the terrorists themselves are considered during fault apportionment.
- Third, H.R. 3210 contains a provision barring the recovery of punitive damages. This most contentious provision was left out of the Senate bill though it is not without precedent when the federal government has regulated tort law.[7] In attempting to assure that every injured party has an adequate opportunity to seek compensation, allowing those first on the docket to deplete the resources of

7. 42 U.S.C.A. § 300aa-15(d) (West 2002) (prohibiting punitive damages in claims made against the National Vaccine Program).

defendants with punitive damage awards could lead to inequity among plaintiffs. At all events, it is difficult to conceive of a defendant to a terrorist attack (other than the terrorists themselves) that would act in an intentional or willful manner that is worthy of a punitive damage award. Short of a bar, punitive damages could be limited to defendants who meet a heightened culpability standard and punitive damage awards could be capped at some multiple of compensatory damages (*e.g.*, 3 to 1). Though this might not be an optimum situation, it could provide a viable compromise.

- Fourth, a filtering mechanism could be employed to ensure that plaintiffs do not try to file suit against defendants based on questionable legal theories. One option might be a heightened pleading requirement. Another option would be to model a provision on existing statutes such as California's Anti-SLAPP (Strategic Lawsuit Against Public Policy) statute. Cal. Civ. P. Code § 425.16 (West 2002). When a defamation claim is filed in California pertaining to speech on a matter of public concern, the suit is subject to a special motion to strike if the plaintiff cannot show a probability of success on that claim. When considered in light of FRCP 56, any heightened standard would necessarily surpass the current substantial evidence test (directed verdict standard) that would be relevant to any federal cause of action. Therefore, a plaintiff would be required to show not that a reasonable jury *might* find in his favor but instead that there is a *probability* that such a finding will occur. If a defendant is granted the motion to strike, he may also be awarded reasonable legal fees and costs.

With the vast number of possible defendants with deep pockets that might

be touched by a large terrorist attack, a filtering mechanism could be a useful tool to make certain that only legitimate claims were brought before an already strained judiciary seeking to manage what will not doubt be complex litigation.

- Fifth, H.R. 3210 provided for reducing an award by any compensation due from collateral sources. The justification for this again was that the resources available to compensate the injured are limited. Most commonly, it is not seen as desirable to let a culpable party benefit from the collateral resources available to the plaintiff. In the instance of a large-scale terrorist attack, the extensive liability has the potential to bankrupt defendants and it could be seen as preferable social policy to ensure that all plaintiffs receive adequate compensation for their injures regardless of the source. Allowing well-insured plaintiffs to receive additional compensation via the tort system could unfairly reduce the size of an award given to a less fortunate injured person.
- Sixth, a limit on attorney's fees has been proposed. This limit is not without precedent in federal law[8] and could ensure that both plaintiffs and their counsel are compensated to the fullest extent possible using available resources. Even if a large award is obtained for a legitimately injured plaintiff, the award may be ineffective compensation when one-third to one-half of it must be paid to a lawyer. Alternatively, it may be more desirable to leave attorney's fees unchecked within the standard cause of action in order to make the global settlement option (discussed *infra*) more attractive for potential plaintiffs. This, in combination with a prohibition on pre-judgment interest, could make a certain and

8. 28 U.S.C.A. § 2678 (West 2002) (providing for limits on contingency fees for suits under the Federal Tort Claims Act and imposing criminal penalties for violation).

speedy administrative settlement more attractive.

D. Protection for Insurance Companies

The primary motivation for H.R. 3210 and S. 2600 is to provide a method of cost sharing/protection for insurance companies suffering a loss as a result of a substantial terrorist attack. Such federal involvement could be very important considering the likelihood of another attack and the current trend of rising premiums or lack of coverage. Since insurance companies are generally free to contract around terrorism liability, with some exceptions (e.g. workers compensation coverage), obtaining insurance relevant to such risks may become impossible for the business and real estate community if action is not taken. Unlike the Senate bill, H.R. 3210 was not a government subsidy for insurance companies but instead provided for what amounted to a federal loan for catastrophic loss and seemed to have industry support. Providing for such federal assistance along with litigation controls might protect insurance companies adequately so that they can continue to provide coverage against terrorism in the face of uncertain risk.

E. Global Settlement Provision

Any proposed law might also contain a provision that would allow for potential defendants to join in the creation of a global settlement fund that would compensate plaintiffs according to an agreed administrative procedure. This may be an attractive option to both plaintiffs and defendants since it would allow both sides to avoid costly and speculative litigation thereby allowing more money to be allocated to redressing actual harm. Recognizing that there are innumerable ways a settlement fund could be constructed; the following is simply a suggestion of how that mechanism might work. Detailed analysis of the possible workings of a settlement provision would be expansive

and is beyond the scope of this paper.

Any plan could be modeled after the current compensation fund that has been established for the victims of 9/11, though the federal government need not contribute monetarily. Recently proposed legislation would extend compensation provided by the Victim's Fund to those injured in the first WTC bombing, the African embassy bombings and the Oklahoma City bombing.[9] If enacted into law, the precedent set may suggest that the federal government would be a financial player in the settlement of any future terrorist attack. These government driven compensation funds, of course, are by no means free from controversy. Some are very uncomfortable with what has already been done by the government and, question whether the government should be picking "winners" and "losers" in the compensation challenge created by criminal or warlike actions. Consequently, some are not enthusiastic about accepting or are unwilling to accept federal involvement. These critics would rather have suits barred in cases defined as terrorist acts; preferring that the public depend upon private charitable action such as the $13 billion raised for the victims of the mass murders of September 11.

Putting aside the question of government funding, those favoring a fund approach might maintain that legislation providing such a settlement opportunity would allow for plaintiffs to receive certain compensation quickly and without the burden of a contingency fee. Provisions providing for exclusion of pre-judgment interest and allowing for full attorney's fees should a plaintiff seek recovery under the federal cause of action would be added incentive to chose the settlement option. Defendants that are subject to liability and whose culpability is foreseeable might be advantaged to provide

9. *Changes to Sept. 11 Fund Would Extend Aid to Victims of Past Terror Bombings*, The New York Times <http://www.nytimes.com/2002/05/24/nyregion/24AID.html?todaysheadlines> (May 24, 2002; Last

the settlement option with available resources (insurance, etc.) in order to speed resolution of claims in an efficient and cost effective manner. If settlement participation was presumptive, identifying the class of plaintiffs that is to be bound by the agreement would not be difficult since the direct victims of a terrorist attack are readily identifiable and could easily opt out of the settlement class should they chose to take their cases to trial.

Any administrative procedure creating the global settlement fund would present unique challenges. First, how would the full list of defendants be ascertained in the absence of prior litigation and, second, how would the level of contribution be set between multiple defendants of various financial means?

Previous situations that have presented opportunities for settlement funds have pointed to a class of defendants based upon prior litigation trends (*e.g.* asbestos). Waiting for such trends to develop is obviously not possible if any legislation is to increase efficiency. For a settlement option to be effective and equitable in dealing with terrorism litigation, there should be a method for crafting the fund before litigation begins. Fortunately, the events that would trigger the use of any such legislation would also instantly give rise to a finite, though admittedly large, list of potential defendants. The following is a discussion of how the parties to the litigation, both plaintiffs and defendants, might be made to shape the global settlement fund in their own best interests.

Those that are directly injured by a terrorist attack could be forced to file their suits in federal court within a fixed time frame (e.g. six months) where they would name defendants and outline claims for relief. Injuries would seem readily apparent and those who were subjected to the attack would be immediately aware of them unlike speculative

---

accessed May 28, 2002).

future plaintiff problems inherent in asbestos litigation. Admittedly, there may be cases where this presumption does not hold true. A radiological attack would certainly involve speculative injuries that may render this tool ineffective.

Following the close of the period for filing suit, a list of all named defendants would be available from which to craft the settlement fund. It would be up to each individual defendant to assess the number and magnitude of claims filed against him when making the decision to participate in a settlement fund or to defend at trial should a plaintiff press his case. The limits on liability within the federal cause of action discussed previously could provide for some protection for defendants from being forced to participate in a settlement when their culpability is questionable or liability is otherwise limited.

Once the list of participating defendants has been determined, the level of financial contribution of each must be ascertained. This could be left to negotiations between those identified defendants. These entities, often with legal staff, would be in the best position to negotiate terms based on culpability, insurance and other capital resources. Defendants could also craft rules concerning the administration of the fund subject to any necessary guidelines concerning expediency and equity. Allowing defendants to create and administer the settlement fund could limit legal fees for plaintiffs who chose that option to the cost of filing the complaint and any subsequent administrative paperwork required by the fund. Contingency fees could be limited to only those cases brought to trial.

It is possible that some future attack may be of such magnitude that it would be essentially impossible to provide compensation to all injured parties (*e.g.* a nuclear attack

in a major city with millions of plaintiffs). It may be desirable to include presidential authority to compel plaintiffs to accept a settlement or perhaps bar suit entirely. Israel has a similar extra-judicial system of compensation for terror attacks.

IV. CONCLUSION

The terrorist attacks of 9/11 introduced liability issues of a magnitude never before seen in the American legal system. The perpetrators of the 9/11 attack sought not only to kill and destroy on an unprecedented scale but also to disrupt our very way of life. To protect that way of life, the debate about how our legal system should respond to this new reality must be reasoned but also expedient. How will the potential crushing liability for businesses be balanced against the needs of those injured in a future attack? How will litigation be managed so that the court system does not become paralyzed by an onslaught of suits thereby exacerbating the harm caused by an attack? How will scarce resources be distributed to those that have been injured? The time to consider these questions in crafting our legal and social response to terrorism post 9/11 is now and not in the confused and emotional aftermath of a future attack.

Our Purpose

The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.

THE FEDERALIST SOCIETY
for Law and Public Policy Studies
1015 18th Street, NW, Suite 425
Washington, D.C. 20036

Phone (202) 822-8138
Fax (202) 296-8061

www.fed-soc.org

The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would be the substitution of their pleasure for that of the legislative body."

The Federalist No. 78