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## Analysis of the Department of Justice Regulations for the September 11th Victim Compensation Fund

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# ANALYSIS OF THE DEPARTMENT OF JUSTICE REGULATIONS FOR THE SEPTEMBER 11<sup>TH</sup> VICTIM COMPENSATION FUND

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## I. INTRODUCTION AND PURPOSE

ON SEPTEMBER 22, 2001, the United States Congress and President George W. Bush responded to the terrorist attacks of September 11th with the passage of the Air Transportation Safety and System Stabilization Act<sup>1</sup> (the “Act”), a law whose stated objective was to “preserve the continued viability of the United States air transportation system.”<sup>2</sup> One of the key components of the Act was Title IV, the “September 11th Victim Compensation Fund of 2001” (the “Victim Compensation Fund”).<sup>3</sup> In an effort to forestall an avalanche of litigation directed against the airline industry, this portion of the Act provides compensation from the United States Government to individuals who suffered physical injury or to representatives of individuals who died as a result of the September 11th terrorist attacks, provided they do not seek restitution for these claims through the courts.

On December 20, 2001, the Department of Justice (the “DOJ”), as mandated by the Act, issued regulations delineating eligibility requirements and procedures for the determination

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<sup>1</sup> Pub. L. No. 107-42, 115 Stat. 230 (codified as amended in scattered sections of 49 U.S.C.) [hereinafter *System Stabilization Act*].

<sup>2</sup> *Id.* at preamble.

<sup>3</sup> *Id.* §§ 401-409.

of pecuniary claims under the Victim Compensation Fund.<sup>4</sup> Now, with the issuance of the DOJ Regulations, potential claimants and their attorneys can better evaluate the benefits and drawbacks of pursuing relief under the Victim Compensation Fund instead of through traditional litigation.

The major purposes of this paper are to analyze the calculation of economic damages under the Victim Compensation Fund as prescribed by the recently issued DOJ Regulations and to compare that calculation with a traditional calculation of economic damages. A corollary objective is to delineate the major qualitative issues that may distinguish the compensation packages under the Victim Compensation Fund from the traditional avenues of litigation. These are appropriate topics for several reasons. First, the massive loss of life and limb in the September 11th terrorist attacks created a huge number of potential claimants. Although the combination of factors determining the economic damages for each of these individuals is unique, a template that would give them or their representatives a greater understanding of the appropriate calculation process for their claims would appear necessary. A subsidiary goal of this analysis is to provide this type of chart. While the recently promulgated DOJ Regulations include charts estimating payments under the Victim Compensation Fund, this paper attempts to compare those DOJ charts with traditional litigation-based damages models.

Secondly, the calculation of economic damages, while common in wrongful-death and wrongful-injury cases, is considered by many participants in the legal profession to be somewhat confusing. Moreover, even attorneys, who have a good understanding of the methodologies and formulas used to calculate economic damages under normal circumstances, may be somewhat confounded by the DOJ Regulations. Attorneys who are not accustomed to the calculation of economic damages may find themselves even more challenged. A secondary goal of this analysis is to add clarity and light to what some consider a confusing and obtuse process.

Thirdly, economic-damage claims are expected to be the major component of total pecuniary damages for many of the victims in these cases because the population of victims comprised

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<sup>4</sup> September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 21, 2001) (codified at 28 C.F.R. pt. 104) [hereinafter *DOJ Regulations*].

a rather large proportion of well-paid professionals.<sup>5</sup> Consequently, the economic-damage calculation is an extremely important component of this entire claims process; an adequate understanding of the DOJ-sanctioned calculation process, as well as its comparison with the calculation in the traditional litigation setting, is more vital than ever.

Finally, in addition to differences in the calculation methodology under the alternate compensation methods and, in all likelihood, differences in the total potential compensation for individuals, there exist many qualitative issues to be considered. These qualitative issues will influence the desirability of potential awards under these two very different methods. Major qualitative issues must be addressed in order to allow clients and their representatives to better judge the desirability of compensation packages under the Victim Compensation Fund versus the traditional avenues of litigation.

This paper will examine traditional methodology for the calculation of economic damages in the United States in instances of wrongful death and injury ("Traditional Method") and will compare this with the method sanctioned by the DOJ Regulations for claimants under the Victim Compensation Fund ("DOJ Method"). The authors will

- define *economic damages*, both in the traditional sense and as defined by the DOJ;
- present *formulas for calculating economic damages* for wrongful death and for wrongful injury, both under a Traditional Method and under the DOJ Method;
- present regulations for calculation of the *major components of the formulas*;
- present *sample calculations* for victims under both methods; and
- examine and discuss qualitative issues and their impact on selecting the most desirable method of seeking compensation.

## II. DEFINITION OF ECONOMIC DAMAGES

The concept of economic damages (or economic loss) in cases of wrongful death and injury has been well established in the United States through common law and through state and

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<sup>5</sup> See Johnathan Duffy, *The 'Forgotten' Victims*, BBC NEWS, Sept. 19, 2001, at [http://news.bbc.co.uk/hi/english/world/americas/newsid\\_1552000/1552051.stm](http://news.bbc.co.uk/hi/english/world/americas/newsid_1552000/1552051.stm) (last visited February 26, 2002).

federal legislation. Most wrongful death statutes in the United States are modeled after Lord Campbell's Act, enacted in England in 1846 and entitled an "act for compensating the families of persons killed by accidents."<sup>6</sup> The significance of Lord Campbell's Act to the U.S. legal system is that it created a new cause of action based upon the defendant's wrongful act, neglect, or default, limited recovery to certain named beneficiaries, and measured damages with respect to the loss suffered by these beneficiaries. In 1847, one year after Lord Campbell's Act, New York adopted the first wrongful-death statute in the United States.<sup>7</sup> Today every jurisdiction in the United States has enacted a wrongful-death statute.<sup>8</sup>

Although somewhat oversimplified, it is generally accurate to state that in instances of wrongful death or injury, economic damages primarily consist of the value of lost future income and support, including nonmonetary contributions, that would have accrued to an individual (or the individual's family), primarily as a result of their contribution of "human capital" to the workplace or the home or both. Any other resulting economic loss—such as past and future medical expenses caused by wrongful injury and funeral expense in the case of wrongful death—are also included.<sup>9</sup>

In many instances, a family loses its main source of income as well as valued household contributions due to the death or injury of a family member. The major purpose of awarding economic damages is to make the injured party "whole" economically. That is not to say that an award of money to a plaintiff will heal an injury or breathe life into a decedent. On the contrary, no award of money or any other finding of law can do that.<sup>10</sup> What an award of economic damages can do, however, is provide a present value amount that, when invested, can replace the individual's economic contribution to his or her

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<sup>6</sup> Lord Campbell's Act (Fatal Accident Act), 1846, 9 & 10 Vict., c. 93 (Eng.).

<sup>7</sup> See Lanni P. Tama, *Recovery for Loss of Consortium in a Wrongful Death Action*, 49 BROOKLYN L. REV. 605, 609 n.21 (1983).

<sup>8</sup> See Erin A. O'Hara, *Hedonic Damages For Wrongful Death: Are Tortfeasors Getting Away With Murder?*, 78 GEO. L.J. 1687, 1706 (1990). For a full listing and description of the various state statutes, see Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402 app. (1966).

<sup>9</sup> In instances where a decedent was injured and later died of his injury, injury-related medical expenses would, of course, be included in the calculation of economic damages.

<sup>10</sup> See RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979).

family. It is an amount that fairly represents the economic loss resulting from the injury or death of the individual.

Section 402 of the Victim Compensation Fund defines “economic loss” as “any pecuniary loss resulting from harm (including loss of earnings or other benefits related to employment, medical expense loss, replacement service loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.”<sup>11</sup> Despite this broad definition of economic loss, the term “applicable state law” apparently limits the definition. However, the DOJ Regulations are unclear as to which State’s damages laws apply and just how the “applicable state law” phrase is incorporated into the DOJ charts. For example, § 408 of the Victim Compensation Fund limits the liability of the air carriers and others, as subsequently amended, and restricts substantive law and choice-of-law principles to the State in which a crash occurred.<sup>12</sup> This seemingly restricts consideration of applicable state law to New York, Pennsylvania, and Virginia. Whether the limitation of § 408 applies to earlier sections of the Victim Compensation Fund remains unclear. This uncertainty is particularly evident when one looks at the uniform compensation charts issued by the DOJ,<sup>13</sup> although the domicile of the decedent is to be used to determine the effect of state income taxes when calculating economic damages.<sup>14</sup>

One aspect of particular note, and possible concern, with regard to calculating economic loss under the Victim Compensation Fund, is the decision of the DOJ to limit economic loss of victims earning beyond the 98th percentile for annual income in the United States for the year 2000.<sup>15</sup> This rule results in an income cap of \$225,000 per year in the calculations<sup>16</sup> and precludes equitable treatment for certain high-income individuals. In the normal context of economic-loss claims for the population as a whole, this limitation would not be significant. However, it is estimated that there will be a disproportionate number

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<sup>11</sup> *System Stabilization Act*, *supra* note 1, § 402(5).

<sup>12</sup> *Id.* § 408(b)(2). Section 408 also grants the United States District Court for the Southern District of New York original and exclusive jurisdiction over actions related to the September 11th attacks.

<sup>13</sup> U.S. Dep’t of Justice, *Presumed Loss Calculation Tables Before any Collateral Offsets* 3–7, at [http://www.usdoj.gov/victimcompensation/loss\\_calc.html](http://www.usdoj.gov/victimcompensation/loss_calc.html) (last modified January 18, 2002) [hereinafter *Loss Calculation Tables*].

<sup>14</sup> *Id.* at 1.

<sup>15</sup> *DOJ Regulations*, *supra* note 4, at 66,278.

<sup>16</sup> *See Loss Calculation Tables*, *supra* note 13, at 3 n.1.

of high-income earners among the claims emanating from individuals who worked at the World Trade Center.<sup>17</sup>

### III. CALCULATION OF ECONOMIC DAMAGES FOR WRONGFUL DEATH

Tables I and II outline the formulas for calculating economic damages in cases of wrongful death under the Traditional Method and the DOJ Method, respectively. A discussion of each major component of economic damages, including a description of traditional sources of required informational data for each, follows in tables III-A, III-B, and III-C. Finally, calculations of economic damages for five representative individuals under both methods are presented to demonstrate a clearer picture of the dollar differences between the two.

TABLE I  
PROJECTED NET ECONOMIC LOSS  
WRONGFUL DEATH—TRADITIONAL METHOD

1. Calculate Gross Economic Loss
  - Projected Lost Future Earnings over the Decedent's Expected Worklife
  - plus*
  - Value of Lost Future Services
  - minus*
  - Personal Consumption (Maintenance) Expenditures
2. Calculate Present Value of Gross Economic Loss<sup>18</sup>

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<sup>17</sup> See Duffy, *supra* note 5.

<sup>18</sup> Although it can be confusing, Present Value is a relatively simple concept. The best example to explain Present Value comes courtesy of the letters in many states. If you win the \$1,000,000 jackpot, you do not receive \$1,000,000 up front, but rather something approximating \$50,000 per year for 20 years. If you prefer your money up front, the state will give you \$530,000. That \$530,000 received in the present is the Present Value of the stream \$1,000,000 which would have been received over a 20-year period at the rate of \$50,000 per year. In fact, if you invested that \$530,000 at 7% interest, you could indeed draw \$50,000 per year in principal and interest, and at the end of the 20<sup>th</sup> year when you received your final payment of \$50,000, the balance in the investment would be \$0. In other words, at a 7% interest rate (often referred to as a discount rate) \$530,000 today and \$1,000,000 to be received at the rate of \$50,000 per year for 20 years are equivalent.

In the calculation of Net Economic Loss for economic damages, economic damages, economists are calculating the Present Value of future lost earnings. The Net Economic Loss is designed to be an amount that can then be invested so that the family can draw down principal and interest or injured party to replace those lost future earnings.

3. Discount these future cash flows by an interest rate attainable in a portfolio of U.S. government securities of intermediate- and long-term maturity length (currently 4 to 5%) to find Net Economic Loss—Traditional Method

TABLE II  
PROJECTED NET ECONOMIC LOSS  
WRONGFUL DEATH—DOJ METHOD

1. Calculate Gross Economic Loss  
Projected Lost Future Earnings (after taxes and capped at \$225,000 per year) over the Decedent's Expected Worklife  
*minus*  
Personal Consumption (Maintenance) Expenditures  
(Note: No Value Lost Future Services is given for the value of lost future services by victims who were working full time.)
2. Calculate Present Value of Gross Economic Loss<sup>19</sup>
3. Subtract Collateral Sources of Compensation (such as life insurance, pension and government payments) to find Net Economic Loss—DOJ Method

A. CALCULATION OF LOST FUTURE EARNINGS OVER A  
DECEDENT'S WORKLIFE

Lost future earnings of an individual comprise all components of compensation, including future salary or wages, overtime, bonuses, profit sharing, and fringe benefits that may be a significant portion of total compensation that the decedent is projected to have earned over his worklife.<sup>20</sup> In the case of the owner-manager or active partner in a privately held business, economic damages should consider not only current compensation, but also loss in future value of the enterprise due to the death of the principal or partner.<sup>21</sup>

Table III—A summarizes the major elements of this calculation and notes any differences between the Traditional Method and the DOJ Method for claimants to the Victim Compensation

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<sup>19</sup> Because the DOJ Regulations do not ascribe value to lost future services, number 2 in the formula will always have a value of zero.

<sup>20</sup> See generally Katherine K. Yunker, *Addressing the Real Problems for Law and Economics of Factoring Interest Rates, Earnings Growth and Inflation into Awards for Lost Future Earnings*, 56 U. PITT. L. REV. 1, 22–28 (1994) (discussing factors involved in calculation of future earnings).

<sup>21</sup> Edwin T. Hood et al., *Valuation of Closely Held Business Interests*, 65 UMKC L. REV. 399, 405–406 (1997).



Fund. The major difference, as indicated by the table, is that future income under the DOJ Regulations is calculated *after* state and local taxes.<sup>22</sup> Typically, income taxes are not deducted from the calculation of economic damages under the Traditional Method in a majority of States.<sup>23</sup> Such a difference could reduce this portion of economic damages by thirty to forty percent under the Victim Compensation Fund.

TABLE III-A  
DETERMINATION OF LOST FUTURE SALARY AND BENEFITS

STEPS	Data Sources/Methodology	DOJ Regulation Differences
<b>1. Determine Decedent's Annual salary level at death.</b>	Examination of income tax records, W-2 forms, personnel files, labor contracts etc. Include average overtime and bonus, if applicable. <sup>24</sup>	Income base derived from three years of tax returns, but capped at \$225,000.00 or 98 <sup>th</sup> percentile for annual income in U.S.
<b>2. Project Decedent's Annual income over his worklife expectancy.</b>	Using the annual salary level calculated in Step 1 as a base and a projected annual growth rate, calculate decedent's salary for each year of his remaining worklife. A) Annual growth rate may be influenced by the following: <ul style="list-style-type: none"> <li>• Historical growth rates of decedent's salary vis-à-vis the average for the economy.<sup>25</sup></li> <li>• Unique factors influencing the future prospects for the decedent.</li> <li>• Outlook for the economy and the industry in which the decedent worked.</li> </ul> B) Worklife expectancy is taken from U.S. Department of Labor's <i>Worklife Estimates: Effects of Race and Education</i> , Bulletin 2254, February 1986. C) If decedent was the principal/partner in a privately held enterprise, project the increase in value of the decedent's portion of that enterprise over his worklife expectancy projecting from past performance of that enterprise combined with current and expected future economic and industry conditions.	Two major differences <ul style="list-style-type: none"> <li>• Future income is determined on an after-tax basis, thereby diminishing awards compared with Traditional Method under which taxes are typically not deducted.</li> <li>• Worklife expectancy is an average of U.S. tables for both men and women. Because the worklife expectancy for women is shorter than that for men, the resulting effect of averaging is to decrease the economic damages figure for men and increase it for women, as compared with the Traditional Method.</li> </ul>
<b>3. Calculate Present Value of Lost Income</b>	Discount lost future earnings in Step 2 by an annual rate that represents the average current yield on a portfolio of mixed maturity U.S. Government bonds.	No material differences

<sup>22</sup> See *Loss Calculation Tables*, *supra* note 13, at 1.

<sup>23</sup> See *DOJ Regulations*, *supra* note 4, at 66,290

<sup>24</sup> For those not working or with limited work experience, annual earning capacity may be projected on the basis of age, sex, race and educational attainment based upon the US Census Bureau's *Current Population Survey Report-Educational Attainment in the United States: March 1999* (P20-528)

<sup>25</sup> For the years 1960 through 1990, average salaries grew an average of 6% annually, and for the 1990s, the average was 3.5%.

4. Calculate the Value of Lost Benefits	A benefits handbook from the place of the decedent's employer is helpful. Often benefits may include insurance, retirement, 401 k plans, auto allowance, and stock options. At times it is expedient to calculate benefits as a percent of the present value calculated in Step 3 above, although it is sometimes judicious to calculate lost retirement separately. <sup>26</sup>	No material differences
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#### B. CALCULATION OF LOST FUTURE HOUSEHOLD CONTRIBUTIONS OVER A DECEDENT'S LIFE EXPECTANCY

Lost future household contributions primarily include the present value of all of the work such as household maintenance, cleaning, cooking, yard work, childcare, and home and auto repair that the decedent would have provided for his or her family.<sup>27</sup> Table III-B summarizes the major elements of this calculation and notes the differences from the approved methodology of the DOJ for claimants to the September 11th Victim Compensation Fund of 2001.

As noted in the table, the DOJ Regulations do not specifically address lost household contributions for victims who were working on a full-time basis. Depending upon the age of the victim and the average number of hours of his or her contribution per week, this category's omission could diminish the economic-loss calculation for working adults under the Victim Compensation Fund by \$100,000 to \$200,000 as compared with traditional methodologies.

<sup>26</sup> In the U.S., employee benefits approximate 20-25% of total employer compensation.

<sup>27</sup> See generally Frank D. Tinari, Book Review, 8 J. LEGAL ECON. 93 (1998) (reviewing KURT V. KRUEGER & JOHN O. WARD, *THE DOLLAR VALUE OF A DAY: 1997 DOLLAR VALUATION* (1999)).

TABLE III-B  
DETERMINATION OF LOST FUTURE HOUSEHOLD CONTRIBUTIONS

STEPS	Data Sources/Methodology	DOJ Regulations Differences
<b>1. Determine Decedent's Annual household contribution at time of death.</b>	Surviving spouse/family is a good source of information on this component of economic loss. Studies indicate that the average working male with two children contributes approximately 20 hours per week and that the value of this work is roughly \$9 per hour. Multiply the number of hours per week (52) by the dollar value per hour, typically between \$6 and \$10. An excellent source is JOHN O. WARD & ASSOC., <i>THE DOLLAR VALUE OF A DAY: 1999 VALUATION</i> (2001).	No provision for the calculation of the loss of future household contributions for victims that were working full time. The DOJ Regulations do provide for the value of services for those victims who were not working or who were working on a part time basis, but do not offer specific details for the calculation of such services.
<b>2. Project Decedent's annual household contribution over his life expectancy.</b>	1. <b>Annual household contribution</b> from step 1 2. <b>Life expectancy</b> is found in the U.S. Census Bureau, <i>Statistical Abstract of the United States</i> , Tables 115-188 (2000). 3. <b>Growth Rate—3-4%</b> , justified as follows: Minimum wage has grown at an average annual rate of approximately 4% over the past several decades.	No material differences for those who are covered (see above).
<b>3. Calculate Present Value of Lost Household Contribution.</b>	Discount lost future household contribution in Column 2 of Table III by an annual rate that represents the average current yield on a portfolio of mixed maturity U.S. Government bonds.	No material differences for those who are covered (see above).

### C. CALCULATION OF PERSONAL CONSUMPTION OVER A DECEDENT'S LIFE EXPECTANCY

The present value of a decedent's lost earnings must be reduced to reflect personal consumption, that is, expenditures that would have been made by the decedent for his or her personal needs had he or she lived.<sup>28</sup> Such expenditure categories include food, clothing, medical, transportation, and entertainment. The reason for this deduction is the logical assumption that such expenditures would not have been available for the decedent's family had he or she lived. In fairness, these expenditures should be deducted from the decedent's income to deter-

<sup>28</sup> Lloyd Cohen, *Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action*, 34 EMORY L.J. 295, 300 & n.24 (1985) (citing Comment, *supra* note 8, at 412-413).

mine the family's loss, now that the decedent is no longer alive. Table III-C below summarizes the major elements of this calculation and notes no differences between traditional methodology and the DOJ Regulations for claimants to the Victim Compensation Fund.

TABLE III-C  
DETERMINATION OF PERSONAL CONSUMPTION  
(MAINTENANCE) EXPENDITURES

STEPS	Data Sources/Methodology	DOJ Regulations' Differences
1. Determine Decedent's personal consumption percentage.	<b>Based upon consumption expenditure tables compiled by the Bureau of Labor Statistics.</b> Related inversely to both income and the number of persons in the family. Usually, in the 20-30% range.	No material differences
2. Determine Decedent's personal consumption in present dollars.	Multiply the appropriate percentage by the Present Value of Decedent's Lost Salary and Benefits.	No material differences

#### D. OFFSETTING COLLATERAL SOURCE PAYMENTS IN THE AWARD CALCULATION

The Victim Compensation Fund defines "collateral source" to mean "all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001."<sup>29</sup> Although traditional methodology for the calculation of economic and noneconomic damages does not typically allow for any offset of collateral sources against these damage amounts,<sup>30</sup> the Victim Compensation Fund calls for such a deduction<sup>31</sup> and the DOJ Regulations strongly enforce this provision.<sup>32</sup> This means that after the calculation of economic and noneconomic damages for a victim under the DOJ Regulations, a deduction will be made for these various categories of collateral source payments. For example, if a decedent has a \$250,000 life insurance policy, this must be

<sup>29</sup> *System Stabilization Act*, *supra* note 1, § 402.

<sup>30</sup> See generally Christian D. Saine, Note, *Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 CASE W. RES. L. REV. 1075, 1076 (1997).

<sup>31</sup> *System Stabilization Act*, *supra* note 1, § 405(b)(6).

<sup>32</sup> *DOJ Regulations*, *supra* note 4, at 66,279; *Loss Calculation Tables*, *supra* note 13, at 2. But see *DOJ Regulations*, *supra* note 4 at 66,274 (refusing to define "collateral sources" to include private charitable assistance).

deducted from the DOJ figures.<sup>33</sup> The same holds for certain pension payments and non-spousal Social Security benefits paid to the family as a result of the decedent's death. Clearly, depending upon the nature and amount of collateral-source payments, such an offset policy, could result in a significant reduction in award amounts for claimants seeking restitution under the Victim Compensation Fund as compared with amounts awarded under traditional litigation methods.

#### IV. CALCULATION OF ECONOMIC DAMAGES FOR WRONGFUL INJURY

Tables IV and V outline the formulas for calculation of economic damages in the case of wrongful injury under the Traditional Method and the DOJ Method, respectively. Much of the methodology mirrors the calculation of economic damages for wrongful death.<sup>34</sup> Consequently, the discussion will accentuate the differences in the injury calculation as compared to the death calculation. Material differences between the Traditional Method and the DOJ Method for calculating economic damages for wrongful injury are also provided in Tables VI-A, VI-B, and VI-C. Due to the lack of specifics in the DOJ Regulations regarding the calculation of economic loss for injury, it is not feasible to compare award calculations under the two methodologies.

TABLE IV  
PROJECTED NET ECONOMIC LOSS  
WRONGFUL INJURY—TRADITIONAL METHOD

1. Calculate Gross Economic Loss
  - Projected Lost Future Earnings over the Injured's Expected Worklife
  - plus*
  - Value of Lost Future Services
  - minus*
  - Past and Future Injury-Related Medical Expenses
2. Calculate Present Value of Gross Economic Loss to find Net Economic Loss—Traditional Method

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<sup>33</sup> Recent DOJ Guidelines for the Victim Compensation Fund indicate that insurance premiums paid by victims and their families would be credited against insurance proceeds before offset.

<sup>34</sup> See *id.* at 66,286-87.

TABLE V  
PROJECTED NET ECONOMIC LOSS  
WRONGFUL INJURY—DOJ METHOD

1. Calculate Gross Economic Loss  
Projected Lost Future Earnings over the Injured's Expected Worklife  
*minus*  
Past and Future Injury-Related Medical Expenses  
(Note: No Value Lost Future Services is given for the value of lost future services by victims who were working full time.)
2. Calculate Present Value of Gross Economic Loss
3. Subtract Collateral Sources of Compensation to find Net Economic Loss—DOJ Method

The methodology for the calculation of net economic loss in the case of wrongful injury is basically identical to that for wrongful death, except for the deduction for consumption. Since the injured party is alive, he will continue to require expenditures for his personal needs. Consequently, there is no deduction for personal consumption expense as there is for the decedent in a wrongful-death calculation. However, there is the addition of past and future medical expenses, which may be substantial, depending upon the nature and severity of the injuries.<sup>35</sup>

A. CALCULATION OF LOST FUTURE EARNINGS OVER AN  
INJURED'S WORKLIFE

Lost future earnings of an injured party are calculated in a similar manner as those for a decedent and include lost future wages, profit sharing, retirement, and other benefits, as shown in Table III-A. One major difference between the calculation of lost future earnings for wrongful injury and the same calculation for wrongful death is that credit must be given for any earnings that the injured party is capable of making on an injured basis. If the injured party is capable of returning to work on an injured or disabled basis, these "earnings on an injured basis" must be subtracted from what the injured party would have earned without the injury to determine a net loss in income.<sup>36</sup> Table VI-A summarizes the major elements of this calculation and notes any

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<sup>35</sup> *Id.* at 66,278-79.

<sup>36</sup> *Id.*

differences between the Traditional Method and the DOJ Method.

TABLE VI-A  
DETERMINATION OF LOST FUTURE SALARY AND BENEFITS

STEPS	Data Sources/Methodology	DOJ Regulations' Differences
<b>1. Determine Injured's Annual salary level at time of injury.</b>	Same as wrongful death. Also, interview of injured party.	No material differences, except capped by 98 <sup>th</sup> percentile
<b>2. Project Injured's income over his worklife expectancy</b> without the injury and also on an injured basis. Calculate the incremental loss due to the injury.	Same as wrongful death—income before injury. Income on an injured basis—medical reports and vocational evaluations are helpful as well as interview with injured.	No material differences, except possible effect of cap
<b>3. Calculate Present Value of Incremental Lost Income.</b>	Same discount process as wrongful death.	No material differences
<b>4. Calculate the Value of Incremental Lost Benefits.</b>	Same process as wrongful death.	No material differences

#### B. CALCULATION OF LOST FUTURE HOUSEHOLD CONTRIBUTIONS OVER AN INJURED'S LIFE EXPECTANCY

In cases of injury, the injured party often will experience a reduction in his or her ability to perform certain tasks around the home. The economic value of these lost contributions is calculated for injury in the same manner as for death. The one major difference is that credit must be given for any household contributions that the injured party is capable of making on an injured basis.

As noted with the wrongful-death calculation, the DOJ Regulations do not specifically address lost household contributions for victims who were working on a full-time basis.<sup>37</sup> Depending upon the age of the injured party and the average number of hours of his or her contribution per week, this omission could reduce the economic-loss calculation under the Victim Compensation Fund by a significant portion of the difference calculated for decedents under the Traditional Method and the DOJ Method (between \$100,000 to \$200,000).

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<sup>37</sup> *Id.* at 66,287 (mentioning victims with no prior income or only part-time work experience).

Table VI-B summarizes the major elements of this calculation under the Traditional Method and notes the significant differences from the DOJ Regulations.

**TABLE VI-B**  
**DETERMINATION OF LOST FUTURE HOUSEHOLD CONTRIBUTIONS**

STEPS	Data Sources/Methodology	DOJ Regulations' Differences
<b>1. Determine Injured's Annual household contribution at time of injury.</b>	Same as wrongful death. Also, interview of injured party.	No provision for the calculation of the loss of future household contributions for victims that were working full time. The DOJ Regulations do provide for the value of services for those victims who were not working or that were working on a part time basis, but did not offer specific details for the calculation of such services.
<b>2. Project Injured's household contribution over his life expectancy</b> without the injury and also on an injured basis. Calculate the incremental loss due to the injury.	Same as wrongful death—uninjured household contribution. Household contribution on an injured basis—medical reports and interviews with injured are helpful.	No material differences for those who are covered (see above).
<b>3. Calculate Present Value of Lost Household Contribution.</b>	Same discount process as wrongful death.	No material differences for those who are covered (see above).

### C. CALCULATION OF PERSONAL CONSUMPTION EXPENSES

As discussed earlier, the present value of a decedent's lost earnings must be reduced to reflect personal consumption, that is, expenditures that would have been made for his personal needs had he lived. For an injured party, there is no subtraction of personal consumption expense because the injured party is alive and, ostensibly, will have continuing requirements for consumption expenditures as before the injury. This methodology is identical for both traditional calculations and Victim Compensation Fund calculations.

### D. CALCULATION OF PAST AND FUTURE INJURY-RELATED MEDICAL EXPENSES

A large potential economic loss for an injured party is injury-related medical expenses, both past and future. In instances of severe injury and disability, individuals may have life-care plans



with costs far in excess of future lost income. Table VI-C summarizes the major elements of this calculation and notes that this methodology is identical for both the Traditional Method and the DOJ Method.

TABLE VI-C  
DETERMINATION OF PAST AND FUTURE MEDICAL COSTS

STEPS	Data Sources/Methodology	DOJ Regulation Differences
<b>1. Determine Injured's Past Injury Related Medical Expenses.</b>	<b>Based upon an analysis of all injury related medical records and invoices and bills from insurance and medical service and supply providers.</b>	No material differences
<b>2. Determine Injured's Future Injury Related Medical Expenses.</b>	Based upon medical reports and analysis as well as life care plans, if applicable. Future amounts must be brought back to present value as with income streams.	No material differences

#### E. OFFSETTING COLLATERAL-SOURCE PAYMENTS IN THE COMPENSATION CALCULATION

As with a wrongful-death case, the traditional methodology typically does not require any offset based on collateral sources in the estimation of economic and noneconomic damages arising from wrongful injury. The Victim Compensation Fund calls for such a deduction,<sup>38</sup> and the DOJ Regulations enforce this provision.<sup>39</sup> Thus, after economic and noneconomic damages for an injured party are calculated under the DOJ Regulations, various collateral-source payments will be deducted. For example, if an injured party has received or will receive injury-related medical insurance payments, or disability payments related to the injuries, those payments must be deducted from the sums presented in the Victim Compensation Fund charts prepared by the DOJ. Clearly, depending upon the nature and amount of collateral-source payments, such an offset policy could result in a significant reduction in claim amount for injured claimants seeking restitution under the DOJ Method as compared with the Traditional Method.

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<sup>38</sup> *System Stabilization Act*, *supra* note 1, § 405(b)(6).

<sup>39</sup> *DOJ Regulations*, *supra* note 4, at 66,279.

## V. SAMPLE CALCULATIONS OF ECONOMIC DAMAGES FOR WRONGFUL DEATH—TRADITIONAL METHOD VS. DOJ METHOD

The above discussion has delineated the differences in calculation of a victim's economic damages in cases of wrongful death or wrongful injury under traditional litigation methods as well as under the DOJ Regulations. Now the discussion shifts to the actual calculation of economic damages for wrongful death in the case of five representative decedents. Exhibits I, II, and III provide the calculation of economic damages under traditional litigation methods, the calculation of economic damages under the Victim Compensation Fund, and the comparison of the results, respectively, for five individuals with varying combinations of income, age, gender, and family circumstances.

Economic losses under the Traditional Method are calculated according to the methodology discussed earlier in this analysis. The final number under the Traditional Method includes lost household services and a deduction of 25 percent for attorney fees.<sup>40</sup> It should be noted that the calculations under both methods are for economic damages only and do not include any money for noneconomic loss.

The calculations under the DOJ Method are derived from the Presumed Economic and Non-Economic Loss Tables for dependents revised by the DOJ on March 13, 2002.<sup>41</sup> Collateral-source numbers for insurance are based on statistics relating life-insurance coverage to disposable income.<sup>42</sup> Social Security benefits were estimated on the basis of data provided by the Social Security Administration. Although pension funds will no doubt be a source of offset in certain cases, they were not quantitatively addressed in these calculations because of the wide variability in pension benefits among individuals. However, in instances of public servants such as police and firemen, the pensions resulting from death and disability may be substantial, causing the net Victim Compensation Fund awards to be miniscule in such instances when compared to awards available under the Traditional Method. This same result may hold for military and government personnel. In such instances, it is critical that the

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<sup>40</sup> In practice, the authors expect that attorney's fees generally will be less than twenty-five percent. Lower attorney's fees will result in a greater net recovery for the claimant under the Traditional Method.

<sup>41</sup> See *Loss Calculation Tables*, *supra* note 13.

<sup>42</sup> See AMERICAN COUNCIL OF LIFE INSURERS, 2000 LIFE INSURERS FACT BOOK.

value of these pensions be factored into the Victim Compensation Fund calculation. It should also be noted that the awards table for the Victim Compensation Fund includes \$250,000 for each decedent and another \$100,000 for each dependent to compensate for noneconomic loss.<sup>43</sup> These amounts are therefore deducted in our examples to determine net economic losses under the DOJ Method. Legal fees—estimated to be a nominal five percent of the award<sup>44</sup>—are also deducted.

The calculations indicate that, in every example except one, the net economic losses calculated under the DOJ Method are less—and often significantly less—than the net losses calculated under the Traditional Method. This is true even after allowing for a significantly higher attorney cost for the Traditional Method. The diminution of the economic loss award under the DOJ Method ranges from over \$200,000 for an individual in the lower income brackets to several million dollars for the individual at the highest level of income and between approximately \$389,000 to \$541,000 for those in the upper middle income ranges. In two of the five calculations, the Victim Compensation Fund awards were less than half the value of a traditional litigation award. It should be noted that Victim Compensation Fund awards to female decedents did not appear to be as badly out of line as those to males. Part of this was no doubt due to the gender differences in worklife expectancy under the Traditional Method as compared with the DOJ Method, which used no gender distinction in worklife expectancy.

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<sup>43</sup> *Loss Calculation Tables*, *supra* note 13, at 2.

<sup>44</sup> The Special Master suggested the five-percent figure as an appropriate amount for those using counsel to assist them in preparing a claim against the Victim Compensation Fund.

**EXHIBIT I:**  
**SAMPLE WRONGFUL DEATH CALCULATIONS FOR ECONOMIC**  
**LOSSES USING THE TRADITIONAL METHOD**

<b>DECEDENT</b>	<b>Ms. Executive Assistant</b>	<b>Mr. Building Maintainer</b>	<b>Mr. Insurance Executive</b>	<b>Ms. Security Analyst</b>	<b>Mr. Investment Banker</b>
Salary & Benefits	\$50,000	\$40,000	\$100,000	\$150,000	\$750,000
Age	30	50	40	35	35
Dependents including Spouse	2	2	3	1	3
Annual Household Contribution	\$8,000	\$8,000	\$8,000	\$8,000	\$8,000
<b>TRADITIONAL CALCULATIONS</b>					
Lost Salary and Benefits	\$1,115,500	\$512,000	\$2,320,000	\$3,255,000	\$20,775,000
Lost Household	\$296,400	\$150,000	\$201,600	\$267,600	\$229,200
Less: consumption	(\$289,900)	(\$133,120)	(\$556,800)	(\$911,400)	(\$4,155,000)
Total Economic Loss	<b>\$1,121,500</b>	<b>\$528,880</b>	<b>\$1,964,800</b>	<b>\$2,611,200</b>	<b>\$16,849,200</b>
Less: Atty. Fees	25%	25%	25%	25%	25%
<b>Net TRADITIONAL after atty. Fees</b>	<b>\$841,125</b>	<b>\$396,660</b>	<b>\$1,473,600</b>	<b>\$1,958,400</b>	<b>\$12,636,900</b>

**EXHIBIT II:**  
**SAMPLE WRONGFUL DEATH CALCULATIONS FOR ECONOMIC**  
**LOSSES UNDER THE DOJ METHOD**

<b>DECEDENT</b>	<b>Ms. Executive Assistant</b>	<b>Mr. Building Maintainer</b>	<b>Mr. Insurance Executive</b>	<b>Ms. Security Analyst</b>	<b>Mr. Investment Banker</b>
Salary & Benefits	\$50,000	\$40,000	\$100,000	\$150,000	\$750,000
Age	30	50	40	35	35
Dependents including Spouse	2	2	3	1	3
Annual Household Contribution	\$8,000	\$8,000	\$8,000	\$8,000	\$8,000
VCF Award before Offset	<b>\$1,773,427</b>	<b>\$829,154</b>	<b>\$2,174,885</b>	<b>\$2,388,487</b>	<b>\$4,542,828</b>
Less: Non-Economic	(\$450,000)	(\$450,000)	(\$550,000)	(\$450,000)	(\$550,000)
Offset: Ins	(\$150,000)	(\$120,000)	(\$300,000)	(\$450,000)	(\$1,500,000)
Offset: SS	(\$64,800)	(\$64,800)	(\$183,600)	(\$97,200)	(\$183,600)
Offset: Pension	Unknown	Unknown	Unknown	Unknown	Unknown
Net VCF Award	<b>\$1,108,627</b>	<b>\$194,354</b>	<b>\$1,141,285</b>	<b>\$1,491,287</b>	<b>\$2,309,228</b>
Less: Attorney fees	5%	5%	5%	5%	5%
<b>Net VCF Award after atty. fees</b>	<b>\$1,053,196</b>	<b>\$184,636</b>	<b>\$1,084,221</b>	<b>\$1,416,723</b>	<b>\$2,193,767</b>

EXHIBIT III:  
COMPARISON OF SAMPLE WRONGFUL DEATH CALCULATIONS FOR  
ECONOMIC LOSSES UNDER TRADITIONAL METHOD AND THE  
DOJ METHOD

DECEDENT	Ms. Executive Assistant	Mr. Building Maintainer	Mr. Insurance Executive	Ms. Security Analyst	Mr. Investment Banker
Salary & Benefits	\$50,000	\$40,000	\$100,000	\$150,000	\$750,000
Age	30	50	40	35	35
Dependents including Spouse	2	2	3	1	3
VCF minus Traditional	(\$212,070)	(\$212,024)	(\$389,379)	(\$541,678)	(\$10,443,134)
VCF:Traditional	125%	49%	77%	76%	18%

## VI. QUALITATIVE ISSUES

Thus far, this discussion has been primarily concerned with differences in calculations of economic damages under two methodologies: the Traditional Method and the DOJ Method. The preliminary findings in this analysis suggest that, in certain instances, the allowable claims for economic losses under the DOJ Method may be substantially lower than those available under the Traditional Method. This result is especially true in those instances where there are significant amounts of collateral-source payments to victims and/or their families, where a victim had significant household contribution losses, and where the victim was in a very high income bracket.

Having examined major quantitative differences of the two methods, it is now appropriate to examine some of the qualitative issues that differ between these two methods and that may also have a bearing upon the venue that an individual and his or her representative should select for compensation. Although several of these qualitative areas may require consideration, the most important ones appear to be liability, rapidity of payment, predictability of award, certainty of payment, availability of punitive damages, limitations on monetary awards, and legal fees.

### A. LIABILITY

Barring an unforeseen capitulation of responsibility by the airlines and others, liability must be proved in court under traditional litigation, no simple task in this unique instance. The Victim Compensation Fund, however, is basically a no-fault reparations program with the U.S. Government standing ready to

pay qualified claims from victims.<sup>45</sup> Consequently, there is no need to prove liability under the DOJ Method.<sup>46</sup>

#### B. RAPIDITY OF PAYMENT FOR COMPENSATION

The traditional litigation route likely will take several years to reach resolution. Under the Victims Compensation Fund, the determination of the amount of the award is made no later than 120 days after filing the claim<sup>47</sup> and payment is authorized within twenty days after determination.<sup>48</sup> In addition, an eligible claimant can receive an advance payment of \$50,000 immediately in the cases of death and \$25,000 in the certain cases involving serious physical injury.<sup>49</sup>

#### C. PREDICTABILITY OF AWARD

In many instances, award amounts are highly predictable under the Victim Compensation Fund. The DOJ has issued tables of presumed economic and noneconomic damage totals for decedents according to age, income, and number of dependents.<sup>50</sup> On the other hand, traditional litigation is subject to much more uncertainty with regard to the amount of potential settlement with an insurance company or an award by a jury.

#### D. CERTAINTY OF PAYMENT

There is no question that the U.S. Government has the financial resources to back the Victim Compensation Fund. While the insurance coverage of the airlines is large—approximately \$1.5 billion per aircraft<sup>51</sup>—it is finite and may not be sufficient for all of the potential claims that may be asserted (particularly if claims for property damage are included).

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<sup>45</sup> *DOJ Regulations*, *supra* note 4, at 66,274 (describing the fund as “fast track administrative compensation program, eliminating the red tape, time, and expense of a traditional lawsuit”).

<sup>46</sup> *System Stabilization Act*, *supra* note 1, § 405(b)(2).

<sup>47</sup> *Id.* § 405(b)(3).

<sup>48</sup> *Id.* § 406(a).

<sup>49</sup> *DOJ Regulations*, *supra* note 4, at 66,284 (codified at 28 C.F.R. pt. 104, § 104.22(a)).

<sup>50</sup> *See Loss Calculation Tables*, *supra* note 13, at 3–7.

<sup>51</sup> Panel Discussion, *The Japanese Initiative: Absolute Unlimited Liability in International Air Travel*, 60 J. AIR. L. & COM. 819, 825 (1995) (“Airlines today can buy as much as \$ 1.5 billion in coverage for any one accident from their insurance carriers.”).

### E. PUNITIVE DAMAGES

Punitive damages may be available under traditional litigation route. They are not available under the Victim Compensation Fund.<sup>52</sup>

### F. MONETARY AWARD LIMITATIONS

#### 1. *Maximum Awards*

There are no maximums under the Traditional Method. Implied limitations under the Victim Compensation Fund are somewhere in the area of \$3 million to \$4 million before the offset of collateral sources, a limit that may discourage victims with exceptionally high income.<sup>53</sup>

#### 2. *Minimum Awards*

There are no minimums under the Traditional Method. The Victim Compensation Fund wants to ensure that every single decedent gets at least \$350,000 and every married decedent receives \$500,000, including collateral-source funds.<sup>54</sup>

### G. LEGAL FEES

The DOJ suggests no more than five percent of a compensation award should go to attorneys fees.<sup>55</sup> Under the Traditional Method, attorneys fees may range between twenty and thirty-five percent.

## VII. SUMMARY AND CONCLUSIONS

This paper analyzed the calculation of economic damages under the Victim Compensation Fund using the recently issued DOJ Regulations. The results were compared with a calculation of economic damages using the traditional litigation damages methodology. A corollary objective was to delineate the major *qualitative* issues that further differentiate the two methods, thus impacting the choice a client must make.

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<sup>52</sup> *System Stabilization Act*, *supra* note 1, § 201(b)(2).

<sup>53</sup> See *Loss Calculation Tables*, *supra* note 13, at 3 (listing highest award as \$4,351,060 for a 30-year-old married decedent with two children under age 9). See also *DOJ Regulations*, *supra* note 4, at 66,274 (anticipating that, "absent extraordinary circumstances, awards in excess of \$3 million, tax-free, will rarely be appropriate").

<sup>54</sup> *DOJ Regulations*, *supra* note 4, at 66,274–75.

<sup>55</sup> *Id.* at 66,280 (noting that such fees are not authorized by the System Stabilization Act).

The calculated amounts for economic damages under traditional litigation methods are expected to be greater than those calculated under the DOJ Regulations for the Victim Compensation Fund for the following reasons:

- The DOJ Method requires an offset of collateral sources.
- The Victim Compensation Fund does not provide for the economic loss for lost household services.
- The Victim Compensation Fund does not provide complete restitution for those in exceptionally high income brackets.
- Future income is calculated on an after-tax basis under the Victim Compensation Fund.

Traditional litigation calculations typically incorporate none of these four practices, which tend to diminish compensation awards.

Although lower in dollar damages, the Victim Compensation Fund finds itself ahead of traditional litigation methods in the realm of qualitative issues. In brief, payment of claims under the Victim Compensation Fund is fast, certain and predictable.

- *Rapid Recovery*—The DOJ has pledged that once a claim is made, compensation is paid no longer than 140 days thereafter.
- *Certainty of Recovery*—The program is no fault and the U.S. Government's resources are behind the awards and payments. Compensation under traditional litigation methods may depend upon proof of liability, jury findings, and the availability of resources to honor an award, once made.
- *Predictability of Recovery*—The DOJ has provided tables that set forth presumed economic and noneconomic loss for decedent claims based upon age, income, and number of dependents.

Clearly, there are trade-offs between the two distinct avenues for seeking compensation for victims of September 11, 2001. Both methods have their good points and their bad. On the one hand, a victim who has a large amount of collateral-source payments will be somewhat discouraged from using the Victim Compensation Fund and more willing to attempt to traverse the traditional litigation route. The same may hold true for those victims who had very large incomes. On the other hand, those needing a fairly predictable payment rather quickly (and perhaps desiring to forgo the vagaries and pressures brought about from being involved in protracted legal litigation maneuvering) may be strongly drawn to pursuing relief under the Victim Com-



pensation Fund. Affected parties and their counselors will want to become familiar with the two avenues and make the choice that best suits their unique circumstances with regard to both the quantitative and qualitative issues discussed above. We believe this analysis will help in that process.