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INDUSTRY IN CRISIS: A PROGRESS REPORT ON VICTIM COMPENSATION AND THE AIRLINES AFTER THE SEPTEMBER 11TH LEGISLATION

RAYMOND L. MARIANI*

I. INTRODUCTION

MORE THAN ONE year has passed since the most deadly attack ever carried out on American soil. The aviation community and the rest of the nation may never fully reconcile how terrorist attacks converted four passenger aircraft into missiles that destroyed national icons, killed thousands of our citizens, and cast a bright light on the vulnerability of our aviation system. Nonetheless, the more tangible parts of our national aviation system and the targets of the terrorist attacks are in reconstruction. Airports have reopened for flights. The Pentagon has been rebuilt. The creation of new office buildings in conjunction with a memorial will be underway soon at the World Trade Center site.

For most people, daily routines now more closely resemble the day before September 11, 2001 than the day after. The same cannot be said, however, for the two groups most directly affected by the terrorist attacks. The victims' families and the aviation industry are both struggling to recover financially and in other respects.

The Government stepped in within a week of the terrorist attacks in an attempt to mend the economic damage. It created two distinct but related programs: the September 11th Victim Compensation Fund of 2001 ("the Fund") to compensate the victims' families who, in exchange, would not sue and possibly bankrupt the airlines, and a corresponding piece of legislation that would give a financial boost to the airlines in the form of a

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grant/loan program ("the Airline Assistance Program"). Congress never clarified the legal or historical justification for these related programs, apart from a general desire of all Americans to aid those most directly affected by the terrorist attacks. The lack of an articulated legislative rationale has come to haunt both programs, as those left to run them must rely on their own interpretation of the statutes for guidance or choose to steer the programs according to their own philosophies under the guise of divining legislative intent.

Both programs have been a source of divisiveness since inception. With respect to the Fund, debate continues among the public at large over why these victims deserve compensation of any kind from the Government. Questions persist about why these victims deserve treatment different from those killed in other terrorist attacks, or those killed by non-hostile events. The morality and equity of awarding differing amounts to victims' families based on the relative economic position of each decedent also continues to generate controversy. Finally, the claimants themselves argue against a de facto damage cap instituted by the Special Master of the Fund. The single largest employer of victims threatened to commence litigation on that issue if necessary, a promise fulfilled by a group of those families in a proposed class action.

Distribution of money allocated by the Airline Assistance Program has been overshadowed by concerns of the government board responsible for that process, and the electorate, over spending taxpayer money on a government "bailout" for already ailing companies. Most companies turned down have been

5 See id.; Jenkins, supra note 2.
smaller, low cost carriers. They accuse the Air Transportation Stabilization Board (ATSB) of relying on an outdated view of regulation and competition by favoring larger carriers for loan guarantees, and ignoring the consumers' priority on pricing over service. The ATSB has cloaked its deliberations in secrecy and explained its decisions with little more than a few cryptic sentences in rejection letters to these small carriers.

Any sympathy that these corporations may have engendered from the public was coincidentally destroyed by a realization last year about what has been happening in the CFO's offices of the biggest publicly held corporations in America. Many corporate officers who claimed credit for incredible increases in revenues and shareholder value in the 1990's were unmasked in 2002 as simply well-heeled confidence men. This scandal over corporate mismanagement and fiscal manipulation has not implicated any air carriers. Nonetheless, the atmosphere of distrust and disgust by a nation of investors over corporate greed and irresponsibility, regrettably for the airlines, coincided with the timing of their applications to the ATSB.

Members of Congress and the President, who already defended themselves for enacting the legislation, guarded against voters at the midterm elections in November 2002, making them pay a price for propping up corporations that constituents consider unworthy of taxpayer subsidies. The ATSB members, all Presidential (i.e. political) appointees, are not unmindful of these issues. These political variables continue to chill the atmosphere surrounding assistance to the airline industry.

Nor has either program been very successful, if they are indeed desirable. More than one year after the Special Master of the Fund began accepting applications, only 398 families out of 3,000 of the deceased estates, as well as the injured, have accepted a proposed damage award from the Fund. Few families have actually received a check. Meanwhile, some claimants choose the alternative path of litigation, with that option retain-

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8 Letters of denial from Daniel G. Montgomery, Executive Director, Air Transportation Stabilization Board [hereinafter “ATSB”] to Scott Dickson, Chairman, President, and Chief Executive Officer, Vanguard Airlines, Inc., Frontier Flying Services, Jacob Schorr, President and Chief Executive Officer, Spirit Airlines, and Michael Conway, President, National Airlines, available at www.ustreas.gov/atsb [hereinafter “ATSB”] (last visited June 20, 2003).

9 Id.

ing appeal as the Fund is battered in the press and by the victims' families themselves.\textsuperscript{11}

All of the major air carriers posted staggering losses for the year 2002, despite the Airline Assistance Program. USAirways and Vanguard filed for bankruptcy.\textsuperscript{12} The United Airlines bankruptcy watch was a daily event\textsuperscript{13} until it finally capitulated on December 9th.\textsuperscript{14} Yes, the Government offered to support loan applications with its guarantee, but at a cost few carriers can afford. Only two of the Big Six carriers even applied for assistance.\textsuperscript{15} Of the sixteen carriers that did apply, more than half were turned down.\textsuperscript{16}

This article follows one published last year, which described in detail the creation and operation of the Fund and the Airline Assistance Program.\textsuperscript{17} Here, the two programs are revisited more than one year after enactment. This article assesses the relative success and failure of each program, the viability of alternatives, and the results we can expect for the victims and the aviation industry as the programs continue to conclusion.

II. THE VICTIM COMPENSATION FUND REVISITED

A. CONGRESS CREATES THE ANTI-LAWSUIT

Within two weeks of the terrorist attacks, the U.S. created the Fund as an alternative to lawsuits for the almost 3,000 families of the deceased and the families of the injured.\textsuperscript{18} In theory, the Fund would provide prompt benefits, using a simple process with "fair and just" awards.\textsuperscript{19} The Attorney General selected a

\begin{footnotes}
\item[15] ATSB, supra note 8.
\item[16] Id.
\item[18] System Stabilization Act, supra note 1.
\end{footnotes}
veteran mediator, Kenneth Feinberg, as Special Master of the Fund. The Fund opened for business on December 21, 2001.\textsuperscript{20} The program had momentum and offered a fresh alternative to the drawn out lawsuits that inevitably followed past aviation-related terrorist attacks, such as the decade-long Pan Am-Lockerbie bombing lawsuit against Libya.

After several months of delay and struggling, however, the Fund was no longer attractive to claimants. The Special Master became, by various accounts, a scapegoat for Congress’ decision to deduct collateral sources, a saint for his patience, a ministerial servant wrongly trying to assume “prime ministerial” responsibilities, and a lightning rod for criticism that anyone chooses to direct at the Fund.\textsuperscript{21} The position has become roughly akin to Mayor of New York: after a very short honeymoon period, it is a thankless task in which even the best intentioned and most skilled diplomat will rarely please more than a small minority of his constituents at any given time.

The Rules that define the process for awards were not finalized until several months into 2002.\textsuperscript{22} These Rules, the place where legislative theory meets the reality of victims and their losses, continue to be the subject of disappointment, anger, frustration, and all other emotions that surface anytime wrongful death claims arise. Instead of being viewed as a source of predictability, the Rules have become the embodiment of a process that claimants criticize as excessively inflexible and dogmatic.

The Fund has been hampered in other respects. Many claimants do not appreciate, or refuse to accept, that the Fund will not compensate them in a manner similar to a traditional lawsuit. Each claim involves reaching a total dollar value for damages that would be “fair” to the claimant considering the factual circumstances of the loss. But unlike the usual courtroom dispute, the issue of compensation for these 3,000 deaths has not been limited to a defendant and its insurance adjuster. Instead, another 300 million taxpaying citizens have provided continuous input as underwriters of the Fund.

The public debate over the Fund did not simply end when the Final Rule (“the Rule”) was published in March 2002. Commen-

\begin{itemize}
  \item \textsuperscript{20} Id.
\end{itemize}
tators continued to challenge the Fund in general, the concept of wage-based awards and the choices that are seemingly impossible to make without offending some constituency. These discussions typically devolve into class warfare: “The Government thinks the death of your electrician husband counts for less than the death of someone else’s stockbroker wife.”23 Others continue to launch vitriolic attacks against the victims, in caustic and blunt affronts on their supposed greed.24 One reply to an article on the Fund stated simply, “I’m sure everyone has lost someone in their lifetime. Should they get compensation, too?”25

Meanwhile, the claimants have not abandoned hope, amid this hostile environment, of enhancing the available benefits. One victim’s spouse started a website that seeks to scrap the Rule as it relates to collateral source deductions, and advocates a minimum non-economic loss award of one million dollars per claimant.26 Similarly, a bill to amend the Act was introduced in 2002, proposing that same relief.27 That bill was sent to committee and did not resurface in the 107th Congress.28

To complicate things further for claimants, one person, the Special Master, fulfills multiple roles for the Fund. He is the surrogate defendant, scrutinizing damage submissions for exaggerations and overreaching. He is also the judge, making a determination of the award, based principally on the victim’s past wages and the corresponding table for economic loss calculation in the Rules. As judge, he has been very vocal about generally capping awards at about 3 million dollars, saying awards above that cap would “rarely be appropriate.”29 Lastly, the Special Master has been the only visible advocate for claimants who sign onto the Fund and waive their right to sue most defendants.

These different and conflicting roles of the Special Master have created a dilemma as more awards are issued. When claim-

23 Bazelon, supra note 4.
24 See Comment to Bazelon, (July 3, 2002), supra note 4 (on file with author) (“Wake up you greedy bastards. This tragedy affects us all. Stand together because you all have the same grief, therefore share the proceeds on an equal basis.”).
26 Fix the Fund, at www.fixthefund.org (Dec. 8, 2002); see David Chen, supra note 21, at B10.
28 Id.
VICTIM COMPENSATION FUND

Ants express dissatisfaction with awards, they are essentially expressing dissatisfaction with the Special Master. Yet this is the same person, the only person, trying to encourage more claimants to pick the Fund as their best chance of obtaining a fair award. Might the Fund benefit from someone other than, or in addition to, the Special Master serving as a spokesperson who tries to attract new claimants to seek an award from the Fund?

B. CLAIMANTS BEGIN TO CHOOSE

As of July 2003, just over 2,000 families had submitted an eligibility form to the Fund. By making that filing, they waived their right to sue any airline, airport or aircraft manufacturer. The first awards by the Fund were not issued until late July and early August of 2002. Only 624 families have received notices of award from the Fund. As of July 2003, 398 of the 624 families have accepted the awards. One hundred families requested a hearing. The remaining families had not decided how to proceed.

For those families who eagerly awaited the first group of awards for an indication of how their own claim might be valued, the information released was not very enlightening. The Fund lists the average amount of the awards after collateral offsets ($1.49 million), and the median award after offsets ($1.23 million). The Fund also posts a range of awards for four income levels: victims who received income of less than $50,000 (award range of $250,000 - $2.7 million); income between $50,000 and $100,000 (award range of $250,000 - $4.1 million); income between $100,000 and $200,000 (award range of $250,000 - $4.5 million); and income over $200,000 (award

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30 September 11th Victim Compensation Fund of 2001, Table 1 General Award Statistics, supra note 10.
32 September 11th Victims Compensation Fund of 2001, Table 1 General Award Statistics, supra note 10.
33 Id.
34 Id.
35 Id.
36 Id. at Table 2, Range of Award Values for Cases Relating to Deceased Victims.
range of $250,000 to $6.0 million).\textsuperscript{37} Each award is listed separately by dollar amount within each range.\textsuperscript{38}

This data, however, is of little assistance in calculating or even estimating any prospective awards. The Fund declines to state the number of children or other dependents of each decedent. Moreover, the collateral offsets are not disclosed. The Fund website admits as much: "Readers should understand that collateral source offsets vary greatly among claimants and can account for substantial differences in awards from what appear to be similarly situated claimants."\textsuperscript{39} These awards could have been millions of dollars higher but may have been reduced for life insurance benefits or other offsets. The information released offers insufficient guidance for families that might otherwise choose the Fund over a lawsuit.

The attorneys representing a group of 14 "test cases" stated that awards issued to their clients averaged 75 percent more than would have been expected pursuant to straight application of the published tables.\textsuperscript{40} However, only one of the 14 claims involved a person earning in excess of $100,000 per year.\textsuperscript{41} The absence of any claims in that test group where income exceeded the 98th percentile ($231,000) perpetuated skepticism among the families of victims in that income range as to whether the Fund would cap awards at $3 to $4 million, as stated by the Special Master when the Rules were issued.\textsuperscript{42} The reporting of awards up to $6 million has partially dispelled that concern.

The only details of a claimant’s background information and underlying financial data in conjunction with an award are anecdotal. For example, voluntary disclosure was made by the parents of a victim who was single, with no children in his 20’s.\textsuperscript{43} He was earning almost $60,000 per year and was awarded $1.19 million, with a deduction of $150,000 for offsets resulting in an award of $1.04 million.\textsuperscript{44} The award was separated into non-economic loss and economic loss.\textsuperscript{45}

\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Daniel Wise, In 14 Test Cases, Sept. 11 Fund Master Gives ‘Fair Compensation’ to Families, 228 N.Y.L.J. 1 (Sept. 2002).
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} David Chen, Family Accepts $1.04 Million Award from 9/11 Victims Compensation Fund, N.Y.L.J. Aug 8, 2002, at A20.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
If this decedent was a New York resident, the award would exceed any verdict under New York law. With no persons economically dependent on this victim, New York law would severely limit any remaining damages for a wrongful death lawsuit.\textsuperscript{46} In contrast, the Fund’s standard non-economic loss award is $250,000 for each victim.\textsuperscript{47} This indicates that the award included $940,000 in economic loss. A lawsuit might have provided half of that $1.15 million, perhaps even less.

This is the type of comparative analysis that potential claimants should be able to conduct to determine whether to file with the Fund. If the Special Master succeeds in inducing hundreds of additional claimants to apply for an award from the Fund, versus joining the consolidated lawsuits against airlines, airports, and security companies, may depend in large measure on his policies for disseminating information about the awards to date.

C. THE LAWSUIT OPTION: MORE THAN AN ATTRACTIVE NUISANCE

Over 100 claimants have opted out of the Fund by filing lawsuits against the entities protected by the Act.\textsuperscript{48} Most lawsuits name United Airlines and American Airlines as well as companies hired for security functions at the airports where the terrorists boarded the four aircraft used in the terrorist attacks as defendants.\textsuperscript{49} Some cases also name numerous other airlines as defendants on the theory that they shared responsibility for hiring competent checkpoint security at the airports where the terrorists were screened for weapons.\textsuperscript{50} The government entities that own airports related to the terrorist attacks have also been sued.\textsuperscript{51} Dulles Airport in Virginia, Logan Airport in Boston, and the Portland, Maine Airport have all been named as defendants


\textsuperscript{47} 28 C.F.R. § 104.44 (West 2002).


\textsuperscript{49} E.g., Koutny v. United Air Lines, Inc., No. 02 Civ. 2802 (S.D.N.Y. filed Apr. 10, 2002).

\textsuperscript{50} E.g., Driscoll v. Continental Airlines, No. 02 Civ. 7912 (S.D.N.Y. filed Oct. 3, 2002).

\textsuperscript{51} E.g., Jane Doe v. City of Portland, No. 02 Civ. 7153 (S.D.N.Y. filed Sept. 9, 2002).
in lawsuits by victims' families. Some parties have also sued Boeing.

These cases are consolidated before Judge Alvin Hellerstein in the Southern District of New York, the venue required by the Act for all matters related to the terrorist attacks. Discovery in these consolidated cases has progressed slowly. First, the United States objected to any non-party discovery. The information demanded would raise national security issues, according to lawyers for the Government, and could endanger public safety and law enforcement efforts if disclosed. The Government moved to intervene in the cases in July 2002.

Lawyers for some families that have neither sued nor filed a claim with the Fund appeared before Judge Hellerstein in July 2002. They asked him to keep the cases at a slow pace so they could join lawsuits once their clients decide which avenue they will choose for recovery. The struggle over disclosure of government data concerning airport security and terrorist threats ("SSI" sensitive security information) has made it unnecessary for Judge Hellerstein to intentionally slow the pace of discovery in deference to the undecided claimants.

The court stayed all discovery as a result of the Government's intervention and directed the Government to submit briefs on the issue. A hearing in September 2002 indicated that the number of claimants who had filed suit had reached a critical mass that required a more systematic approach to discovery. The court ordered the parties to create plaintiff and defense steering committees and then submit proposed discovery plans.

The one year anniversary date of the terrorist attacks created a difficult choice for victims' families who are considering filing suit. The Fund allows them to file a claim until December 21, 2003. However, New York law requires them to file a lawsuit against the Port Authority within one year of an alleged tort. The Port Authority owned and operated the World Trade Center as well as Newark Airport, the departure point for the
flight that crashed near Shanksville, Pennsylvania. By filing suit against the Port Authority, these families would forego their right to file a claim with the Fund.\textsuperscript{59}

Four families, on behalf of all others similarly situated, moved by order to show cause before Judge Hellerstein for an extension of time to file a claim against the Port Authority until September 10, 2004.\textsuperscript{60} The Port Authority, despite having many of its own personnel among the ranks of the victims, opposed the motion.\textsuperscript{61} The court denied the motion, holding that it did not have power to override the statute.\textsuperscript{62} However, the court fashioned a remedy that resolved this dilemma favorably for the claimants. Judge Hellerstein held that the court will automatically suspend suits filed by claimants who file against the Port Authority.\textsuperscript{63} The Port Authority did not need to file an answer or responsive motion.\textsuperscript{64} The judge allowed each claimant to decide before December 21, 2003 whether to file a claim with the Fund or pursue a lawsuit against the Port Authority.\textsuperscript{65} Once a claim is filed with the Fund, the lawsuit against the Port Authority must be dismissed within ten days.\textsuperscript{66}

The court advised the parties in November that it would entertain motions to dismiss by February 7, 2003. American Airlines moved to dismiss the claims by all victims other than the passengers and crew on the four aircraft, which would dismiss most claims. A number of security companies and non-carrier airlines joined in the American brief. The motion is based on a lack of duty owed to those victims in the WTC and on the ground for checkpoint security. State law played a prominent role in the American motion because the System Stabilization Act specifically references state law as applicable to the extent that it does not conflict with federal law.

The airports filed a separate joint motion to dismiss as to all claimants on two bases. First, the airports allege that they owe no duty to any person for checkpoint security, a function specifically and exclusively reserved to the airlines under the federal

\textsuperscript{59} System Stabilization Act, \textit{supra} note 1, § 405 (c)(3)(B)(i).
\textsuperscript{60} Mulligan v. Port Auth., No. 02 Civ. 6885 (S.D.N.Y. filed Aug. 29, 2002).
\textsuperscript{61} \textit{Id.} (referring to Affidavit and Memorandum of Law of the Port Authority, Sept. 3, 2002).
\textsuperscript{62} \textit{Id.} (referring to Order dated Sept. 6, 2002, per J. Helerstein).
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.}
aviation regulations. Second, the airports moved to dismiss claims for any other aspect of airport security on the basis that the plaintiffs do not allege a cause of action under federal regulations, the only possible source of a duty owed to them. The Portland Airport moved to dismiss on the separate basis that the plaintiffs did not comply with a Maine statute requiring a timely notice of claim to be filed.

The court granted the Portland Airport motion based on the claim statute. No plaintiff appealed the ruling. The airports’ motions were otherwise denied as they concern checkpoint security pending some limited discovery. The airline/security company motions to dismiss remain pending.

Noticeably absent to date from the list of defendants in virtually all cases is the United States Government. The only theory to support a claim against the Government would involve alleging breach of a duty to prevent the terrorist attacks through intelligence services and the military. The initial response of the Government after the attacks was a refusal to acknowledge any lapse in intelligence that would otherwise have resulted in preventing the attacks.

The tenor of those comments changed dramatically, particularly for the Federal Bureau of Investigation (FBI), in mid-2002. A field agent received whistle blower protection from Congress after stating that, prior to the terrorist attacks, she was blocked by senior FBI officials from obtaining a search warrant for the computer and other belongings of Zacarias Moussaoui, who has been charged with conspiring with the 19 terrorists killed in the terrorist attacks. The FBI changed its response to the growing inquiry into its actions, from claiming a few days after the attack that “there were no warning signs,” to admitting in May that it cannot rule out the “possibility we could have come across some lead that would have led us to the hijackers.”

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68 But see Schroeder v. FAA, No. 02 Civ. 7185 (S.D.N.Y. Sept. 10, 2002).
69 See FBI Director’s Comments, N.Y. TIMES, May 31, 2002 (Sept. 17 - “There were no warning signs that I’m aware of that would indicate this type of operation in the country.”).
71 See FBI Director’s Comments, supra note 69.
A Senate investigation resulted in a harshly critical report of the FBI.\textsuperscript{72} One senator who co-authored the report stated that, had the FBI assimilated the information from its field offices before September 11, it would have resulted in a "veritable blueprint for 9/11."\textsuperscript{73} The report cited the Moussaoui matter as well as the FBI ignoring a Phoenix agent's concerns over many young Arab men seeking flight training in the United States.\textsuperscript{74}

The release of this and other information known to law enforcement before the terrorist attacks resulted in the passing of legislation to create an independent commission to investigate errors by the Government prior to September 11.\textsuperscript{75} The White House opposed the commission,\textsuperscript{76} but ultimately agreed. The Commission has been proceeding with testimony and hearings.\textsuperscript{77}

These concessions by some FBI officials, however, would not firmly support a lawsuit against the Government by victims' families. A substantial portion of the intelligence community has rejected this analysis and asserted that the few scraps of information about terrorist activities related to aviation were too disparate among the massive quantity of incoming data.\textsuperscript{78} Establishing liability of the Government would also require plaintiffs to prove more than simple negligence, the standard of care in the lawsuits against the airlines and security companies. Instead, they would need to jump the more significant hurdle of the discretionary function exception to the Federal Tort Claims Act.\textsuperscript{79}

Plaintiffs would have great difficulty proving that government intelligence officers abused their discretion in the manner that they decided to collect, organize, review, and interpret data on


\textsuperscript{73} Id.

\textsuperscript{74} Id.


\textsuperscript{77} See generally National Commission on Terrorist Attacks, \textit{available at} www.9-11 commission.gov/hearings (last visited July 1, 2003).


potential terrorist activities. Without clear guidelines to use as a benchmark for government handling of the information, a claim by plaintiffs would amount to no more than second-guessing these officials because few former intelligence officials can be expected to testify against their colleagues. This type of claim is also incompatible with the lawsuits now pending that allege negligent airport security, making it less attractive because the cases might not be consolidated.

D. The Silent Majority

And what of the remaining potential claimants? The largest category of victims’ families is the undecided group. More than halfway into the filing period for the Fund, only one-third of all victims families have chosen either to file with the Fund or file suit. Approximately 2,000 families, not counting more of the injured, are watching and waiting. They have only a few months remaining to decide.

The dissatisfaction over the de facto damages cap instituted by the Special Master remains a big sticking point for high income claimants. The single largest group of victims, the employees of the Cantor Fitzgerald firm, recently raised this problem to a new level of visibility. The review of statistics concerning their losses is sobering. Of 1,000 people employed by the firm, two-thirds were killed in the attack. Not a single employee present in their offices on floors 101-105 survived. Over 700 children lost a parent. Twenty families lost multiple family members. Against this backdrop of horrific loss arose the potential for the first serious challenge to the Fund.

A report issued by the General Counsel of Cantor Fitzgerald to the Special Master and Department of Justice ("the Report") confronted the ceiling on recovery that the Special Master created through the Final Rule. The Report directly challenged the capping of awards at the 98th percentile of wage earnings as a contravention to the legislation that created the Fund and the will of Congress. The Report pointedly cited cases that con-

80 Cantor Fitzgerald Report, supra note 6.
81 Id. at 15.
82 Id.
83 Id.
84 Id.
85 Id.
86 Id. at 37.
strain the limited authority of an administrative officer to change the mandate provided by enabling legislation.\textsuperscript{87}

The Report suggested that Cantor Fitzgerald families might launch a collateral attack on the Fund through judicial review pursuant to the Administrative Procedures Act (APA), if their concerns were not met by the Special Master. Comparing the Fund to an "agency" as defined by the APA, the Report stated that "an administrative agency lacks the power to issue regulations that 'effect an impermissible alteration of the statutory framework.'"\textsuperscript{88} The Report asserted that an aggrieved party can therefore file a declaratory judgment lawsuit that seeks to invalidate the regulation and may seek injunctive relief as well.\textsuperscript{89} The proposed legal challenge by Cantor Fitzgerald was underscored by a separate statement that such a dispute is ripe for review if the issue is purely legal and delay would directly affect the claimants.\textsuperscript{90}

The threat became reality in a lawsuit filed by five Cantor families as a proposed class action.\textsuperscript{91} They named the Special Master Kenneth Feinberg, John Ashcroft and the Department of Justice as defendants. The complaint did not seek to invalidate the Fund. Instead, plaintiffs challenged the amounts of the awards as inconsistent and contravening the System Stabilization Act. They quoted numerous Feinberg statements and claimed that he improperly influenced his decision with concerns over how much the Treasury should pay out and how much claimants actually need to put their life back together from his personal perspective. The plaintiffs also claimed that the Rules he created perpetuate this invalid scheme and must be stricken as contrary to the enabling statute. Two other lawsuits joined in the challenge to the Fund.\textsuperscript{92}

Success for these plaintiffs would have dealt a serious blow to the Fund. The Cantor Fitzgerald families alone constitute approximately 20 percent of all claimants. The claimants who have already accepted awards could have challenged the amounts of their awards if the challenge were successful and the Rules had to be changed. With the pace of awards to date disap-

\textsuperscript{87} Id. at 30.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 31 n.16.
\textsuperscript{90} Id.
\textsuperscript{92} Smith v. Feinberg, No. 03 Civ. 1040 (AKH) (S.D.N.Y. 2003); Schneider v. Feinberg, No. 03 Civ. 129 (AKH) (S.D.N.Y. 2003).
pointing many of these families, the prospect of more delays created by revisiting earlier awards would be the last thing the Fund needed for publicity.

Judge Hellerstein issued a single comprehensive order that rejected all challenges to the Fund. He held that Congress invested the Special Master with substantial discretion over a scheme for compensation. Additionally, Congress was entitled to delegate to him such discretion intending that he would provide less to claimants than they would otherwise receive in a trial by jury. No plaintiff has appealed the ruling.

Apart from the size of awards, claimants may also be reluctant to choose the Fund for other reasons. First, a claimant family must initially complete the application to the Fund, which runs 30 pages. It is well organized, but nonetheless intimidating for someone who is not a lawyer, accountant, or other professional accustomed to similar compilations of data. One claimant who is an accountant expressed frustration with the red tape.

Second, many claimants have retained counsel who may guide them away from the Fund. An attorney hired on a contingency basis could make more money through a lawsuit, because of potential for higher damage awards. Some attorneys might also prefer a lawsuit because of the publicity such high profile cases bring to a plaintiff's firm. A number of firms will likely represent most of their clients by filing claims with the Fund, guaranteeing contingency fees to counsel, and then representing some claimants in lawsuits.

The slow payout of charitable donations is another factor that has delayed claimants' decisions about choosing the Fund. Several major charities that collected donations still had close to one billion dollars to disperse as of June 2002. Those claimants who believe that the Fund might be insufficient to replace a lost income stream would benefit from knowing the total compensation from other sources before deciding whether to file a lawsuit. Claimants should be able to make that calculation with application to the Fund by December 2003. It would be surprising if virtually all charitable donations had not been distributed two years after collection.

Finally, many claimants who are foreign nationals would experience additional obstacles to obtaining a prompt award. Laws concerning distribution of an award raise concerns because of common law marriages recognized in other countries but not by New York, income taxes levied on awards unlike the exemption in the United States, multiple residences, and other issues. Some have inquired whether they can sue an entity in the home country of the decedent without waiving the right to an award under the Fund, a point not addressed by the legislation.

E. LAWSUITS COMPATIBLE WITH THE FUND

The Fund does not require a claimant to forego all lawsuits in exchange for the Government awarding damages. Claimants must give up their right to sue airlines, manufacturers, airports and similar potentially culpable parties who would face liability for negligence. The Act specifically permits claimants to maintain lawsuits against terrorists and their conspirators who perpetrated the terrorist attacks.

A group of approximately 75 victims’ families filed suit on August 15, 2002, in the U.S. District Court for the District of Columbia. The suit names almost 100 defendants, including banks, Islamic foundations, and the government of Sudan. The plaintiffs seek to satisfy any judgment through assets held by the defendants in the United States. A similar suit was filed in the same court against Osama Bin Laden, the Republics of Iran and Iraq, and numerous other defendants. Cases were filed in Pennsylvania federal court as well as Florida federal court.

At least ten lawsuits by numerous plaintiffs against hundreds of defendants accused of perpetrating or conspiring to arrange the terrorist attacks have also been filed in the U.S. District

97 Id.
98 System Stabilization Act, supra note 1, § 405 (c) (3) (B) (i).
99 Id.
101 Sept. 11 Families Sue Saudis, Islamic Groups, 228 N.Y.L.J. 1, 4 (Aug. 16, 2002).
102 Id.
These cases are proceeding separately from the cases filed against the airlines, security companies, and airports.

III. THE AIRLINE COMPENSATION FUND

A. EAGER TO LEND A HAND?

The Government's stated intention of helping an ailing airline industry by instituting a loan program appears less successful than its efforts concerning the victims of the terrorist attacks. Airlines face the opposite problem with the Fund: very eager applicants, but few that qualified for an award. Sixteen air carriers lined up for what each believed is a just portion of the $10 billion available from the program. Four carriers were approved and have closed on a government guaranteed loan, three more were conditionally approved, and seven were denied assistance.

The loan program follows a series of government subsidies that were also a part of the Act. After the Government handed out $5 billion in grants based on revenues prior to the terrorist attacks, air carriers were justifiably optimistic on receiving additional funding from the private markets via a government guarantee on loans. What many of those carriers did not expect were government terms that one commentator characterized as no better than "what the local loan shark might have offered."

Before the program could consider most of the applicants, Congress was already prepared to cut back on funding. The Senate Appropriations Committee voted to cut the Airline Assistance Program from $10 billion to $4 billion. The full Senate rejected the measure after vigorous lobbying by USAirways. The very act of trying to scale back the program, however, sent a message to applicants about their likelihood of success.

Comments by the former ATSB Executive Director about the state of the industry explain why many carriers criticize the ATSB for lacking insight into their needs. He stated, upon re-

106 ATSB, supra note 8.
107 Id.
signing his position in April 2002, that the recovery of the airline industry “has been more rapid than expected.” He also believed that “capital markets had reopened” and that the ATSB had already “achieved its goals of stabilizing the airline industry.”

In reality, most carriers cannot survive the daily losses and the consequential draws on cash. USAirways filed for voluntary bankruptcy on August 12, 2002. United Airlines stated on August 14 that it could file for bankruptcy by November 2002. That prediction came true when it filed for Chapter 11 protection on December 9, 2002. The ability of one carrier to actually turn a profit in 2002 carried such significance that it merited a front cover story for a leading weekly business periodical.

B. MANY ARE CALLED, FEW ARE CHOSEN

The deadline for applications to the Airline Assistance Program was June 28, 2002. Seven of the sixteen applications were filed on the last day. The following carriers applied to the program for a guarantee in an amount representing ninety percent of the total loan the carrier sought to secure and received the following disposition:

112 Id.
114 Wong, supra note 12, at A1.
115 United Bankruptcy, supra note 14.
118 ATSB, supra note 8.
United Air Lines | $1.8 billion | denied
USAirways | $900 million | approved
America West | $377 million | approved/closed
Evergreen Int’l Airlines | $148.5 million | approved
American Trans Air | $148 million | approved/closed
Frontier Airlines | $65 million | approved/closed
Spirit Airlines | $54 million | denied
National Airlines | $50.5 million | denied
Aloha Airlines | $40.5 million | approved/closed
World Airways | $27 million | approved
MEDjet International | $7.7 million | denied
Corporate Airlines | $7 million | denied
Vanguard Airlines | $7.2 million | denied
Frontier Flying Service | $7.2 million | denied
Gemini Air | $7 million | denied

Some carriers, including American Airlines, Northwest, and Continental did not seek a loan guarantee. Despite that decision, they expressed their displeasure with the Government’s role in providing an advantage for competing carriers through a guarantee from the program. The president of Northwest Airlines accused the Government of “playing God” by shaping the industry for the future.120 Northwest had almost $3 billion in cash at mid-year 2002, making it eligible for private capital and therefore, ineligible for an ATSB guarantee.121 Continental’s CEO similarly opposed a loan to United Airlines.122 Those airlines that did apply were also quick to express similar criticism once they were rejected, one complaining that the ATSB is “picking winners and losers.”123 With excess capacity a clear source of present industry losses, each carrier would benefit from the failure of one of its brethren, particularly if the likes of a giant, such as United, fell victim permanently to the post-September 11 doldrums and could not recover after bankruptcy.

America West was the first loan application approved, after numerous concessions by the airline, most notably the granting of an equity stake to the Government.124 Even with the conces-

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119 Id.
120 Carey, supra note 109.
121 Id.
122 See Susan Carey, United Faces Hurdles for Loan Guarantee, WALL ST. J. EUR., Aug. 12, 2002, at A1 (“If United gets the loan, then we and others could be dead.”).
124 ATSB, supra note 8.
sions, the vote was 2-1. The other carriers approved and with loans closed are Frontier Airlines, American Trans Air, and Aloha.

Those carriers close to obtaining government-backed financing are USAirways, Evergreen Airlines and World Airways. The ATSB letter to USAirways arrived just a few weeks before its bankruptcy filing. The loan approval was contingent on concessions from unions, more and better priced warrants for the Government, and better collateral. The ATSB issued a second letter immediately after the USAirways bankruptcy, confirming its commitment to guarantee the USAirways loan, despite its financial condition. Evergreen’s request for $148.5 million was cut to a maximum of $90 million and it was required to make other changes to its business plan.

Denials of applications by eight other carriers have overshadowed the approvals. Vanguard received the first denial. Although it revised its application several times, the Board ultimately denied the application on unanimous vote. In a letter to the carrier, the Board cited its failure to turn a profit in

129 Id.
132 ATSB, supra note 8.
any single year since inception in 1994. The Board concluded that based on its application, Vanguard needed an additional infusion of capital apart from the loan, but that equity never materialized. The Board stated that Vanguard’s hiring of a brokerage house to raise the equity was insufficient because that firm promised no direct funding itself. Vanguard filed for bankruptcy within days of receiving the ASTB rejection.

The Frontier Flying Service application was unanimously rejected in part on the basis that the airline was not affected financially by the terrorist attack. This has been a key factor for the ATSB in order to avoid certain criticism that the program is a bailout for losses that airlines experienced before the terrorist attacks. Frontier Flying apparently cited an increase in its insurance rates as a further justification for the loan. The ATSB denied the guarantee on the basis that Frontier Flying experienced minimal increases in its insurance premiums.

The Spirit Airlines application was rejected on a 2-1 vote, with Department of Transportation representative Kirk Van Tine dissenting. The rejection cited the carrier’s solvency, stating that it provided no “reasonable reassurance” of repayment. Spirit Airlines challenged the ATSB’s understanding of the industry and its supposed disfavor of low cost, low fare carriers. Another corporate officer of Spirit described the ATSB process as "kind of a mystery." He claimed that his airline had a better rating than America West on the ATSB rating system but was

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134 Id.
135 Id.
136 Id.
139 Id.
141 Id.
142 Miller, supra note 123.
declined by the "bean counters" at the Board. A request for reconsideration was denied by the same 2-1 vote.

National Airlines was turned away unanimously on similar grounds. The ATSB concluded that National was not necessary to a "safe, efficient and viable commercial aviation system" because of low-cost competition available in the markets it services. It also stated that National's proposed business plan posed "an unacceptable risk" to the Government, with insufficient amounts and forms of equity.

National issued a lengthy press release that accused the ATSB of refusing to thoroughly and fairly consider its application, holding outdated and ill-founded views of criteria to use for a healthy airline, and maintaining a bias against small carriers. In a blistering attack by on the ATSB, National's CEO accused it of being biased against National because it is the principal competitor of America West. The Government holds an equity stake in America West as a condition of its loan guarantee. National further attacked the ATSB for bias because it hired a division of General Electric as a consultant to project revenues of applicants. GE is also a creditor of America West as well as USAirways, another approved applicant.

National also complained formally to the Department of Justice in a July 26, 2002 letter that America West violated its own business plan by increasing service into Las Vegas by 50% but only by 5% in other markets. Supporters of National Airlines in the Nevada Congressional delegation were harshly critical of the ATSB. One referred to the ATSB as a "little three member board" with a mind to "run people out of business" by denying applications. Another accused the Board of bias and criti-

144 Id.
147 Id.
148 Id.
150 Id.
151 Id.
152 Id.
153 Smith, supra note 143.
cized its failure to explain the standards it employs for review of applications.\textsuperscript{154}

Denials also were issued for Corporate Airlines, MedJet, Great Plains and Gemini Air.\textsuperscript{155} The Board’s letters were not specific and differed little from each other, citing poor credit risks and excessive expansion plans.\textsuperscript{156}

These denials were the undercard for the real attraction, the bout between the ATSB and United Airlines. The days leading up to the decision devolved from lobbying efforts by competitors into personal attacks by other airlines on United managers and their business strategies. One commentator noted that lobbying is commonplace, but “I don’t think I have ever seen it be so close to a blood sport.”\textsuperscript{157} Continental’s Chief Executive officer was not shy about voicing his hopes for the worst: “This is survival for us. This is not a game. This is not a boys’ club. All of us are dying. United isn’t too big to fail. They’ll just make a bigger hole when they hit the ground.”\textsuperscript{158} Even European airlines chose to pile on, expressing their hope that the thinning of competitors through market forces would help the industry.\textsuperscript{159} A November 6 letter from the ATSB seeking more information from United foreshadowed the Board’s decision one month later.\textsuperscript{160}

The decision by the ATSB was a two vote denial, with the DOT representative, General Counsel Kirk Van Tine postponing his vote pending further information.\textsuperscript{161} The letter of denial was

\textsuperscript{154} Id.


\textsuperscript{157} Micheiline Maynard, United’s Rivals Press a Struggle of Rare Ferocity, N.Y. TIMES, Dec. 4, 2002, at Cl.

\textsuperscript{158} Id.

\textsuperscript{159} Suzanne Kapner, European Airlines See Threat in Aid to United, N.Y. TIMES, Dec. 4, 2002, at C8.


more detailed than others, predicting a liquidity crisis despite any loan, and unrealistic forecasts of short term revenues that are contrary to industry analysts and not mindful of low-cost competitors. The two members also cited high costs of operating, an under funded pension plan and insufficient collateral. In an unusual gesture, they also issued separate press releases to justify their actions, the Chairman graciously expressing his reluctance where the United employees would be affected while Treasury Secretary Fisher took one last shot at United, characterizing its business plan as "fundamentally flawed."

The reaction was jarring, even for an airline that knew denial was a strong possibility. One flight attendant described the feeling as "absolutely devastating." It was all the more frustrating for workers that own a majority of the company stock, after conceding more in wages and other compensation over the prior several months in an effort to present the ATSB with a healthy business plan. The Speaker of the U.S. House, representing United's home city of Chicago, had personally lobbied and was described as "obviously disappointed" by his spokesman. Despite a plan to cut up to $5.2 billion in costs over five years, the Board would not agree, and was described as "irresponsible" by one union leader. Bankruptcy followed within days.

Although those denied aid are quite critical, others not so close to the situation do not agree. "They're being very stingy with taxpayer-guaranteed dollars, and that's what we wanted," concludes Representative John Mica, Chairman of the House Transportation Committee's Subcommittee on Aviation. "We're perpetuating dinosaurs if we approve loans for pre-9/11 problems" concludes one commentator.

C. Surviving Another Cold Winter

Airlines have been hit with additional costs resulting from the terrorist attacks, apart from lost revenue. Delta's Chief Execu-

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166 Id.
167 Smith, supra note 143.
168 Id.
tive Officer stated in testimony to the House Subcommittee on Aviation of the Transportation Committee that forty percent of the industry’s estimated $7.5 billion loss in 2002 would be a direct result of higher security and insurance costs.\textsuperscript{169} Delta’s terrorism insurance increased from $2 million to $150 million dollars, and cockpit door reinforcement cost $20 million.\textsuperscript{170} Cargo restrictions, a security tax, and air marshals occupying revenue seats have all added costs to operations.\textsuperscript{171}

The state of the industry is bleak indeed, particularly for the former giants of air travel. Losses incurred in 2002, shown below, cannot be repeated in 2003 without the complete collapse of some carriers:

<table>
<thead>
<tr>
<th>Airline</th>
<th>Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Airlines</td>
<td>$3.5 billion</td>
</tr>
<tr>
<td>United Airlines</td>
<td>$3.2 billion</td>
</tr>
<tr>
<td>Delta</td>
<td>$1.3 billion</td>
</tr>
<tr>
<td>US Airways</td>
<td>$1.65 billion</td>
</tr>
<tr>
<td>Continental</td>
<td>$451 million</td>
</tr>
<tr>
<td>Northwest</td>
<td>$798 million\textsuperscript{172}</td>
</tr>
</tbody>
</table>

In the words of United’s own chairman to his shareholders, the results for 2002 were “abysmal and unsustainable.”\textsuperscript{173}

As a result of these costs, the airlines have requested additional aid from the Government. The White House is very unlikely to support any “direct assistance.”\textsuperscript{174} The Aviation Subcommittee’s Chairman John Mica summarized the mood in Congress: “Let me say quite firmly at this point: there will be no government bailout.”\textsuperscript{175} Any further aid will therefore consist of

\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{173} Letter from Glenn Tilton to Shareholders (Mar. 28, 2003) available at \textit{www.UAL.com/investor relations}.
\textsuperscript{174} Dreazen, \textit{supra} note 169.
\textsuperscript{175} Id.
amounts too small to make a significant impact on a carrier's balance sheet.

The ripples through the industry continue to cause lost jobs, lower wages, and other instability. American Airlines announced 7,000 job cuts in August 2002. Delta decided to cut another 7,000 people in October, meaning a 25 percent reduction in workforce since the terrorist attacks. Northwest Airlines plans to cut 1,600 flight attendants through attrition or layoffs. The five unions of United Airlines had offered $1 billion in concessions per year for five years, but it was not sufficient for the ATSB to grant its loan guarantee application.

The first quarter of 2003 was simply another disappointment to begin a new year of losses. American Airlines declared a loss of one billion dollars, described by its president as "truly dreadful" performance. Delta reported a loss of $466 million. Northwest lost $396 million, and Continental lost $221 million. United lost $1.3 billion despite cuts of up to 1,250 jobs.

The red ink has not been limited to air carriers. GE Aircraft Engines announced plans to cut 1,000 jobs in 2002 and between 1,200 and 1,800 jobs in 2003. The manufacturer attributed the lost revenue to airlines grounding jets and to the shortage of available funds to purchase new equipment. The Chief Executive of the division said a recovery may not happen until

186 Id.
Boeing announced declining revenues against 2001 figures, due to the severe downturn in aircraft sales. It has already cut 30,000 workers.

Those working at airports also have felt the pinch of declining revenues and fewer flights. The two New York City airports, LaGuardia and JFK International, employ 40,000 workers. Traffic was down 12 percent at LaGuardia in June 2002 versus June 2001, and was down 29 percent at JFK over that same period. Newark experienced a 16 percent drop in the same time period. Los Angeles lost 19 percent of its flights, and Boston’s Logan Airport lost a hefty 23 percent of its traffic. The ten busiest airports have been more fortunate, with a traffic decrease of only 6 percent on average.

IV. MOVING PAST SEPTEMBER 11TH

Despite the impact on thousands of families of the victims and the airline industry, all of those affected by the terrorist attacks are trying to move on, some faster than others. The lawsuits filed by some victims’ families likely will continue for years, exploring airline security and government warnings before the terrorist attacks. Some airlines which are named as defendants may no longer exist when the cases reach their conclusion. The airlines will fall victim to the costs of September 11, the decrease in revenues, failure to obtain loans, the pre-September 11 doldrums of the economy, or some combination of these and other factors.

A. IF YOU FUND IT, THEY WILL COME

As the potential claimants must choose between the Fund and lawsuits in late 2003, the number of applicants should dramatically increase. If the Fund does not sign up at least 2000 of the potential claimants for decedents’ families, it will be considered a failure by most, particularly those who become the targets of

187 Id.
189 Id.
191 Id.
192 Id.
193 Id.
194 Id.
the lawsuits filed by the remaining claimants. Any less would mean that a majority or close to it found the concept unacceptable due to inadequate awards, lack of predictability or other reasons.

The de facto damage cap of the Fund is regrettable to the extent that it stifles the ability of claimants to argue for a damage award that they believe is justified, under the enabling legislation that created the Fund. Despite that shortcoming, the Fund remains the best choice for most claimants. Like the democratic system that was one of the targets pursued in vain by the terrorist attacks, the Fund remains the best of several imperfect alternatives available. Victims might have earned income, after consumption and reduction to present value, many times more than the $6 million that the Special Master has to date issued as a maximum award. But the next option, a lawsuit with difficult liability theories against companies with capped exposure, is far less certain. The Fund may appear slow, but lawsuits will take far longer to reach a judgment.

Some claimants may be attracted to a lawsuit for the potential of a very large award and the notion of assigning fault to vindicate the deceased. However, there is not much that claimants can do financially to punish an industry that has already been devastated. Recovery is limited to insurance policy limits for all but the security companies. The lawsuits will not prove a point to the public or the industry because there is no liability mystery to solve or behavior to deter. Without the ability to place Osama Bin Laden in the dock, the lawsuits have opted for substituting United Airlines, American Airlines and other non-terrorist organizations as defendants.

B. SURVIVING DESPITE THE ATSB

Air carriers have few choices remaining other than survival of the fittest. Most have cut costs by layoffs and reduced passenger amenities. The larger carriers have parked some aircraft to reduce maintenance costs and allow flexibility of flights with fungible aircraft. Flights have been cut back to reduce capacity. Aircraft purchases have been delayed.

Despite these efforts, the next year will likely bring change to the ranks of the larger carriers. Without a dramatic increase in travel, excess capacity will continue because of the number of competitors. This is healthy for consumers, but not so promising for carriers. The union contracts and other constraints on
these big carriers make it difficult for them to cut costs further, although they continue to lose money daily.

The only other relief for air carriers may come in the form of a more relaxed view of consolidation from the Antitrust Division of the Department of Justice and other government agencies. United’s attempt to merge with USAirways in 2001 was rejected as excessively anti-competitive by governments regulators. It announced a code sharing arrangement in 2002. Delta, Continental and Northwest agreed to a similar arrangement. Some commentators call for a more relaxed view of airline consolidation, believing that the number of carriers will not dwindle to just a handful in the present marketplace.

V. CONCLUSION

The Victim Compensation Fund will likely attract the majority of potential claimants, with dramatic increases in applications in autumn 2003. Those who have chosen to file suit in lieu of the Fund should not expect to proceed to trial and judgment for several years due to complex issues over sensitive security information materials.

Most airlines will see little additional assistance from the Government through the ATSB or other government funding. The severe downturn in revenues and the increased costs will continue through the end of 2003 and into 2004, hastening the process of some carriers that are experiencing severe financial difficulty either merging or closing operations. Attrition will likely become the greatest force in bolstering revenues of the surviving carriers and ultimately returning them to profitability.