



Lives but? in the Balance

Kenneth Feinberg has negotiated settlements in many large injury cases, including Agent Orange and asbestos, but none of them prepared him for the intensity of running the Sept. 11 Victim Compensation Fund.

By Alina Tugend

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enneth Feinberg, a slight, balding man, constantly fidgets with his cell phone and pens and shifts back and forth in his chair. He is not a man of Solomonic bearing.

With his thick Boston accent and lawyerly delivery, Feinberg, 57, doesn't have the aura of a man weighing the value of human lives. But for the past two years, Feinberg has been listening to the often heart-wrenching claims of victims of the Sept. 11 terrorist attacks in order to determine how much money they should receive for their injuries or for the loss of loved ones. Feinberg was appointed special master of the federal Victim Compensation Fund in November 2001.

Physically injured victims who were at the World Trade Center or the Pentagon are eligible for compensation from the fund. In addition, the "personal representatives" of those who died on the airplanes used in the attacks, or those who were killed at the World Trade Center or the Pentagon can receive compensation. The fund does not cover those who were emotionally traumatized but not physically injured, nor does it cover those who lost businesses or jobs as a result of the attacks.

More than 3,000 people are estimated to be eligible to apply for compensation from the fund. By late July, 2,116 claims had been submitted. Of those, 991 were for injuries and 1,105 were for deaths. Of the 180 victims of the Pentagon attack eligible to apply for funds, 80 had done so. Of the representatives of 39 victims of the crash in Shanksville, Pa., eligible for compensation, six had filed claims.

Earlier in the summer, Feinberg said the average compensation for a death is \$1.4 million after offsets. He predicts that amount may rise to nearly \$1.6 million by Dec. 22, the final date to apply to the fund. He believes many of those waiting until the last moment to apply have high incomes and are therefore eligible for the most compensation. Currently, the awards for those who lost loved ones range from about \$250,000 to about \$6.1 million, while the compensation for injuries ranges from \$500 for minor injuries such as cuts and mild

abrasions to more than \$6.8 for permanent disability. The largest overall award so far—\$6.8 million—has gone to a Pentagon employee, Juan Cruz-Santiago, who was horribly burned. A supervising accountant for the Army, Cruz-Santiago, 52, was one of the most badly injured victims—he never will work again and will require medical treatment for decades.

The Victim Compensation Fund was rushed into being after Sept. 11 as part of a measure designed to protect U.S. airlines from the devastating effects of lost business and possible lawsuits. In the frantic days after the attacks, Congress realized something had to be done to ensure that

the airlines did not go bankrupt. The airlines already were struggling before Sept. 11, and Congress and airline officials feared the attacks would be the final blow as planes flew virtually empty and the threat of thousands of lawsuits loomed.

Thus was born the Air Transportation Safety and System Stabilization Act, passed by Congress on Sept. 22, 2001, and signed into law by President Bush on Sept. 24. "In less than two days from the inception of the idea, the United States had enacted the largest single corporate bailout bill in history and the largest public entitlement program—the victims fund—in decades," writes journalist Steven Brill in his book, *After: How America Confronted the September 12 Era* (Simon and Schuster, 2003).

It is not until Part 4 of the seven-part law that the "September 11 Victim Compensation Fund of 2001" is mentioned and defined. It requires victims who choose to go through the fund to give up their right to sue the airlines or any other defendants—except the terrorists. "It was a novel approach to compensating victims in the wake of a terrorist attack," says Paul Harris, formerly deputy associate attorney general in the current administration. "It would compensate them without the additional ordeal of litigation." Harris, who was deeply involved in developing the details of the fund, has since moved into private practice. The fund, which was to be overseen by the Justice Department with input from the Office of Management and Budget and the White House, was not capped, and Congress did not appropriate any money for it.

"It's all paid out of petty cash," Feinberg notes. "It isn't as if I have a certain amount of money and I have to distribute it. [It's] whatever it costs." OMB officials expected that Feinberg might have to spend up to \$6 billion. The actual number probably will be closer to \$3 billion or \$4 billion, Feinberg says, because fewer people died or were injured than initially feared.

The law stipulated that the attorney general would appoint a special master to oversee and administer the fund and "within a week or two, they went shopping for one," says

September 11th Victim Compensation Fund

Who Is Eligible

Claimants must prove they or the deceased victim were near enough to be at risk of harm at the World Trade Center, the Pentagon, the Shanksville, Pa., site or in one of the aircraft involved in the Sept. 11 crashes. The fund cannot compensate for emotional harm or injuries that don't show up during the two-year duration of the fund.

To document injuries claimants must:

- Prove injuries treated within 24 hours of incident or rescue.
- Or prove care sought within 72 hours of the incident or rescue. The fund's special master can extend the time.
- Prove injury required inpatient hospital treatment for at least 24 hours or caused temporary or permanent partial or total physical disability, incapacity or disfigurement.

To document death claimants must:

- Provide a death certificate.
- Indicate where the victim was killed.
- If the victim was at the World Trade Center, claimants must prove victims were there at the time of the crashes by presenting affidavits from employers showing victims were working in or visiting the buildings or records from federal, state, city or local governments showing their whereabouts.

SOURCE: SEPTEMBER 11 VICTIM COMPENSATION FUND

Alisa Tugend is a New York-based writer who has written for The New York Times, the Los Angeles Times and the American Journalism Review.

Joshua Gotbaum, former executive associate director and controller at OMB under President Clinton. Gotbaum oversaw the September 11th Fund, an unrelated private charity set up after the attacks. "At first, they thought they needed a Republican expert. Then, they discovered they needed a mediator, and Ken is a mediator and a very good one," Gotbaum says.

Feinberg, a Democrat, had the backing of

Greenspan, Feinberg's law partner. For such an exceptional piece of legislation, the details were remarkably sketchy. And Feinberg had only until Dec. 21, 2001, to submit the first draft of the fund's regulations for public comment. "In three weeks [after Feinberg was appointed], it was important to meet with as many different groups as possible and find out what would divide people, what kind of information people

discretion about deducting them. Many victims were outraged such benefits would count against their final award.

But what about the millions of dollars available from charities? Could charity money reduce the size of payments from the fund? Congress' intent was not explicitly stated in the statute. After much back and forth, Feinberg says, the decision was that charity money would not be included in calculating the size of an award from the fund. "There were two reasons we didn't offset charity," he says. "One, we felt it was not the donors' intention to have charitable money to merely subsidize the federal tax payout, that people wouldn't give the money if they thought it was going to be offset against the federal program. And secondly, it was a Machiavellian matter: the threat from the charities that if I did offset their money, they would hold back the charity and not distribute the money until after I distributed my money so it couldn't be offset. When I heard that, I blinked," Feinberg says.

The offset question was one of many difficult issues Feinberg has dealt with. "There's been a debate on every single issue," Harris says. The statute required that claimants suffer physical injury," Harris says. "What



"If they had gotten some graybeard to run the fund, I think it would have been mired in disaster—this needed a hands-on lawyer."

— Steven Brill, journalist

Sen. Edward Kennedy, D-Mass.—he used to be Kennedy's chief of staff—and a few other powerful members of Congress. Feinberg's wealth of experience soon overcame concerns about his party affiliation. He has negotiated settlements on such complex and emotional class actions as Agent Orange (an herbicide used during the Vietnam War that has been implicated in soldiers' illnesses) and the Dalkon Shield (an intrauterine birth control device associated with pelvic disease and septic abortion) as well as cases involving health problems related to breast implants and asbestos. What's more, Feinberg offered to run the victims fund pro bono. Attorney General John Ashcroft appointed him special master on Nov. 26, 2001.

Conquering Controversies

With Feinberg on board, the next step was "to put flesh on the statute," says Deborah

needed," Greenspan recalls. "We had to deal with massive computations, and we didn't have access to all the information you do when doing damages in individual tort cases. It was important to come up with a consistent approach," Greenspan adds, so that the amount a victim receives "isn't based on whether he or she brings a good or bad economist to the table."

Every point, every detail, had to be decided, from basic terminology to the overall plan for determining the size of awards. Even before Feinberg was appointed, a major and still highly contentious issue arose: the question of offsets. According to the law, "collateral sources" of compensation related to the attacks must be deducted from any award from the federal fund. Life insurance, pension funds and death benefit programs are specifically mentioned in the law, so Feinberg had no

is the scope? Is it if someone inhaled dust from the collapse of the towers? Is a hospital stay required? Did they have to be admitted to an emergency room? What if someone was witnessing the collapse and had a heart attack? "The statute called for an injury in 'the immediate aftermath.' Is this 24 hours? 96 hours? And the recovery workers? Where do they stand?"

The question of payments for pain and suffering arose. How much should they be? Should they be graduated? How do you determine who suffered more: someone who jumped from a tower, was burned to death in the Pentagon or crashed in a plane?

"Ultimately I looked to the federal legislative precedent," Feinberg says, referring to the Public Safety Officers Benefit Program. "The policemen and firemen's death benefit bill is \$250,000, the military insurance program, if you're killed in Afghanistan

[for example], is \$250,000." So every victim's family received a base amount of \$250,000, with another \$100,000 for a spouse and each additional dependent.

What about same-sex partners? Could they receive benefits for the death of a partner? In what gay rights groups considered a landmark decision, Feinberg decided that the answer was yes when, in January 2003, he awarded the lesbian partner of an Army employee who was killed in the Pentagon attack \$577,000. His rationale? He would follow state law regarding same-sex partners. For example, Virginia, unlike New York, does not allow state compensation to be granted to domestic partners. However, state laws would only apply in the absence of a valid will. In this case, the partner was named as the beneficiary of the will and therefore was entitled to compensation from the fund.

How about illegal immigrants who wanted to apply for funds but were afraid they might be deported? The Immigration and Naturalization Service assured Feinberg that it would not use any information submitted to the fund to initiate deportation procedures.

All these decisions were controversial, but most difficult of all was coming up with a formula to determine how much each victim could get. With the help of OMB, the Justice Department and the White House created a chart that factored in such details as a victim's age, salary and number of dependents, and then stipulated an amount based on those factors, barring special circumstances. The box's formula only goes up to a top salary of \$231,000, because that was the 98th percentile of earnings according to 2000 figures from the Internal Revenue Service.

For example, if a married 25-year-old who was killed in the attacks left behind a spouse and two dependent children, that surviving family would receive \$4.5 mil-

Valuing Lost Lives

The September 11 Victim Compensation Fund uses a variety of factors, such as age, salary and benefits, projected income, household expenditures and consumption and tax rates, to determine compensation for deaths. Awards are offset by other sources of death benefits and compensation.

Range of Awards After Offsets

Annual Income	Age	Award
\$50,000 or less	35 or under	\$280,000 to \$2.7 million
\$50,000 or less	Over 35	\$250,000 to \$2.5 million
\$50,000 to \$100,000	35 or under	\$320,000 to \$4.1 million
\$50,000 to \$100,000	Over 35	\$250,000 to \$3 million
\$100,000 to \$200,000	All ages	\$250,000 to \$4.5 million
Over \$200,000	All ages	\$250,000 to \$6 million

Sample Claims Paid

Married civilian employee, age 54, at the Pentagon with no dependents and base compensation of \$116,000: \$685,573 after \$508,850 in offsets.

Married military officer, age 26, with no dependents and base compensation of \$44,000: \$1,841,128 after \$168,489 in offsets.

Single trader, age 34, with no dependents and base compensation of \$100,000: \$1,356,552 after \$150,000 in offsets.

Married laborer, age 47, with three dependents and base compensation of \$58,000: \$1,036,556 after \$298,694 in offsets.

Married project manager, age 36, with one dependent and base salary of \$231,000: \$3,481,491 after \$939,680 in offsets.

SOURCE: SEPTEMBER 11 VICTIM COMPENSATION FUND

lion—the highest amount shown on the chart for a person killed in the attacks.

The final rules published in the *Federal Register* on March 13, 2002, spell out the reasoning: Feinberg decided to calculate awards only up to the 98th percentile because "providing compensation above that level would rarely be necessary to ensure that the financial needs of a claimant are met." In addition, Feinberg notes, determining an award beyond the 98th percentile using the standard award calculation "could very well produce inappropriate results." However, Feinberg stresses that the \$231,000 salary is not a cap—although some lawyers contend it essentially is—and notes that anyone who believes they deserve more can provide detailed records to demonstrate extraordinary circumstances.

The chart, which was published in newspapers across the country, caused a furor by assigning vastly different dollar values to the lives of people killed in the attacks. In finalizing the regulations, fund officials weath-

ered the public outcry as well as a range of lengthy and intense discussions with a vast array of groups. More than 8,000 comments came in. What was remarkable, according to Feinberg, was that the many heated conversations remained respectful. "There was a lot of arguing, a lot of discussion, [which] was intellectually and emotionally the right thing to do, [but it was] never personal, never political. [It was] just 'how can we get this done?'"

Harris, the Justice official most deeply involved at the time, agrees. "A thick layer of emotion was overlaid on all discussions, whether internal or with advocates, but I would never describe it as acrimonious," he says. "I met with hundreds of victims from the Pentagon. At one of those meetings in a congressman's office, four or five women who lost their husbands came with two or three kids. At one point,

one woman took off a wedding band and gave it to me. She said 'this they gave me with his remains.' It was charred and scratched. She said, 'Just hold it and feel what we lost.'"

The draft regulations came out in the *Federal Register* less than three months after the law was passed and three weeks after Feinberg was appointed to his post. The next hurdle was to create an application for funds that would elicit enough information to enable Feinberg and his team to determine the appropriate amount without making the process so burdensome that applicants simply would give up. The application also had to be accessible to people of widely varying abilities and education.

The fund came up with a basic form, but most families wanted to attach additional information, so some applications ran thousands of pages. PwC Consulting, then part of PricewaterhouseCoopers but later acquired by IBM, was hired to review the applications to ensure they were readable and complete. Then PwC

passed them on to Feinberg's staff. "Sometimes we'd get 6,000 pages from one client," says Camille Biras, office administrator for Feinberg's law firm. "Each claim is an individual story and all are very, very involved. Many [applicants] are not from traditional families, and there's always extenuating circumstances."

For example, she notes, some victims might have been supporting a family not just in the United States, but in another country as well. The families of the victims, "come in here and tell Ken a story of how [the victim] sent money back to Mexico, and he's got to listen and decide," Biras says. "Every single case is reviewed and reviewed."

Victims and victims' families also can choose to go before a hearing officer to explain their cases. Greenspan estimates that about 100 people have requested hearings. In many instances, victims' families have brought lawyers and economists to these hearings to explain why they should get more than the formula allowed. Each person who applies to the fund also is logged onto the fund's Web site, so anyone with a competing claim can view it. For example, a parent or a former spouse might decide he or she should receive the compensation rather than a live-in partner.

'Very Raw'

So far, just 65 plaintiffs have filed lawsuits related to Sept. 11 against the airlines and other defendants. Most people attribute the limited number of lawsuits to the fund's success, and they ascribe that success to Feinberg. "He has been the glue to the entire Victim Compensation Fund," Harris says. "He has the experience and the practical know-how. His choice was critical to the entire process." Adds Brill: "If they had gotten some graybeard to run the fund, I think it would have been mired in disaster—this needed a hands-on lawyer."

As the hands-on lawyer, however, Feinberg has been the target of victims' anger and grief. Feinberg attended hundreds of meetings with victims across the country and met numerous families individually. Although he has worked on many cases where people died or were severely injured, this one was different. "I underestimated the degree to which families in grief would respond the way they did," he says. "I've dealt with it for 20 years, but

this is the first time that a compensation scheme was established so soon after the triggering event. Usually these cases percolate for years in the litigation system and work their way up to the point where the families have sort of come to peace with the event, [have] moved on. It's like the closing of the last chapter. This was Chapter One. It was very raw, very raw."

Sept. 11 widow Irene Golinski is furious at Feinberg and disappointed in the fund. Her husband, Ronald, 60, was a re-

Franz represents seven other Pentagon victims, and he is going down a dual path—helping his clients get their compensation cases together and preparing to sue. He is awaiting a ruling by Judge Alvin Hellerstein of the U.S. District Court for the Southern District of New York, who oversees all Sept. 11-related litigation.

Hellerstein will rule on a motion submitted by the airlines on whether the victims who were killed on the ground can have standing in the case—in effect,

whether the airlines can be held responsible for such deaths. Arguments were held in May, and Hellerstein is expected to rule anytime.

"Feinberg's staff gave us good ballpark figures of what they will get," Franz says, and based on those estimates, he says, he believes his clients will get far more by going to court. "We have clients who would likely get \$10 million," he says. But if Hellerstein agrees with the airlines, then Golinski and Franz's other clients will have to go with the compensation fund.

Golinski, who has three daughters, two of whom are in college, declined to state an exact amount she would receive from the fund, but said it would be "far less" than \$500,000, and she disputes Feinberg's assertion that the average payout—after offsets—will be about \$1.4 million.

"I feel like at the beginning I didn't respond to any of this—I was in shock or something," she says. "Now as time goes on, and I see the injustice, it really, really upsets me. I think there should be a flat amount for each person."

Others have been equally dissatisfied with the fund. Marc Moller, a lawyer with the Manhattan-based law firm of Kreindler & Kreindler, is the plaintiff liaison for the 65 plaintiffs suing the airlines and other defendants. He says that the real problem is that the fund doesn't address the needs of those in the top 2 percent of income. "The high earners would not recover their loss, and while the special master denies it, he will not go above \$6 million," Moller says. "If they sued, some cases are worth \$10, \$15, \$20 million. In the currency of the courtroom, you could go about \$30 million if you have a high earner with children. Notwithstanding denials, the fund will not recognize awards that high."

Victims' Compensation

Victims of the Sept. 11 attacks have until Dec. 22, 2003, to submit claims to the September 11 Victim Compensation Fund. The fund had issued 720 award letters as of Aug. 14.

Claims for Deceased Victims

2,191

Claims Submitted

720

Award Letters Issued

\$1.5 million

Average Award After Offsets

126

Requests for Hearings

SOURCE: SEPTEMBER 11 VICTIM COMPENSATION FUND

tired Army colonel who had returned to work at the Pentagon in personnel management with the Army. His wife was on the phone with him when the plane slammed into the Pentagon, killing him. His remains never were found.

Golinski says that when she takes into account the offsets from her husband's life insurance and pension, her payout from the fund will be much less than the \$1.4 million average Feinberg cites. "The fund is a slap in the face," she says. "It's a bigger slap in the face than what happened." Golinski, 52, has attended numerous meetings where Feinberg presided and has come away unimpressed. At one meeting, she says, Feinberg gave out his personal phone number and said, "Call any time." "Just try to get a hold of him," she says. "I tried three different times. He's not available."

Golinski has not filed suit, but is working with a lawyer, Keith Franz of the Baltimore law firm of Azael, Gann & Franz.

Some victims' families were so unhappy with Feinberg's decisions that they brought the matter before Hellerstein earlier this year, claiming that Feinberg abused his discretion. In May, Hellerstein dismissed the lawsuits, saying the fund's regulations were lawful and valid.

Feinberg listens to the critiques, absorbs them and, when applicable, incorporates them into the fund, he says. Even though he is used to being in the middle of very tough cases, he says, this job has caused him many sleepless nights. "I don't doubt if I'm doing it the right way," he says, "but it's trying to come to grips with the depth of emotional tragedy."

Factoring Fairness

All those involved realize that no one program could make everyone happy, especially with the huge disparities in wealth among the victims. "This is the fairest program he could think of," says Philip Perry, who was acting associate attorney general at Justice when the fund regulations were being developed and now is the general counsel at OMB. "Ken was intent that everyone get a fair recovery and recognized at the high [income] end there were a much more complicated set of issues than at the low end. There was recognition that people who had extraordinary talents and income could not be treated in a cookie-cutter fashion."

The problem, many say, is that in its haste to get the fund written into law, Congress didn't decide what role the fund was meant to play. "Is it a tort-based system or is it a social-welfare safety-net system? One can read the statute any way you want," Feinberg says. "[It includes] tort-based concepts, but then Congress says, 'You'll offset all collateral sources of income. That's social welfare! We'll make sure you're not destitute, but if you've got other sources of income like life insurance, that should serve you fine.' I would have urged Congress to pay everybody the same amount and let them sue. But once Congress decided that lawsuits against the airlines were inappropriate, [were] contrary to the public interest, would be damaging to the transportation infrastructure of the country [and] would send the wrong signal to the terrorists, I'm not sure Congress could do anything but what it did. [When] you eliminate a lawsuit, you've got to put something in its place. Since the Congress rained formidable obstacles to suing the airlines, to giving peo-

ple their day in court, it was felt in part, that the compensation mechanism established by the statute should track some of the loss-based concepts, like economic and noneconomic loss," he adds.

Leo Boyle, president of Trial Lawyers Care, which was set up in the wake of the attacks to provide free legal advice, says the fund has been "an economic lifesaver to hundreds and hundreds of families. It was pretty clear right from the beginning that lawsuits were not a reasonable option," he adds. "In my opinion, the fund has been ex-

Weighing Injuries

Injury claims differ widely, so the September 11 Victim Compensation Fund has no standard method for evaluating them. Amounts depend on the nature, severity and duration of the injury. For permanent disabilities, awards are calculated similarly to those for deaths.

Personal Injury Claims (as of Aug. 11)

188

Awards Issued

\$500 to \$6.8 million

Range of Awards

SOURCE: SEPTEMBER 11 VICTIM COMPENSATION FUND

traordinarily successful in particular for families whose incomes were between the 1st and 98th percentile nationally. No one plan is right for everyone."

Next Time?

And for those who wonder why the Sept. 11 victims should receive funds when those killed in the 1993 World Trade Center bombing, or Oklahoma City, or by the embassy bombings in Kenya didn't, Boyle, a past president of the Association of Trial Lawyers of America, has a response: "We owe something. We need to recognize that those 3,000 to 4,000 families took this hit for everyone—there but for the grace of God, go I."

But what about next time? Another terrorist attack on American soil is possible, and those victims will no doubt expect similar treatment to the Sept. 11 victims.

Feinberg calls Sen. Don Nickles, R-Okla., one of the most thoughtful critics of the fund. Nickles thinks his initial fear—that the fund would set a bad precedent—has been borne out, according to his

counsel, Biri Zomer. "Every other group wants to come on board, and there's not the appetite among the members of Congress to do that," Zomer says. In fact, a bill introduced by Sen. Charles Schumer, D-N.Y., to include the 1993 World Trade Center victims in the Sept. 11 compensation fund has been stuck in the Senate Judiciary Committee, Zomer says.

For Brill, "the real failure of the government's response is not the response itself, but making it so exceptional. It's a marked contrast to the Oklahoma City

bombings and the embassy bombings, and a marked contrast to how the next ones will be handled," he says. The fear of the airlines going bankrupt made this a unique situation, Brill says. Next time, Congress might not be so eager to set up an uncapped compensation fund. And next time, how will the victims be defined? Would they be any American victims of terrorist attacks anywhere in the world? Do the terrorists need to be foreign, or could they be domestic, like Timothy McVeigh? What about embassy bombings that are technically on American soil, but in foreign lands?

Feinberg believes compensation should kick in next time only if there is a foreign attack against Americans on American soil. "But maybe that's a lawyer's gloss on all this," he says. "9/11 was like Pearl Harbor and the Kennedy assassination, a unique historical tragedy. If you accept the notion of uniqueness, then the program is a one-off. But I think the genie is out of the bottle. It's hard next time there's a foreign attack not to come with some variation of the program, and I think Congress will."

Brill agrees, but says the time to develop such a program is now "when people can talk about it calmly and rationally. It's a terribly complex and emotional issue and we really need to have a big discussion. We can't do it in the dead of night."

The fund is still a work in progress; it's too early to determine its success. Nevertheless, "a lot of what you don't see is how things would have worked without the fund," says Boyle of Trial Lawyers Care. "It would have been a nightmare. There's some rough spots around the edges, but this country has never taken care of its fallen people the way we did on Sept. 11." ●