

ADR and Victim Compensation Programs
A talk with Ken Feinberg

I. September 11th Victim Compensation Fund

- A. Air Transportation Safety and System Stabilization Act
 - 1. Title IV of the Act governs the September 11th Victim Compensation Fund of 2001. Congress created the fund to protect the airline industry to protect the airline industry, to compensate the victims, and to show the world that America would rally around the victims.
 - 2. September 11th Victim Compensation Fund
 - a. Statutorily eligible claimants:
 - i. Person present at the World Trade Center, the Pentagon, or the site of the plane crash at Shanksville, Pennsylvania, at the time or immediate aftermath of the terrorist related crashes of 9/11 who suffered physical harm or death as a result. 49 U.S.C. § 405(c)(2)(A)
 - ii. Person who was a member of the flight crews of those planes. 49 U.S.C. § 405(c)(2)(B)
 - iii. Or the personal representative of the decedent who files a claim on behalf of the decedent. 49 U.S.C. § 405(c)(2)(C)
 - b. Compensation:
 - i. Economic loss calculated based on the projected earning power of the deceased individual.
 - ii. Noneconomic loss for pain and suffering.
 - iii. Deductions for collateral sources of income, e.g. life insurance, pensions, social security, and worker's compensation.
 - iv. No punitive damages. 49 U.S.C. § 405(b)(5)
 - c. Rights waiver
 - i. If the claimant accepts payment, he waives the right to file a civil action. 49 U.S.C. § 405(c)(3)(B)
 - 3. The role of the Special Master
 - a. The Special Master is granted sweeping powers to draft the fund's rules and procedures, oversee the fund's operations and disbursements to all claimants.
 - b. While the Special Master is tasked with creating the forms for submitting claims, the information to be included, and the procedures for the hearing and evidence, the statute does not specify what the procedures must be. The statute grants him broad discretion.
- B. Fund disbursements
 - 1. The types of injuries recoverable

- a. Serious physical injuries that required at least 72 hours of medical treatment that resulted from being present at the site of the aircraft crashes.
 - b. No emotional/mental distress claims.
 - 2. Noneconomic losses
 - a. \$250K for the death of a decedent.
 - b. \$100K for each surviving spouse claimant and dependent.
 - 3. Charitable donations: no deductions or offsetting for charitable donations.
 - 4. No statutory appeals process. The fund rules, however, provided for an administrative appeals process.
 - 5. The fund was completely voluntary and funded entirely by taxpayers.
- C. Issues
- 1. Economic loss computation
 - a. One of the major issues was calculating the economic loss. Economic loss calculations, a tort concept, can be a highly speculative process.
 - 2. Who is eligible to file a claim on behalf of a decedent
 - a. The statute did not specify who qualified to be a “personal representative” or a decedent.
 - b. The Fund followed the will of the decedent or intestacy rules of the decedent’s state if no will existed.
 - 3. Exercising discretion
 - a. The statute granted the Special Master broad discretionary powers. This allowed Feinberg to take into account extraordinary circumstances of individual claimants and level out some of the egregious differences in payouts between the family of high-income earners and low-income earners to the extent it was practicable.
- D. Ultimately, 98% of all the families who lost a loved one in 9/11 enrolled in the program.¹ Over 7,300 claims for death and physical injury were processed.
- E. The Zadroga Act (2015)
- 1. James Zadroga 9/11 Health and Compensation Act allocated an additional \$4.5 billion to 9/11 victims.
 - 2. Amended the Air Transportation Safety and System Stabilization Act to make those who were killed in the rescue and recovery efforts to be eligible for compensation under the September 11th Victim Compensation Fund of 2001.

II. Mass Tort Resolution Programs

- A. ADR programs vs. tort system
 - 1. Avoids the uncertainty of protracted litigation.

¹ September 11th Victim Compensation Fund, *Compensation for Deceased Victims*, https://www.justice.gov/archive/victimcompensation/comp_deceased.html

2. A way to divert a flood of claims to a more efficient and cost effective vehicle for resolving these types of claims.
3. Can lessen the legal fees for the parties involved.
4. Programs can be designed to exist parallel to or as a substitute to the tort system. Generally, if designed to be a substitute, there is no appeals process except to the extent created under the parameters of the program. The claimant waives his right to file a suit in exchange for participating in the programs.

B. BP Oil Spill

1. Feinberg was tasked with creating and distributing a \$20 billion fund set up by BP to pay damage claims as a result of a massive oil spill in the Gulf of Mexico in 2010. The oil spill affected 120 miles of the coastline and damaged the fishing and tourism industries, among others.
2. Fund rules
 - a. Eligibility:
 - i. Live or work;
 - ii. Own or lease property;
 - iii. Own or lease vessels, or
 - iv. Accepted work in the affected areas.
 - v. The claims must be sufficiently related to the oil spill.
 - b. Documenting losses
 - i. The claims must have some evidentiary basis, showing damage and extent of damage.
 - c. Claimants sign a release and waiver of liability when they take the award.
3. One of the biggest challenges resulted from the diverse claimants and the types of financial impact of the oil spill. Over a million claims were filed and over a third were denied because they lacked sufficiently proof of eligibility or damage.

C. GM Ignition Compensation Claims Resolution

1. GM recalled 2.6 million cars worldwide as a result of a defective ignition that was linked to 13 deaths in 54 car crashed. The defective switch would rotate from the “run” position to “accessory” which would shut off the engine and disable the airbags.
2. The program provided no limits on the amount that could be awarded to individual claimants.
3. The program rules that were created were as follows: if there was a car crash but the airbags did inflate, the claimants were not eligible. If the airbags did not inflate, the claimants may be eligible. The claimant must submit evidence showing that the ignition switch defect was the proximate cause of the accident – e.g. a police report, an insurance claim and report, repaid records, etc.

4. Economic loss calculations used the value of life tables and took into account extraordinary circumstances.

III. Charitable Funds

- A. Purpose differs from other types of funds. The purpose is purely to help victims, and there are no releases or restrictions.
- B. These funds are created when people make charitable donations after a tragedy, which are funneled into funds that disburse unencumbered payments to victims.
- C. Feinberg works on these types of funds as pro bono projects. They are designed so that recipients do not waive their rights, there are no economic loss calculations, and the gifts are divvied up based on the total amount in the fund.
 1. In certain instances, payments may be made for those who were present at the site of the tragedy in recognition of their mental distress.
 2. E.g. Boston Marathon – One Fund Boston
 3. E.g. Newtown-Sandy Hook Community Foundation