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THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

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Within two weeks after the September 11 terrorist attacks, Congress enacted, and the President signed into law, the statute creating the September 11th Victim Compensation Fund. This unique statute, unprecedented in American history, created a legislative no-fault alternative to our traditional litigation system. It provided generous compensation to those families and surviving victims who voluntarily elected to forgo their right to sue in favor of entering the new Fund. The law was the result of intense lobbying by the domestic airline industry, which feared that thousands of lawsuits alleging airline negligence as a contributing factor to the September 11 tragedies would severely reduce airline passenger volume and contribute to the real possibility of airline bankruptcies. Loan guarantees and other financial measures were quickly made part of federal law. A victim compensation fund complemented these airline protections.

The new law also included important provisions designed to minimize the likelihood that eligible families and victims would opt to litigate rather than enter the Fund. Airline liability was capped at $6 billion, the amount of insurance available on the four doomed planes. From this limited Fund would be paid not only all wrongful death and personal injury claims, but also all property damage and business interruption claims. By all accounts, these monies were clearly expected to be inadequate to satisfy fully all potential claims. At the same time, the new statute required all September 11 litigants to sue in federal court in Manhattan. Pentagon families and the families of those lost in the plane crash in Shanksville, Pennsylvania, were required to travel to New York City in order to press their claims. The new statute deliberately created an unlevel playing field; the goal was to encourage--but not require--each eligible family or physically injured victim to enter the Fund. Litigants could sue if they so desired; not only were they unlikely to be successful (traditional tort obstacles loomed large in proving culpability and causation), but the jurisdiction and venue requirements of the new law discouraged lawsuit filings. The financial cap on airline liability made the entire option unappealing.

For 32 months, I administered the Fund. The statute conferred on me practically unfettered discretion to design and implement the program. Appointed by the U.S. Attorney General, requiring no Senate confirmation, and subject only to the pressures and reactions of public opinion, I labored to draft a program that would satisfy broad statutory directives.

In the end, the Fund proved to be a remarkable success. Fewer than 100 families decided to litigate rather than enter the Fund. Meanwhile, more than 5,000 families and physical injury survivors opted to participate in the program and received more than $7 billion in tax-free public compensation (private entities such as the airlines, the World Trade Center, and the security companies did not contribute in any way to the Fund; this was all taxpayer monies paid out of the U.S. Treasury). The average award for a death claim was just over $2 million, with awards ranging from nearly $500,000 to over $7 million. Physical injury awards averaged $400,000 and were as high as over $8 million for a surviving burn victim.

Why such unprecedented generosity? The statute required it. In order to discourage lawsuits and encourage grieving family

this issue. Instead, my formula would be applied across the board, without the distinctions that juries make every day.

There also was the problem of which family member could file the claim and who would actually receive the Fund award. Congress was silent on these issues. Nowhere in the statute was there one word about eligibility to file and allocation of proceeds. We dealt with these problems by designing a program that proved creative and workable: If the victim had completed a will, we would follow the distribution plan reflected in the will. In the absence of a will, we would look to the law of intestacy of the victim's domicile. This, coupled with the domicile's wrongful death statute, provided us a clear formula for determining claimant eligibility and allocating Fund awards. These rules, of course, rarely helped people who were engaged or same-sex partners in their efforts to file a claim or secure a part of an award. But in such cases I was usually successful in mediating an agreed-upon resolution of the dispute. Today, there are less than two dozen disputed claims being litigated in various surrogate courts.

Finally, there was also the thorny issue of how to encourage foreign claimants who lost a loved one on September 11, or the seven families of illegal undocumented workers who died on ***16** that day, to file a claim with the Fund. All were eligible. The statute creating the Fund made no distinction between foreign and domestic claimants, or documented and undocumented workers. Here, I engaged in an intensive "selling job," traveling throughout the nation and to Europe in an effort to convince surviving families to file with the Fund. Unfamiliar with the program, and expressing an understandable degree of skepticism, these families were reluctant to waive their right to litigate by entering the Fund. Gradually, they came to recognize the wisdom of the program, and eventually almost all of them opted to participate.

The reluctance of eligible claimants to file with the Fund was not limited to foreign families and the families of undocumented workers. Indeed, one interesting aspect of the program--familiar to many class action litigators--is how filing the rate for the Fund increased as the statutory filing deadline of December 22, 2003, approached. Fully familiar with the psychology of class action settlement administration, where most class members do not register to participate in a settlement fund until the deadline date approaches, I warned members of Congress not to extend the December 22, 2003, deadline for filing. True to form, about half of all participants filed with the program during the last 60 days; until the waning days of the Fund, thousands of claimants were unsure of what to do or when to do it. Only when they realized that Congress would not extend the statutory deadline--and that procrastination was no longer acceptable--did they file in droves. I continue to believe it would have been a major blunder had Congress decided to extend the deadline for filing. Instead, 97 percent of all eligible claimants ultimately decided to participate in the program.

Three major issues arise out of the success of the September 11th Victim Compensation Fund. First, was the Fund a good idea, was it sound public policy? After spending almost three years administering the statute and authorizing more than $7 billion in public funds to some 5,500 families and victims, I have concluded that the Fund was an excellent idea--a perfect example of the generosity and compassion of the American people. I fully understand and appreciate those critics who maintain that the Fund was a congressional afterthought, that it became a last-minute addition to a statute designed to protect the airline industry from lawsuits. But the latter could have been accomplished without a victims' compensation fund, and certainly without authorizing the very generous awards that characterized the program. No, the Fund was an emotional response by the American people and their elected representatives at a time when the nation's citizens were determined to come to the rescue, at least financially, of those fellow Americans most in need. Like the Marshall Plan, recent tsunami relief, and other examples of America's generosity, the September 11th Victim Compensation Fund is one further example of the best in the American character.

But praising the Fund does not necessarily mean that it should be endorsed as a valuable precedent to be replicated the next time we witness a terrorist attack on domestic shores. The Fund was a unique response to an unprecedented historical event. It fit the moment. It should be viewed in this narrow context, as a justifiable, emotional response by the American people to a singular historical event comparable only to the American Civil War, Pearl Harbor, and, perhaps, the assassination of President Kennedy. If there is a next time, and, unfortunately, we are told that a second terrorist attack here at home is likely, I doubt that Congress will be as willing to replicate the Fund or to cite the program I administered as a viable precedent.

Why is this so? A simple review of the correspondence I received as Special Master, and the telephone calls and meetings I engaged in with the American people, corroborate my reservations: "Mr. Feinberg, my son died in Oklahoma City. Where is my check?" Or "My wife died in the African Embassy bombings in Kenya, how come I'm not eligible for your Fund?" Finally, "Mr. Feinberg, my daughter died in the *first* World Trade Center attack in 1993, committed by the very same people;

how come I can't receive one of your checks?" Nor are the inquiries limited to the results of terrorism. "Mr. Feinberg, last year my husband saved three little girls from drowning in the Mississippi River, and then he drowned--a hero. Where's my check?" Where do the legitimate objectives of public compensation--very generous public compensation--begin and end? This is the slippery-slope argument. Once it is decided as a matter of public policy to compensate some citizens but not others, one immediately runs head-on into the problem of deciding who should be eligible for such public largess, and why.

The fact is that there are some basic principles that stand in the way of expanding the concept of the Fund to any other situations where innocent victims are left in the wake of manmade or natural disasters. First is the idea--deeply embedded in our national character--of self-reliance, that every day, individual Americans make choices and live by those choices. It has never been part of our national character to expect a handout from the government when life throws us a curveball. Innocent victims of life's misfortunes do not expect generous public compensation funded by the American taxpayer. True, government stands ready to serve by providing low-cost loans and other relatively minimal remuneration in the event of a flood or even when one is the victim of a crime. But providing over $2 million in tax-free compensation runs against the historical norm here in America and can be explained only as a unique contribution made by the American people in response to an unprecedented disaster. The next time will be different, and it is unlikely that Congress will respond as it did immediately after September 11.

Second is the historical concept which is part and parcel of our American heritage--the idea of limited government. The American people do not expect government to act as a guarantor every time ill befalls an American citizen. If "Big Brother" is an alien concept when it comes to our liberty and freedom, it is also looked upon with some skepticism when we are told that "the government is only trying to help you." ***17** The American people recoil at the notion of the federal government using taxpayer monies to compensate the victims of every type of misfortune from terrorism to natural disasters, from property crimes to fires and automobile accidents. Cradle-to-grave public compensation would be historically unprecedented and criticized as inconsistent with America's history.

If the Fund is to be defended as sound public policy, it can best be justified not from the perspective of the victims but, rather, from the perspective of the nation. This point is critical. Any attempt to explain and justify the Fund by distinguishing among victims--at the World Trade Center, the Pentagon, Oklahoma City, Kenya, the *USS Cole*, etc.--will prove unconvincing. (I know from firsthand experience that my efforts to do so rang hollow.) Better to explain the uniqueness of the Fund as a response by the American people, who were determined to exhibit the type of national solidarity and cohesiveness so essential immediately after the foreign terrorist attacks. The nation demanded a September 11 Fund. As Jack Rosenthal of the New York Times Foundation put it, the Fund was a type of "vengeful philanthropy," designed to send a message to the terrorists that America would not be cowed, divided, or brought to its knees. Instead, we would respond as one people with an unprecedented generosity and compassion.

And what if I am wrong, and another terrorist attack leads to a new effort by Congress to compensate additional victims? Should the statute I administered be replicated next time?

I don't think so. If Congress decides in its wisdom to enact a new statute to compensate the victims of a second terrorist attack, I believe it should provide the *same amount* of compensation for *all* eligible claimants. I learned valuable lessons from my administration. Authorizing different awards based upon traditional tort concepts of economic and noneconomic loss fueled emotional divisiveness among the very people I was trying to help. At the same time, it required me to gaze into a very murky crystal ball in an effort to determine the victims' financial future. And the requirement that I make thousands of individual calculations obviously promoted inefficiency and delay, although it came with the territory. Accordingly, if there is a next time, I urge Congress to provide the same flat payments for all eligible claimants. (Of course, this recommendation begs two very important additional questions: What should be the size of the flat payment, and will Congress avoid any effort to tinker with the existing tort system? The minute you decide to modify the rules governing access to our civil justice system, which is exactly what Congress did in its effort to aid the airline industry, you dramatically complicate any compensation initiative.)

Finally, there is the question I frequently am asked when I visit law schools to explain the success of the Fund: Is the Fund a viable alternative to mass tort litigation? Can we view it as a precedent, a model to replace the inefficiencies and over-deterrence that, it is argued by critics, characterize much of the mass tort phenomenon involving asbestos, tobacco, and other harmful products? Why not enact a similar statute that would replace the existing tort system in certain cases by