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The September 11th Victim Compensation Fund of 2001: Policy and Precedent

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EDITOR'S NOTE: This article is an edited version of remarks Mr. Feinberg delivered on September 8, 2011, at the *Lawyers and the Law in New York City: 10 Years After 9/11* event, hosted by the New York City Bar Association's New York City Affairs Committee and the *New York Law School Law Review*. The video of his full address is available at: <http://nyls.mediasite.com/mediasite/SilverlightPlayer/Default.aspx?peid=4dec496d5c4f49afb5ab187d567ab6401d>. The *New York Law School Law Review* provided the citations.

THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001: POLICY AND PRECEDENT

Eleven days after 9/11, Congress passed a law providing that any victims who wanted to come into an administrative no-fault system and receive compensation as if they were in the tort system could do so.¹ This law established the September 11th Victim Compensation Fund of 2001 (the “9/11 Fund” or the “Fund”). It was voluntary and allowed individuals to receive compensation but avoid litigation if they signed a release stating that they would not sue anyone (except the terrorists or countries harboring terrorists) for damages resulting from the 9/11 attacks.²

Over the course of thirty-three months, we corralled ninety-seven percent of all the death claims through this fund.³ And we paid 2600 physical injury claims.⁴ Imagine if there was no 9/11 Fund. With no appropriation from Congress, I was asked to take money out of the U.S. Treasury (“Ken, take it out of petty cash from the U.S. Treasury.” That’s how the program worked.). The Fund was supported by \$7 billion in taxpayer money, and we secured virtually all the releases possible up to the statutory expiration date of December 22, 2003. However, after the statute expired, thousands of physical injury claimants came forward—these were latent claims for physical injuries that began to manifest themselves. Unfortunately, there was no longer a fund, so those claimants had to sue; and those cases, for the most part, have settled, years later.

Often it is asked whether the Fund was sound public policy. I believe that it was. I have publicly stated over and over again that I believe it was the right thing to do. However, it is a very close question. Very close. I think it was the right thing to do because it was a unique response to an unprecedented national tragedy rivaled only by the American Civil War, Pearl Harbor, and the assassination of President Kennedy. On the other hand, one cannot justify the 9/11 Fund from the perspective of the victims of such tragedies or other disasters. I certainly cannot. We would have to be able to explain why there was a 9/11 Fund for the 9/11 victims, but none for the victims of the Oklahoma City bombing. And why there was no fund for the victims of Katrina, in which 1000 people died. There was no Hurricane Katrina fund. There was also no fund last year for the victims of the tornadoes in Joplin, Missouri, and Tuscaloosa, Alabama. These tragedies had innocent victims and yet the government did not step up and pay those victims \$2 million on average, as was the case for the 9/11 Fund.

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1. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, tit. IV, §§ 401–09, 115 Stat. 230, 237–41 (2001) (codified at 49 U.S.C. § 40101 (2006)). The purpose of the 9/11 Fund was “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.” *Id.* § 403.
 2. *See id.* § 405(c)(3)(B).
 3. U.S. Dep’t of Justice, *Compensation for Deceased Victims*, SEPT. 11TH VICTIM COMPENSATION FUND OF 2001, http://www.justice.gov/archive/victimcompensation/payments_deceased.html (last updated Jan. 28, 2005).
 4. KENNETH FEINBERG, U.S. DEP’T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 110 tbl.12 (2004), www.justice.gov/final_report.pdf.

However, I do not believe that the 9/11 Fund, as successful as it appears from the statistics, can serve as a precedent for future tragedies. It was a one-off program; it will never be replicated. The idea that one person is designated by Congress through the Attorney General to pay 5300 people or families billions of dollars with very little oversight, very few checks and balances, no committees, and no real appeal system, and the idea to single out for special treatment a select group of people who are the victims of a curve ball of life's misfortune, does not sit well.

If Congress had waited two more weeks, it would likely not have created the 9/11 Fund, or at least not in the same way. Most likely, Congress would not have required me to calculate damages and pay every person a different amount of money. In order to get the stockbroker and the banker's family to give a release waiving their right to sue, they received much more payment than the busboy, the soldier, the fireman, or the policeman. Tied to the hip of the tort system, I had to give everyone different amounts to attract them out of litigation.

Yet I defend the 9/11 Fund. The American people wanted to demonstrate to the world the best of our heritage, that we will come to the aid of those in need, that we are one community, that we will find a way to help people who were victims of the attacks. It is a part of the American character. Therefore, I think that creating the 9/11 Fund was absolutely the right thing to do. Just don't do it again. And, if you do it again, don't do it that way.

A common question relating to the 9/11 Fund is whether the tort system is the best way to resolve mass claims and claims from mass disasters. I do not know if it is the *best* way, but I believe it is the *only* way. Victim compensation funds, such as the 9/11 Fund and the BP Deepwater Horizon Disaster Fund, are aberrations. I believe that generally the tort system works pretty well and, though it is not perfect, disputes are resolved under that system. Every once in a while, policymakers think that a particular tragedy requires us to think outside of the box and create an alternative system, and that is fine. The BP Oil and 9/11 funds offered good alternatives. But I do not believe that it is necessary to tinker with the tort system. The second reason is that the American legal system and the tort system are so ingrained in the fabric and history of our country that it is highly unlikely that these compensation funds or other alternatives will change the tort system other than at the edges. To attempt more is the equivalent of tilting at windmills.

In sum, I defend the 9/11 Fund because I think it was the right thing to do. Moreover, I point with pride to the fact that the system and the 9/11 Fund worked when it had to work.

The Fund worked in part because of the support of the legal community in New York City. The legal profession is often criticized, and sometimes justifiably so. But for an example of how our profession actually serves the public interest, look at what bar associations around the country did to make sure that the 9/11 Fund would work—not only in theory but in practice. In addition, public officials, including New York City Mayor Michael Bloomberg and New York City Corporation Counsel Michael Cardozo, also played a substantial role in the success of the Fund. In the early days of the Fund, when it was criticized and questioned by emotionally

distraught families and victims, Mayor Bloomberg stood by me and the Fund. In fact, he stood right next to me and said, “Give the Fund a chance. It’s the right thing to do.” I do not think we would ever have succeeded in this city without the mayor’s support and, day in and day out, the support of Michael Cardozo. I talked to Michael once a day during some of these difficult times, when trying to encourage people to take advantage of the Fund. And Michael took the heat, along with others in the Corporation Counsel’s office. They never flinched and repeatedly asked what they could do to help make the Fund accessible and urge citizens of this city to take advantage of the program.

In the end, if statistics are a guide, the 9/11 Fund was a success. More than \$7 billion—all public taxpayer funds—were distributed to approximately 5300 eligible claimants.⁵ The average award for a death claim was about \$2 million; for a physical injury claim, approximately \$400,000.⁶ And these monies were distributed tax-free. Only ninety-four people who were eligible to enter the Fund declined and decided to litigate in Federal Court in Manhattan. (All of these lawsuits were settled some five years later.). I believe the Fund stands alone as the best historical example of the compassion and sensitivity of the American people. In a time of great national trauma, America decided to send a message to the rest of the world—that we as a people would stand beside those victims of a terrible tragedy, and that the terrorist attacks would unite, not divide, us as a nation. We showed the world that we would not only track down and bring to justice those responsible for the tragedy, but that we would also exhibit a type of “vengeful philanthropy,” demonstrating to the world our unified sense of community and our determination to act as one people. The 9/11 Fund was “Exhibit A” in this regard.

5. *Id.*

6. *Id.*