2000
Insurance Panel

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Recommended Citation
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NK: It's now my pleasure to introduce a very interesting panel, an insurance panel that I think all of us will enjoy. We're going to have a moderator, as you know, Mitch Baumeister. Unfortunately Dan Donnelly has, as you heard at lunch, slipped and fallen. And contrary to his assertions, that fall was not engineered by the defense bar; I have it on good word. I'm sure Mitch will give you an update on his condition.

Most of you know Mitch, with the firm of Baumeister and Samuels in New York. He's an aviation plaintiff's trial lawyer and heavily involved over the years with air carrier litigation, from Lockerbie to Swiss Air to TWA and now Egypt Air. So help me welcome Mitch Baumeister.

MB: Thank you, Norman; good afternoon. It's a privilege to be standing up here today substituting for Dan Donnelly. I want you to know I spoke to Dan and he's very upset he can't be here to talk about GARA. Those of you that know him know he loves that subject, GARA ("General Aviation Revitalization Act"). But Dan, I spoke to him yesterday; he's strong, he's doing very well. He just wanted to know if there was any cause of action against his wife for tripping him. I said, "No, Dan, I couldn't get involved in that." But he is doing well and he sends his best.

This afternoon I think we have as fine a group of people in the aviation insurance industry as I've ever seen. Many, many years ago when I was a law student, I worked with that company called USAIG for a few years before I saw the light and joined my old firm, Kreinler and Kreinler. But I still have many friends
in the insurance industry, even though they’re on the wrong side of the fence.

I wanted to get things going with my insurance people; a lone plaintiff’s lawyer with four insurance types. So I said, “Gentlemen, I think we want to try to make this as informative as we can, and I’m going to ask some questions today and I really want you to give the people in the audience some information that they can walk away with as to the real guts of what goes on in terms of aviation insurance handling, both general aviation and air carrier. And to do that, let me introduce each of the individuals and then we’ll get to the format. The format, by the way, is going to be an exhibit, a tab E. It’s a short agenda. We may get to all of it, we may not get through the first three questions. But as we go through it if there are things—and there are many of you just as experienced as those of us up here—who have questions or thought, jot them down. Because I’m going to hopefully have some time so you can get some questions answered later on.

On my right we have Richard Boeschen. Richard is the executive vice-president and chief operating officer of Universal Loss Management, a claim management facility responsible for the investigation and the handling of aviation losses for the HCC Insurance Holding Group, located in Frederick, Maryland and Dallas, Texas. He’s a graduate of the Aviation Accident Investigation course at the University of Southern California, and formerly had been the claims director of the American Aviation Services of National Aviation Underwriters, and the senior vice-president for Loss Management Services in Frederick, Maryland from 1985 to 1998. Thank you for coming, Richard.

Seated next to Richard is Tony Faiia, who’s executive vice-president for AIG Aviation. Tony was a commissioned officer in the United States Army, did a tour of duty in Vietnam. He is a licensed pilot, multi/single engine land and instrument as well. He has a long history in aviation, starting in 1975 with AIG Aviation as a claims rep, and working his way up to the point today where he is executive VP of AIG Aviation. He also is a member of the Aircraft Crime Prevention Institute and wrote a publication called “Overview: Air Disaster Family Assistance Act of 1996,” a topic we’re going to touch on today; how that’s changed, maybe to some extent, the way insurance companies approach settling claims or dealing with claimants now that we have active and vocal family assistance groups. Thank you for coming, Tony.
All the way on my left is David Kraus. David is vice-president of the manufacturing and special risks department at United States Aviation Underwriters, Incorporated. David is a licensed pilot and a trial lawyer for 16 years involved in both aviation and insurance defense work. And today in his position at U.S. AIG he manages worldwide litigation involving airframe and component part manufacturers including a specialty in helicopters. Thank you, David.

And last but certainly not least, Harry Cibak. Harry is vice-president and director of manufacturer’s liability claims for Associated Aviation Underwriters, and Harry was worked for Associated for over 16 years. I will take a personal indulgence because I’ve known Harry for a lot of years, and to me Harry—I’ve known him professionally and personally and I consider him to be someone that I trust, who’s always thoroughly prepared when he sits down with you. Well-reasoned, soft-spoken but firm, and someone who genuinely cares—and I don’t say this lightly—genuinely cares about the people who have suffered in air crash cases. And many of the individuals, some of the individuals in the insurance industry that I’ve dealt with, absolutely have the same credentials; I think we’re moving towards that in this industry. That’s not to say that Harry isn’t a tough negotiator; he doesn’t give anything away. He doesn’t give away snow in winter, but I consider him to be a consummate professional and a true friend. Harry, thank you for coming.

All right. Having said that, let me start out with the first topic, and I’ll throw it out to the panel—Richard, possibly you, and if Dan were here he would say it—and that is, the General Aviation Revitalization Act which a lot of people believe really is nothing more than a specialty group boondoggle for the aircraft manufacturing industry to avoid its responsibility to innocently injured victims and escape from insurance responsibility. How has GARA changed the insurance handling of general aviation claims today? Has it had an impact, and if so could you tell us in what way?

RB: Well, we all know that GARA was written to try and curtail the tail of products type losses for manufacturers. It’s really no different than a statute of repose, which we’re all familiar in any number of states. And has it affected the rest of the aviation community, and in my situation primarily in pilots and FBOs (fixed-based operators)? To a certain extent it has affected the industry. If the plaintiff cannot go to a deep pocket like a manu-
manufacturer who has unlimited insurance, they'll go seek other avenues to attempt to get the big bucks for their clients. And the pilot, most often who we insure and handle the claims for, often has low limits. And even though the insurance carrier may want to pay those limits and get out of it, a lot of times the plaintiffs will not allow that to occur because they're not interested in defending the empty chair.

So therefore the plaintiffs will look to other areas such as maintenance facilities, sometimes as far back as three, four, ten years, as far as somebody having worked on an aircraft, but you also find that a lot of the FBOs are as insurance-poor as the pilots are, and they carry low limits and they're a big deductible away from bankruptcy. So the carrier there is in the same position as the carrier for the pilot, and that is the plaintiff's attorney's not going to let him out to defend that empty chair.

Now, is all this different than it was before GARA? Probably not. Because before GARA, all these things were happening, also. The manufacturers would defend their product, which meant that the pilots and the FBOs and their carriers had to provide a defense so that the plaintiff didn’t have to defend the empty chair. So it's still happening the way it did before. I've seen a number of cases where the manufacturers have claimed GARA defense and have gotten out, and in the cases that I've seen they've rightfully got out. They probably shouldn't have been in there in the first place, and if GARA was not involved, they probably shouldn’t have been in there. I wouldn’t have brought them in as a co-defendant in those situations. And as we all know, if it's a component part that isn’t 18 years old, you can still go against the manufacturer.

But I believe the biggest change as a result of GARA is that it's most affected the plaintiffs and the plaintiffs' attorneys who are looking for the large recoveries, and now they don’t have the—they can’t hold the manufacturers hostage with the threat of big defense dollars. So from the standpoint of the pilot and the FBO, I’m not sure if it’s really that much different today than it was six years ago.

MB: Richard, let me ask you this. Isn’t it true today that many of the pilots, if the manufacturer is gone and we have a passenger who’s injured, that one of the difficulties—and it seems to be increasing—is that the pilot’s limits have to be limited in many situations to $100,000 per seat? And where you have catastrophic injuries, if the manufacturer is gone and the
pilot has a limitation on insurance, what is happening to the fixed-base operators in terms of their expanding liability, and are they able to get adequate insurance and afford to pay for it if they are in fact involved?

RB: Well, I guess it's a question of what's adequate insurance. And you know, from their standpoint, as I indicated, most of the FBOs do carry lower limits—unless they're large FBOs like Million Air or some of those—and the premiums are getting more prohibitive to get the bigger limits. But generally, the lower limits are satisfactory for most of them because they don't have a lot of assets to be attached anyway.

MB: Well, let me give you an example. I was involved in a case where the FBO had low limits. It was catastrophic injuries, and they just declared bankruptcy. And the more I've been talking about this, the shifting scale, it seems that many of the FBOs are complaining that GARA is in a sense putting them out of business, because they cannot afford to purchase $5, 10 million limits. And there is the shifting sands of liability, going over to them and the component manufacturers. Do you find that in the insurance business, that this is shifting in any way? And does anyone else?

RB: I don't really think that it's shifting, because the FBOs were there before when the manufacturers were being sued before GARA. So the FBOs were there, the manufacturers were there, the pilots were there; everybody that had touched the airplane or flown the airplane or looked at the airplane got involved in the litigation.

MB: It's very simple. If you HAD an FBO with a million dollars and an aircraft manufacturer with $50 million, the bottom line is you would make up the difference. Now you have only the FBO and a limited-liability policy on the pilot. So don't you consider that—does anyone now consider that to be, number one, a fair shift? I mean, that's the fundamental question: Is that a fair shift?

HC: I think we need to fundamentally look at what is the explanation for the accident. We talk about a shift as if the manufacturer, who is able to get out under a GARA defense, has somehow had a windfall and been able to walk away from responsibility. And indeed, I don't think GARA, as a statute of repose, obviously it does not come without some limitations.
There is a provision there indeed that if a manufacturer knowingly withholds information that affects—excuse me—knowingly withholds information from the FAA relevant to the safety of that product, then indeed they cannot rely on GARA to be dismissed in the case.

So I think again that while there may be some temptation to start talking about fairness in the sense of policy limits and shifting, I think fundamentally you have to look at, again, what is the explanation for the accident. If indeed a manufacturer is responsible, if in fact they did not disclose any safety concerns to the FAA, the plaintiff's bar has been quite, I think, active in pursuing that exception to GARA. And I think the courts have been quite liberal in allowing that discovery to be conducted.

MB: Well, Harry, I would respectfully disagree that the courts have been, if anything, liberal in terms of interpreting the question of whether there has been a misrepresentation. I think they've rather narrowly construed it. And when you say, it kind of begs the question; that is, is the aircraft manufacturer responsible or not? First off, there are a lot of cases where it's a gray area on a design issue or a failure to warn, as you know. Most of the cases are settled. Having the manufacturer in the mix adds a pot of money to compensate fairly—not outrageously—the victim. When you take that pot away, don't you shift, essentially, the potential for the recovery here and the quick resolution of claims? I mean, don't you really lengthen the process? David?

DK: Where is the liability? You talk about deep pockets and fairness; in that deep pocket there's got to be some liability. If there is no liability, then you can sing your song all you want that it's unfair, but it's the right thing to do at that point. You've got most of the GARA decisions that are favorable to the manufacturer, and there's good reason for it. The manufacturer looks at the facts of the accident and what he's faced with, and he's not going to make a motion to dismiss based on GARA if there's a likelihood that he's going to lose. So the fact that most of those cases are favorable to GARA is no surprise—favorable to the manufacturer—is no surprise.

But the fairness thing is something that works both ways. Manufacturers have been dealing with the end-of-the-line defendants—have been dealing with joint and several liability, for years. And we don't hear any screams that gee, that's not fair for the manufacturer when he's in there perhaps for 10 percent and has to carry the freight. Is that fair? Probably not an issue
of fairness, but what's right or wrong. Sometimes you can be right, and the fairness issue is you get nothing. That is fair and that is right.

As far as the GARA decisions go, what I've seen for the most part is that when manufacturers get out on GARA, there's very little merit to the underlying claim in the first place. The aircraft is 18, 20, 30 years old, and they look for a part that perhaps isn't. Of course, the manufacturer has a better idea as to whether he's got a new part in that aircraft, and if he does he's not going to make that motion. GARA will not be a defense, and why create bad law on that particular case?

MB: Well, David, I think the point you're making is that if there's no liability, there's no liability. But that begs the issue of ultimately what we're talking about here, is there's nothing magical about the 18-year statute of repose. And if ultimately we look at the system as being one which is theoretically meant, absent the pilot—okay, the pilot case, causing the crash—more importantly, to compensate fairly the victim from either the pilot's aviation insurance pool or the manufacturing pool or the FBO or a combination of all of them. If the just and efficient handling of claims, which is the subject we're going to turn to next, is what the system is about, I don't understand why the insurance agency, en masse, didn't work against GARA and say the manufacturer should be responsible past premium dollars. Because doesn't GARA put a roadblock and lengthen the process, as a practical matter?

DK: No. The risk is still there for the operator, the pilot. And as far as having a greater burden, I don't believe there's a shift. When you have a pilot—an operator as opposed to the manufacturer—in the mix, they're going to know what their risk is. The fact that the manufacturer's not there anymore, does that increase their risk? You'd like to think so, but I think the manufacturers are from the—the operator and the maintenance people is, they still have what they have in that case. The fact that the manufacturer may or may not be there is minimal. We're all faced with that risk.

MB: Well, let's shift into that subject, then, of if compensation to the victim is what the aim—do we all agree that compensation for the victim of an air crash is what aviation insurance is all about? Is that a fair statement?

DK: Based on liability.
MB: Sure, based on liability. Of course, based on liability.

DK: That little thing about liability is always there, you know.

MB: Let me ask you this. You know, I’m a heretic in the plaintiff’s bar. I can tell you this: I haven’t met, in twenty-seven years, an air carrier litigation, a passenger, who has caused a major crash. And I’ve got to tell you, in general aviation, there aren’t—putting aside the potential for the pilot, there aren’t a heck of a lot of passengers that cause air crashes. This is the closest thing we have in our tort system to an almost no-fault system. And what I’m saying to you, if the object here is to get compensation into the hands of victims, full and complete and fair compensation—moving beyond GARA now, moving into air carrier, moving into general aviation—tell me: What is your approach, the four of you, to getting the aviation insurance to do the job of compensating the victims? Tell me. Anyone can jump in. Tony?

TF: I think the compensation issue is important. A lot of it is decided at an early stage by the respective insured client, if you will, that has limited budget or a set budget that he is going to use to buy a certain amount of coverages, limits. His operating requirement—in some cases 135 or 121, or 135, to carry certain minimums, but on the Part 91 they can carry whatever they want to. And if we find a small operator, individual operator, that’s going to pay $700 in premiums for coverage, he can probably ill afford to pay three or four thousand dollars to buy a million dollars.

Fairness is not necessarily a legal issue to debate. I guess GARA itself is set by the Legislature, and they determine, possibly, fairness. The statutes of repose, in many states early on, were 12 years in some cases. GARA, of course, has imposed 18 years, and that’s promoted possibly a lot of production of aircraft.

But to get back to the fairness issue and limits of liability, there are things that go into play early on that even the insured operator has to set in motion or the FBO. And once you get into those coverages, liability decisions have to be made on what your insurance culpability is.

MB: Let’s assume for a minute that there is liability in the case. How do you get to—what do you do in the insurance industry? You’re more experienced at it; what do you do to resolve it? What’s the philosophy? What’s the practical aspect of
resolving getting help to the victims? What's your present philosophy? And I'd like each of you to comment on that; both claimants that are represented by lawyers and claimants that are not represented by lawyers.

TF: I think maybe the first thing to do in any accident investigation, if any claim comes in, one, identify your coverage. Two, investigate; three, determine what liability exposure your client, your insured has. And then four, identify the damage exposure. Certainly there's comparative fault possibly on the pilot, ATC, government, FBO, the manufacturer. You have to assess all that liability and make a determination yourself in handling the claim. If you have exposure—certainly if you're there by yourself and you have individual exposure, I think our job or our occupation is—and our mission, basically—is to settle claims. Step up, contact the claimant, and move forward with assessing the claim, settling the claim, as quickly as possible. We prefer to make a timely, early offer in settlement of the claim, and not drag this out for years and years. Of course, once you get into the manufacturing problems and compare fault, when you get into the true gray areas of compare fault, then you start the debate issue at some delay. Those cases get delayed, unfortunately.

MB: After 28 years, I've got to tell you, I've never settled a case pre-litigation. And I'm coming to these things hearing about these things get settled all the time. Who's settling these cases, Harry?

HC: Well, I think certainly—

MB: David, how come we haven't been talking?

DK: You don't have the right cases.

MB: I never have the right cases. Harry, tell me.

HC: Certainly the effort is, as someone said, to look at an accident as quickly as possible to respond as quickly as possible. But what I might suggest to you is something that is disappointing from a claims person's perspective in dealing with claims is that very often the process will turn to the liability aspect. And I think about this in the context of airline litigation where in fact overtures are often made to plaintiff's counsel to want to discuss their case and to resolve their cases. But information on damages is withheld while the effort plods on to the
core liability and the possibility of punitive damages. Very often I see in airline litigation that—you know, it can be better than a year before you get basic information. And indeed if you were given it early on, you could evaluate. You could provide an offer to counsel. And indeed if they didn’t want it they can reject it, but that process doesn’t occur. The effort seems to be geared at liability, and very often to the person responsible.

TF: I think a key to it is communication. At least when you have the air carrier accident there is at least a mix of, a multitude of personalities; of plaintiffs, of experts, potential defendants. And if we have a component manufacturer or airline involved, there are a large group of claimants that arrive on your doorstep early on. But once the passengers—if they are represented, and notwithstanding the Family Assistance Act issues—I think it’s incumbent upon us, the insurance industry, to contact the claimant and/or contact the claimant’s attorney early, so that we can have that communication with the claimant’s attorney and let them know that we are investigating it, trying to determine culpability, exposure, and at the earliest possible date negotiate a settlement with the claimant. It’s to their benefit to get the claim settled earlier, and hopefully they would follow our lead. Obviously there might be defenses raised early on, and those we deal with. But if we’re communicating, maybe we can say—and defense counsel may not want to hear this—but maybe we can save the litigation dollar or the litigation logistics, the time involved.

MB: Well, let me just respond briefly. Harry, I disagree with you and Tony that—you know, we hear about communication, let’s evaluate the case, let’s contact the plaintiff’s lawyer; TWA 800’s a perfect example. The case has been grinding on for more than three and a half years. There’s an issue of DOSA, whether it will apply or not. Defendant sees range go high if it’s knocked out, plaintiff sees low if it goes low. None of those cases have been evaluated, nor even a reasonable offer been made on it.

Swiss Air 111, a case I’m also involved in, another perfect example. There was, quote, a press offer of settlement made by Swiss Air, but it was fundamentally done to try to get the European cases over. There have been no two cases settled in Swiss Air. So I think the—you know, Egypt Air, I will tell you this today. I got a letter yesterday from the general manager of Egypt Air addressed to one of my clients, saying they wanted to
settle the case. And frankly, some experienced plaintiffs' lawyers view it as a jaundiced attempt just to get discovery information. As a practical matter, the cases will not get settled. Isn't it true that ultimately if a plaintiff's lawyer has the responsibility of getting the greatest amount of money for his client or her client, that ultimately he has got to push these legal issues? He has got to push the liability issue, he has got to push the question of punitive damages if it in good faith exists there, and he is in a sense handcuffed until [inaudible] responsibility. And frankly, you're handcuffed until the same thing plays out. I mean, isn't that the fact in air carrier litigation?

HC: Well, I think again—and you put your finger on it when you say if in good faith it exists—but I think, Mitch, very often, in good faith, things such as punitive damages do not exist. In fact, we rarely see an award of punitive damages. And I—while I do believe plaintiffs' counsel have the obligation to familiarize themselves with the facts of an accident and certainly to explore who is responsible and who should be providing compensation to individuals, I do believe that the focus has really shifted to that effort almost exclusively, so as not to listen to a carrier, an insurer, and its interest in trying to discuss the case on damages. That process is typically held in abeyance, you know, for an extraordinary amount of time.

MB: And who do you blame for that, Harry? The system?

HC: Well, I don't think I can blame anybody other than to say that the opportunity does exist to negotiate cases with representatives of airlines if in fact there can be an exchange of information and I think an effort to reasonably approach damages in the case. Some of these cases that you're talking about, Mitch, indeed involve questions of law that are unsettled at this point, and indeed that may explain why you're not getting settlements over offers as quickly as you'd like to see.

MB: What about defense lawyers and insurance companies working on sharing agreements, delaying the process?

TF: Well, that's done—the sharing agreements and/or the planning agreements are done in some cases, particularly where there might be no contribution amongst the tortfeasors and you get some waivers between potential defendants. But that should not within itself delay settlement, particularly where you get a sharing agreement and defendants, if you will, have already
agreed to share a certain percentage of fault amongst themselves. At that juncture there should be some active negotiation. However, I recognize most manufacturers and air carriers are unwilling to accept charges of punitive damages, particularly where they're so highly-regulated [inaudible] 121 operation. And in most cases the operators, the air carriers, are following a very close regimen of pilot training, of maintenance, and it's hard for them to accept the punitive counts; i.e., willful, wanton neglect or gross neglect. And unfortunately we see many battles go on, and until those charges of punitive damages are dismissed possibly in court or the first day of court, those cases may not settle unless we can obtain concessions by the plaintiffs who bring the charges.

MB: Well, to move off the air carrier situation—or just to stay with it for one second—would you agree that in many air carrier cases the system—strike it. Do you agree that possibly there have been problems with both the system as it impacts on the defense and the plaintiff's lawyers in terms of timely getting to resolved cases because of questions of law, because of funding agreements, because politically just a certain amount of time has to go under the board?

And what about victims' groups? Do you think victims' groups have an impact on the timely resolution of—has it had any impact in the insurance side on resolving air carrier cases? What's your feeling about how that new—in a sense, since the Lockerbie case we've now seen as plaintiffs' lawyers and deal with on a daily basis the Lockerbie group, the ValuJet group, the—and I applaud them—the Swiss Air group, the TWA 800 European and American group—each of these groups, which bring a certain level of sophistication along with them, how has that impacted on the handling of air carrier disposition?

TF: Well, I think the victim rights groups were instrumental constantly in setting into motion the Air Disaster Family Assistance Act of 1996. They're a vocal group. They've attained a marked position, if you will, with the NTSB in their rights, their ability to gain information. They're not participants within the investigation, but they gain daily information. They know and understand they have certain rights. However—and without getting into the Family Assistance Act—have they barred us from settling the claims early? Not really, I don't think.
MB: Well, what about family assistance groups where information—you go and you settle a case. Is that information, although it's confidential, is it generally shared? If you settle a case today, are you concerned that you set a floor or a ceiling that's going to ripple throughout the group and it's going to cause some difficulties?

HC: I think that under confidentiality agreements, whether victims' groups [inaudible] or do not, are very difficult ones to maintain. And if anything, I would suggest that if they limit anybody, I think they limit us.

MB: That's what I'm talking about.

HC: We do not disclose what we are settling a case with another potential—with another plaintiff. And yet of course, these numbers we know are discussed. And yes, I think that victims' groups have know sharing this information, and I guess I am a little concerned about that because I think in the sharing of this information, settlements—you know, I'm not sure exactly what is being said. And so no one in these groups would be familiar, or as familiar, with the case, of course, as the people who presented it to us, and of course ourselves as we evaluate and then respond to it.

MB: Well, what about a situation where you have—in a sense, non-dependency cases, using a shorthand phrase? Or in Egypt Air, where the defendants are looking at a substantial number of elderly people going to Egypt to take a vacation along the Nile? Do you find that there's a lumping, and saying, "Well, in a non-dependency case we are not going to pay above or below"? In other words, almost a blanket bargaining that becomes a floor or a ceiling for every non-dependency case? Do you find that that's been a hindrance or that that's a reality in modern air carrier negotiations today?

TF: I won't say that it's a floor or a maximum. In non-dependency cases—and we're going to presume for a moment you're not in a particular state situation that might limit that compensation to the non-dependent or the non-dependency situation—but I suppose you have to evaluate each one, see if there are any special considerations on each claim. I don't know that you can just catalog all groups of older non-dependent individuals as being worth X dollars. I think it's fair to exercise some due diligence ourselves, and screen the merits of
their particular biographical situation and make (inaudible) rather than just exclude them and say that these cases are worth X dollars.

MB: Well, I'll tell you something. Based on my experience and a lot of plaintiffs' lawyers out there today, in the air carrier litigation, non-dependency cases are, you know, basically regarded in what I'll call pecuniary-injury states or there's one flat rate. And the families find it insulting, and it causes huge problems not only in terms of you settling cases but in terms of information to the plaintiffs' groups.

HC: Well, running a, quote, flat rate, I can understand as being objectionable if it was only understood to be a flat rate.

MB: And it has been.

HC: I would suggest that whatever numbers are being arrived at have been arrived at with an understanding of how the law should compensate that type of case. And I would say equally important to people who are similarly situated is that there is some consistency in these offers that are made to people. I guess it's a difficult thing to win, but when you are dealing with and taking single non-dependent death cases, you know, to each family the individual who is lost there of course had some special meaning to that family.

And we know what single non-dependent death cases, on a national average, are going for, and I think the effort, again, having established what is fair, is to treat everyone fairly. And I would suggest that if you, you know, have some great variance in those numbers, that indeed people will feel that they are not being treated fairly, either. So I would not of course support the concept of a, quote, flat rate, unless of course the law would suggest that indeed that number may be appropriate compensation.

TF: I don't think you have to search, yourself, for the pecuniary value of the individuals, non-dependent or otherwise.

MB: But I'm talking about, Harry and Tony, the reality. The reality isn't that the flat rate is my term; the reality is that is—in fact in the family groups, they know non-dependency cases—and everybody in aircraft X and Y are receiving the same amount of money. And one of the most difficult things—would you agree with this—in terms of settling a case is to—each non-dependency case is treated identically. And this has been the
same in many of the recent air carrier cases, but also to explain to family victims' groups, disseminate information, and understandably so, that if a husband died, is that husband—was that human being more valuable than my son, and why is that family being compensated? And do you find that by sharing this information, do you think that plays a role in terms of holding up settlements in these cases?

HC: Well, does it hold up settlements, I'm not sure. I think although victims' support groups have been around for a little bit, it's a little bit difficult to measure, you know, the impact of their activities on the settlement process. I think again, obviously what we all do is on each individual case we do evaluate the merits of the case.

TF: Each state has their own damage law considerations. And I think we all, in evaluating the cases, will start a process of evaluating based on what the damages of that particular state, the damage law, will allow. Whether it's a pecuniary loss or a shift into the non-pecuniary side in evaluating [inaudible] or care of counsel advice. And I wish, frankly, maybe we could have just a flat rate. Just strictly speaking from an economical standpoint, you have a loss, you affix X dollars to it. That would be far too easy. I don't think the state legislatures, however, would allow that to happen.

So therefore, we have to evaluate each individual case based on its merits. And I know we go to the claimant and/or the plaintiff attorney frequently and ask for a complete biographical sketch of that individual; whether they're married or not; if they are married, what their dependency [inaudible] their income levels, their hobbies, and a long list of items. We certainly get it from the plaintiffs' counsel frequently in the day in the life of the individual, but we try to gather that data early on either from the individual claimant or if they're represented through counsel, and gain that knowledge so that we can adequately and properly evaluate claims on a timely basis and make a timely settlement.

MB: Does the process change in general aviation cases, David?

DK: Well, isn't that part of your responsibility to your client, to tell them what kind of measure of damages they can expect? And that perhaps the single non-dependency is the low rung on
the ladder, and maybe it’s unjust and unfair but that’s, so far, the law’s measure of damages?

MB: David, absolutely. And I tell each and every one of them for 28 years, “Unfortunately you’ve run smack against this legislative wall. Go out and write your Congressman and write your Senator and take care of it.”

DK: But then how could you then come to the air carrier or the insurer and say, “You haven’t compensated this person enough and you should do more?”

MB: No. What I’m talking about, David, is we can always talk about what the number is, and argue all day long on that subjective basis. What I’m saying to you is when you get into—and we do get into it on the defense side, the air carrier cases—they group non-dependency cases with one fell swoop. And everybody is treated the same, and that is an exceptionally difficult—understandably—pill for anyone to deal with as a practical matter.

DK: Does the message get through, though, sometimes?

MB: Well, ultimately. I’ll give you Lockerbie as a perfect example. I mean, they had a magistrate who essentially forced it through. However, then another series of cases went forward and they got a favorable ruling from a judge and they received more, so then you had a family group that was resentful. And then, “So then, why isn’t my lawyer pushing everything to the limit, because those families got compensated because they pushed the law and got a favorable judicial ruling?” And then the defense lawyers say, “Well, you know, it’s the plaintiffs’ lawyers. We want to throw money at you, but on the other hand you’re not [inaudible].” So it’s a complex issue, and I think the family groups make it more complex.

But to move on—and let’s stick with that point—do you make distinctions in the aviation insurance business to a law firm that simply markets and gets the cases, and hasn’t taken a deposition? Or do you make a difference if someone’s aggressively pursuing a case? Does it—do you make distinctions so that plaintiffs’ lawyers in their responsibility should push a case to the limits in order to recover their job, the maximum amount of money? Shouldn’t they do that?

DK: They are all factors in the mix. There’s a whole realm of possibilities and criteria as to what constitutes and what will
make up your settlement figure. Not only from the damages and liability but from the jurisdiction, the judge, the possible jury you're going to be facing, the quality of your opponent; has he taken these cases before? Is he familiar with trying these cases? Is this his first one? Yeah, those are all factors. How you weigh them, that's on a case-by-case basis.

HC: I would suggest also that it's certainly not desirable from an insurer's perspective to have some precedent that you get paid more the longer you wait and the harder you fight. Again, more incentive for the insurer to step up early, as Tony had mentioned, and to try to settle these cases.

MB: But isn't it true, Harry? I mean, the dark secret in this room; isn't it true? The harder you fight, the longer you hang around, the greater the likelihood is you're going to have more money for your client rather than the law firms that cave in at seventy-five percent?

HC: I don't know that that is true.

MB: Do you think it's true, David?

DK: I don't find a lot of truth there.

MB: Tony?

TF: No, I don't think it's true. The cost, I must admit, gets higher. The longer you're in it, the more costs; defense costs if nothing else. The more experts you're going to have, the more extrinsic evidence that's going to be presented that you're going to have to evaluate. There are cost factors, and those cost factors could creep into settlement values. Not even addressing punitive issues, but there is certain consideration there. But the longer we're in a case does not necessarily and should not necessarily increase the value of a case. The value of a case today versus five years from now should not necessarily change unless there's some change in the law.

MB: Richard, is that true in general aviation cases?

RB: Yes, I think so. I mean, you do the same thing—I agree with Tony—where you investigate, you do liability, you do damages, you evaluate the case. And we're, in general aviation, hampered by, as Harry was talking about, getting the damages information. And we as the insurance company personnel are also charged with setting a reserve on a particular claim, and
that's very difficult to do if you don't have damages information. I'm a lot easier to deal with if you tell me what your damages are today as opposed to two years from now, because I've set a reserve on that file for your client, your client's claim. And if I set a $250,000 reserve on that claim and I can't get any information out of you—two years from now I finally get the information and now your claim looks like a $500,000 claim—I have to answer to somebody up there as to why it took me two years to move my reserve from $250 to 500,000 and try to settle the case. So we're hampered by not getting the data, the damages information, being able to evaluate the case. And the longer it goes, I don't think that really plays a factor in it other than if it takes longer to get the data, then there may play a factor.

TF: It's a two-way street. The longer it goes, we may define certain evidence, certain information that is defensible, that makes the case defensible. And our offer may drop, for varying reasons.

MB: What are the primary tools that you use in your office to evaluate a claim? I mean, do you basically use your experience? Do you rely on your outside defense counsel? Does the competency of outside defense counsel play a role in resolving a case, if at all? Do judges play a role? Are they positive, negative? ADR, focus groups? What's the heart and soul of what you do to come up with numbers?

DK: Essentially the first step is to investigate that accident; find out as much as you can about that accident—what went wrong, what could possibly go wrong, all the parameters about that specific day and date of loss and the mechanics of it. From there, you look at perhaps what kind of claim is going to come out of that; how many people were injured or killed, and then start to build your file, so to speak, with regard to their information on damages—never forgetting that we still have liability questions and accident questions still coming in. So that's your first steps, after that.

NTSB investigation, make sure you read that. Many times, though, with pre-litigation claims handling, you'll get a claim in or somebody gives you a call, and there's very little information. It could be because they just got the case and the statute is going to run next week. What do you do? Well, for the most part I guess the plaintiffs' attorney has to file suit and protect himself. But even after that, we'd suggest that, give us 90 days, 120 days
to answer, and in that let's talk about it. Let's talk about the facts, let's talk about the accident, the claim. Do you have the damages information? Have you yourself done any investigation of the accident? Your claimant, the product that you're possibly claiming against? Do you know what the theory is? We have a term for—and this happens a lot on the manufacturing side—you file the suit, then you look for the theory. We call these plaintiffs' attorneys "AT&T operators"—Avoid The Theory. They just—sometimes they need discovery to find an avenue of liability. But many times it's get in there; they get the case late, they do the shotgun approach and they lead out later.

MB: Let me—Norman told me we've got to conclude. We have a lot of subjects to cover, but we will conclude. And I want to thank each of you, and I'd like each of you just to take 20 seconds, if you would, from the aviation insurance viewpoint, and tell me what you think can be done to better the system in terms of aviation insurance and compensating victims. You start, Dave. Don't tell me to get rid of plaintiffs' lawyers.

DK: No, who would we have to shoot at afterwards? Take a good hard look at pre-litigation claims handling and settlements. It's not easy, but it can be accomplished. You have to be forthright, and you really have to know your case. Give us a call. On the manufacturing side, we know about the accident. We know about it when it occurs. We will usually have a lot of information that we're willing to share. If it's a liability matter, we'll jump to damages. If it's—by the same token if it's not a liability matter, we will try to convince you that it's not in your best interest to take a case you're going to lose two years from now. It's cost-saving for us and it's cost-saving for the plaintiff. Take a look at it. You have to know about your case, the client, the product and the accident. And if you know that, give us a call. We'll be happy to discuss it with you.

HC: I would think it important that everyone understand that there indeed is an interest at an insurer to resolve cases as quickly as possible, and to open lines of communication to accomplish that end. And to keep in mind that as much as the liability concerns of a case need to be addressed, so too do the damages, and give that equal effort. I think indeed if that was done, and for a moment put the guards down in terms of assuming some of the motivation of the insurer, you may indeed find
that the insurer will make a reasonable offer and in fact settlements can be accomplished.

TF: Certainly communication is a key word; investigation is key. Do it on a timely basis. We prefer to keep very close track on our investigation, identify what is happening. Keep in contact with the plaintiff attorney if he’s involved, so that he has a communication link and will hopefully advise us what he—information he has, so that we can analyze it, develop those facts, and make a timely decision on liability and damages. And if there is liability, a proper offer can be made. The case can be settled on a timely basis.

RB: I think I agree with all that, and I think there are those cases that you will not be able to settle rapidly. But I think on those cases, what we need to do is look more to the Alternative Dispute Resolution with mediations; hire the retired judge, the retired plaintiffs’ attorney, the retired defense attorney. Sit down and do the mediation and get it taken care of.

MB: Okay. Thank you very much, each of you; I appreciate you coming today.

[END OF PANEL DISCUSSION]
Comments