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REMEDIES FOR VICTIMS OF TERRORISM

*Georgene Vairo**

I. Introduction

When two jetliners slammed into the World Trade Center, another dive-bombed into the Pentagon, and the final one ditched into a field in Pennsylvania, our world and our lives changed. I happened to be in New York City that day, waiting in my brother's driveway for a car to take me to the airport for my 10:30 a.m. American Airlines flight back to Los Angeles. My mother was with me, waiting for a car to pick her up to take her to Pennsylvania Station for a train to Florida. As we stood there, waiting anxiously for our already late respective cars, the ground under my feet felt as if it was shaking like an earthquake. Based on my L.A. experience, I figured it was about a 2.2 magnitude tremor. Because I had been standing on the driveway since a little after 8:30 a.m., I had no idea that what I must have felt was the second plane crashing into the South Tower.

When the cars finally arrived, both at about 9:20 a.m., the driver of my mother's car said he could not bring her to Penn Station because he heard that Manhattan was shut down. I decided nonetheless to try to make a mad dash for Kennedy airport. Feeling anxious for some unknown reason beyond the fact that I was late, we decided to ask the driver's dispatcher about the status of the airports. Of course, we were told that all the airports had been shut down, too. I returned to intercept my mother, and we figured out how to break back into my brother's empty house.

Once we did, we gasped together as we turned on the television and watched the World Trade Towers burning. We kept watching in

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horror, as everyone else in the country probably was, and so many people throughout the world were, but our thoughts immediately turned to my brother. He left us at about 9:00 a.m. to take the subway into his office two blocks from the World Trade Center. Where was he? Of course, cell phones weren't working; we could not get through to him and he could not get through to us.

We had no idea whether he was dead or alive; stuck in a dark subway tunnel; being overrun by other panicked passengers. There was no information about the subways at all.

Luckily, he never made it past Fiftieth Street. My brother made his way home by walking and catching lifts once out of Manhattan, but it took hours for him to get home. When he walked in the door hours later, we all hugged and cried. We were a lucky family. So many others were not. It appeared that the deaths, the injuries, and the suffering would be on a scale unknown to our country. Even those of us who did not lose a family member lost friends, or had close friends who lost their loved ones. Additionally, we lost our sense of security and invulnerability as a nation.

When most of us think about September 11, 2001, we think about the horrible images we saw, and wonder why anyone would want to cause such death, damage and destruction. At the time, we thought about finding the perpetrators and punishing them, but few of us considered the civil lawsuit landscape.

Nonetheless, the needs of the families of the people injured and killed stayed in our minds and our hearts. Unprecedented private giving to charities providing for the families of the dead and the injured poured out. Additionally, there was quite unprecedented restraint on the part of the plaintiffs' bar. For instance, Leo V. Boyle, president of the Association of Trial Lawyers of America (ATLA), urged his members not to bring any lawsuits.¹ Instead, we saw bar associations coming together to provide pro bono services to the families in need.² But as a lawyer, and particularly as a law

1. See Diana B. Henriques, *Lawyers Offer Free Advice In Tapping Federal Fund*, N.Y. TIMES, Oct. 15, 2001, at B11; see also William Glaberson, *The Lawyers: Lawyers Said to Back Compensation Plan to Polish Image*, N.Y. TIMES, Jan. 14, 2002, at A9.

2. Trial Lawyers Care (TLC) is one such organization set up, by ATLA, after the attacks to provide legal services. Visit the organization's website at <http://911lawhelp.org/index.htm> (last visited Feb. 28, 2002).

professor who has been studying mass torts for decades,³ I was curious to see how the victims of the World Trade Center (WTC) and Pentagon bombings would be compensated. Would there be lawsuits? How many of them? Who would the defendants be? How much money would there be to pay? How could the victims get any money out of Osama bin Laden? Would Congress do anything? In my first classes after the September 11 attack, I asked my Civil Procedure and Complex Litigation students these questions. We discussed various types of claims that different plaintiffs might bring—personal injury, property damage, loss of business; problems of obtaining jurisdiction over and enforcing judgments against Osama bin Laden and others responsible for the attacks; theories of liability for holding the airlines, World Trade Tower officials, and others responsible, and the complex insurance coverage disputes that would arise, among other issues. I suggested that it would take some time for the contours of the litigation to develop, and that it was unlikely we would see Congress enter the fray in the near term.

Much of what we predicted has transpired. A complicated array of cases is already occupying the time of the courts, and many others will be filed in the future. To name a few: 1) there is complex litigation involving the insurers of the WTC over whether the plane crashes in Lower Manhattan were part of one occurrence or two, the resolution of which would result in proceeds of \$3.5 billion instead of \$7 billion;⁴ 2) various personal injury suits have been filed against Osama bin Laden and others;⁵ 3) businesses who lost money due to

3. See Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 *FORDHAM L. REV.* 167 (1985) [hereinafter *Multi-Tort Cases*]; Georgene M. Vairo, *The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 *LOY. L.A. L. REV.* 79 (1997) [hereinafter *Claimants Trust*]; Georgene M. Vairo, *Essay: The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617 (1992) [hereinafter *Paradigm Lost*].

4. See Stephen Labaton, *A Nation Challenged: Liability; Insurer Sues to Limit Its Payout for World Trade Center*, *N.Y. TIMES*, Oct. 23, 2001, at B5. Since the attacks, Larry Silverstein, who holds a ninety-nine year lease on the WTC property, has settled with two of his other insurers. Ace Bermuda Insurance, Ltd. agreed to pay \$298 million, and XL Insurance Ltd. settled for \$67 million. See Jonathan D. Glater, *Holder of Trade Center Lease Settles with Two Insurers*, *N.Y. TIMES*, Feb. 16, 2002, at B3.

5. See Mark Hamblett, *Bin Laden Named in Suit: N.J. widow files first action stemming from Sept. 11 attack*, *NAT'L L.J.*, Oct. 22, 2001, at A4. This

the curtailment of flights in the immediate aftermath of September 11 and the steep drop in tourism have brought numerous suits.⁶ Notices of claim have been filed against the city of New York by rescue workers and others who believe that breathing the noxious fumes emanating from the WTC site has caused respiratory problems.⁷

After briefly summarizing these types of cases, and the interesting set of federal statutes that could be invoked to provide federal subject matter jurisdiction over cases involving foreign or American victims of terrorism or human rights abuses suffered in foreign countries,⁸ I will focus principally on the Congressionally enacted September 11th Victims Compensation Fund of 2001 (VCF), and discuss some of the interesting issues the VCF raises.

In Part II, I will canvass the traditional tort lawsuits that victims of the September 11 attacks may bring, as well as the specialized statutes that provide federal jurisdiction and remedies for victims of terrorism. Part III discusses the VCF. I was quite surprised that Congress acted as quickly as it did. But, as a proponent of aggregated solutions to mass tort cases, I thought the move had great potential.⁹ Lawyers ought not get rich off of this disaster. All victims should receive reasonable compensation within a short time frame. However, aside from questions about the fairness of the regulations prepared by the Special Master and problems with the statutory scheme, Congress' action raises some interesting questions relating both to fairness and federalism. After describing the VCF and some of its problems, in Part IV, I will turn to a consideration of these questions.

II. TRADITIONAL TORT AND SPECIALIZED FEDERAL REMEDIES

The terrorist attacks on September 11 created a vast range of plaintiffs. It was obvious that those suffering personal injuries or the representatives of those killed on September 11 would file civil

article provides a brief description of *Doe v. The Islamic Emirate of Afghanistan*, 01 Civ. 9074, a case filed in the Southern District of New York by a Jane Doe plaintiff regarding the death of her husband in the North Tower.

6. See Robert A. Schwinger, *High Court Suggests No 'Economic Loss' Remedy for Disaster*, N.Y.L.J., Nov. 27, 2001, at 7.

7. See John J. Goldman, *N.Y. Rescue Workers Move to Sue Over Respiratory Damage*, L.A. TIMES, Feb. 12, 2002, at A10.

8. See *infra* notes 13-25 and accompanying text.

9. See, e.g., *Claimants Trust*, *supra* note 3, at 156-66.

lawsuits for compensation. This original plaintiffs' group would include people killed in the four jet crashes, as well as the people working at or visiting the WTC and the Pentagon. It also would include the police officers, firefighters, and other rescue workers who were injured or died as a result of the attacks.

Other plaintiffs would sue for property damage sustained as a result of the attacks and for loss of business resulting from the shutdown of air traffic in the days following the attacks and the drastic decline in travel in the wake of the attacks. Given the magnitude of damage, it was clear that there would be insurance coverage disputes.

A new set of claimants recently emerged in the months after September 11. There is continuing concern that the air quality in the vicinity of the WTC is unhealthy. For three months, fires continued to burn. Many of the workers at the site developed the "WTC cough" and a host of other health problems. Over one thousand notices of claim have been filed on their behalf against the city of New York. It is quite possible that other workers, as well as people who live and work in the area of the WTC, will file suits as well.

Who would the plaintiffs sue? There are several sets of defendants: 1) American Airlines and United Airlines, as well as the companies charged with airline security; 2) owners, operators of the buildings; WTC security personnel; the City and Port Authority; the architects and contractors who designed and built the WTC; and other similar defendants (WTC defendants); 3) Osama bin Laden and other individuals, entities, or states responsible for the attacks; and 4) various governmental entities. As a professor who writes and teaches in the area of mass torts, claims arising out of the WTC and Pentagon disaster would provide a career's worth of classroom examples, articles, and books. There would be numerous procedural and substantive problems managing and resolving the lawsuits that have already been filed, and that are likely to be filed in the future.

With respect to the first set of defendants, there would be no problems obtaining jurisdiction or enforcing judgments. However, given that those who hijacked the jets brought no illegal objects aboard,¹⁰ determining the liability of the airlines could be somewhat

10. See generally Andrew Tilghman, *For Stranded Travelers, the Frustration Builds*, THE TIMES UNION (Albany, NY), Sept. 15, 2001, at B1

problematic. Of course, various theories of negligence could be advanced, but the case for liability is arguably not as strong as in the case of Pan Am Flight 103, the Lockerbie crash case,¹¹ where terrorists smuggled a bomb aboard the jet. And, despite the sympathy factor, it is arguable that jurors would be less likely to find the airlines culpable.

With respect to the WTC defendants, there are some indications that some WTC security personnel told the workers in the second tower that they should go back to their offices.¹² Otherwise, their degree of culpability appears to be somewhat tenuous as well.

The terrorists, of course, are obviously substantively liable, but how will personal jurisdiction be obtained and judgments enforced? With respect to governmental entities such as the city of New York, the state and federal government, and their agencies, to what extent will sovereign immunity preclude recovery by those injured? These questions just scratch the surface.

Additional issues are presented by the use of various specialized statutes that provide an opportunity to sue the terrorists and their sponsors in United States courts. Briefly, however, there are several avenues available to victims of terrorism, both United States citizens and foreign citizens, for seeking damages for personal injuries suffered either in the United States or in other countries. The Alien Tort Claims Act, enacted in the first Judiciary Act of 1789,¹³ provides for federal subject matter jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁴ This statute was little used until the Second Circuit's landmark case, *Filartiga v. Pena-Irala*,¹⁵ when that court held the federal courts had jurisdiction over a suit against a former Paraguayan police officer for the alleged torture and murder of the plaintiff's deceased Paraguayan relative. According to the court, the customary international law prohibits official torture, and

(explaining that under the new airline security regulations, passengers will be prohibited from carrying items such as boxcutters).

11. *In re Air Disaster at Lockerbie Scot.*, 37 F.3d 804, 811 (2d Cir. 1994).

12. See John Cichowski, *Cherished Memories of Those Missing . . . Met with an Outpouring of Compassion*, THE REC. (Bergen County, NJ), Sept. 15, 2001, at A4.

13. Ch. 20 § 9(b), 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350 (2000)).

14. 28 U.S.C. § 1350 (1994).

15. 630 F.2d 876 (2d Cir. 1980).

section 1350 provides subject matter jurisdiction for tort claims based on violations of that law.

The import of this statute is that an alien can sue another alien in a United States court for violations of international law even when the violations of international law take place outside the United States. Arguably, this statute would provide federal subject matter jurisdiction over claims by aliens killed or injured in the September 11 disaster against Osama bin Laden and others responsible for the attack. Without this statute, such plaintiffs could sue in state court, but not federal court, because there would be no alienage jurisdiction and their tort claims do not arise under federal law.

Not all courts were as receptive as the *Filartiga* court to the use of United States courts in cases where the claims arise in a foreign country. In another important case, *Tel-Oren v. Libyan Arab Republic*,¹⁶ the Court of Appeals for the District of Columbia held that the Alien Tort Claims Act did not provide federal subject matter jurisdiction over a case brought by citizens of Israel, the United States and the Netherlands against the Palestine Liberation Army (PLO) and Libya for murdering a number of civilians during a terrorist attack in Israel. Although the three-member panel so held on different grounds, they were unanimous that the Alien Tort Claims Act could not reach such claims. Partially in response, Congress enacted the Torture Victim Protection Act (TVPA).¹⁸ TVPA provides a federal cause of action in favor of persons tortured or extrajudicially killed, and therefore jurisdiction under section 1350, against any individuals acting under the actual or apparent authority or color of law of any foreign state.

Directly combating the growing problem of terrorism, Congress enacted the Antiterrorism Act of 1990.¹⁸ Primarily a criminal statute, the Antiterrorism Act also provides a potent civil remedy tool. Section 2333 of the Antiterrorism Act allows plaintiffs injured or killed as a result of an act of international terrorism to sue for treble damages and attorney's fees.¹⁹ Unlike the case of the Alien Tort Claims Act and the TVPA, where federal and state court jurisdiction

16. 726 F.2d 774 (D.C. Cir. 1984).

17. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1993)).

18. 18 U.S.C. §§ 2331-2339 (2000).

19. See 18 U.S.C. § 2333.

are concurrent, the private remedy available under the Antiterrorism Act is exclusively federal.

The Antiterrorism Act defines international terrorism as acts that occur primarily outside of the United States.²⁰ Therefore, the Antiterrorism Act should be a powerful tool in cases where terrorists act outside of the United States and kill or injure United States citizens in foreign countries. The Daniel Pearl case, involving the *Wall Street Journal* reporter killed in Pakistan, may be an example. A problem with using the Antiterrorism Act in connection with the September 11 events, however, is the limitation of the Act to cases where the acts occurred primarily outside the United States. A case can be made that although the injuries were suffered in the United States, the planning that took place outside of the United States satisfies the "primarily" requirement. However, Congress rectified any ambiguity when it enacted the USA PATRIOT Act of 2001 (the "Patriot Act").²¹ The Patriot Act expands the definition of the types of terrorism that would give rise to a claim under section 2333. Section 802 of the Patriot Act defines domestic terrorism as acts that take place primarily within the United States.²²

Although enforcement of judgments rendered under any of these provisions will be difficult to obtain, the various acts of Congress freezing the assets of the terrorists and their cohorts provide some solace. The year 2000 Terrorist Asset Report to Congress by the Office of Asset Control,²³ for example, indicated that \$3.7 billion in assets of six of seven Department of State designated sponsors of terrorism were blocked by the United States. An additional \$254 million of Taliban assets were blocked. By Executive Order on September 23, 2001, President Bush froze the assets of twenty-seven entities believed to be supporting the Al Qaeda network.²⁴ This resulted in the blocking of additional millions of dollars more, including at least \$5 million in the United States. Unfortunately, however, plaintiffs may not be able to enforce judgments against these assets because, in the exercise of its foreign affairs policies, the

20. See 18 U.S.C. § 2331(c).

21. Pub. L. No. 107-56, 115 Stat. 272.

22. See *id.* § 802.

23. See <http://www.ustreas.gov/ofac/bulletin.txt> (last visited Mar. 11, 2002).

24. See Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

United States government may not release the funds to private parties.

To the extent that victims of terrorism seek a remedy from sovereign nations listed as a sponsor of terrorism (neither the Taliban, because the United States never recognized the Taliban government, nor Al Qaeda, a non-governmental entity, could seek such protection), section 1605 of the Foreign Sovereign Immunities Act generally provides an exception to the assertion of sovereign immunity in cases against a foreign sovereign for personal injuries caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.²⁵ When the section 1605 exception is satisfied, the federal courts will have jurisdiction over the foreign sovereign pursuant to 28 U.S.C. § 1330. Again, however, there may be problems with enforcement of judgment.

III. THE SEPTEMBER 11TH VICTIMS COMPENSATION FUND

Congress' decision to establish the VCF to provide a quick and reasonable remedy for those who suffered personal injuries as a result of the events of September 11 held the promise that many of the problems discussed in the preceding section could be avoided. As we will see, however, the VCF is not a perfect solution.

A. The Victim's Compensation Fund: Procedures Under the Interim Final Rule

Shortly after the terrorist attacks of September 11, Congress took action to offer an alternative to court litigation for victims of the attacks. On September 22, 2001, Congress provided for the creation of the September 11th Victim Compensation Fund of 2001 as part of the Air Transportation Safety and System Stabilization Act (the Act).²⁶ The purpose of the fund is to compensate any victim or relative for injury or death resulting from the September 11 attacks.²⁷ The Act provided basic definitions and outlined general procedures to be used in devising the system of compensation. It also authorized Attorney General John Ashcroft, acting through a Special Master

25. See 28 U.S.C. § 1605(a)(7) (West Supp. 2001).

26. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 237 (2001).

27. See *id.* (outlining the provisions for establishing VCF).

appointed by him, to administer the plan and promulgate procedural and substantive rules to that end.²⁸

The focus of this portion of the Article is to outline the proposed rules promulgated under the Act and published for comment in December 2001 (the "Interim Rule").²⁹ The Interim Rule covered claimant eligibility, the procedures for filing a claim, the review process, methods of determining the amount of compensation, distribution of payments, and limitations. This section will begin with an overview of the initial procedures promulgated pursuant to the Act, then it will address eligibility for compensation, including calculation of compensation amounts, and will also address some of the concerns the Interim Rule provoked. The next section of the Article will assess the effect that public comments and criticism of the Interim Rule had on the Final Rule issued by the Department of Justice on March 7, 2002.³⁰

1. Procedures: applying for compensation from the fund

One of the first steps in developing a compensatory scheme of this size is to determine how people should apply for benefits. On November 26, 2001, Attorney General John Ashcroft appointed Kenneth Feinberg as Special Master. The Special Master was charged with the monstrous, and at times unenviable, task of implementing the Act by drawing up procedures and rules for administering the VCF. Among the Special Master's first duties was to create an application form.³¹ The eligibility form must be filed by a victim or the victim's personal representative within two years after regulations are issued, and has the effect of waiving the applicant's right to litigate the claim in court.³² In addition, at the time of filing, eligible applicants may submit a request for advance benefits to

28. See Pub. L. No. 107-42, § 404, 115 Stat. 237-38 (2001).

29. See September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 21, 2001) (interim final rule with request for comments) [hereinafter Interim Rule].

30. September 11th Victim Compensation Fund of 2001 Final Rule, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (to be codified at 28 C.F.R. pt. 104) [hereinafter Final Rule].

31. See *Eligibility Form and Application for Advanced Benefits from the September 11th Victim Compensation Fund of 2001*, at <http://www.usdoj.gov/victimcompensation/eligformappadvben.pdf> (last visited Mar. 11, 2002).

32. See Interim Rule, *supra* note 29, at 66,283.

alleviate immediate financial hardship, which is later deducted from the Special Master's final award.³³

Submitting the application thus begins the VCF process and precludes other forms of recovery, including civil lawsuits.³⁴ The claimant must then fill out a Death or Personal Injury Compensation Form and submit it along with relevant documentation, such as tax returns and disclosure of benefits received from collateral sources.³⁵ The claimant must select one of two tracks: Computation of Presumed Award (Track A) or a Hearing (Track B).³⁶ Once this is substantially complete, the claim is deemed filed, and the Special Master has 120 days to determine an award.³⁷ Regardless of whether the claimant selects Track A or B, the application is subject to an initial determination of eligibility. If claimants are initially found ineligible for VCF compensation, they may appeal to the Special Master.³⁸

a. Track A

Once a claim is deemed filed, a claims evaluator has forty-five days to notify the Track A claimant of the presumed award.³⁹ The claimant may then either accept the award and demand payment, or file supplemental submissions within twenty-one days and request review before the Special Master or his designee.⁴⁰ The Special Master must then decide whether there was an error in determining the presumptive award or whether there are "extraordinary circumstances" that were not considered in arriving at the presumptive award.⁴¹ The Special Master then notifies the claimant

33. *See id.* at 66,284-85.

34. A straightforward flowchart detailing the claims process is available at the Department of Justice website at http://www.usdoj.gov/victimcompensation/flow_chart_d19.pdf (last visited Feb. 17, 2002).

35. The definition of "collateral source" is an extremely volatile issue, as compensation from collateral sources offset VCF awards. *See infra* Part III.A.3.b.

36. *See* Department of Justice website, at http://www.usdoj.gov/victimcompensation/flow_chart_d19.pdf (last visited Feb. 17, 2002).

37. *See* Interim Rule, *supra* note 29, at 66,283.

38. *See id.* at 66,285.

39. *See id.*

40. *See id.*

41. *See id.*

in writing of the final award determination, which is not subject to any further review.⁴²

b. Track B

If the claimant elects Track B, the object is to present information necessary for a complete understanding of the claim.⁴³ The Special Master may take various factors into account in adjusting the award, including “the identity of the victim’s spouse and dependants; the financial needs of the claimant; facts affecting noneconomic loss;”⁴⁴ and any other relevant factors the claimant may proffer. Under the Interim Rule, review hearings are generally limited to a maximum of two hours and may be public or private.⁴⁵ Counsel may be present, and the claimant may present witnesses, including experts.⁴⁶ After the hearing, as in Track A, the Special Master issues a final, binding award determination.⁴⁷

2. Eligibility: who may apply for compensation?

The Act requires that the Special Master place certain limitations on who may apply for compensation from the VCF. Simply stated, those eligible to apply for compensation are individuals present at the WTC, Pentagon and the Pennsylvania crash sites who suffered physical injury as a “direct result” or in the “immediate aftermath” of the crashes, and personal representatives of those who died on American Airline Flights 11 and 77 or United Airlines Flights 93 and 175.⁴⁸ “Immediate aftermath” was initially defined as the period ending twelve hours after the crashes, or in the case of rescue workers, ninety-six hours after the crashes.⁴⁹ The Interim Rule defined “physical harm” as “a physical injury to the body that was treated by a medical professional within 24 hours of the injury having been sustained or within 24 hours of rescue”⁵⁰

42. *See id.*

43. *See id.*

44. *Id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.* at 66,282.

49. *See id.* These standards are modified in the Final Rule. *See infra* Part III.C.

50. Interim Rule, *supra* note 29, at 66,282.

Furthermore, the Act defined “present at the site” within certain geographic limitations.⁵¹ In addition, if there is a dispute as to who the personal representative of a deceased victim is, the Special Master may suspend determination of the claim. Alternatively, he may calculate the appropriate amount, if sufficient information is available, and place the payment in escrow until the dispute is resolved by parties or by the proper court.⁵²

The limitations on the type of harm compensated through the VCF serve an important purpose. Congress designed the VCF to compensate those who have suffered physical harm, not those whose *sole* claim is emotional harm or property damage.⁵³ Importantly, those who claim latent injuries are likewise ineligible. The Special Master reasoned that to include such people would cause two potential problems. Specifically, because of the legally preclusive nature of the VCF claims process, claimants who make claims against the VCF for latent injuries, but later manifest injuries greater than those claimed, would be undercompensated. Conversely, those who make latent claims now and manifest *de minimis* injuries (or none at all) will be overcompensated.⁵⁴

The geographic and temporal limitations purport to serve Congressional intent as well. Limiting the geographic area allows recovery for those persons who were at a location in which there was “a demonstrable risk of physical harm resulting from the impact of the aircraft or any subsequent fire, explosions, or collapse of buildings”⁵⁵ This limitation also goes to the requirement that compensated injuries be a direct result of the attacks. The temporal requirement serves a similar end.

Of course, in reality, these limitations may undermine the success of the VCF. For instance, although directly related to the WTC attack, many who will claim personal injury due to their inhalation of the polluted, smoky air in the months after September 11 are probably precluded from seeking compensation. Similarly, the shopowners in the vicinity who suffered property damages and

51. *See id.*

52. *See id.* at 66,283. In many cases, the determination of the appropriate representative will turn on state law.

53. *See id.* at 66,276.

54. *See id.*

55. *Id.*

loss of business opportunity in the aftermath of the attack will also be ineligible. Arguably, the VCF should provide a vehicle for the resolution of all claims related to the attacks. Although there always will be a point at which a line must be drawn, perhaps it was drawn too soon.

3. Calculating losses: how much and why?

Of all the determinations and rules promulgated under the Act, calculation of the final award is the most difficult for the Special Master because it involves an assessment of the value of a life. As lawyers, we may be used to applying economic concepts when determining the appropriate amount of damages for death or injuries. For the victims and their families, however, such calculations appear callous, unfair and inhuman. The Special Master tried to overcome these concerns by articulating that his system would be based upon two primary objectives: 1) to make the process efficient, straightforward, and understandable to claimants; and 2) to treat each claimant fairly based on individual circumstances *and* relative to other claimants.⁵⁶ In formulating rules, the Special Master is attempting to inform potential claimants and equip them with the proper tools to determine whether to litigate or engage in claims resolution via the VCF.

a. economic loss computation

The Special Master issued a schedule of presumed economic losses that serve as a guideline for potential claimants in evaluating their decision to file a claim with the VCF.⁵⁷ The calculation of economic losses under the Interim Rule involves five steps. First, the victim's pretax earnings for the previous three years are considered, including employer benefits. Second, wage growth is calculated to compensate for promotions and inflation at a rate of 6.6% for victims up to thirty years of age, 5.1% for victims ages

56. See *id.* at 66,728.

57. See *Presumed Economic and Non-Economic Loss Tables*, at http://www.usdoj.gov/victimcompensation/vc_matrices.pdf (last visited Mar. 11, 2002) [hereinafter *Loss Tables*].

thirty-one to fifty, and 4.2% for victims over fifty.⁵⁸ Third, the schedule assumes an average work life as defined by the Department of Labor. Fourth, the amounts are adjusted to present value so that they may be paid in a lump sum, reflecting investment potential. Finally, the sum is reduced based on “consumption factors.”⁵⁹ The Special Master initially estimated that the average recovery, subject to the collateral source rule discussed below,⁶⁰ would be \$1.6 million,⁶¹ and the range of recoveries for economic damages would be between approximately \$300,000 and \$4.35 million.⁶²

b. noneconomic loss and collateral source compensation

Calculation of noneconomic losses and the offset of collateral source compensation are extremely controversial. The Special Master initially capped noneconomic loss at \$250,000 per decedent, plus \$50,000 for the victim’s spouse and each dependent. This is equivalent to capping “pain and suffering” in the tort context. In addition, the Act requires that any VCF award be offset by recovery from “collateral sources.”⁶³ Thus, monies received from insurance policies, pensions, death benefit programs, and the like may be deducted depending on the Special Master’s final definition of “collateral compensation.”⁶⁴ It should be noted that the Interim Rule did not include contributions from charities as collateral source

58. *See id.* These wage increase assumptions are based on data gathered from the Board of Actuaries of the Civil Service Retirement System and the Board of Actuaries of the Military Retirement System.

59. *Id.* These consumption factors include the amount the decedent would have consumed during his or her work life. This includes costs for food, clothing, and transportation but excludes housing, health, education, insurance, pensions, and cash contributions.

60. *See infra* Part III.A.3.b.

61. *See* Diana B. Henriques & David Barstow, *Victims’ Fund Likely to Pay Average of \$1.6 Million Each*, N.Y. TIMES, Dec. 21, 2001, at A1.

62. *See id.* I should note that this incredibly wide range is due in part to the fact that economic awards vary depending on age, number of dependents, and income at time of death. The first figure is for a single decedent, age sixty-five, with no dependents, who made \$10,000 at the time of death. The latter is for a married decedent, age thirty-five, with two dependents, who made \$175,000 at the time of death. The controversy behind such disparity is addressed below.

63. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(6), 115 Stat. 230, 239 (2001).

64. *See* Interim Rule, *supra* note 29, at 66,279.

compensation. However, the Special Master may later determine that such benefits actually are a collateral source.⁶⁵

B. *The Victim's Compensation Fund: Problems*

Public controversy ensued after the issuance of the Interim Rule on December 21, 2001. Much of the negative comment arose out of the collateral source provisions of the Interim Rule. The Special Master bore the brunt of much criticism over this rule, perhaps undeservedly because the Act itself provided for the collateral source rule and made offsets *mandatory*.

As two commentators stated, “[T]he regulations deduct certain benefits, like life insurance and pensions, from compensation awards The proposed rules turn the Congressional legislation on its head”⁶⁶ In fact, the collateral source offset keeps the statute standing on its feet.⁶⁷ To the extent that the collateral source rule is problematic, the defect is in the Act itself. Senator John Corzine of New Jersey admitted that “Congress, in its haste to establish the [VCF], was shortsighted in requiring [deduction of] so-called collateral sources [I]t is up to Congress to fix the inequity of the collateral source rule.”⁶⁸

It also appears the public and many attorneys misconceived the nature of the Interim Rule. Congressional desire to make payments as quickly as possible likely led to giving the Interim Rule the effect of law upon its publication. However, the Rule clearly states that “[t]his rule is designated ‘interim,’ however, because the Department [of Justice] is also seeking further comment . . . and may expand or adjust aspects of the rule”⁶⁹ The entire purpose of notice and

65. *See id.*

66. Fred Price & Mitch Kleinman, *The Damaged Spirit of the Sept. 11 Fund*, N.Y. TIMES, Jan. 18, 2002, at A24.

67. Pub. L. No. 107-42, § 405(b)(6) states: “The Special Master *shall* reduce the amount of compensation . . . by the amount of the collateral source compensation the claimant has received or is entitled to receive” In addition, Pub. L. No. 107-42, § 402(4) defines “collateral source” to include “life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments”

68. Sen. Jon S. Corzine, *Fix the Victims' Fund*, N.Y. TIMES, Jan. 28, 2002, at A14. In addition, Senator Corzine criticizes other politicians for taking Kenneth Feinberg “to task” for the collateral source rule, preferring to cite Congressional culpability. *See id.*

69. *See* Interim Rule, *supra* note 29, at 66,274.

comment rulemaking is to allow the public the opportunity to suggest changes that will make the rule better or more workable.

Still others question the fiscal wisdom of the VCF and the precedent it sets. While Senator Hillary Rodham Clinton queried, “[H]ow do you put a price tag on a life?” others asked why such a scheme was not created after the bombings in Oklahoma City, Nairobi, or even the bombing of Pan Am Flight 103.⁷⁰ The quick creation of the VCF was seen as a betrayal for many of the victims’ relatives in these other tragedies who have unsuccessfully sought compensation from the government.⁷¹ The Special Master is in a precarious position of administering a fund without a ceiling while attempting to achieve fair results for victims and their families. The “tension between providing compensation to families and limiting the government’s financial exposure” is no small task.⁷²

In sum, the Special Master faces pressure from all sides. Given the number of claimants, it was unlikely that he would arrive at a Final Rule that pleases all parties. Pressure from claimants and attorneys is likely to continue throughout the process of resolving claims. In addition, Congress and taxpayers will be keeping an eye on the payments. Although most Americans probably would like to see the victims and their families made “whole,” most also probably do not want to see them overcompensated to the point where the VCF becomes a budgetary black hole. There are some who are outraged that the victims’ families could become millionaires.⁷³ There are others who understandably complain that the stringency of state law will result in no recovery for members of alternative families, such as gay and lesbian partners or straight domestic partners, including those with children.⁷⁴ Others complain that the Interim Rule does not incorporate a measure of economic damages

70. Diana B. Henriques & David Barstow, *A Nation Challenged: Victims’ Compensation; Fund for Victims’ Families Already Proves Sore Point*, N.Y. TIMES, Oct. 1, 2001, at A1. However, bills are pending in Congress that would provide the victims of those attacks with the same benefits offered by the VCF.

71. *See id.*

72. *Id.*

73. *See* Final Rule, *supra* note 30, at 11,237.

74. *See* Elissa Gootman, *Seeing Families, Senator Calls For Changes in Sept. 11 Fund*, N.Y. TIMES, Jan. 14, 2002, at B2. However, the Special Master has stated that he will provide benefits to the extent permitted by state law.

for the value of household work.⁷⁵ Some objections have been raised to the use of public sector statistics to determine the economic losses of people who worked predominately in the private sector. Additionally, there were objections to the plan to determine awards partially based on gender.

C. Final Rule Changes: Will They Help Alleviate Outcry?

On March 7, 2002, the Special Master issued the Final Rule that incorporated several significant changes.⁷⁶ The simplest change was increasing the presumed noneconomic loss for spouses and dependents from \$50,000 each to \$100,000.⁷⁷ Also, regarding eligibility, the temporal limitation for “physical harm” was expanded to “within 72 hours of injury or rescue for those victims who were unable to realize immediately the extent of their injuries or for whom treatment by a medical professional was not available,”⁷⁸ from the initial twenty-four hour restriction. Additionally, the Special Master is given great discretion in extending the time period for rescue personnel on a case-by-case basis.⁷⁹ This may or may not allow rescue workers to recover for injuries such as “WTC cough,” depending on how much discretion is exercised.

The rules for collateral source offsets were likewise modified to address some of the concerns raised by comments to the Interim Rule. The Final Rule allows the Special Master to exclude insurance premiums and other forms of self-contribution, made during the decedent’s lifetime, from the offset calculus.⁸⁰ The Special Masters’ statement, preceding the Final Rule, explains that certain government benefits should not be included in determining the offset amount.⁸¹ These include: victim tax relief, contingent Social Security benefits, contingent workers’ compensation benefits, 401(k) accounts, savings

75. See Final Rule, *supra* note 30, at 11,233, 11,239. This portion of the Special Master’s statement notes the initial concern that replacement services were not mentioned in the Interim Rule.

76. See *id.*

77. See *id.* at 54. The presumed loss for decedents remained at \$250,000.

78. *Id.* at 11,245.

79. See *id.* (“Or within such time period as the Special Master may determine for rescue personnel.”)

80. See *id.* at 11,246.

81. See *id.* at 11,233-34.

accounts, or other investments.⁸² Most importantly, the Special Master stresses the fact that presumed awards are not binding, and that all claimants may present additional evidence of “individualized circumstances” at hearings.

Additionally, under the Final Rule, salary tables for men will be used to determine all victims’ worth.⁸³ This will benefit women and not penalize men as would have been the case if neutral tables were used. The Final Rule also considers nonwage work, such as household work, in determining awards.⁸⁴

The Final Rule contains a significant change designed to address the problem of whether a particular claimant ought to pursue a remedy in the VCF or in court. Claimants may meet with VCF administrators to receive advice about whether certain forms of extra-VCF compensation qualify as collateral sources and possibly receive a non-binding “ballpark” award figure. This provision is very important because it goes to the goal of providing claimants enough information to make an intelligent decision about whether to waive their right to judicial resolution of their claims.

Whether these changes are enough is a question easily debated, but not easily answered in any definitive way. Surely the Special Master is aware of the old saying that “you can’t please everybody.” The idea, however, is to please as many people as possible and encourage widespread use of the VCF. Mary Schiavo, a plaintiffs’ attorney from Los Angeles, stated that she believed the VCF was geared toward low- and medium-income claimants with many dependents.⁸⁵ Assuming this is true, there is a likelihood that high-income claimants may feel that they would not receive their fair share from the VCF and pursue litigation.⁸⁶

82. *See id.*

83. *See* Stephanie Francis Cahill, 9-11 Victim Fund to Consider Nonwage Work, 1 ABA J. EREPORT (Mar. 15, 2002), at <http://www.abanet.org/journal/ereport/m15now.html> (last visited Apr. 8, 2002).

84. *See* Final Rule, *supra* note 30, at 11,234.

85. *See* Bob Van Voris, *Lawyers Take Over Ground Zero: Litigation to Follow Compensation Regulations*, NAT’LLJ., Mar. 11, 2002, at A1.

86. *See id.* One possible reason for this effect is the larger amounts of collateral compensation that higher income claimants are likely to receive (such as life insurance payments).

More extremely, Donald Nolan, who represents plaintiffs and is based in Chicago, suggested that some parties are so disenchanting with the VCF that they may challenge the entire system.⁸⁷ Potential claims in this vein could be that the Special Master exceeded his authority under the statute or that the statute itself is unconstitutional.⁸⁸ ATLA president, Leo Boyle, has identified a more pressing concern for those who chance litigation. Because property damage is not covered by the VCF, and because Congress capped airline liability at insurance policy limits, are personal injury tort litigants likely to recover anything any time soon, or at all? Boyle points out that with \$40-50 billion dollars in property damage, many with equally viable claims against the airlines, and only \$3.2 billion dollars of available airline insurance, even *assuming* attorneys can get past difficult issues such as causation, actual recovery is highly debatable.⁸⁹ In the end, despite collateral offsets and other controversial VCF provisions, the VCF may be a claimant's best chance of seeing any recovery. However, as of mid-April 2002, only 434 claims have been filed with the VCF, and only 265 are applications of representatives of the 3,054 people killed.⁹⁰ Once the first awards, based on a sample of representative cases, are announced, probably by August 2002, victims likely will have the benchmarks they need to decide whether to participate in the VCF.

The success or failure of the VCF will be closely watched, not necessarily because it is under-inclusive in the sense that it compensates only those who suffered personal injuries at a particular place at a particular point in time, but because of the precedent it has established in terms of Congressional intervention into the tort process. Let us now turn to the question whether the VCF is, in a sense, the camel's nose under the tent.

87. *See id.*

88. *See id.* The likelihood of success of such claims involves a detailed analysis of related questions of administrative law that are beyond the scope of this Article.

89. *See id.*

90. *See Few Applicants for the September 11 fund so far*, CNN.COM/U.S., Apr. 17, 2002. Reportedly the first claims filed by a worker at the WTC was filed on April 8, 2002. *Smithwick v. American Airlines Inc.*, no. 02 CV 2669 (S.D.N.Y. Apr. 8, 2002). The plaintiff is the widower of a portfolio manager who worked on the 93rd floor of the north tower. She sued the airline and the firm handling passenger screening at Boston's Logan Airport. *See The Docket*, NAT'L L.J., at B8, col. 4 (Apr. 15, 2002).

IV. THE CAMEL'S NOSE UNDER THE TENT?

Congress did not immediately provide a compensation fund for the victims of the Oklahoma City bombing, another unspeakable disaster. Nor did it immediately provide compensation to the victims of the 1993 WTC bombing. The cases arising out of that disaster, which luckily resulted in death and injury to relatively few people, are still pending in courts in New York. Moving to another sort of disaster, despite invitations and pleas from the United States Supreme Court, Congress to date has failed to do anything, except introduce a few bills, to resolve the asbestos litigation.⁹¹ In the past, for good reasons having to do with federalism and separation of powers concerns, Congress has left it to our tort system to provide remedies for those who suffer personal injuries, except in a very few exceptional cases where the government itself was arguably the most culpable party.

Now, however, it increasingly appears that Congress may want to play an important role in the resolution of mass torts and other complex cases.⁹² While Congress likely has the power to enact legislation that governs how complex cases should be resolved, such legislation presents complex separation of powers and federalism problems.⁹³ Whether Congress acts in a way that governs the procedures to be used in various types of cases or whether Congress enacts substantive rules, these problems are raised to a greater or lesser degree.

What I would like to explore in this part of the Article is a problem I discussed in an article on federalism that I wrote for this journal a couple of years ago.⁹⁴ Specifically, I questioned the motives of various members of Congress, typically Republicans, who sought legislation that would allow state court class actions based on state causes of action to be removed to federal court notwithstanding a lack of complete diversity and problems with the requisite

91. One such proposal in the House was the Asbestos Compensation Act of 2000, H.R. 1283, 106th Cong. (2000).

92. See Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559 (2000) [hereinafter *Federalism*].

93. See *id.* at 1563-64.

94. See *id.* at 1605-09.

jurisdictional amount.⁹⁵ On the other hand, as a proponent of consolidation and aggregation in complex cases, there are clearly practical reasons justifying such legislation. The question is how to balance federalism with practicality.

At the time that I wrote that article, it seemed inconceivable that Congress would actually get into the business of providing remedies for persons who suffer personal injuries. In *Amchem Prods., Inc. v. Windsor*⁹⁶ and *Ortiz v. Fibreboard Corp.*,⁹⁷ the Supreme Court rejected the class action settlements proposed in those cases to deal with the asbestos mess. Rather, the Supreme Court in both of those cases essentially begged Congress to intervene in the resolution of the "elephantine" asbestos mess.⁹⁷ Nothing happened. So, even though the September 11 disaster hopefully is a sui generis case, Congress' reaction to that disaster may signal its growing taste for intervening in the resolution of other litigations that implicate the interests of our nation as a whole.

95. *See id.* The legislation in question is the Class Action Fairness Act, most recently introduced in the House as H.R. 2341, 107th Cong. (2001), and in the Senate as S. 1712, 107th Cong. (2001). The House passed its version of the bill on March 13, 2001 by a vote of 233-190. The Senate version of the bill is still under consideration by the Senate Judiciary Committee. *See* House Approves Class Action Legislation; Bill Would Expand Federal Jurisdiction, 2002 U.S.L.W. 2574 Legal News (Mar. 19, 2002).

Similarly, Congress passed and President Clinton signed into law the Securities Uniform Standards Act of 1998, which bars most securities class actions based on state law fraud theories. It supplements the Private Securities Litigation Reform Act of 1995 that was designed to heighten the standards for prosecuting such actions in federal court. The 1998 Act is designed to close a perceived loophole in the 1995 Act. Supporters of the 1998 Act believed that the increased filing of class actions in state courts based on state law fraud theories of liability undermined the 1995 Act. The 1998 Act amended Section 16 of the Securities Act of 1933 and Section 28 of the Securities Exchange Act of 1934 to prohibit class actions brought by private parties based on such theories. *See* 15 U.S.C. §§ 77p, 78bb (*amended by* Pub. L. No. 105-353, Title I, § 101(a)(1) & (b)(1), 112 Stat. 3227, Nov. 3, 1998). It further provides that state court class actions brought on such theories are removable to the federal court in the district in which the state action was filed. Moreover, it permits federal courts to stay discovery in state court actions.

96. 521 U.S. 591 (1997) (rejecting asbestos class action settlement certified under FED. R. CIV. P. 23(b)(3) based on inadequate representation of future claimants).

97. 527 U.S. 815 (1999) (rejecting asbestos class action settlement certified under FED. R. CIV. P. 23(b)(1)(B) for lack of adequate representation).

98. *See Ortiz*, 527 U.S. at 821.

This does not mean, of course, that Congress will or should intervene in any garden-variety mass tort. For example, it is hard to believe that Congress would care whether a particular company, such as A.H. Robins for example, becomes bankrupt because the particular branded product it sold—the Dalkon Shield—allegedly caused injury to thousands of users of the product.⁹⁹ There are similar products on the market. We can argue about whether it is a good thing or a bad thing that state product liability laws protect consumers, but also punish corporations and perhaps chill the development of new products and may result in some desirable or worthwhile products being taken off the market. Similarly, it is hard to believe that Congress should be overly concerned about the problems raised in the breast implant litigation.¹⁰⁰ However, when personal injury litigation threatens the existence of an entire industry or industries, Congress undoubtedly will and perhaps should take a great interest.

It is important to remember that in the VCF, Congress preserved the victims' right to sue the airlines and others. However, it capped what the airlines would ultimately have to pay in the aggregate.¹⁰¹ And, in section 408(b)(1) of the Act creating the VCF, Congress created an exclusive federal cause of action for damages arising out of the September 11 terrorist-related attacks.¹⁰² It also provides that

99. See generally *Claimant's Trust*, *supra* note 3; *Paradigm Lost*, *supra* note 3, at 123-56 (discussing Dalkon Shield Claimants Trust).

100. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992).

101. See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 201(a)(1), 115 Stat. 646 (2001). The amendments to Pub. L. No. 107-42 contained therein cap airline liability at the limit of the airlines' liability insurance.

102. H.R. 2926 § 408(b)(1) provides:

AVAILABILITY OF ACTION- There shall exist a federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of Title 49, United States Code, this cause of action shall be the *exclusive* remedy for damages arising out of the hijacking and subsequent crashes of such flights.

H.R. 2926, 107th Cong. § 408(b)(1) (1st Sess. 2001); see also H.R. 2926 § 104.1 (setting forth that the purpose of the Act is to "provide compensation to eligible individuals who were physically injured as a result of the terrorist-

the law of the state where the crash occurred applies to any suit brought under the VCF.¹⁰³ The bottom line, however, is that Congress is channeling all claims arising out of the September 11 attacks to either the VCF or a particular federal court.

One obvious reason for coming up with the compensation scheme that Congress developed was the need to protect the airline industry. This protection preserves our ability to use this method of transportation. Similarly, in situations such as the asbestos litigation, in terms of types of claims and sets of defendants, Congress could decide that there is a need to keep entire industries afloat to ensure that staple products are available to people across the country.

A major barrier, however, to any such effort will be the perception that the VCF is the camel's nose under the tent, to put it one way, or stealth tort reform, to put it less charitably. Looking back, we can ask: Was the first assault on the tort system the battle for tort reform that began in the 1980s? Was it the state attorney generals' tobacco litigation settlement that needed Congress' blessing?¹⁰⁴ Was it the Supreme Court's invitation in *Amchem*? Or, do we see the real seeds of the demise of the tort system in the claims resolution facility created by Congress to compensate the victims of September 11? Is Congress going to take over the tort arena? Where are we headed?

It used to be that tort plaintiffs would seek relief in state or federal court. Typically, one, but no more than a few, plaintiffs would sue individually for compensatory and punitive damages, and they would ultimately win, lose, or settle within the context of their individual lawsuits.¹⁰⁵ By the mid- to late-1980s, things had

related aircraft crashes of September 11, 2001, and to the 'personal representatives' of those who were killed as a result of the crashes.").

103. H.R. 2926 § 408(b)(2); 66 Fed. Reg. 246 (Dec. 21, 2001) (Executive Order 13132-Federalism) ("This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federal assessment.").

104. See Barry Meier, *Remaining States Approve the Pact on Tobacco Suits*, N.Y. TIMES, Nov. 21, 1998, at A1.

105. See *Claimants Trust*, *supra* note 3, at 87-94 (noting that initial stages of the Dalkon Shield litigation were marked by concerns of individual autonomy and an absence of pressure for global resolution).

changed. More and more product liability suits were displaced—sometimes voluntarily, sometimes not—by class action litigation and settlement. The Supreme Court largely put the kibosh on mass tort class action settlements in *Amchem*, the massive asbestos class action settlement, exhorting Congress to take action.¹⁰⁶

Of course in the past, federal regulatory agencies have played a major role in mass tort cases. For example, in the Dalkon Shield litigation, the breast implant litigation, and the diet drug litigation, the Food and Drug Administration played a major role in providing the public with information about safety problems with a product. Indeed, the federal regulatory agencies may have been “played” by some of the parties to help establish their litigation positions. But, in those cases, the litigation was already mature or maturing. Moreover, all parties expected that the lawsuits would be resolved through litigation—be it in state, federal or bankruptcy court. Now, however, there appears to be a de-emphasis on the courts’ traditional common law approach to resolving claims in an ad hoc way and a greater emphasis on legislative solutions or statutes that rein in the courts discretion. Are we witnessing the end of the tort system? Or, the mass tort system? Are we seriously moving toward administrative resolution of mass torts? If so, is that a good thing?

In an earlier article, I discussed the irony, in this age of Supreme Court-decreed federalism (notwithstanding *Bush v. Gore*¹⁰⁷), of congressional Republicans proposing legislation that would allow defendants to take state law-based claims out of state courts and remove them to federal court.¹⁰⁸ In that article, I suggested various reasons why, in general, such legislation is not generally a good idea. Rather, I have come to the view that state courts have an important role to play, even when there is concurrent federal jurisdiction and the federal courts will be involved as well, in being the primary interpreters of issues of state law. In our federal system, we traditionally have left it to the states to provide remedies for victims of personal injuries, breach of contract, property disputes, etc. This

106. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997) (commenting that “[t]he benefits asbestos-exposed persons might gain from the establishment of a grand scale compensation scheme is a matter fit for legislative consideration”) (emphasis added).

107. 531 U.S. 98 (2000).

108. See *Federalism*, *supra* note 92, at 1561.

view is not inconsistent with my long-held belief that federal courts are not only appropriate, but oftentimes, are the only effective place to resolve major litigations. I presume, for example, in my *Claimant's Trust* article, that claims values for a particular mass tort litigation have been established in traditional ways pursuant to state law.¹⁰⁹ Once claims values are established, however, and the crush of cases involving a particular product overwhelm the state and federal judiciaries, the time will come for global resolution that, as a practical matter, ought to be achieved at the federal level.

I have argued that the use of procedural tools available only in the federal courts can help achieve such a resolution. I have even argued that it is appropriate to allow the federal judiciary to apply federal common law in appropriate cases to resolve some of the substantive issues in the case.¹¹⁰ But my argument always has been that the judiciary has the competence to develop the right approach to resolving disputes, specifically personal injury cases.¹¹¹ I have never argued that Congress has the duty or the competence to be involved intimately in how personal injury cases are to be resolved. And perhaps the problems the VCF Special Master is having suggests that I was correct to question Congress' competence in this area.

Nonetheless, given the exigencies of the September 11 disaster, and the current phase of the asbestos litigation for example, I think congressional action may well be appropriate. In both situations, there are very good reasons for ensuring prompt and reasonable compensation to personal injury victims. In the case of the WTC and Pentagon victims, one can view them as victims of war being cared for by the government. Certainly asbestos victims can hardly be analogized to victims of a war. Nonetheless, there are some very sick individuals who have serious illnesses that can almost only be explained by exposure to asbestos. They deserve reasonable compensation in a reasonable period of time. There are many other asbestos claimants who may be less deserving, but their claims are clogging the courts; indeed, they have been clogging the courts for

109. See *Claimants Trust*, *supra* note 3.

110. See *Multi-Tort Cases*, *supra* note 3, at 200-08.

111. See *id.* at 200-08, 223-24.

decades, and all estimates suggest that they will be clogging the courts for decades more.¹¹²

In addition, we need to think about and beyond the implications for the defendants in these cases. In the September 11 disaster, the bankruptcy of an entire industry critical to our nation's economy loomed large. No rational person in this country could imagine life without planes flying overhead. Indeed, it was eerie enough for me in September, both in New York City and in Los Angeles, not to hear jets flying overhead; to look up and see no planes flying. Similarly, the range of defendants now being sued in the asbestos cases has blossomed because so many of the traditional defendants are now bankrupt. It can be argued that asbestos threatens bankruptcy in multiple industries across our economy.

There have been bills proposed in Congress to deal with the asbestos litigation. The Asbestos Compensation Act Bill (H.R. 1283) was resubmitted in the Spring of 2000.¹¹³ The Act would set up an administrative compensation fund replenished by contributions from asbestos defendants. The bill has not been resubmitted in the 107th Congress, but other bills that would provide tax relief to asbestos defendants who pay into settlement funds are on the table. And, there are rumors that Congress will entertain a bill that would allow for the deferral on unimpaired claims, so that asbestos victims with actual serious injuries can be suitably compensated. The fact that these bills keep coming up is one indication that Congress will continue to focus on the asbestos problem.

The climate for the passage of an asbestos compensation bill has improved. Those dissenting from the adoption of the 2000 Asbestos Compensation Bill¹¹⁴ argued that the courts had improved settlement

112. See generally Deborah Hensler et al., RAND INSTITUTE FOR CIVIL JUSTICE, Aug. 2001 (providing an overview of the current state of asbestos claims and the continuing growth of such litigation). RAND has issued studies on the asbestos litigation problem fairly regularly since the 1980s. The August 2001 report is an advanced summary of a more detailed report due for publication in Spring 2002.

113. See H.R. 1283, 106th Cong. (2000) (remarking that this Bill had originally been introduced Mar. 25, 1999).

114. See H.R. REP. NO. 106-782, at 81-82 (2000). The dissenters suggest that courts have had success in streamlining asbestos litigation, largely due to MDL procedures. They also suggest that "asbestos is now a mature tort . . . [A.]sbestos cases today are less time consuming . . . than other types of tort action." *Id.* at 81.

and trial procedures. In reality, the courts are more overwhelmed than ever because the number of claims filed has spiked dramatically in the last couple of years.¹¹⁵

The opponents of the 2000 bill also argued that the Chapter 11 problem—the threat of bankruptcy enunciated by asbestos defendants—was overstated.¹¹⁶ They cited comments of asbestos defendants in their Securities and Exchange Commission filings that minimized the materiality of the asbestos threat. Things have changed dramatically. All but one or two of those named, and many others, have now filed for Chapter 11 protection.¹¹⁷

Critics also stated that the bill amounted to an unjustified corporate bail out for culpable defendants who knew that exposed workers were put at risk. In actuality, we now see hundreds of new defendants, including smaller local defendants being asked to foot a larger and larger share of the damage because most of the traditional defendants are in Chapter 11.¹¹⁸

Similarly, a number of the provisions were critiqued for smacking too much of tort reform—caps on punitive damages; attorney's fees; choice of law and forum selection—and for being an opt-out rather than opt-in plan; that there would be increased delay; that the medical criteria was too tough, etc.¹¹⁹ In actuality, if Congress really wants to do something for victims and corporations, these flaws can be negotiated away.

Congress is showing an increasing willingness to deal with personal injury claims when there is a “disaster.” As discussed above, Congress acted with dispatch to simultaneously prevent the airline industry from crashing and helping the victims of September 11 get quick compensation.¹²⁰ It remains to be seen how well the

115. See Hensler et al., *supra* note 112, at 2-5. Broadening the types of defendants sued is one factor contributing to the growth of asbestos claims. Much of the information gathered by RAND directly controverts the positions of the dissenter in the 2000 House Report. *See id.*

116. H.R. REP. NO. 106-782, at 82 (2000).

117. See Hensler et al., *supra* note 112, at 51.

118. *See id.*

119. The dissenting views regarding all of these subjects are presented in H.R. REP. NO. 106-782, at 79-96 (2000).

120. The Air Transportation Safety and System Stabilization Act was passed just eleven days after the attacks on the WTC and the Pentagon. *See* Pub. L. No. 107-42, 115 Stat. 230 (2001).

compensation fund will work, but especially if it succeeds, it may well be the camel's nose under the tent. Prior to the Act, one of the few times Congress involved itself in the personal injury realm was in the case of the Swine Flu disaster several decades ago when the federal government itself was one of the culpable targets.¹²¹ Now, there are bills to provide immunity to insurance companies, drug companies, etc. in the wake of September 11 to prevent those industries from going under in the case of another terrorist disaster.

Certainly, the asbestos mess does not present the same kind of disaster as the various damages resulting from an act of terrorism. It is appropriate, however, for Congress to consider, stepping in to prevent the decimation of an entire industry or set of industries. As the asbestos mess, or some similar mass tort or other problem morphs and begins to engulf whole new industries and companies, action would be justified.

Plaintiffs lawyers and Congressional Democrats will increasingly have an interest in seeing appropriate legislation. More companies can use the threat of Chapter 11, or the filing of Chapter 11 to stop all lawsuits against them.¹²² Once a Chapter 11 is filed, serious delays and often reduced compensation (especially in the case of asbestos) are always the outcome. Chapter 11 may not be an option for all defendants—they lose autonomy and it scares investors who may not understand the benefits of it to the company—but the threat and reality is there and those with the interests of plaintiffs in mind need to deal with the reality.

Of course, drawing the line between a real disaster and what amounts to a plea for a corporate bailout will not be easy. But, in this complicated time, with the federal courts' wings clipped,

121. See National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113. Passage of this statute at the behest of President Ford stemmed from a swine flu outbreak at the Army base in Fort Dix, New Jersey. Some feared that an outbreak on the scale of the influenza epidemic of 1918-19 was possible and a nationwide program inoculated about 40 million people. However, the inoculations themselves proved deadly for many who had allergic reactions to the shots. The statute provided that the only remedy available would be against the government by administrative remedy. Manufacturers and administrators of the vaccine were insulated from liability. For a concise synopsis of the events surrounding the swine flu program, see Paul Mickle, 1976: *Fear of a Great Plague* at <http://www.capitalcentury.com/1976.html> (last visited Mar. 23, 2002).

122. See 28 U.S.C. § 1334(c)(2) (1994).

legislative compromises can be made that will provide reasonable, efficient and relatively quick compensation when the judicial system is unable to do its job.

IV. CONCLUSION

Congress has moved quickly to provide a system of compensation for many of the victims of the September 11 disaster. The September 11th Victims Compensation Act simultaneously provides protection for the airline industry, undoubtedly a critical one for our economy as well as our convenience (I can attest to this need, having taken the train to Los Angeles from New York—four days and three nights—in the aftermath of September 11) and provides the tools, perhaps imperfectly, to provide reasonable and prompt compensation to victims. It is hard to argue that the statutory scheme set up by Congress in its haste is perfect. Moreover, it is not appropriate as a general matter for the legislative branch to do what courts are in the business of doing, especially since the courts do it best.¹²³ Thus, it would be regrettable if the VCF is the camel's nose under the tent in terms of it being stealth tort reform. But, it may provide an indication that in some limited areas, where a judicial resolution appears inadequate, the asbestos mess being the obvious one, Congress may and should act.

123. See Vairo, *Multi-Tort Cases*, *supra* note 3, at 167-73, 223-24 (suggesting that the federal courts are in "the best position to provide a fair resolution . . . in mass toxic tort litigation," and that resolving choice of law questions "is no more burdensome in [the mass tort] context than any other.").