

The Victims Compensation Fund: A Model for Future Mass Casualty Situations

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I. INTRODUCTION

Americans and people around the world will remember where they were as the news flash came across televisions and radios that a plane had hit one of the twin towers of the World Trade Center in New York City. Initially there was speculation that this disaster was an accident, but when the second plane hit the other tower, there was no mistaking that the United States had fallen victim to a terrorist attack. Not only were the towers in New York attacked, but an American Airlines flight was intentionally crashed into the Pentagon, and a United Airlines flight crashed into a field in Pennsylvania. We have now learned that the United Airlines plane was headed for Washington when passengers aboard that plane realized their fate and chose to take a chance and overpower the hijackers. As one commentator has noted, “[t]he tragedy of September 11, 2001 has changed the way that Americans live.”¹ Americans are now subject to greater scrutiny in airports, hotels, concerts, sports events, and anywhere Americans gather in large numbers.² Some of the most significant changes have come in the transportation industry, and more specifi-

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1. John M. Barkett, *If Terror Reigns, Will Torts Follow?*, WIDENER L. SYMP. J. 485, 486 (2003).

2. *Id.*

cally, the aviation sector.³ Aviation is vital to our nation's economy and has been essential to Americans' sense of personal freedom.⁴

One of the first legislative responses to the terrorist attacks of September 11, 2001, was the Air Transportation Safety and System Stabilization Act (ATSSSA),⁵ which was signed into law by President Bush on September 23, 2001.⁶ ATSSSA does not address aviation security, but it is designed to limit the financial impact of September 11 on the airline industry.⁷ The first order of business for the government was providing the airlines with \$5 billion (plus up to \$10 billion in loans) to compensate them for the losses incurred during the mandatory grounding the first three days following the attack, and to head off expected future losses resulting from reduced air traffic.⁸ The stated objective of ATSSSA was "[t]o preserve the continued viability of the United States air transportation system."⁹ There were several components constructed under the ATSSSA, including, the Victims Compensation Fund (hereinafter "the Fund").¹⁰

The Fund was designed to provide an alternative to litigation for the victims of the September 11, 2001 attacks and their families.¹¹ The manner in which the Fund was created and what the Fund provides is different from any other compensation scheme for terrorist attacks and mass casualty situations.¹² Thus far, the Victims Compensation Fund has been successful in achieving its goal, being that a large percentage of those eligible applied for compensation from the Fund.¹³ However, the Fund has been criticized for failing to target those directly accountable for the attacks. Additional criticism stems from the fact that the creators of the fund have asked taxpaying citizens to step forward and pay the price for

3. Cynthia C. Lebow, *Understanding the September 11th Victim Compensation Fund: The Proper Response or a Dangerous Precedent?*, 1 ANN. 2002 ATLA-CLE 243 (2002).

4. *Id.*

5. ATSSSA, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 note).

6. Margaret M. Blair, *The Economics of Post-September 11 Financial Aid to Airlines*, 36 IND. L.REV. 367, 367 (2003).

7. Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649, 712 (2003).

8. *See id.*

9. Kent C. Krause, *Sept. 11 Leaves the Airline Industry Reeling*, 66 TEX. B. J. 20, 20 (2003).

10. *See Blair, supra* text accompanying note 6.

11. Raymond L. Mariani, *Industry in Crisis: A Progress Report on Victim Compensation and the Airlines After the September 11th Legislation*, 68 J. AIR L. & COM. 253, 256 (2003).

12. *See id.* at 257 ("The program had momentum and offered a fresh alternative to the drawn out lawsuits that inevitably followed past aviation-related terrorist attacks, such as, the decade-long Pan Am-Lockerbie bombing lawsuit against Libya.").

13. *See Relatives of Victims Rush to File for 9/11 Fund*, CHI. TRIB., Dec. 23, 2003, at 12, available at 2003 WL 70654039.

the losses due to the September 11, 2001 attacks.¹⁴ While there are criticisms of the fund, in general the Fund has provided a legitimate means of compensation for those eligible in an expeditious manner, and established a new regime for mass tort compensation.

II. WHAT IS THE VICTIMS COMPENSATION FUND?

A. WHAT IS THE VICTIMS COMPENSATION FUND AND WHAT ARE THE REQUIREMENTS TO APPLY FOR THE FUND

The Victim's Compensation Fund was established by the government after the September 11, 2001, attacks and was designed to pay thousands of victims for the losses resulting from those attacks.¹⁵ In return, the victims and their families who made the choice to participate in the Fund were prohibited from seeking any type of compensation through litigation.¹⁶ In theory, the Fund would provide timely benefits with a simple process of fair and just awards.¹⁷

In order to qualify for an award under the Fund, claimants must be individuals who were:

(1) present at the World Trade Center, at the Pentagon, or at the site of the air crash at Shanksville, Pennsylvania; . . . (2) members of the flight crew or passengers on the four flights that were the target of the terrorists attacks; or the personal representative of a decedent killed either at the World Trade Center, the Pentagon, or in the plane crash.¹⁸

In order to be considered for compensation, the “[c]laimant must submit a claim form developed by the Special Master which requires: (1) information detailing the physical harm that claimant suffered; . . . (2) disclosure of any possible economic and non-economic losses; and (3) information about all collateral source compensation.”¹⁹

B. THE SPECIAL MASTER

The Attorney General selected Kenneth Feinberg, a veteran mediator, as Special Master of the Fund.²⁰ The Special Master fulfills multiple roles for the Fund including the responsibility of being a surrogate defendant, and analyzing damages requests to ascertain whether or not such

14. See Mariani, *supra* note 11, at 257 (discussing how taxpaying citizens are a continuous financial source for the Fund).

15. Mariani, *supra* note 11, at 253.

16. *See id.*

17. *Id.* at 256.

18. Lebow, *supra* note 3, at 243.

19. Richard P. Campbell, *The September 11th Attack on America: Ground Zero in Tort and Insurance Law*, 9 CONN. INS. L. J. 51, 68 (2002).

20. Mariani, *supra* note 11, at 256-57.

requests are exaggerated.²¹ The Special Master also acts as the judge, determining the awards given to each family, as well as being an advocate for those who are considering signing up for the Fund.²² By statute, the Special Master has the responsibility of “[a]dministering the compensation program [through] hearing officers and other administrative personnel” to be employed for that purpose.²³ The statutory duty of the Special Master is straightforward: he “shall . . . determine (1) the claimant’s eligibility, (2) the extent of harm (including economic and non-economic losses), and (3) the amount of compensation not later than 120 days after that date on which a claim is filed.”²⁴ The statute forbids the Special Master from taking into consideration fault of any type by any person in making his awards.²⁵ In fact, the only issues that the Special Master may consider are those dealing with the claimant’s evidence on eligibility and damages.²⁶ The hearing officers will consider reports and testimony from expert witnesses and others on such matters as work history, earnings capacity, and family relationships.²⁷ The hearing officers in the first instance and the Special Master in a final review are fully authorized to protect the government from fraudulent claims.²⁸

C. THE DETERMINATION OF DAMAGES

In determining the amount to be rewarded to each victim, the Special Master must determine the claimant’s extent of harm, including economic and non-economic losses.²⁹ Recoverable losses are defined by the act as including economic loss encompassing lost earnings or benefits related to employment, medical expenses, and replacement services, losses due to death, burial costs and loss of business or employment opportunities.³⁰

Non-economic losses include losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and all other losses related to non-pecuniary reasons.³¹ From these awards, the Fund requires a deduction of compensation received by claimants from other

21. *See id.* at 258.

22. *See id.*

23. ATSSSA §§ 404(a)(1), 404(a)(2), 404(a)(3); *see also* Campbell, *supra* note 19, at 59.

24. ATSSSA §§ 405(b)(1), 405(b)(3); *see also* Campbell, *supra* note 19, at 59-60.

25. *See* ATSSSA § 405(b)(2); *see also* Campbell, *supra* note 19, at 63.

26. Campbell, *supra* note 19, at 63.

27. *Id.*

28. *Id.*

29. *See id.* at 86.

30. *See id.* at 86.

31. *See id.* at 85-86.

sources, such as, pension plans, life insurance policies, death benefits, and other governmental plans and programs.³² The non-economic damages are limited to \$250,000 per decedent, and an additional \$100,000 for each spouse and dependent.³³

Thus far, the Fund lists its average award after collateral offsets at \$1.49 million, and the median award after offsets at \$1.23 million.³⁴ Initially, the Fund posted the average awards based on four income levels: (i) victims who received income of less than \$50,000, the award ranged from \$250,000-\$2.7 million; (ii) victims who received income between \$50,000-\$100,000, the award ranged from \$250,000 to \$4.1 million; (iii) victims who received income between \$100,000 –\$200,000, the award ranged from \$250,000 to \$4.5 million; and (iv) victims who received income over \$200,000, the award ranged from \$250,000 to \$6.0 million.³⁵ Even with the above numbers listed as possible awards, Special Master Kenneth Feinberg stated outright that awards from the Fund exceeding the \$3 million mark will be rare and seldom appropriate.³⁶

However, Special Master Feinberg promised to provide sufficient compensation to ensure that victim's families receive at least a minimum level of resources to help meet their needs and rebuild their lives.³⁷ Accordingly, Special Master Feinberg stated that the families of the deceased should receive a minimum of \$500,000 from a combination of the Victim Compensation Fund, other state and federal programs, life insurance policies, and other sources of compensation, with single decedents receiving a minimum of \$300,000.³⁸ While the monetary benefits listed above may seem generous for some families, the manner in which the money is disbursed causes problems amongst some who stand to receive nothing. If a decedent had a combination of life insurance and pension benefits in excess of the amount that his family would receive from the Fund, the family may in turn receive nothing from the Fund.³⁹ So, despite the promise for sufficient compensation, there are those who arguably have a problem with the manner in which damages are being awarded.

III. PERCEIVED CRITICISMS OF THE VICTIMS COMPENSATION FUND

Criticisms of the Fund are primarily centered around three key ar-

32. See Kenneth P. Nolan & Jeanne M. O'Grady, A Year Later-the September 11th Victim Compensation Fund, 17 *AIR & SPACE LAW* 6,6 (2002).

33. Stephen P Watters & Joseph S. Lawder, *The Permanent Impact of September 11th*, 59 *BENCH & B. MINN.* 17, 18 (2002).

34. Mariani, *supra* note 11, at 259.

35. *Id.* at 259-60.

36. Watters & Lawder, *supra* note 33, at 18.

37. Campbell, *supra* note 19, at 77.

38. *Id.*

39. *Id.*

eas: (i) the idea that those who are guilty go unpunished; (ii) the Fund being a one size fits all approach; and (iii) the costs associated with the Fund and its application similar to that of a no-fault scheme.

A. GUILTY GO UNPUNISHED

It will be a long road for the victims and families who have suffered losses and have chosen the path of litigation while they wait for the final outcome of the lawsuit. It will also be many years before the effect of the suits on the airlines will become obvious. While the majority of the victims and families have filed complaints with the Victim Compensation Fund, there are certainly those who believe that litigation is the only answer. Families who have made the choice to litigate show no concern for the amount of money they may or may not receive, but care more about making sure justice is had for the sake of their family members who perished in the September 11, 2001, tragedy.

“I’ve chosen to go to court rather than accept a payoff from the 9/11 [V]ictims [C]ompensation [F]und. Instead, I want to know what went so wrong with our intelligence and security systems that a band of religious fanatics was able to turn four U.S. passenger jets into an enemy force, attack our cities and kill 3,000 civilians with terrifying ease. I want to know why two 110-story skyscrapers collapsed in less than two hours and why escape and rescue options were so limited.”⁴⁰

This statement, made by a woman who lost her husband at the World Trade Center, embodies the sentiment of many who suffered losses due to the September 11, 2001, attacks. Although the majority of families and victims have initiated the application process with the Fund, there is much criticism of the Fund and the manner in which it is operated by Special Master, Kenneth Feinberg. Initially, there were many individuals who believed the Fund was solely established as a cost saving mechanism for the airlines and that it was not intended, first and foremost, to benefit the victims and their families.⁴¹ This notion, along with the idea that families and victims are required to forfeit their right to sue those that may have been responsible, such as, the airlines, port authority, or any other domestic company, all lends to the belief that Congress did not intend to protect the families, rather that Congress set out to protect the airlines.

40. Beverly Eckert, *Silence Cannot Be Bought*, USA TODAY, Dec. 19, 2003, at A.23, available at 2003 WL 5325525.

41. See Campbell, *supra* note 19, at 77 (discussing how the regulatory framework established by the Special Master supports a common compensatory scheme for each victim’s family without taking into consideration each family’s circumstances in order to maintain easy administration).

B. ONE SIZE FITS ALL APPROACH

A frequent refrain from families associated with other tragedies is that the victims and families of September 11, 2001, are receiving special treatment. As one commentator has framed the debate, "I'm sure that everyone has lost someone in their lifetime. Should they get compensation, too?"⁴² American citizens have been the victims of terrorist attacks many times before the events of September 11, 2001. For instance, the Oklahoma City Federal Building bomb, the U.S.S. Cole, the first World Trade Center bombing, and the bombing of Pan Am flight 103 over Lockerbie were all terrorist incidents before September 11, 2001.⁴³ Until now there has never been a Fund created for the victims of various terrorist attacks. With respect to the Fund, debate continues among the public as to why these victims deserve compensation of any kind from the government.⁴⁴

C. THE COSTS ASSOCIATED WITH THE VICTIM COMPENSATION FUND

Unlike the usual courtroom disputes that follow with traditional tort law, the issue of compensation for these 3,000 deaths has not been limited to the insurance adjuster and the defendant.⁴⁵ Instead, 300 million tax-paying citizens are continuous underwriters of the Fund.⁴⁶ In fact, the utilization of tax dollars to finance the Victims Compensation Fund raises serious concerns about the fairness of the Fund at the exclusion of victims of other terrorist attacks.⁴⁷ Criticism of the Fund revolves around class issues such as the government putting a higher price tag on the life of a stockbroker versus that of a young electrician.⁴⁸

The Fund is a classic "no-fault" system similar to the no-fault auto insurance covering medical expenses and wage loss.⁴⁹ There is no requirement to show liability or negligence in order to recover from the Fund.⁵⁰ The Fund is structured to compensate victims and their families with average incomes for their economic damages quickly and inexpensively.⁵¹

42. See Mariani, *supra* note 11 at 258.

43. See Stephen P. Watters & Joseph S. Lawder, *The Impact of September 11th on Tort Law and Insurance*, 29 WM. MITCHELL L.REV. 809, 811 (2003).

44. Mariani, *supra* note 11, at 254.

45. *Id.* at 257.

46. *Id.*

47. Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121, 128 (2002).

48. See *id.* at 258.

49. See Watters & Lawder, *supra* note 33 at 18.

50. *Id.*

51. Campbell, *supra* note 19, at 93.

IV. BENEFITS OF THE FUND

A. UNDOCUMENTED WORKERS

Among the victims of the September 11, 2001 attacks were undocumented workers. The families of the victims that were undocumented workers before September 11, 2001, have been afraid to come forward to claim their share of the losses for fear that they will face deportation.⁵² These families fear that they will be deported by the Immigration and Naturalization Services (INS), but INS has agreed to forego action against the families who come forward to seek payment from the Fund.⁵³ The hope is that these individuals will come forward and receive the compensation they deserve.

While the government does not have to be concerned with the legal suits from these undocumented workers, the willingness of the Fund and the INS to work together ensures some form of justice for these individuals. Thus far, more than sixty families of undocumented workers from Central and South America have filed with the federal government.⁵⁴ On the other hand, because the Fund will not allow a family member to file without evidence of a death certificate, there are some families who are unable to collect payment from the Fund because they cannot prove their relative(s) perished in the September 11, 2001, attacks.⁵⁵

(B) THE DIFFICULTIES WITH SUING THOSE BELIEVED RESPONSIBLE FOR THE SEPTEMBER 11, 2001, ATTACKS

There is also a large group of insurers who intend to file suit against certain individuals and organizations they feel are responsible for the losses of September 11, 2001, including Osama Bin Ladan, Al Qaeda, Saudi Arabia, Iraq and Iran.⁵⁶ The lawsuits, brought by a variety of insurers, seek \$300 billion in damages and recovery claims against property and other insurance policies.⁵⁷ Additionally, the suit seeks to recover some of the above damages from assets belonging to the defendants and frozen by the United States government under anti-terrorism legislation.⁵⁸ According to the firm representing the group of insurers, they have already paid out or reserved for more than \$4 billion in claims.⁵⁹ The central issue then becomes the prospective likelihood of these suits

52. *Id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. Jess Bravin & Kara Scannell, *Sept. 11 Victims Can Sue Airlines, Boeing and Landlord*, WALL ST. J., Sept. 10, 2003, at B1, available at 2003 WL-WSJ 3979258.

57. *Id.*

58. *Id.*

59. *Id.*

prevailing, and the time and costs that must be expended in pursuing these claims – all issues that may prove daunting challenges to these insurers.⁶⁰

(C) PRECLUDES THE FEEDING FRENZY FOR PRIVATE ATTORNEYS

With the enactment of the Victim Compensation Fund, the government is also hoping to limit individuals from retaining counsel because counsel may dissuade families and victims from seeking relief from the Fund.⁶¹ An attorney hired on a contingency basis stands to make more money through a lawsuit because there is a potential for higher damages awards.⁶² Attorneys may also push families towards a lawsuit because of the attention and publicity the suit may bring to the firm.⁶³

(D) KEEPS AIRLINES SOLVENT BECAUSE IT ALLOWS AIRLINES LIKE FRONTIER TO RECOVER THE SEPTEMBER 11, 2001, ATTACKS.

The airline industry suffered a huge economic loss in the wake of the events of September 11, 2001.⁶⁴ Air travel stopped for four days and then resumed very slowly.⁶⁵ By the end of September 2001, domestic enplanements were down by 34% from September 2000, and international enplanements were down about 23%.⁶⁶ Airline analysts estimated that airlines would be forced to reduce their output in 2001 by about 20% or \$20 billion.⁶⁷ Two years after the September 11, 2001 attacks, the airline industry is still far from recovery.⁶⁸ Some of the after-effects of the terrorist attacks on the major airlines include mothballed planes, downsized services, and a continuous result of record losses.⁶⁹

On October 2, 2002, in a statement before the Senate Commerce Science and Transportation Committee, Leo Mullin, Chief Executive Officer for Delta Airlines, spoke of the financial impact of September 11, 2001, on the airline industry. Mullin pointed out that in 2001, industry losses for nine major airlines totaled \$7.4 billion, with these losses reaching \$10 billion if Congress does not provide aid.⁷⁰ Mr. Mullin went on to

60. *See id.*

61. Mariani, *supra* note 11 at 268.

62. *See id.*

63. *See id.*

64. Margaret M. Blair, *The Economics of Post-September 11 Financial Aid to Airlines*, 36 *Ind. L. Rev.* 367, 379 (2003).

65. *Id.*

66. *Id.*

67. *Id.*

68. Keith L. Alexander, *For Airlines, 9/11's Impact Lingers; Price Competition, Weak Economy Add to Pressures*, *WASH. POST*, Sept. 11, 2003, at E01, available at 2003 WL 62214736.

69. *Id.*

70. LEO F. MULLIN, *DELTA AIRLINES, AIRLINE INDUSTRY VIABILITY* (Oct. 2, 2002) (Congressional testimony before the Senate Commerce, Science, and Transportation Committee), available at 2002 WL 100237736.

state that airline stock analysts' estimates for 2002 losses were as high as \$7 billion, a most discouraging figure since it was projected that the airlines would recover in 2002.⁷¹ An exhibit used by Mullin indicated that as of June 2002, airline debt had grown by \$18 billion, a 21% increase since January 1, 2001.⁷² The average carrier now has a debt to capitalization ratio in excess of 90%.⁷³ These numbers are important because they show the financial impact that the September 11, 2001 attacks had on the airlines.

Despite these continued losses to some air carriers, others are finding ways to continue with business and demonstrate profits. Frontier Airlines, the number two carrier at Denver International Airport, announced that it will be the first carrier to pay back federal loans.⁷⁴ The government provided the airlines with \$5 billion in immediate aid and another \$10 million to those air carriers who qualified to assist the airlines in a recovery following the impact of the September 11, 2001, attacks.⁷⁵ Frontier made the announcement on December 22, 2003 and the company anticipates that the airline will make the last payment of \$11.6 million.⁷⁶ Initially, Frontier borrowed \$70 million from the United States government, but has been able to pay back the loan due to an increase in profits for the last two quarters.⁷⁷ Frontier attributes these profits to a change in pricing structure, making the pricing structure easier to understand and more computer friendly.⁷⁸ Additionally, Frontier credits its employees for its success.⁷⁹

The impact of the Fund in this area can be stated quite simply. With total payouts of around \$1.5 billion, the Fund has avoided pushing an industry already besieged by monetary issues into complete collapse.⁸⁰ When coupled with internal competitive refinements like those undertaken by Frontier, the result has been a leaner and more competitive U.S. airline industry.

71. *See id.*

72. *Id.*

73. *Id.*

74. *See* Julie Poppen, *Frontier First to Pay Back Federal Loan*, ROCKY MTN. NEWS, Dec. 22, 2003, at 31A, available at 2003 WL 6383797.

75. *Id.*

76. *See id.*

77. *See id.*

78. *Id.*

79. *Id.*

80. *See* Josh Getlin, *Most Families Seek 9/11 Aid; In Lieu of Suits, More Than 92% of Those Eligible Have Applied for Federal Assistance*, L.A. TIMES, Dec. 23, 2003, at A16, available at 2003 WL 68906657

V. PROPOSED APPLICATION OF VICTIMS COMPENSATION FUND TO ALL FUTURE MASS CASUALTY SITUATIONS WHERE TERRORISM IS THE CAUSE

A. WHY DO WE HAVE A TORT-BASED SYSTEM?

In the immediate aftermath of the September 11, 2001 disaster, most Americans were surprised by what was perceived as the unprecedented and immediate governmental action resulting in the establishment of the Victims Compensation Fund.⁸¹ The Victim Compensation Fund has been described as “[t]he country’s largest experiment in paying mass victims and their families without placing blame.”⁸² The main reason for establishing the Victim Compensation Fund was to provide compensation for the victims and the victim’s families who suffered losses from the September 11, 2001 terrorist attacks, while limiting the potential litigation against the airlines and other private entities. Congress created very strong incentives for those injured by the attack to keep the blame focused on the terrorists, as opposed to turning attention towards more readily identifiable entities with deeper pockets, such as the airlines whose planes were hijacked.⁸³ As one response to this, Leo Boyle, the President of the National Association of American Trial Lawyers, requested a moratorium on civil lawsuits arising out of the events of September 11, 2001.⁸⁴ Boyle has been quoted as saying that “[w]hat happened on September 11th was a mass murder, not a mass tort.”⁸⁵

The Victim Compensation Fund is the first of its kind to establish a no-fault based recovery process for victims. In the past, we have seen other mass casualty incidents handled in the courtroom under the tort laws. Tort Law provides compensation for injured people and those who suffer property damage through normative decision making by juror, allocating responsibilities along the lines of fault and causation and through voluntary decisions by risk adverse parties and insurers.⁸⁶ The concerns over tort liability and adverse jury verdicts help shape individual conduct into acceptable patterns of civic behavior.⁸⁷ The United States founded

81. Mullinix & Stewart, *supra* note 47, at 123.

82. *Id.* (quoting Amanda Ripley, *What is a Life Worth?, To Compensate Families of Sept. 11, the Government has Invented a Way to Measure Blood and Loss in Cash. A Look at the Wrenching Calculus*, TIME, Feb. 11, 2002, at 22, available at 2002 WL 8385702.

83. Jim Gash, *At the Intersection of Proximate Cause and Terrorism: A Contextual Analysis of the (Proposed) Restatement Third of Torts' Approach to Intervening and Superseding Causes*, 91 K.Y. L.J. 523, 525 (2002-03).

84. See Gash., *supra* note 83, at 524.

85. Mullinix & Stewart, *supra* note 47, at 124 (quoting Leo V. Boyle, *Victims Fund Will Work, But Don't Toss Torts*, LEGAL TIMES, Jan. 28, 2002, at 53).

86. Campbell, *supra* note 19 at 54.

87. *Id.*

its legal principles upon fairness and the concept of *stare decisis*, which is the doctrine of precedent under which it is necessary for a court to follow earlier judicial decisions where the same points arise again in litigation. The question now becomes what does this legislative reaction to September 11, 2001 mean for the future of tort law and loss allocation?⁸⁸ On one hand, the measures taken by the government appear necessary to preserve our air transportation system and insurance industry, and ensure that victims and their families receive some sort of compensation.⁸⁹ On the other hand, opponents may criticize the measures undertaken by the government as an unfair subsidy for those affected industries that are able to spread the loss to the industries' consumers.⁹⁰

An important part of determining liability under current tort based law is foreseeability, or the lack thereof. The test for foreseeability is whether the defendant is aware of facts demonstrating that the plaintiff was exposed to an unreasonable risk of harm.⁹¹ As Justice Cardozo stated "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."⁹² With respect to the foreseeability of the airlines, it seems that the blame is being placed on the wrong individual or entity. Although September 11, 2001 was not the first hijacking or terrorist attack on the United States, it was the first of its kind in the method used. September 11, 2001 was the first time that our own airliners were used as the weapon of choice for a suicide attack, killing thousands of people. In addition, the box cutters used by the terrorists were not even considered weapons for security purposes at the time of the September 11, 2001 attacks.⁹³ Principles such as foreseeability and causation will therefore be difficult to prove. For example, juries will be asked to determine if there is a breach of duty when a security company allows a passenger to board the plane carrying a box cutter, that at the time, was not prohibited on the aircraft?⁹⁴

In spite of the fact that no one anticipated the magnitude of the terrorist attacks on September 11, 2001 or the events that happened thereafter, the nation is now aware of possible increased security risks to its people. There is a potential that the standard of care and foreseeability that applies to businesses, including the airlines, will be increased. Since the attack, the government and media have warned the American people

88. Watters & Lawder, *supra* note 43 at 810.

89. *Id.*

90. *Id.*

91. *Id.* at 816.

92. *Id.* at 816-17 (quoting *Palsgraf v. Long Island R.R., Co.*, 162 N.E. 99, 100 (N.Y. 1928)).

93. *See id.* at 813.

94. *See id.*

of the likelihood and possible mode of the next terrorist attack.⁹⁵ Furthermore, the foreseeability of terrorism- the risk reasonably to be perceived- has increased significantly.⁹⁶ The formerly unthinkable is now a distinct possibility, and this heightened foreseeability has infused the duty to protect with a heightened standard of care.⁹⁷ The implication of the long-term viability of future application of the standard of care has changed.

B. ACCOUNTABILITY

Irene Golinski, whose husband Ron, died at the Pentagon said she is leaning towards filing a suit for damages.⁹⁸ She notes succinctly that for her, “[it]’s not about money, it’s about accountability.”⁹⁹ In her opinion, taking a check from the Fund does not give answers, but, alternatively, litigation may provide answers about the airlines and other parties involved.¹⁰⁰ The Victim Compensation Fund has provided families and victims with compensation, but it has not answered the questions about why this horrible event occurred, and what could have been done to prevent it from ever happening. Seemingly, the answer to who is accountable for these losses can best be solved through our traditional tort system.

At the forefront of the accountability argument is that the government had some idea about a possible attack prior to September 11, 2001. During a daylong hearing on Capitol Hill, many disclosures regarding the vulnerable airline security system at the time of the September 11, 2001 attacks were made.¹⁰¹ The hearings focused on the screening procedures, inadequate background information on the potential terrorists, and a lack of communication between intelligence agencies, the FAA, and the airlines.¹⁰² It was reported that 9 of the 19 hijackers triggered security concerns, and were subjected to additional screening on September 11, 2001.¹⁰³ According to the National Commission investigating the events of September 11, 2001, these individuals were allowed to board the planes because officials were focused on checking for explosives.¹⁰⁴ Agents at Newark International Airport flagged one of the hijackers boarding the

95. Watters & Lawder, *supra* note 43, at 810.

96. *Id.* at 817.

97. *Id.*

98. Getlin, *supra* note 80 at A16.

99. *Id.*

100. *Id.*

101. See Robert Cohen, *9/11 Hijackers Raised Security Red Flags- But Panel Says Terrorists were Allowed to Board 4 Airliners Because of Officials’ Focus on Explosives*, STAR-LEDGER, Jan. 28, 2004, at 1, available at 2004 WL 56508631.

102. *See id.*

103. *Id.*

104. *Id.*

United Airlines flight 93 that crashed in Pennsylvania.¹⁰⁵ The report states that although the hijacker's bag was screened for explosives and subsequently boarded on the airplane, the hijacker himself boarded the plane without any difficulty.¹⁰⁶ All five of the hijackers boarded American Airlines flight 77 that crashed into the Pentagon were singled out for security reasons, but again they were allowed to board with no further questions.¹⁰⁷ One had no bags; the others were held until it was confirmed that they had boarded; and three of them set off the security alarms, but after being checked with metal-detection hand wands or explosive detectors they were allowed to proceed.¹⁰⁸

Some families hope that by filing a lawsuit they will uncover information about government and corporate missteps that allowed the hijackers to carry out their plot, while other families dislike the idea that taxpayers should foot the bill for the death of their loved ones.¹⁰⁹ With taxpayers footing the bill for the Victim Compensation Fund, it is difficult to determine whether or not the right people are held responsible for the September 11, 2001 attacks. In the wake of the nation's largest budget deficit, the idea of allowing taxpayers to pay for the losses of other mass casualty situations becomes less sensible.¹¹⁰

With respect to this budget issue, in February 2004, President Bush announced a \$2.4 trillion budget that promises to cut the deficit over the coming five years.¹¹¹ The fiscal blueprint going before Congress, estimates that the budget deficit in the current fiscal year, ending September 30, will reach a record \$521 billion, from \$375 billion last year.¹¹² On President Bush's watch, the budget surplus built up by President Clinton has been replaced by what the President's accountants anticipate will be about \$1.35 trillion in deficit spending over the next five years.¹¹³ President Bush described the deficit as a reflection of the happenings that have shaped his presidency, such as the recession, the September 11th attacks, and the war in Iraq.¹¹⁴

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Michelle Garcia, *Nearly 100 Families are Suing Over 9/11*, WASH. POST, Jan. 23, 2004, A09.

110. See Greg Hitt & John D. McKinnon, *Bush Unveils Budget Package of \$2.4 Trillion*, WALL ST. J., Feb. 3, 2004, at A1, available at 2004 WL-WSJ 56918863.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

C. SYMPATHY NO LONGER AN ISSUE

When the nation woke up to the shock and horror of September 11, 2001 there was an outpouring of sympathy for the victims and their families. Everyone spoke of uniting behind our government, and most importantly, our President, as we stepped out to fight a long battle. While the outpouring of sympathy and hope remains for the victims and families who suffered extraordinary losses, there is now a demand for information on why this happened and why our country was unable to prevent the occurrence. As discussed earlier, there have been calls for hearings to shed light on the events leading up to the attack. There were intelligence reports dating back to March of 1998 about the possible use of airliners for suicide terrorist hijackings, but all the intelligence was discounted.¹¹⁵

Despite the support remaining for the victims and the families who still suffer from September 11, 2001 there is a plea for answers as to why the United States fell victim to such a horrific attack on its own soil.

VI. THE VICTIMS COMPENSATION FUND TODAY

Monday December 22, 2003, was the last date for those wishing to take advantage of the Victims Compensation Fund.¹¹⁶ All those victims who chose to apply for the Fund had to do so on or before the December 22 deadline. As of December 22, 2003, 2,838 eligible victims had filed preliminary applications on behalf of those victims who had died, or approximately ninety-five percent of those eligible.¹¹⁷ This number compared to the 1,800 who had filed one month earlier.¹¹⁸ Federal officials stated that the program had achieved its two goals of “(1) offering billions of dollars in compensation to families and to injured victims, (2) while protecting the airlines from potentially ruinous litigation.”¹¹⁹ There are many reasons contributing to the increase in the number of relatives applying on behalf of victims during the last few weeks before the deadline. Some victims and family members did not know the Fund existed, and therefore, failed to take advantage of opportunities, while others were so grief stricken that the application process seemed overwhelming.¹²⁰ Thus far, the fund has made 1,800 payments ranging from \$250,000 to \$6.9 million to families and victims of the September 11 at-

115. *See id.*

116. *See Relatives of Victims Rush to File for 9/11 Fund, supra* note 13 (“Officials with the federal Victim Compensation Fund . . . said applications had come in by the hundreds as the hours to the midnight deadline wound down Monday [December 22, 2003]”).

117. *Id.*

118. *Id.*

119. *Id.*

120. *See id.*

tacks.¹²¹ These 1,800 payments have totaled roughly \$1.5 billion in spending for the Fund.¹²²

VII. CONCLUSION

By most accounts the Victim Compensation Fund has been successful. With over 95 percent of those who were eligible for the Fund applying, it has achieved its goal. There are many benefits that the Victim Compensation Fund provides, such as providing an alternative to litigation, allowing undocumented workers to recover benefits, preventing a feeding frenzy for private attorneys, and giving the airlines the opportunity to recover from the losses suffered because of the September 11th attacks. While these benefits have made a significant difference, the Fund has received much criticism.

Those who have chosen to litigate believe that someone or something should be held accountable for the tragic events of September 11, 2001. For these victims it is not about the money that they might receive if they are triumphant in the traditional tort litigation system, but it is about answers. An additional concern is that taxpayers should not be responsible for the lack of care exercised by the airlines and the remaining defendants. Many of the families are angered by the idea that the Fund places a higher value on the lives of those individuals who made a higher wage versus those who worked for next to nothing. Furthermore, there are those families who have suffered losses at the hands of other terrorist attacks and have not been given the opportunity to benefit from such a Fund.

As a nation, we are in a time where there is a serious call for answers about how and why September 11, 2001 happened, and the subsequent events that have brought us to war in Iraq. The unique implications of September 11, 2001 for the airline transportation industry have undeniably changed the landscape of competition for at least the next decade, and as one of the principle remedies involved in recovering from this attack, the Fund represents a model of compensation to suit the new realities of the 21st century. Thus far, it is fair to say that the Fund should not be applied to all mass casualty situations below the magnitude of another September 11th style attack, but in those situations reflective of this new form of asymmetrical warfare, it remains a viable alternate to tradition tort litigation to allow a nation to promptly recover form attack.

121. *Id.*

122. *Id.*