11-2012

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Recommended Citation
98 Cornell L. Rev. 127 (2012-2013)

MANAGERIAL JUDGING: THE 9/11 RESPONDERS' TORT LITIGATION

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Professors James A. Henderson, Jr. and Aaron D. Twerski have served as special masters to Judge Alvin K. Hellerstein in the 9/11 first responders' litigation since December 12, 2006. As this issue goes to press, they continue to serve in that capacity.

The special masters acknowledge the outstanding research assistance of Shimon Sternhell. This Article could not have been written without his invaluable review of thousands of pages of transcripts and documents. He created a chronology of events that not only was critical to our work but can serve as a guide to other scholars who wish to analyze this landmark litigation.

Judge Hellerstein acknowledges the contributions of the following law clerks who assisted him in the 9/11 litigation: Michael Cabin, Allie Cheatham, Robin Effron, Leo Kittay, Catherine Lake, Michelle Parikh, Sandra Park, Laura Popp-Rosenberg, William Ralph, Owen Roth, and Brian Sutherland.

INTRODUCTION

Most Americans associate the terrorist attacks on the World Trade Center (WTC) in New York with the violent deaths of nearly three thousand victims within hours from the time that jetliners crashed into the twin towers.[1] Less attention has been focused on the more than sixty thousand postcollapse responders who, over a ten-month period, engaged in round-the-clock rescue, recovery, and debris-removal efforts at the site.[2] Many of the responders—police officers, firefighters, construction workers, and others—allegedly suffered injury and death from exposure to the hazardous environments in which they worked.[3] This Article describes the tort litigation in federal district court on behalf of the more than ten thousand responders who claimed to have suffered injury due to their on-site exposures.[4]

Governmental responses aimed at compensating the injured victims of the 9/11 attacks began immediately and are unique in the history of American jurisprudence.[5] Within days of the attack, Con-

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1 *See In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 361 (S.D.N.Y. 2003).

2 *In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 525 (S.D.N.Y. 2006) (stating that workers cleared the WTC site in just under ten months); ANTHONY DEPALMA, CITY OF DUST: ILLNESS, ARROGANCE, AND 9/11, at 217 (2011) (reporting that, while the exact number of Ground Zero workers is unknown, Mount Sinai Hospital, which treated many of those who toiled at Ground Zero, "settled on 60,000 as the best estimate").

3 *In re* World Trade Ctr. Disaster Site Litig., 414 F.3d 352, 358–59 (2d Cir. 2005); Anthony DePalma, *Illness Persisting in 9/11 Workers, Big Study Finds*, N.Y. TIMES, Sept. 5, 2006, at A1; Anthony DePalma, *Debate Revives as 9/11 Dust is Called Fatal*, N.Y. TIMES, Apr. 14, 2006, at B1.

4 *Workers at Ground Zero on 9/11 Face Settlement Deadline*, NJ.COM (Nov. 8, 2010, 5:29 AM), http://www.nj.com/news/index.ssf/2010/11/deadline_for_settlement_offer.html (reporting that more than ten thousand plaintiffs sued the City of New York and others for their handling of the WTC cleanup).

5 1 KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at v (2004), *available at* http://www.justice.gov/final_report.pdf (describing the VCF as a "unique and unprecedented experiment"); *see also In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 500 (S.D.N.Y. 2009) (observing that the claims arising out of the 9/11 cleanup operation were "not typical mass tort claims").

gress enacted legislation that created a no-fault Victim Compensation Fund (VCF) and channeled attack-related civil litigation into federal court.[6] Those victims not included in the VCF brought tort actions in subsequent years against the City of New York and a number of private contractors who supervised work at Ground Zero and other sites to which debris was transported.[7] In 2004, to protect the City of New York and the contractors from potentially crushing tort liability, Congress again stepped in and created the Captive Insurance Company (Captive), which provided $1 billion to defend tort claims arising from debris removal, and to pay such claims when warranted.[8] Ultimately, in late 2010, over ten thousand such claims were settled for between $625 million and $712.5 million.[9] The litigation and ultimate settlement of these claims took place in the U.S. District Court for the Southern District of New York, presided over by Judge Alvin K. Hellerstein.[10] On December 22, 2010, nine years after the enactment

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6 Air Transportation Safety and System Stabilization Act (ATSSSA), Pub. L. No. 107-42, §§ 401–409, 115 Stat. 230, 237–41 (2001).

7 *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 525–26, 542–43. The WTC site was divided into four quadrants with a primary contractor assigned to each quadrant. *Id.* at 529. The primary contractors were Tully Construction (Zone 1), Bovis Lend Lease (Zone 2), AMEC Construction (Zone 3), and Turner Construction (Zone 4). *Id.* The primary contractors in turn entered into subcontracts with over 140 specialty subcontractors that were needed to provide various services to complete the recovery effort. *Id.*; *see also Overview of the World Trade Center Litigation Settlement Process Agreement, As Amended*, WORBY GRONER EDELMAN & NAPOLI BERN LLP, http://www.877wtchero.com/docs/Overview-of-the-World-Trade-Center-Litigation-Settlement-Process-Agreement-As-Amended.pdf (last visited Sept. 28, 2012) [hereinafter *Overview of Settlement Process*] (providing a complete listing of the subcontractor defendants). Plaintiffs also sued Weeks Marine, Inc., which operated barges that transported Ground Zero debris to the Fresh Kills Landfill, and the contractors at the Fresh Kills Landfill. *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100, 21 MC 103, 2010 WL 4683610, at *1–2 (S.D.N.Y. Nov. 15, 2010). The contractors at the Fresh Kills Landfill were Phillips & Jordan, Inc., Evans Environmental & Geological Science and Management LLC, and Taylor Recycling Facility, LLC. *Id.* at *1.

8 Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11, 517–18 (2003).

9 Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. TIMES, Nov. 20, 2010, at A1; *Overview of Settlement Process*, *supra* note 7, at 1.

10 ATSSSA, § 408(b)(3), 115 Stat. at 241 ("The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001."). Once the 9/11 cases were filed in the Southern District of New York, they were consolidated before Judge Hellerstein. Robin J. Effron, *Disaster-Specific Mechanisms for Consolidation*, 82 TUL. L. REV. 2423, 2428 (2008). Before agreeing on the final settlement, the parties had originally consented to a settlement that would have provided payouts totaling $575 million to $657.5 million. Mireya Navarro, *Judge Rejects Deal on Health Claims of Workers at Ground Zero*, N.Y. TIMES, Mar. 20, 2010, at A12. However, Judge Hellerstein rejected that first settlement claiming it did not adequately compensate plaintiffs. *Id.*; Transcript of Status Conference at 54, *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100(AKH) (S.D.N.Y. Mar. 19, 2010) [hereinafter Transcript of Status Conference (Mar. 19, 2010)]. For more on the initial settlement, see *infra* Part VI.

of the first VCF,[11] Congress amended the earlier legislation, creating a supplemental, no-fault Victim Compensation Fund (VCF-2).[12] This revision enabled a broader range of injured victims, including bystanders not engaged in debris-removal efforts,[13] to receive health benefits[14] and share in $2.775 billion of compensation.[15]

This Article chronicles and analyzes the events and the strategies that led to the 2010 settlement of the tort litigation. The authors of this Article actively participated in managing and shaping many of these events and may lay claim to insights to which others may not have direct access. Nevertheless, almost all of the factual information upon which this Article relies is part of the public record. As such, any scholar who wishes to double-check and evaluate this Article's factual information may do so. It will help to sharpen the focus of this analysis if the authors identify at the outset some events on which this Article will not focus. The 2001 VCF has been the subject of a substantial body of literature examining the manner in which the VCF special master, Kenneth R. Feinberg, administered the distribution of the Fund.[16] This Article will not revisit those developments. The VCF will receive mention only as it directly relates to the tort litigation in which the authors participated. Nor will this Article attempt to assess the

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11 Michael McAuliff, *Senators Approve James Zadroga 9/11 Health Bill After Months of Partisan Bickering*, N.Y. DAILY NEWS (Dec. 22, 2010), http://articles.nydailynews.com/2010-12-22/news/27085256_1_health-bill-coburn-chuck-schumer. The President signed the Zadroga Act into law on January 2, 2011. James Zadroga 9/11 Health and Compensation Act of 2010, 76 Fed. Reg. 36,027, 36,027 (June 21, 2011) (to be codified as amended at 28 C.F.R. pt. 104).

12 *See generally* James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623 (codified at scattered sections of 26 and 41 U.S.C. (2011)) (amending the first VCF legislation).

13 James Zadroga 9/11 Health and Compensation Act of 2010, 76 Fed. Reg. at 36,029; Carl Campanile, *Zadroga Zone Expands 10 Blocks to Canal*, N.Y. POST (Aug. 30, 2011), http://www.nypost.com/p/news/local/zadroga_zone_expands_blocks_to_canal_loCxmD7bXlEUZ6xKKRWplN; Alison Gendar, *Zadroga 9/11 Health Fund Expanded Past Ground Zero to People in Neighborhood Sickened by WTC Attacks*, N.Y. DAILY NEWS (June 21, 2011), http://articles.nydailynews.com/2011-06-21/local/29707112_1_john-feal-zadroga-ground-zero.

14 Congress allocated approximately $1.5 billion for health benefits. *See generally* James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623 (amending the first VCF legislation).

15 James Zadroga 9/11 Health and Compensation Act of 2010, 76 Fed. Reg. at 36,028. From the $2.775 billion appropriated, "[o]nly $875 million may be spent in the first five years of the program with the remainder being paid out in the sixth year." *Id.*

16 *See generally* Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1 (2006); Kenneth R. Feinberg, Special Master of the Fed. September 11th Victim Comp. Fund of 2001, Speech: Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation (Sept. 14, 2004), *in* 19 WASH. U. J.L. & POL'Y 21 (2005); Tracy Hresko, *Restoration and Relief: Procedural Justice and the September 11th Victim Compensation Fund*, 42 GONZ. L. REV. 95 (2006); Stephan Landsman, Introduction, Symposium, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205 (2003).

VCF-2 created by the 2010 Zadroga Bill (now Zadroga Act). The work of the special master on that project, Sheila Birnbaum, will extend over the next six years.[17] This Article will reference VCF-2 only as it relates to the tort litigation that took place in Judge Hellerstein's court. Finally, this Article will not discuss the tort-related litigation brought by those who were killed or injured by the terrorist-related crashes at the WTC site, the Pentagon, and the field in Shanksville, Pennsylvania, or other litigation related to the 9/11 cases. Judge Hellerstein presided over all those cases.

The personal injury litigation arising out of the WTC debris-removal operations deserves careful scrutiny. The claims raise novel legal issues, some of which will confront courts for decades to come.[18] Equally deserving of attention are the methods employed in managing the most complex case in the history of American mass tort litigation.[19] More than ten thousand plaintiffs—in separate, though related, actions—alleged over three hundred different diseases that they claimed were either brought on or aggravated by their exposures to the dust-borne toxins at or near Ground Zero.[20] Some plaintiffs were exposed to the WTC site for only a few hours and others for more than ten months.[21] They came to the litigation with a wide variety of medical conditions that predated their 9/11 exposures.[22] Many were tobacco users.[23] At the times they came to the work site, the plaintiffs ranged in age from eighteen to seventy-four.[24] Depending on where on the site they worked, the responders were exposed to different combinations of toxins with the potential to cause different types of diseases.[25] Most plaintiffs, at some time or other during their

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17 James Zadroga 9/11 Health and Compensation Act of 2010, 76 Fed. Reg. at 36,028.

18 *See infra* Part VII.

19 *See infra* Parts IV, VII.

20 *In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 503 (S.D.N.Y. 2009) ("[P]laintiffs, in the aggregate, claim approximately 387 diseases ranging from the most life-threatening to the merely irritating.").

21 *In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 364 (S.D.N.Y. 2003); Telephone Interview with Ned Adams, 9/11 Litig. Database Adm'r, Tech. Concepts & Design, Inc. (July 5, 2011).

22 *NYC Sees Fraud in Some 9/11 Health Claims*, CBS NEWS (Mar. 11, 2010, 11:05 PM), http://www.cbsnews.com/stories/2010/02/17/national/main6218041.shtml. Defendants also reported that they did a statistical sampling of five hundred plaintiffs, which showed that seventy-eight percent have an elevated body mass index that would categorize them as morbidly obese, obese, or overweight. Transcript of Status Conference at 37–39, *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100(AKH) (S.D.N.Y. May 29, 2008).

23 Memorandum from James A. Henderson, Jr. & Aaron D. Twerski, Special Masters to Judge Alvin K. Hellerstein, to Judge Alvin K. Hellerstein, U.S. Dist. Court for the S. Dist. of N.Y. 12–13 (Sept. 24, 2009) (on file with authors) [hereinafter Sept. 2009 Memorandum]; *see* Denise Mann, *Years Later, 9/11 Rescue Workers Still Show Decreased Lung Function*, CNN (Apr. 7, 2010, 9:25 PM), http://edition.cnn.com/2010/HEALTH/04/07/911.rescue.lungs/index.html.

24 Telephone Interview with Ned Adams, *supra* note 21.

25 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 500.

work on-site, were provided with protective equipment such as facemasks and different types of respirators. However, access to training and supplemental equipment such as respirator filters, fitness of the masks for the demands of the worksite, and supervisor insistence that responders use the masks varied widely.[26] No other tort litigation, whether based on widespread environmental contaminants or on mass-marketed prescription drugs, has ever presented so many different injuries caused by such varying degrees of exposure to such indeterminate toxins.[27] How courts successfully managed these cases to conclusion is of more than anecdotal interest. Important lessons are provided here, not the least of which relate to the institutional capacity of any court to manage such nonclass, mass tort litigation involving so many interrelated variables.

I

How 10,000-plus Responder-Plaintiffs Wound Up in Federal Court Rather than Claiming Against the Victim Compensation Fund (VCF)

To understand how 10,000-plus responder-plaintiffs brought tort actions in federal court against the City of New York and its contractors rather than sought compensation from the VCF, it is necessary to briefly review the statutory and regulatory structures that governed the compensation scheme enacted immediately after the attacks. Congress established the VCF as part of the Air Transportation Safety and System Stabilization Act (ATSSSA).[28] The Act provided for no-fault compensation for persons suffering "physical harm" who were "present at the World Trade Center . . . in the immediate aftermath" of the crashes.[29] Regulations promulgated by the Department of Justice elaborated upon these terms. The regulations provided bright-line rules that limited recovery to those who suffered actual physical injury or death within twelve hours of the crashes as a direct result of the attacks.[30] For rescue workers, the immediate aftermath included the period "until 96 hours after the crashes."[31] "Physical harm" included physical injury to the body that was treated within twenty-four hours of the injury being sustained or within seventy-two hours for

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26 *In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 531–36 (S.D.N.Y. 2006); *see* DePalma, *supra* note 2, at 59.

27 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 500; Transcript of Status Conference at 21, *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100(AKH) (S.D.N.Y. Dec. 10, 2008) [hereinafter Transcript of Status Conference (Dec. 10, 2008)].

28 ATSSSA, Pub. L. No. 107-42, §§ 401–409, 115 Stat. 230, 237–41 (2001).

29 *Id.* § 405.

30 September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.2 (2003).

31 *Id.*

those who initially failed to realize the extent of their injuries.[32] Under the regulations, the physical injury had to be verified by contemporaneous medical records created by the medical professionals who provided the necessary care.[33] Those rescue workers who suffered respiratory injuries that did not manifest within seventy-two hours could apply for a waiver of the seventy-two-hour rule.[34] The regulations, however, did not permit waivers for the twelve-hour and ninety-six-hour time limits that helped to identify who was present in the "immediate aftermath" of the crashes.[35] Finally, all VCF claims had to be filed no later than December 22, 2003.[36] The overwhelming majority of claimants in the 9/11 tort litigation in federal court could not satisfy these VCF eligibility criteria.

Although responder-plaintiffs injured during debris removal mainly targeted the City of New York and its contractors in the tort actions, 9/11 plaintiffs joined several other major defendants.[37] These additional defendants included the Port Authority of New York and New Jersey (Port Authority), which owned the Twin Towers, and several contractors that the Army Corps of Engineers (Army Corps) had engaged to transfer the debris to a landfill site in Fresh Kills and to examine it for personal effects and human remains.[38]

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32 *Id.* ("The term *physical harm* shall mean a physical injury to the body that was treated by a medical professional within 24 hours of the injury having been sustained, or within 24 hours of rescue, or within 72 hours of injury or rescue for those victims who were unable to realize immediately the extent of their injuries or for whom treatment by a medical professional was not available on September 11 . . . .").

33 *Id.*

34 *Id.* (providing that the special master may waive the seventy-two-hour rule "for rescue personnel who did not or could not obtain treatment by a medical professional within 72 hours").

35 *Id.*

36 *See* 1 FEINBERG ET AL., *supra* note 5, at 112. There were 108 claims that were filed after the December 22, 2003 deadline, but only "11 were accepted as timely based on a finding by the Special Master that the Claimant had taken sufficient action prior to the deadline to effect a timely filing." *Id.*

37 *See In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d, 520, 542 (S.D.N.Y. 2006).

38 *Id.*; *see In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100(AKH), 21 MC 103, 2010 WL 4683610, at *1–2 (S.D.N.Y. Nov. 15, 2010). These additional defendants ultimately settled with plaintiffs, adding slightly more than $100 million to the value of the settlement. *Id.* The Port Authority settled the litigation for $47.5 million. *Id.* The Army Corps employed three companies to work at Fresh Kills: Phillips & Jordan, Evans Environmental & Geological Science and Management LLC, and Taylor Recycling Facility, LLC. *Id.* at *1. The plaintiffs eventually settled with all Fresh Kills defendants for a total of $24.3 million. *Id.* at *1–2. Additionally, after the Captive settled and paid out the claims against Weeks Marine, the Captive sought indemnity from Weeks Marine and its insurer. Telephone Interview with Christopher R. LoPalo, Worby Groner Edelman & Napoli Bern, LLP (June 2011). Consequently, the Captive settled with Lloyd's of London on behalf of Weeks Marine for $28 million and, pursuant to the settlement agreement, assigned the recovery to the plaintiffs. *In re World Trade Ctr. Disaster Site Litig.*, 2010 WL 4683610, at *2. The

II

THE BASIS OF THE FEDERAL DISTRICT COURT'S JURISDICTION TO HEAR THE 9/11 RESPONDERS' TORT LITIGATION

In early 2003, hundreds of plaintiffs filed individual actions in New York state courts alleging that they suffered respiratory injuries as a result of working at the WTC crash site, the Fresh Kills landfill site, or on the trucks and barges that transported debris from the crash site to Fresh Kills.[39] The plaintiffs alleged that the City of New York and the Port Authority had violated multiple sections of the New York labor laws that require an employer to provide "reasonable and adequate protection and safety to the persons employed" in "areas in which construction, excavation or demolition work is being performed."[40] Defendants sought, and the court granted, removal to federal court.[41] Defendants successfully argued that the ATSSSA vests original and exclusive jurisdiction in the United States District Court for the Southern District of New York "over all actions brought for any claim . . . resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001."[42]

In *Hickey v. City of New York*, one of the first responder cases before Judge Hellerstein, the judge confronted the scope of jurisdiction of the federal court. For how long after the initial crash could a federal court consider the plaintiffs' claims as "resulting from or related to the terrorist-related aircraft crashes"?[43] Judge Hellerstein held that, immediately after the crashes, when the rescuers were searching for survivors, the claims "resulted from or related to" the

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plaintiffs also settled with Survivair, Inc., the manufacturer of respirators used in the aftermath of 9/11, for $4.1 million. *See id.*

39 *In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 363 (S.D.N.Y. 2003). Prior to 2003, there were claims brought against the City of New York, the Port Authority, and others for nonrespiratory injuries suffered at the WTC site. *See, e.g.*, Spagnuolo v. Port Auth. of N.Y. & N.J., 245 F. Supp. 2d 518, 519–21 (S.D.N.Y. 2002) (hearing a claim by plaintiff allegedly struck by a falling oxygen tank).

40 N.Y. LAB. LAW § 241(6) (McKinney 2006); *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 542, 568, 573 ("Plaintiffs . . . assert claims for negligence, wrongful death, derivative plaintiffs, and for violations of New York Labor and General Municipal Law.").

41 *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d at 363.

42 ATSSSA, Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230, 241 (2001); *see In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d at 363. In *McNally v. Port Authority of New York & New Jersey*, the Second Circuit held that the ATSSSA created a federal cause of action as the exclusive remedy for damages arising out of the aircraft crashes of September 11. 414 F.3d 352, 380 (2d Cir. 2005). However, the court stated that "[w]hat [the] ATSSSA . . . displaces is not the substantive standards governing liability, but only the state-law damages remedies." *Id.* Thus, the substantive law for a decision in the 9/11 litigation, taking place in federal court, must be derived from state law. ATSSSA § 408(b)(2); *McNally*, 414 F.3d at 380.

43 *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d at 368.

crashes.[44] However, by September 29, 2001, the search for survivors had ended and "the mandate officially shifted . . . to demolition of the ruined structure and clean-up of the mountain of debris."[45] From that point forward, Judge Hellerstein reasoned that the responders' claims, based on violations of New York labor laws, resembled typical workplace injuries, and should be litigated in state courts having greater familiarity with the nuances of those laws.[46] Judge Hellerstein, however, stayed remand to the state courts to allow the parties to first appeal his decision to the United States Court of Appeals for the Second Circuit.[47]

In *McNally v. Port Authority of New York & New Jersey*, decided in 2005, the Second Circuit held that it lacked jurisdiction to decide the appropriateness of the district court's remand to state court.[48] In strongly worded dicta, the court made clear that Judge Hellerstein's limitation of his jurisdiction to pre-September 29 claims was unwarranted.[49] The court of appeals read ATSSSA to mean that Congress intended to cover all tort claims arising from the terrorist crashes and that the Act imposed neither a temporal nor a geographical limitation on those injured by inhalation of toxic dust emanating from the crash site.[50] Accordingly, the court of appeals invited Judge Hellerstein to

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44 *Id.* at 374.

45 *Id.* at 361.

46 *Id.* at 374 (holding that "without a more definite statement of congressional intent," a federal court should not "oust the court having expertise interpreting" the labor law statutes implicated in this litigation).

47 *Id.* at 381. Judge Hellerstein certified for interlocutory appeal to the U.S. Second Circuit Court of Appeals the question of how broadly to interpret the ATSSSA's grant of subject matter jurisdiction. *Id.* 28 U.S.C. § 1292(b) authorizes district judges to certify an order for interlocutory appeal when they are "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." However, interlocutory appeal was only available for cases remaining with Judge Hellerstein and not those that were subject to his remand order. 28 U.S.C. § 1447(d) (2006); *see In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d at 381.

48 McNally v. Port Auth. of N.Y. & N.J., 414 F.3d 352, 371 (2d Cir. 2005) (holding that the district court's remand orders are unreviewable under 28 U.S.C. § 1447(d)).

49 *Id.* at 380 ("[W]e see no basis for the district court's ruling that ATSSSA's preemptive effect differs depending on whether the respiratory injuries were suffered at the World Trade Center site or elsewhere, or on whether those injuries were suffered before or after midnight on September 29. Nothing in the language of the statute or the legislative history suggests such lines of demarcation.").

50 *Id.* The Second Circuit conceded that there will be claims whose connection to the September 11 aircraft crashes will be "too tenuous" to justify a decision that they are related to those crashes. *Id.* "[B]ut we make no attempt to draw a definitive line here. We need not take the phrase 'relating to' to any metaphysical extreme in order to conclude that it encompasses the claims brought before the district court here, *i.e.*, that airborne toxins and other contaminants emanating from the debris created by the crashes caused respiratory injuries to plaintiffs employed to sift, remove, transport, or dispose of that debris." *Id.*

reconsider his decision limiting federal jurisdiction.[51] On remand, Judge Hellerstein adopted the court of appeals' dictum.[52] Meanwhile, during the two years of appellate proceedings, the litigation had not substantially progressed.

III
RESOLVING THE ISSUE OF DEFENDANTS' IMMUNITY FROM TORT LIABILITY

In February 2005, promptly after remand, Judge Hellerstein called a status conference to discuss the issue of whether the defendants in the tort cases could raise valid immunity defenses on a number of state and federal grounds.[53] The City of New York and its contractors argued that they were responding to an emergency and were thus immune from tort liability on both state and federal immunity doctrines.[54] Before the defendants removed the cases to federal court, a state court had recognized a New York statute immunity defense for injuries occurring between September 11 and September 29, 2001.[55] Given that a successful immunity defense would be dispositive on liability, Judge Hellerstein ordered accelerated pretrial discovery on that issue.[56]

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51 *Id.* at 381.

52 Judge Hellerstein adopted the Second Circuit's recommendation on July 22, 2005. *In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 539 (S.D.N.Y. 2006).

53 Transcript of Status Conference at 12–18, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Feb. 7, 2005) [hereinafter Transcript of Status Conference (Feb. 7, 2005)]. Judge Hellerstein believed that the immunity issue needed to be resolved quickly because the plaintiffs needed to know to what extent they have a case, and the defendants needed to know whether they would have to deal with these cases in a substantive manner. Transcript of Status Conference at 12, *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100 (S.D.N.Y. July 13, 2005). This information, Judge Hellerstein reasoned, would allow both sides to properly value the cases and bring them to a point where settlement discussions were possible. *Id.*

54 *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 540.

55 Daly v. Port Auth. of N.Y. & N.J., 793 N.Y.S.2d 712, 718 (N.Y. Sup. Ct. 2005) (holding that the New York State Defense Emergency Act (SDEA), N.Y. UNCONSOL. LAW §§ 9101–9200 (McKinney 2006), grants immunity for injuries incurred up to and including September 29, 2001, when the search for survivors was still ongoing).

56 *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 539. Because of the importance of resolving the immunity question rather quickly, Judge Hellerstein ordered the parties to engage in limited discovery focusing on the defendants' anticipated immunity defenses, even before the Second Circuit had decided how broad to interpret the scope of federal jurisdiction under the ATSSSA. *Id.* The judge initially directed the parties to proceed on this limited course of discovery "with the aim of establishing a joint offer of proof, alleviating [p]laintiffs of the burden of proving all factual averments." *Id.* However, at a Status Conference on November 7, 2005, the judge realized the parties would not reach agreement on a joint offer of proof and conceded that it would be futile to invest any further efforts in the matter. *Id.*; Transcript of Status Conference at 17, *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100, 21 MC 102 (S.D.N.Y. November 7, 2005). Despite the lack of agreement on a joint offer of proof, the judge ordered the parties to complete

In October 2006, Judge Hellerstein issued a lengthy opinion dealing with the subject of immunity.[57] Regarding possible immunities under state law,[58] the critical issues were whether the City of New York and its contractors had performed debris-removal activities under emergency conditions and whether the activities were undertaken in good faith.[59] Judge Hellerstein held that neither of these issues could

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discovery, which occurred in early 2006, and to proceed to make their immunity arguments by motion. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 539–40.

57 *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 520.

58 *Id.* at 546 (noting that defendants claimed immunity under the UNCONSOL. §§ 9101–9200, New York State and Local Natural Disaster and Man-Made Disaster Preparedness Act (Disaster Act), N.Y. EXEC. LAW §§ 20–29 (McKinney 2006), and New York common law).

The SDEA's immunity provision states,

> The state, any political subdivision, municipal or volunteer agency . . . or any individual, partnership, corporation, association, trustee, receiver or any of the agents thereof, *in good faith carrying out, complying with or attempting to comply with any law, any rule, regulation or order duly promulgated or issued pursuant to this act, any federal law, or any arrangement, agreement or compact for mutual aid and assistance or any order issued by federal or state military authorities, relating to civil defense,* including but not limited to activities pursuant thereto, in preparation for anticipated attack, during attack, or following attack or false warning thereof, or in connection with an authorized drill or test, *shall not be liable* for any injury or death to persons or damage to property as the result thereof.

UNCONSOL. § 9193(1) (emphasis added) (footnote omitted). The Disaster Act defines a "disaster" as the "occurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including . . . terrorism." EXEC. § 20(2)(a). "Upon the threat or occurrence of a disaster, the chief executive of any political subdivision is . . . authorized and empowered to and shall use any and all facilities, equipment, supplies, personnel and other resources of his political subdivision in such manner as may be necessary or appropriate to *cope with the disaster or any emergency resulting therefrom.*" *Id.* § 25(1) (emphasis added). The Disaster Act further immunizes a political subdivision "for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any officer or employee in carrying out the provisions" of the act. *Id.* § 25(5). New York common law immunizes acts that are: (1) "'completely sovereign in nature and completely foreign to any activity which could be carried out by a private person'"; and (2) discretionary in nature. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 558–59 (quoting Williams v. State, 456 N.Y.S.2d 491, 493 (App. Div. 1982)).

59 UNCONSOL. §§ 9103(5), 9193(1); EXEC. § 25(1). The SDEA's immunity provision is limited to activities related to "civil defense." UNCONSOL. § 9193(1). When the activities are taken in response to an attack, civil defense measures include "*emergency* medical, health and sanitation services; . . . *essential* debris clearance; *emergency* welfare measures; *immediately essential* emergency repair or restoration of damaged vital facilities . . . ." *Id.* § 9103(5) (emphasis added). Similarly, Disaster Act immunity is not provided for all "actions taken in consequence of a disaster, but instead only to those actions which are necessary to cope with the disaster." *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 558. The SDEA only immunizes activity taken "in good faith carrying out, complying with . . . any rule, regulation or order duly promulgated . . . relating to civil defense." UNCONSOL. § 9193(1) (footnote omitted). The defendants contended that the relevant "good faith" inquiry "is not *how* the Defendants acted, but rather *why* the Defendants acted," and that the immunity provision should apply because the city agencies and private contractors that responded to the September 11 tragedy did so in response to declarations of emergency and executive orders issued by New York officials. *In re World Trade Ctr. Disaster Site*

be decided before completion of full discovery.[60] Assuming that the collapse of the towers presented an emergency, how long did that emergency last?[61] At what point in time, if ever, did the rescue and recovery effort become routine, nonemergency debris removal?[62] Furthermore, if serious breaches of safety requirements occurred during the ten-month debris-removal period, had the City of New York and its contractors acted in good faith?[63] Judge Hellerstein ruled that the record then before the court was inadequate to support any findings on the issues presented to him.

The district court's October 2006 decision also addressed arguments by the City of New York and its contractors that they were entitled to derivative federal immunity, also known as the government contractor defense.[64] The defense extends the immunity traditionally enjoyed by the federal government "for actions taken in furtherance of its government functions to private entities hired to facilitate the government in the implementation of its programs and goals."[65]

Litig., 456 F. Supp. 2d at 552. Judge Hellerstein disagreed, however, and held that good faith "may not be inferred simply from the fact that, at the time of the allegedly negligent acts, the Defendants were acting in a manner responsive to a declaration of emergency." *Id.* at 552–53 ("Although the question of why the Defendants acted may ultimately prove critical to determining immunity under the SDEA, the interests of justice mandate also a consideration of *how* the Defendants acted.").

60 *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 554–55, 558.

61 *Id.* at 553 ("The limitation of immunity to acts undertaken in the context of an emergency is essential to ensure 'the least possible interference with the existing division of the powers of the government and the least possible infringement of the liberties of the people.'" (quoting UNCONSOL. § 9102)).

62 *See id.* at 554 (observing that, although the existence of an emergency is "without question," the issues of "whether the emergency lasted for days, or weeks, or months, and in connection with which precise activities, are fact-intensive questions, not possible to answer in connection with a Rule 12 motion addressed to the pleadings").

63 *Id.* at 555–56 (noting that although defendants developed a health and safety plan for the workers, the pleadings also indicate "there were critical lapses in the enforcement of safety standards and in the dissemination of vital information about the safety of the air at Ground Zero to those most affected, the workers themselves"). Thus, the judge could not determine whether good faith existed on a Rule 12(c) motion for judgment on the pleadings; moreover, a determination on whether good faith existed is an issue for the jury to decide. *Id.*

64 *See id.* at 559–67.

65 *Id.* at 560 (citing Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940)). The government contractor defense was created to shield "the contractor from being held liable when the government is actually at fault" but is otherwise not subject to liability. Trevino v. Gen. Dynamics Corp., 865 F.2d 1474, 1478 (5th Cir. 1989). However, such immunity only arises "where the government: (a) approves in its discretion reasonably precise specifications, (b) supervises and controls the implementation of those specifications, and (c) the contractor is not aware of reasons not known to the government why the application is unsafe or unreasonable." *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 563 (citing *Trevino*, 865 F.2d at 1480). Thus, immunity does not apply when an independent contractor acts independently of the federal government. *Id.* Furthermore, derivative federal immunity only operates where there is a "significant conflict between the state law and a federal policy or interest." Boyle v. United Techs. Corp., 487 U.S. 500, 509 (1988) (internal quotation marks omitted). Consequently, it "will not preclude recovery

Defendants argued that federal agencies had controlled major portions of the cleanup efforts, to wit: (1) the Army Corps had asserted control over health and safety monitoring at Fresh Kills, (2) the Occupational Safety and Health Administration (OSHA) had assumed the lead role for distribution of respiratory equipment and training at Ground Zero, and (3) the U.S. Environmental Protection Agency (EPA) had assumed lead responsibility for environmental monitoring and hazardous waste removal.[66] After reviewing the relevant federal authorities, Judge Hellerstein held that the question was whether the contractors had merely carried out the dictates of the federal agencies—in which event, immunity might attach—or whether they did "something materially different or additional" for which they could be answerable in tort.[67] On each of the issues, Judge Hellerstein found sufficient evidence to lead one to believe that the City of New York and its contractors substantially controlled their own activities and did not act merely as agents of the federal government.[68] Judge Hellerstein's opinion concluded that the record was not sufficiently developed to enable the court to draw the boundary between federally mandated management decisions and decisions reached independently by the various nonfederal defendants.[69] Because further fac-

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for injuries occasioned by violation of state statutes if the entity could have abided by those statutes while implementing the agency's specifications." *In re* World Trade Ctr. Disaster Site Litig., 521 F.3d 169, 197 (2d Cir. 2008).

66 *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 563. The Army Corps retained the services of several contractors to assist in the creation and enforcement of a comprehensive health and safety plan for Fresh Kills. *Id.* at 536–37. Specifically, the Army Corps enlisted Evans Environmental & Geosciences to develop an environmental safety and health plan, while Phillips & Jordan was retained to act as the construction manager for the site, which included overall responsibility for the enforcement of the health and safety plan. *Id.*

67 *Id.* at 563–64 ("[T]o the extent that the relevant federal agencies did not exercise oversight over Defendants' actions, federal immunity will not operate to protect Defendants from liability by suspending application of state law.").

68 *See id.* at 564–67. Judge Hellerstein found that all the federal agencies "operated at the site in an advisory capacity only, never divesting the City of its authority or its duty to protect those working at its behest." *Id.* at 565. Concerning claims arising from Fresh Kills, Judge Hellerstein found that, not only had there not been a showing of Army Corp's control that would endorse the extension of derivative federal immunity to the various Defendants, in fact, "the record suggest[ed] that the City continued to exercise an independent degree of supervisory control over operations." *Id.* at 564. As to OSHA, the judge found that, despite being named as the lead agency in charge of respirator distribution and training, in practice it "continued to work [merely] in an advisory capacity, providing assistance only as needed and requested by the City." *Id.* at 564–65. Moreover, OSHA declined to assume any enforcement role, which was left to the City agencies and the primary contractors, and instead limited its inspectors to merely report any violations to the primary contractors. *Id.* at 565. As for the EPA's role at Ground Zero, the judge found that it lacked any authority to enforce health and safety policies on non-EPA employees. *Id.* Moreover, the EPA exercised its responsibility over toxic waste removal in conjunction with the City's Department of Environmental Protection. *Id.*

69 *Id.* at 566.

tual development was necessary, Judge Hellerstein concluded that he could not decide the issue of federal derivative immunity on motion.[70] Finally, Judge Hellerstein dismissed the claim of immunity under the federal Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), which shields the federal government from "liab[ility] for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions" of the Federal Response Plan.[71] The Stafford Act, he concluded, does not grant immunity to nonfederal actors.[72]

The defendants sought to appeal the district court's immunity decision to the Second Circuit.[73] The defendants claimed that their appeal was of right, pursuant to 28 U.S.C. § 1291 and the collateral order doctrine.[74] Defendants asserted that, as a result of their appeal, the district court was divested of jurisdiction to conduct further pretrial proceedings.[75] In this connection, the defendants asked the district court to certify the immunity issue for interlocutory appeal.[76] After the parties' briefing, Judge Hellerstein denied the request for certification in early January 2007[77] and further held that the district court retained its jurisdiction because the request for expedited appeal did not meet the demanding requirements of the collateral order

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70 *Id.*

71 42 U.S.C. § 5148 (2006); *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 566. By declaring a National State of Emergency, on September 14, 2001, President George W. Bush thereby activated the Stafford Act. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 533. Activation of the Stafford Act allowed for federal assistance to flow to New York City "pursuant to the framework outlined in the Federal Response Plan." *Id.* The Federal Response Plan is an agreement among twenty-seven federal agencies that "establishes a process and structure for the systematic, coordinated, and effective delivery of federal assistance to address the consequences of any major disaster or emergency declared under the [Stafford Act]." *Id.* (alteration in original) (internal quotation marks omitted).

72 *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 566–67; *see also In re* World Trade Ctr. Disaster Site Litig., 469 F. Supp. 2d 134, 144 (S.D.N.Y. 2007) (denying as a matter of law defendants' claim to derivative Stafford Act immunity).

73 *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d at 136–37. The district court issued its immunity opinion on October 17, 2006. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 520.

74 *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d at 137. *See generally* 28 U.S.C. § 1291 (2006) (providing circuit court of appeals with jurisdiction "from all final decisions" of the U.S. district courts, "except where a direct review may be had in the Supreme Court"); Will v. Hallock, 546 U.S. 345, 349 (2006) (defining the collateral order doctrine as a "practical construction" of 28 U.S.C. § 1291's final decision rule that "accommodates a 'small class' of rulings, not concluding the litigation, but conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action'" (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949))).

75 *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d at 137.

76 *Id.* (noting that, on November 15, 2006, the defendants asked Judge Hellerstein to certify his opinion for interlocutory appeal pursuant to 28 U.S.C. § 1292(b)).

77 *See id.* at 145.

doctrine.[78] The defendants then petitioned the Second Circuit for a writ of mandamus to halt the district court proceedings pending the appeal of Judge Hellerstein's immunity ruling.[79] The court of appeals initially granted a temporary stay of proceedings, and several months later a permanent stay, in order to review the immunity issues.[80] Arguments were then heard on October 1, 2007.[81] Five days later, the Second Circuit lifted the stay,[82] allowing the tort cases to proceed to trial.[83]

On the same day that Judge Hellerstein refused to dismiss the plaintiffs' claims based on the immunity defenses, he informed the parties that he intended to appoint a special master to help organize the case.[84] Judge Hellerstein expressed displeasure with the vagueness of the complaints and the parties' inability to firmly establish how many claims they were bringing and how many of them actually alleged serious injuries.[85] He also expressed frustration with the court's seeming inability to move to resolution cases of such great, public importance.[86] Judge Hellerstein suggested the appointment of the then-dean of Hofstra Law School, Aaron D. Twerski, and Professor James A. Henderson, Jr. of Cornell Law School.[87] After hearing opposition from the plaintiffs to his suggested special masters, Judge Hellerstein appointed the two academics (coauthors of this Article), pursuant to Rule 53 of the Federal Rules of Civil Procedure, on December 12, 2006.[88]

The special masters' primary charge was to organize the claims so there would be a reliable count of the plaintiffs involved and to assist the court and the parties in moving the litigation forward.[89] Just as the special masters were to begin these tasks, however, the Second

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78 *Id.* at 140. *See generally Hallock*, 546 U.S. at 349–50 (setting forth the requirements of the collateral order doctrine); Papineau v. Parmley, 465 F.3d 46, 54 (2d Cir. 2006) (same).

79 *In re* World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 169 (2d Cir. 2007).

80 *Id.*

81 *Id.*

82 *Id.* at 171. Though the Second Circuit lifted the stay, it retained jurisdiction to decide the pending appeal. *Id.*

83 *In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 502 (S.D.N.Y. 2009).

84 *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH), 2006 WL 2948821, at *1–2 (S.D.N.Y. Oct. 17, 2006).

85 *Id.*

86 *Id.*

87 Transcript of Status Conference at 42, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Nov. 3, 2006) [hereinafter Transcript of Status Conference (Nov. 3, 2006)].

88 *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH), 2006 WL 3627760, at *1 (S.D.N.Y. Dec. 12, 2006); *see* FED. R. CIV. P. 53.

89 *In re World Trade Ctr. Disaster Site Litig.*, 2006 WL 3627760, at *1; *see In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 502 (S.D.N.Y. 2009).

Circuit, as explained, placed a stay on all proceedings.[90] Thus, the special masters did not commence their work until the middle of October 2007.[91]

When the special masters were finally able to begin their work, the cases appeared even more daunting than earlier. The $1 billion allocated by the Federal Emergency Management Agency (FEMA) that the plaintiffs' liaison counsel had believed adequate to effect a reasonable settlement was now described as insufficient. The liaison counsel now wanted to pursue his case against the private contractors and their insurers, seeking discovery of all relevant insurance policies. Furthermore, it was unclear how to fashion meaningful discovery of ten thousand cases that differed so greatly on their individual facts. Accordingly, Judge Hellerstein sought to find ways to allow the cases to move forward. The sections that follow set forth in detail how this was accomplished.

IV
THE MANY STEPS TO FINAL SETTLEMENT OF THE CLAIMS

Neither Judge Hellerstein nor the special masters were privy to the negotiations between the parties and therefore cannot speak definitively as to the specific path that brought them to settle the case. The authors do believe, however, that it is possible to identify important steps along the way that moved the parties from what appeared to be a stalemate in December 2007 to the presentation to the court of a settlement agreement in early March 2010.[92] The following factors were, in the authors' opinion, of great importance: (1) issuance by the court of a core discovery order requiring responses to a number of important questions;[93] (2) agreement on objective medical criteria to be incorporated in a Severity Chart that ranked injuries according to relative severity;[94] (3) development of a comprehensive, electronically-searchable database;[95] (4) adoption of a schedule for early discovery

90 *See supra* notes 79–83 and accompanying text.

91 *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 501–02; Order Regulating Discovery at 1, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Oct. 10, 2007).

92 Transcript of Status Conference at 2, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Mar. 12, 2010) [hereinafter Transcript of Status Conference (Mar. 12, 2010)]; *see In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH), 2008 WL 793578, at *1–2 (S.D.N.Y. Mar. 24, 2008) (stating that the Core Discovery Order, issued in late 2007, was necessary to enable the parties to create paradigms that could eventually lead to a settlement).

93 *See* Clarifying Order Regulating Discovery at 2–4, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Nov. 27, 2007) [hereinafter Clarifying Order].

94 *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 531–33.

95 *Id.* at 502, 506–22 (providing a printout of the database).

and trials;[96] (5) selection of plaintiffs, using the database, for early trials;[97] and (6) comprehensive correlations of data from the database.

A. Issuance of a Core Discovery Order

Judge Hellerstein was convinced in December of 2007 that sufficient information had not yet been obtained to allow the parties to begin to discuss a reasonable settlement.[98] He believed that if the parties were left to their own devices, the cases would drag on endlessly.[99] Thus, immediately after the Second Circuit lifted its stay, Judge Hellerstein conferred with the special masters to develop a core discovery order.[100] At this stage in the litigation, the ambiguity that characterized plaintiffs' pleadings frustrated Judge Hellerstein.[101] He believed that the pleadings did little to crystallize the issues and did not permit serious settlement discussions or promote resolutions by trial.[102] Consequently, in the discovery order, Judge Hellerstein sought detailed information for each plaintiff with regard to where and when the plaintiff worked in connection with on-site debris removal.[103] He sought information regarding the specific work done by each plaintiff for each subcontractor-employer.[104] For example, he asked what acts or omissions did the plaintiff allege and how did those acts or omissions cause plaintiff's injury.[105]

The core discovery order also asked for detailed information for each plaintiff regarding the availability of personal protective equip-

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96 *Id.* at 523–24.

97 *Id.*

98 Transcript of Status Conference at 15, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 102(AKH) (S.D.N.Y. Nov. 16, 2007) [hereinafter Transcript of Status Conference (Nov. 16, 2007)].

99 *See* Transcript of Status Conference (Feb. 7, 2005), *supra* note 53, at 5–6.

100 *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 501. The parties and the court "needed core discovery to provide the fundamental facts of the cases, the varying responsibilities of government agencies and contractors, and the complex layers of insurance coverage." *Id.* To that end, Judge Hellerstein enlisted the special masters to help "devise such discovery, and to develop computer systems to collect the information and make it accessible." *Id.*

101 *See* Order Granting Motion for Leave to Amend Plaintiffs' Master Complaint at 1, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Dec. 28, 2006) (describing plaintiffs' master complaint as "conclusory, repetitive, . . . sloppy," and "vague").

102 *See* Transcript of Status Conference (Nov. 16, 2007), *supra* note 98, at 24–25.

103 *See* Clarifying Order, *supra* note 93, at 2. Judge Hellerstein required plaintiffs to identify where they worked by "quadrant, cross streets, landmarks, monuments, nearby buildings, etc." *Id.*

104 *Id.* The judge wanted each plaintiff to identify the hiring entity, the type of work the plaintiff was engaged to perform, the type of work the plaintiff actually performed, whom the plaintiff reported to on a day-to-day basis, and who directed the plaintiff's work on a day-to-day basis. *Id.*

105 *Id.*

ment and instructions for its proper use.[106] Another set of questions sought information regarding the nature and severity of the injuries allegedly suffered by each plaintiff.[107] In similar fashion, the order required information regarding when each plaintiff's injuries manifested themselves, which health care providers treated each plaintiff, and the attendant medical diagnosis, if any. The core discovery order also required each plaintiff to provide full medical records going back to 1995.[108] Finally, the order demanded that plaintiffs produce information regarding the compensation, if any, they had received from collateral sources for the injuries they suffered at any of the WTC sites.[109]

The core discovery order required the defendants to answer many of the same questions asked of the plaintiffs; discrepancies, if any, between plaintiffs' and defendants' responses to the same question would then be the subject of further discovery.[110] The order also called for disclosure of all contractual agreements for work performed by the defendants and for disclosure by the defendants of any indemnification and insurance that might be available to cover claims relevant to the litigation.[111] Almost all of the data provided in response to the core discovery order were later entered into a database that the judge ordered the parties, with the help of the special masters, to construct.[112]

B. Development of a Method for Ranking Injuries According to Relative Severity

In order to decide which cases were appropriate for early trial and to render the claims amenable to settlement, it was necessary to

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106 *Id.* at 3. The judge wanted the plaintiffs to specify their claims against each defendant concerning protective equipment used or not used. *Id.* For example, each plaintiff was to identify if protective equipment did not fit, if it was inappropriate for use, if the provided instructions were inadequate, or if the plaintiff encountered any other problem with regards to protective equipment. *Id.*

107 *Id.*

108 *Id.* Defendants initially requested plaintiffs' complete medical records so they could determine whether a particular plaintiff suffered from a preexisting condition. Transcript of Status Conference (Nov. 16, 2007), *supra* note 98, at 36–38. The judge rejected that request and held that the defendants are only entitled to the medical records created after January 1, 1995. Clarifying Order, *supra* note 93, at 3. However, if defendants could explain, in a particular case, why they needed records dating prior to 1995, the judge indicated that he would grant their request. Transcript of Status Conference (Nov. 16, 2007), *supra* note 98, at 39–40.

109 Clarifying Order, *supra* note 93, at 4 (requiring plaintiffs to divulge the source of compensation and the amount that was received).

110 *Id.* at 3–4.

111 *Id.* at 4.

112 *See In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH), 2008 WL 793578, at *1 (S.D.N.Y. Mar. 24, 2008); *see also infra* Part IV.C (chronicling the development of the database).

develop a method for comparatively evaluating the severities of the injuries suffered by the various plaintiffs.[113] Given that the plaintiffs alleged over three hundred types of injuries,[114] severity criteria could not be established for all of them.[115] Nor could reliance be placed on the often subjective, wide-ranging descriptions and diagnoses contained in the plaintiffs' individual medical records. The court and the parties required objective criteria in order to identify which plaintiffs were more, and which were less, severely injured.[116]

As it turned out, monographs published by the American Medical Association (AMA) and the American Thoracic Society (ATS) supplied objective criteria for those categories of diseases that plaintiffs reported with greatest frequency to have resulted from their exposures to the WTC sites.[117] From a larger number of possibilities, the parties, with help from the special masters and approval by the court, selected for evaluation chronic obstructive pulmonary disease (COPD), emphysema, interstitial lung disease, asthma, reactive airways dysfunction syndrome (RADS), laryngial diseases, chronic rhinosinusitis, and gastroesophageal reflux disease (GERD).[118] For the most part, the resulting Severity Chart ranked these diseases on a scale

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113 Transcript of Status Conference at 6–7, *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100 (S.D.N.Y. Sept. 16, 2008) [hereinafter Transcript of Status Conference (Sept. 16, 2008)].

114 *See supra* note 20.

115 Transcript of Status Conference (Sept. 16, 2008), *supra* note 113, at 6–8.

116 *Id.*

117 *In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 503 (S.D.N.Y. 2009).

118 *Id.* at 503; Transcript of Status Conference (Sept. 16, 2008), *supra* note 113, at 8. COPD, emphysema, interstitial lung disease, asthma, and RADS are all diseases of the lower respiratory system. *In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d at 531. Laryngitis, pharyngitis, and chronic rhinosinusitis are diseases of the upper respiratory system. *Id.* at 532. GERD, Barrett's esophagus, gastritis, esophagitis, and gastrointestinal stricture were all diseases enumerated in the Severity Chart and are diseases of the upper digestive tract. *Id.* at 533. The Severity Chart actually consisted of three charts. *Id.* at 533–34. Chart One ranked the severities of enumerated ailments afflicting WTC plaintiffs. *Id.* at 503. Chart One only contained illnesses ranked by the AMA or ATS and only included plaintiffs tested pursuant to criteria promulgated by the AMA or ATS. *Id.* at 531–33. Chart One did not verify the accuracy of plaintiffs' assertions "that they suffer from particular diseases or, for that matter, that those diseases were caused or aggravated by exposures to WTC conditions." *Id.* at 534. Furthermore, Chart One only ranked diseases within each disease category and did not compare severities across the disease categories. *Id.* at 533. Thus, the chart was merely intended to provide the parties and the court with useful information on some of the current illnesses afflicting plaintiffs, not to measure the monetary value of the claimed injuries or to account for injures that WTC conditions caused. *Id.* Chart Two dealt with plaintiffs that previously had diseases enumerated in Chart One but were either cured or their illnesses, to some degree, had ameliorated. *Id.* at 534. Chart Three was intended to capture injuries enumerated in Chart One for which the required tests had not been performed. *Id.* at 534–35.

of zero to four, with four being the most severe and zero being not-yet-medically supportable.[119]

The court was confident that a significant sampling of the plaintiff population for these diseases would support overall assessments of how many plaintiffs were seriously or moderately injured and how many suffered only minor or, as yet, insignificant injuries.[120] The Severity Chart did not include some diseases, including cancers and cardiac problems,[121] nor did it attempt at this stage to establish a causal nexus between the WTC exposure and the diseases suffered.[122] The Severity Chart, in addition to allowing for a comparative assessment of the severity of each individual plaintiff's claimed injuries, provided a rough cut, aggregate assessment of the overall seriousness of the injuries in the plaintiff population.[123] In the authors' opinion, the Severity Chart turned out to be a significant factor in moving the parties toward settlement.

C. Development of a Comprehensive Database

From the outset of the special masters' appointment, Judge Hellerstein urged the development of a database housed by a neutral entity with experience in dealing with complex data-processing issues.[124] Judge Hellerstein reasoned that a fully populated database would eventually allow the parties to settle the litigation by enabling the parties to assign values across various categories of claimed injuries.[125] After choosing a consultant with expertise in utilizing computer technology in complex litigation and a company with an impressive record of dealing with litigation databases, the court turned to the task of selecting the kinds of information to be entered.[126] Months of negoti-

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119 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 503. The enumerated diseases of the upper digestive tract were rated on a scale of zero to two. *Id.* at 533.

120 *See* Transcript of Status Conference (Sept. 16, 2008), *supra* note 113, at 18–20.

121 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 531–33. The Severity Chart did not include cancers and cardiac problems for two reasons: (1) unlike the respiratory diseases, any attempt at this early stage to establish a causal relationship between exposure to the toxins at the WTC site and these diseases was highly speculative, and (2) the variation in severity for these diseases was so great that rating on objective criteria was impossible.

122 *Id.* at 534.

123 Transcript of Status Conference (Sept. 16, 2008), *supra* note 113, at 18.

124 *See* Transcript of Status Conference at 10, 32–34, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Nov. 28, 2006) [hereinafter Transcript of Status Conference (Nov. 28, 2006)].

125 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 505.

126 *See id.* at 522; *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH), 2008 WL 793578, at *1 (S.D.N.Y. Mar. 24, 2008) (recalling the prior retention of Timothy M. Opsitnick of Jurinnov Ltd. to assist with vetting the competing bids made by several technology vendors and approving Technology Concepts & Design, Inc. to create and operate the litigation database).

ation involving the special masters and the parties ensued.[127] At one point, in response to an invitation from the masters to prepare "wish lists," the parties suggested over twelve hundred questions to be propounded to the plaintiffs and defendants.[128] In December 2008, after considering the critiques of counsel from both sides,[129] the special masters recommended to the court that 368 questions be included in the database.[130]

Many of the database questions required the parties to provide multiple answers.[131] For example, some 387 diseases were numerically coded and listed in an attachment (i.e., pick list) from which each respondent selected the appropriate responses.[132] Many plaintiffs suffered from a number of diseases.[133] The database required plaintiffs to identify their medical providers and to state the time periods during which they sought medical help.[134] Some plaintiffs had consulted many physicians and had been hospitalized in various places on different occasions.[135] In all, ninety-two fields out of a total of 368 in the database contained pick lists.[136] The topics included in the database covered such issues as work background data,[137] tobacco use,[138] duration of work at debris sites,[139] respirator use,[140] preexist-

127 *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 522; Order Regarding Database Objections at 1, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Jan. 5, 2009).

128 Data Elements Chart, Sept. 15, 2008 (on file with authors).

129 Memorandum from James A. Henderson, Jr., & Aaron D. Twerski, Special Masters to Judge Alvin K. Hellerstein, to Judge Alvin K. Hellerstein, U.S. Dist. Court for the S. Dist. of N.Y. (Dec. 21, 2008) (on file with authors) [hereinafter Dec. 2008 Memorandum].

130 *See* Order Regarding Database Objections, *supra* note 127.

131 *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 506–22. To foster clarity, each database field stated which party (or parties) were to answer that question and what type of answer the party was to insert. *Id.* Certain database fields required responses from a pick list while other fields required the party to answer either yes or no or to fill in the blank with either numerals, dates, or text. *Id.*

132 September 11th Litigation Database, operated by Technology Concepts & Design, Inc.

133 Telephone Interview with Ned Adams, *supra* note 21.

134 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 511–12. The database fields required plaintiffs to answer when their conditions were diagnosed, who made that diagnosis, how such a diagnosis was made, whether drugs were prescribed to treat the condition, and whether the diagnosis required surgery. *Id.*

135 Telephone Interview with Ned Adams, *supra* note 21.

136 *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 506–22.

137 *Id.* at 506. Questions asked included: Did the defendant hire plaintiff? Where did plaintiff work? On which dates did plaintiff work? Was the plaintiff hired to work on a full-time basis? What type of work was plaintiff supposed to engage in? Did defendants generally provide protective equipment to its WTC employees and, if so, what types? *Id.*

138 *Id.* at 508.

139 *Id.*

140 *Id.* at 509. Each plaintiff had to answer whether respirators were made available, what types of respirators were available, who provided the respirator, on what dates the plaintiff wore the respirator, and whether the plaintiff was instructed on how to properly use the respirator. *Id.*

ing diseases,[141] collateral source benefits,[142] diseases for which recovery was sought,[143] and diagnostic tests.[144] The database required plaintiffs to answer whether they sought to recover for any disease that qualified for a ranking on Chart One of the Severity Chart and, if so, for which diseases and at what level of impairment.[145] For defendants, the database asked whether they had insurance in addition to the policy provided by the Captive.[146]

D. Selection of Claims for Early Trial

By early December 2008, the special masters had recommended to Judge Hellerstein the final format for the database fields.[147] The judge approved their recommendations.[148] He then set forth a rigorous schedule for the parties to populate the fields with the relevant information.[149] In a case management order (CMO) and accompanying flow chart, he divided the plaintiffs into five groups of two thousand plaintiffs, or five cohorts.[150] In order to accelerate the process, the judge required the parties to enter information for each cohort for a select group of thirty-five database fields within forty days.[151]

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141 *Id.* at 510.

142 *Id.* at 514–15. The database inquired whether each plaintiff was provided any collateral source payment related to WTC work (including insurance, government, VCF, Medicare, Medicaid, or Social Security) and, if so, what type. *Id.* The database also asked for the amount each plaintiff received and when such payment was received. *Id.*

143 *Id.* at 511.

144 *Id.* at 512. The plaintiffs were asked whether they had undergone any diagnostic tests in connection with a condition for which they seek recovery in this litigation. *Id.* If so, they had to provide the types of diagnostic tests they underwent, when they underwent such testing, and who performed the tests. *Id.*

145 *Id.* at 513–14. Other fields asked whether the plaintiff seeks to recover for impairments under Chart Two and Three. *Id.*

146 *Id.* at 519–20. If the defendant did, further questions asked what type of insurance may be available, who the carrier is, and what the policy limits are. *Id.* Ultimately, of course, a smaller subset of the database questions and responses turned out to be, in the authors' view, important in moving the parties to settlement. However, it's likely that more of the database information would have been utilized if the cases had actually gone to trial.

147 *See generally* Dec. 2008 Memorandum, *supra* note 129 (responding to the objections to the special masters' suggested database provisions).

148 Order Regarding Database Objections, *supra* note 127.

149 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 523–24.

150 *See id.* at 523–24. Judge Hellerstein divided the plaintiffs into groups A through E. *Id.* at 523. Groups A through D had two thousand plaintiffs each. *Id.* Specifically, group A consisted of plaintiffs with case index numbers 1 through 2,000; group B was comprised of plaintiffs with case index numbers 2,001–4,000; and each successive 2,000 cases were placed in another group. *Id.* The last group, group E, consisted of all plaintiffs with case index numbers 8,001 and higher. *Id.*

151 *Id.* at 523. The parties were required to enter the information for the first cohort within forty days of January 1, 2009, or by February 9, 2009. *Id.* Thereafter, the parties were required to repeat the same steps for each cohort, with each group commencing the process forty days after the previous group began. *Id.* The thirty-five questions appeared in the database and inquired about very basic information. *Id.* Specifically, these questions consisted of a plaintiff's case profile information, a plaintiff's duration of exposure at

Thereafter, using the responses to these thirty-five fields, the special masters were to choose from each cohort of two thousand plaintiffs a subset of two hundred claims involving relatively severe injury and an additional twenty-five claims involving injuries that did not appear on the Severity Chart (e.g., cancer, cardiac).[152] Forty days after the special masters selected the 225 claims, the parties were required to populate the entire database for those cases.[153] The responses to the 368 database questions would be adequate to allow the special masters and parties to identify claims for discovery and early trial. Each of the major parties—the plaintiffs' liaison counsel and the City of New York—was to choose two plaintiffs from each subset of two hundred for early discovery and trial.[154] The court would also choose two plaintiffs and could select from both the subset of two hundred and from the twenty-five plaintiffs whose injuries did not appear on the Severity Chart.[155]

All choices by the parties and the court (six in total from the first subset of 225) were to be completed by April 10, 2009.[156] Parties could engage in extensive discovery as soon as the plaintiffs for early discovery and trial were chosen.[157] Discovery for this first group of six plaintiffs was to be completed by November 21, 2009 and all pretrial motions were to be filed by January 5, 2010 and argued by February 4, 2010.[158] The CMO contemplated that, by May 16, 2010, thirty claims

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the WTC site, a plaintiff's preexisting disorders, the injuries for which a plaintiff seeks recovery, and the severity of a plaintiff's claimed injuries. *Id.* The information for the select group of thirty-five database fields was to be entered for all plaintiffs by July 19, 2009. *Id.* at 528.

152 *Id.* at 523. No specific criteria existed for the selection of these additional twenty-five cases. *Id.* at 523 n.†. The rationale for choosing these twenty-five cases was to enable various types of cases to be selected for discovery and trial. *Id.*

153 *Id.* at 504. On the same day the special masters selected the 225 cases, they were also required to identify 400 additional cases (chosen at random) from that group of 2,000. *Id.* The parties were to populate the database for these 400 cases 120 days later, with the same process repeated every forty days for the next group of 2,000 cases. *Id.* By November 27, 2009, the parties were required to have fully populated the entire database for 3,125 cases, taken from all five groups (five multiplied by 625). *Id.* at 505. Finally, the CMO required the parties to populate the database for each of the 1,375 cases in each group that was not selected as part of the 225-case subgroup or the 400-case subgroup and to have the entire database populated for each filed case by January 1, 2011. *Id.* Judge Hellerstein warned counsel that strict adherence to the schedules was critical to the efficient administration of the cases and that failure to answer timely would be cause for involuntary dismissal. *In re* World Trade Ctr. Disaster Site Litig., 834 F. Supp. 2d 184, 187 (S.D.N.Y. 2011).

154 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 523.

155 *Id.* at 523–24. Because Judge Hellerstein sought early discovery and trial from a broader range of injuries, the court was to choose from among the non-Severity Chart plaintiffs as well. *Id.* at 523 & n.†.

156 *Id.* at 523–24. (noting that the court was to choose its two cases for early discovery and trial by April 10, 2009).

157 *Id.* at 523 (permitting full discovery on all issues relevant to trial).

158 *Id.* at 527, 529.

(six from each of the five cohorts) would be ready for trial.[159] The judge anticipated starting trials on May 17, 2010.[160]

To summarize, this elaborate schedule, in Judge Hellerstein's view (as reflected in the flow chart), was designed to accomplish four goals: (1) to set fixed trial dates, (2) to allow the parties to cross-examine the database responses, (3) to ensure that settlements with individual parties would not interfere with the flow of the litigation, and (4) to advance the claims of those most severely injured.

These selection procedures produced interesting but fairly predictable results. From the first subset of two hundred, plaintiffs' liaison counsel chose two plaintiffs who had been on the WTC site for significant periods of time and who alleged serious respiratory injuries that they believed could reliably be connected with on-site exposures.[161] Defendants' counsel chose plaintiffs who were in their fifties and whose exposures to the WTC site had been relatively short.[162] One such plaintiff smoked two packs a day and the other had serious

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159 *Id.* at 529–30. The court, along with liaison counsel for both sides, individually chose two cases from each of the five groups of two thousand plaintiffs. *Id.* at 523–24. Thus, at the end of the process outlined in Case Management Order 8 (CMO 8), there were thirty cases scheduled for trial. *Id.* at 529–30. If there had been no database, the outcomes in these trials, often referred to as "bellwether trials," would have comprised the only information regarding the values at which the rest of the claims should be settled. Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2338 (2008). In the 9/11 litigation, given the size and diversity of the claims, outcomes in six (or even thirty) cases would not have sufficed to promote rational settlement. For this reason, CMO 8 was designed not only to provide information to select bellwether cases but to provide the parties with detailed and substantial information for each case. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 504. Consequently, CMO 8 required the full population of the 368 database questions for all cases, which would permit the parties to discuss the degree to which the cases identified for discovery and trial were representative and enable them to negotiate values for all cases.

160 DEPALMA, *supra* note 2, at 318.

161 Order Identifying Cases for Trial at 1, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100(AKH), 05 Civ. 1228(AKH), 05 Civ. 1364(AKH), 05 Civ. 4111(AKH), 05 Civ. 9141(AKH), 05 Civ. 10740(AKH), 06 Civ. 3417(AKH) (S.D.N.Y. Apr. 10, 2009); Memorandum from James A. Henderson, Jr., & Aaron D. Twerski, Special Masters to Judge Alvin K. Hellerstein, to Judge Alvin K. Hellerstein, U.S. Dist. Court for the S. Dist. of N.Y. 2 (Apr. 7, 2009) (on file with authors) [hereinafter Apr. 2009 Memorandum]. Plaintiffs' liaison counsel selected Joseph Greco and Frank Malone. *Id.* Mr. Malone was exposed to the WTC site for 494 hours, suffered from a serious asthma condition, and underwent sinus surgery. *Id.* Mr. Greco was at the WTC site for 2,795 hours and revealed injuries in almost all of the categories on the Severity Chart, with the highest ranking in each category. *Id.*

162 Apr. 2009 Memorandum, *supra* note 161, at 2; Order Identifying Cases for Trial, *supra* note 161, at 1. Defendants' liaison counsel chose Richard Ardisson and Robert Galvani, who were respectively fifty-six and fifty-three years old. Apr. 2009 Memorandum, *supra* note 161, at 2–3. Mr. Ardisson was exposed to the WTC site for thirty-six hours and Mr. Galvani was exposed for a total of eighty-four hours. *Id.* At the outset, defendants expressed a desire to take weak, problematic cases to trial to see if juries would find causation in such cases and, if they imposed liability, how they would value such cases. Transcript of Status Conference (Dec. 10, 2008), *supra* note 27, at 32–34.

preexisting respiratory conditions.[163] The plaintiffs' liaison counsel expected that the defendants would mount a *Daubert* challenge to plaintiffs' expert proof on causation.[164] Therefore, the judge believed it was important that the issue be faced early on in a cancer case.[165] Thus, one of Judge Hellerstein's selections was a firefighter, Mr. Hauber, who died from esophageal cancer six years after exposure to the WTC site.[166] He was forty-one years old on 9/11 and had spent approximately three months working full time at Ground Zero.[167] Doctors from the New York City Fire Department determined that Mr. Hauber's cancer was related to his exposure to contaminants at the WTC site.[168] The judge's other selection was a construction worker, the only nonuniformed plaintiff among the first six to be chosen.[169]

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163 Apr. 2009 Memorandum, *supra* note 161, at 2–3 (noting that Mr. Ardisson suffered preexisting conditions of asbestosis, bronchitis, COPD, and GERD.).

164 *See generally* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–93 (1993) (requiring the district court to function as a gatekeeper and only admit expert testimony after "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue"). In making a determination under *Daubert*, the trial judge considers, among other things: (i) "whether a theory or technique . . . can be (and has been) tested," (ii) "whether the theory or technique has been subjected to peer review and publication," (iii) "the known or potential rate of error" of a particular technique, and (iv) whether the technique or theory is "general accept[ed]" within the "relevant scientific community." *Id.* at 593–94. Thus, plaintiffs' liaison counsel chose cases in which it thought it would be difficult to mount a successful *Daubert* attack given the existing (and growing) literature that supported a causal connection between exposure at Ground Zero and diseases such as asthma and COPD. *See* DEPALMA, *supra* note 2, at 218–19, 223 ("[Mount Sinai] found that the rate of asthma among the 20,000 ground zero responders who had been screened between 2002 and 2007 was twice as high as in the general population."). *See generally* Robin Herbert et al., *The World Trade Center Disaster and the Health of Workers: Five-Year Assessment of a Unique Medical Screening Program*, 114 ENVTL. HEALTH PERSP. 1853 (2006) ("WTC responders had exposure-related increases in respiratory symptoms and pulmonary function test abnormalities that persisted up to 2.5 years after the attacks."); G. Moscato & M.R. Yacoub, *World Trade Center Disaster: Short- and Medium-Term Health Outcome*, 67 MONALDI ARCHIVE FOR CHEST DISEASE 154 (2007) (reporting the health effects of various lengths of exposure to the toxins present at the WTC site); Jonathan M. Samet et al., *The Legacy of World Trade Center Dust*, 356 NEW ENG. J. MED. 2233 (2007).

165 *See* Transcript of Status Conference at 59–60, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Mar. 19, 2009); DEPALMA, *supra* note 2, at 246, 318.

166 Order Identifying Cases for Trial, *supra* note 161, at 1; Apr. 2009 Memorandum, *supra* note 161, at 3.

167 Apr. 2009 Memorandum, *supra* note 161, at 3 (revealing that Mr. Hauber was exposed to the site for a total of 872 hours and did not possess a preexisting condition or a history of smoking).

168 Transcript of Status Conference at 38, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Sept. 18, 2009).

169 Order Identifying Cases for Trial, *supra* note 161, at 1; Apr. 2009 Memorandum, *supra* note 161, at 4–5. On February 20, 2009, defendants filed a motion seeking summary judgment against plaintiffs who were employed as police officers or firefighters as to their claims brought under the New York labor law and New York general municipal law. Summary Order Regarding Partial Motions to Dismiss Uniform Workers' Labor Law and General Municipal Law Claims, 21 MC 100 (S.D.N.Y. July 29, 2009) (on file with authors). They contended that the uniformed plaintiffs were not "employed" as labor law defines the

He was forty-two years old at the time of his first exposure and had developed a number of serious diseases.[170]

E. Early Returns from the Database: Confirmations and Surprises

The database accomplished more than providing the basis for informed selection of claims for early discovery and trial. It also enabled the parties and the court to gain overall perspectives on the litigation. By September 2009, the court had gathered a wealth of information.[171] Over nine thousand plaintiffs had given sworn responses to the selected subset of thirty-five questions, and both plaintiffs and defendants in 2,325 cases had given answers to all 368 questions in the database.[172] The database fields relating to injuries provided information on claims for deaths, cancers, heart attacks, and a host of other diseases, even though the Severity Chart did not include these injuries.[173] Below, Diagram 1 provides a snapshot of the severities of the injuries reported in the database in September 2009:[174]

term, nor was there an "accident" as is required for recovery under the general municipal law. Transcript of Status Conference at 25–26, *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100 (S.D.N.Y. July 28, 2009). Consequently, the court felt it imperative to select a case that would not be subject to the summary judgment motion, which was still pending on April 10, 2009 when the court made its selections, and therefore selected a construction worker.

170 *See* Order Identifying Cases for Trial, *supra* note 161, at 1; Apr. 2009 Memorandum, *supra* note 161, at 4–5.

171 *See generally* Sept. 2009 Memorandum, *supra* note 23 (describing observations on the patterns and severities of injuries included in the database).

172 *Id.* at 1.

173 *Id.*

174 *Id.* at 3.

DIAGRAM 1

PLAINTIFF'S STATUS	NUMBER OF PLAINTIFFS	PERCENTAGE OF ALL PLAINTIFFS
Severity Chart rank 4 (most seriously impaired)	520	5.8%
Severity Chart rank 3 (no 4s)	261	2.9%
Severity Chart rank 2 (no 4s or 3s, or Death/Cancer/Heart Attack. A-E injuries only.)	684	7.6%
Severity Chart rank 1 (no 4s, 3s, or 2s, or Death/Cancer/Heart Attack. A-E injuries only.)	1654	18.3%
Severity Chart rank 0 (tested, but no 4s, 3s, 2s, or 1s, or Death/Cancer/ Heart Attack. A-E injuries only.)	898	9.9%
Death, Cancer, and Heart Attack (no Severity Chart rank 4 or 3)	766	8.5%
GERD (no Severity Chart rank 4, 3, 2, 1, 0 for A-E injuries, or Death/Cancer/Heart Attack)	549	6.1%
Residuum (plaintiffs not included in above categories)	3688	40.9%
Totals	9,020	100.0%

A preliminary analysis of Diagram 1 led the special masters to the following conclusions[175]:

1. The combined total of injuries with Severity Chart rankings of zero, one, and two (presumably not serious injuries) comprised 35.8% of the plaintiff population. Those claiming only GERD (ranked only as one or two on the Severity Chart) and presumably not serious, constituted 6.1% of the plaintiff population. Thus, 41.9% of the plaintiff population did not claim to suffer serious injuries.
2. The 3,688 plaintiffs in the lowest "residuum" category in Diagram 1 reflect those who did not rank zero to four in any impairment category on the Severity Chart and who did not report death, cancer, heart attack, or any ranking for GERD. Because they did not claim injuries in any of the above-stated categories, one could assume that most of these plaintiffs did not suffer severe injuries. Had their health been seriously compromised, they would quite likely have been subjected to diagnostic tests and would have made claims reflected on the Severity Chart. The special masters conservatively estimated that at least two-thirds of the residuum category (27% of the entire plaintiff population) did not suffer serious injuries. When one adds this 27% to the earlier figure of 41.9%, an estimated total of 68.9%

175 *Id.* at 3–18.

of the entire plaintiff population had not manifested serious injuries as a result of their exposures.

3. Plaintiffs claiming for death, cancer, and heart attacks represented 8.5% of the plaintiff population. However, some of the cancers were not likely to be life-threatening cancers (e.g., thyroid cancers and some skin cancers). More importantly, the latency period for many of the cancers for which plaintiffs sought to recover were much longer than the time periods between exposure and manifestation.[176] Those claims were likely to be vulnerable to *Daubert* motions on causation.[177] Even if only half of the claims for death, cancer, and heart attacks were likely to be weak, another 4.25% of all plaintiffs presented no serious litigation threat to defendants, bringing the total of relatively weak claims to 73.15%.
4. Thus, in the estimation of the special masters, only 27% of the cases involved levels of severity that could potentially demand significant recoveries. However, even these estimates were probably high. For example, some of the diseases in the Severity Chart (e.g., rhinosinusitis), even if relatively severe for their type, would not likely call for compensation as significant as for diseases such as COPD or interstitial lung disease, even at lower levels of relative severity.[178]

In short, the early information from the database indicated that the number of seriously injured plaintiffs would likely be manageable, thereby giving hope for a possible settlement.[179]

The database revealed a very surprising correlation. It is axiomatic in toxic tort cases that the length and intensity of exposure to toxins correlate positively and strongly with the severity of the injury to the person exposed.[180] However, searches in the database revealed that the dates on which the plaintiffs were exposed (early-only, early-and-late, or late-only) and the total lengths of exposure (twenty hours or two thousand hours) did not correlate strongly with the numbers

176 Transcript of Status Conference at 17, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Jan. 21, 2010) [hereinafter Transcript of Status Conference (Jan. 21, 2010)].

177 Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 59–60.

178 *See* World Trade Center Litigation Settlement Process Agreement, as Amended, Exhibit C, *available at* http://www.877wtchero.com/wtcverdict/Exhibit%20C%20%20Settlement%20Grid.pdf.

179 It can be assumed that, because the number of seriously injured plaintiffs was found to be less than originally expected, plaintiffs' counsel agreed to settle for under $1 billion, a result the Captive insisted on so that it could reserve funds for future cases. *See* Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 59; DEPALMA, *supra* note 2, at 317–18.

180 *See, e.g.*, Sept. 2009 Memorandum, *supra* note 23, at 9 (noting that the special masters assumed that length and intensity of exposure to toxins would correlate with the severity of injury).

or seriousness of injuries.[181] The percentages of serious injury were essentially flat across groups of plaintiffs distinguished on the basis of when they started and how long they worked on the site.[182]

V
THE PARTIES AGREE TO SETTLEMENT

Pressured by the prospect of thirty individual cases heading towards early trial,[183] the parties intensified their efforts to work out a settlement in 2009.[184] Relying on the database, the Severity Chart, and their own investigations, the lawyers representing the plaintiffs, the City of New York and its contractors, and the Captive devoted many thousands of hours to innovative collaboration and hard bargaining over a period of many months.[185] As a result, on March 11, 2010,[186] liaison counsel for the plaintiffs announced a settlement of over ten thousand claims against the City of New York and its contractors for $575 million,[187] contingent on at least ninety-five percent of the eligible individual plaintiffs agreeing to opt into the settlement.[188] And, if greater percentages of plaintiffs joined the agreement, the value of the settlement would increase incrementally up to a total of $657.5 million.[189] On the defendants' side, the settlement involved only the City of New York and its contractors. Other defendants such as the Port Authority of New York and New Jersey and the Fresh Kills contractors were not parties.[190] Some features of the settlement were

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181 *Id.* at 9–10. *But see* Herbert et al., *supra* note 164, at 1855 (reporting on clinical findings from screening examinations conducted on 9,442 Ground Zero workers between July 2002 and April 2004, showing that "[e]arly arrival at the WTC site was significantly associated with an increased reported prevalence of both newly incident and worsened respiratory symptoms").

182 *See* Sept. 2009 Memorandum, *supra* note 23, at 9–10.

183 *In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 504 (S.D.N.Y. 2009).

184 *See* Transcript of Status Conference (Mar. 12, 2010), *supra* note 92, at 8.

185 *Id.* at 8–9 (noting that Margaret Warner, counsel for the Captive, stated that the initial settlement was the culmination of twenty-two months of exhaustive negotiations).

186 Navarro, *supra* note 10.

187 Transcript of Status Conference (Mar. 12, 2010), *supra* note 92, at 15; Alison Gendar & Corky Siemaszko, *Judge in 9/11 Health Trial Orders Settlement Renegotiation for Sick Ground Zero Workers*, N.Y. DAILY NEWS (Mar. 19, 2010), http://articles.nydailynews.com/2010-03-19/local/27059553_1_ground-zero-workers-settlement-lawyers. The authors wish to clarify that the approximately 10,500 cases that were filed turned out to be 9,019 cases because the court dismissed over 1,000 cases due to various factual and technical errors. *In re* World Trade Ctr. Disaster Site Litig., 834 F. Supp. 2d 184, 187 (S.D.N.Y. 2011).

188 Navarro, *supra* note 10.

189 Transcript of Status Conference (Mar. 12, 2010), *supra* note 92, at 15–16. The settlement stipulated that the Captive would contribute an additional $11.5 million for every one percent of plaintiffs opting in after the ninety-five percent benchmark was reached. *Id.*

190 *See id.* at 9; Mark Hamblett, *Settlement Reached with NYC and Contractors in 9/11 Respiratory Case*, LAW.COM (Mar. 12, 2010), http://www.law.com/jsp/article.jsp?id=1202446111975&slreturn=1&hbxlogin=1.

quite innovative. For example, fixed amounts were set for three tiers of lower levels of recovery, which allowed for quick distribution of monies to those plaintiffs; those entitled to greater recovery were subject to more nuanced evaluation of their particular injuries. The settlement also provided for an insurance policy covering all settling plaintiffs for a number of exposure-related cancers that might manifest in the future.[191]

This Article has already identified what may have been the paramount consideration leading to settlement: as the parties and the special masters gathered and organized the relevant data, it became quite clear that a majority of plaintiffs had not suffered serious injuries.[192] Thus, it appeared that seriously injured plaintiffs could be fairly compensated without exceeding the likely available funds. Second, the availability of state and federal immunities for the City of New York and its contractors remained in doubt and would not begin to be resolved until the district court ruled on pretrial motions.[193] The uncertainties surrounding these all-or-nothing issues made settlement a more attractive alternative for both sides.[194] Third, regarding many of the claims (e.g., those involving cancers and cardiac injuries), defendants' *Daubert* challenges to the admissibility of plaintiffs' expert testimony might very well have prevailed.[195] Without such expert testimony, plaintiffs would lose their claims as a matter of law.[196] None of the parties could predict with confidence how Judge Hellerstein would rule on these motions or whether his rulings would stand up on appeal.[197] And finally, defendants had raised other difficult issues, including whether the New York Labor Law applied to the uniformed plaintiffs and whether any duties of care were owed and breached.[198]

In addition, the sequencing of the litigation created uncertainties that made settlement attractive to both sides. For example, with regard to plaintiffs who suffered relatively severe respiratory injuries, defendants were reluctant to face the very real possibility that juries in the first claims reaching trial might return high verdicts that would make it more costly to settle the rest of the claims.[199] And finally,

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191 *Overview of Settlement Process*, *supra* note 7, at 7–11.

192 *See* DEPALMA, *supra* note 2, at 323.

193 *Id.* at 318.

194 *Id.*

195 *Id.*

196 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–93 (1993).

197 *See* Transcript of Status Conference (Mar. 12, 2010), *supra* note 92, at 21–22.

198 *Id.* at 10; Summary Order Regarding Partial Motions to Dismiss Uniform Workers' Labor Law and General Municipal Law Claims, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. July 29, 2009).

199 Typically, parties to a mass tort action that have experienced jury verdicts will usually attempt to negotiate a settlement reflecting the prior verdicts. Roger H. Transgrud,

regardless of who might win at trial, it was certain that the parties would raise a host of legal issues on appeal.[200] It was expected that it would take years to obtain final appellate resolution of these issues, even without potential Supreme Court review, complex remands, and further motions and trial proceedings.[201] And then, if reversals and remands were to be ordered, more years might be devoted to retrying claims.[202] Rarely has tort litigation been confounded by so many factors that could affect the fortunes of so many differently situated plaintiffs.[203] Not surprisingly, then, once the numbers of severely injured plaintiffs were determined to be manageably low, and a rational means of identifying those plaintiffs appeared to be possible, a settlement was almost certain to follow. Indeed, on March 11, 2010, the parties agreed to a settlement.[204]

VI

THE DISTRICT COURT'S REJECTION OF THE SETTLEMENT

On March 19, 2010, Judge Hellerstein threw a bombshell into the proceedings by rejecting the settlement as inadequate.[205] Had the case been certified as a class action, his authority to do so would have been clear.[206] However, Judge Hellerstein had earlier decided not to certify the WTC litigation as a class because, given the wide range of injuries and the particular questions of causation with regard to each injury, individual issues of causation predominated.[207] The judge believed that, even in the absence of class certification, he possessed inherent judicial authority to review the settlement and, if necessary in

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Mass Trials in Mass Tort Cases: A Dissent, 1989 U. ILL. L. REV. 69, 78. However, negotiating a settlement in the 9/11 litigation after a high jury verdict would have been extremely difficult because the Captive wanted to reserve significant funds for future claims and was thus reluctant to provide all its assets. *See* Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 59. Furthermore, plaintiffs' counsel might have been reluctant to settle, even for $1 billion, after receiving an immense jury award. *See* DEPALMA, *supra* note 2, at 318.

200 DEPALMA, *supra* note 2, at 325. In fact, defendants filed some sixty pretrial motions, which are currently on file with the court, on various issues of law.

201 *See* Transcript of Status Conference at 49, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. June 10, 2010) [hereinafter Transcript of Status Conference (June 10, 2010)] (noting that the appeals relating to the scope of federal jurisdiction and the relevant immunity defenses lasted approximately four years).

202 *See* David T. Tran & A. Maria Plumtree, Comparing Mediation, Arbitration and Litigation 3 (unpublished manuscript), http://plumtreetran.com/documents/Comparing_Mediation_Abritration_Litigation.pdf (noting that it could take years until the litigation process is completely exhausted).

203 Transcript of Status Conference (Mar. 12, 2010), *supra* note 92, at 8, 10.

204 Navarro, *supra* note 10.

205 Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 54 ("In my judgment, this settlement is not enough.").

206 FED. R. CIV. P. 23(e) (stating that the court may approve a class action only after finding it "fair, reasonable, and adequate").

207 *In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 499 (S.D.N.Y. 2009).

the interests of fairness, to reject it.[208] In a sharply worded statement delivered at a highly publicized hearing, Judge Hellerstein held that the settlement was unfair to the plaintiffs, giving them too little and giving the lawyers too much.[209]

In reaching this conclusion, the court reasoned that the Captive had approximately $1.1 billion at its disposal to settle the claims.[210] By offering something over $600 million, the Captive was reserving between $400 million and $500 million to protect the City and its contractors against potential liability to claimants who almost surely would manifest 9/11-related injuries in the future.[211] The Captive contended that it needed a substantial cushion to protect its clients against future plaintiffs.[212] Judge Hellerstein questioned how much the Captive should reserve, even if the City of New York had legitimate concerns about latent injuries that might manifest themselves in the future: "[I]s the conjectural right of the future cogent enough to outweigh the real and present needs of the present? In my judgment, too much is put aside for the future."[213]

The other major aspect concerning the settlement that troubled the court related to attorneys' fees.[214] The fees provided for in the attorney-client contracts allowed plaintiffs' counsel to recover one-third of the awards after deduction of expenses.[215] This would have generated total plaintiffs' counsel's fees between $189 million and $216 million,[216] which Judge Hellerstein believed to be excessive.[217] He acknowledged that plaintiffs' counsel had taken on the claims

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208 *See* Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 63; *see also* Order Acknowledging, and Setting Hearing on, Modified and Improved Agreement of Settlement at 2, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100(AKH), 21 MC 102(AKH), 21 MC 103(AKH) (S.D.N.Y. June 10, 2010) (restating the court's belief that it could "rule on the fairness, reasonableness, and adequacy of the settlement").

209 Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 54.

210 Navarro, *supra* note 10. Although, Congress appropriated only up to $1 billion for the Captive, the Captive was permitted to earn income by investing its funds, which allowed it to offset operational expenses. Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11, 517 (2003); DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., A REVIEW OF THE WORLD TRADE CENTER CAPTIVE INSURANCE COMPANY 15 (2008).

211 DEPALMA, *supra* note 2, at 317–18.

212 *See* Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 59.

213 *Id.* In discussions with the special masters, Judge Hellerstein noted that the vast array of private insurance had not been touched, and the Captive had not considered using some of its reserve to purchase excess insurance to protect the city and its contractors in the unlikely event that the entire $1 billion FEMA contributed, and interest earned thereon, might prove insufficient.

214 Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 54–56; DEPALMA, *supra* note 2, at 322.

215 DEPALMA, *supra* note 2, at 325.

216 Michael Howard Saul, *Trade Center Workers Reach Settlement*, WALL ST. J., Mar. 11, 2010, http://online.wsj.com/article/SB10001424052748703625304575116431376090518.html.

217 Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 56–57.

when other lawyers had refused to do so and that litigating the claims involved substantial risks of no recovery (and hence no fees) after years of sometimes heavy work by plaintiffs' counsel.[218] Nonetheless, the judge believed that the fees called for in the attorney-client contracts were excessive and that a reduced fee would fairly compensate the plaintiffs' counsel for their work.[219]

Judge Hellerstein also expressed dissatisfaction with the relatively small amounts allocated in the settlement to compensate those responder-plaintiffs who had contracted cancer soon after exposures to the work site.[220] Except for cases involving blood cancers, the compensation awarded to those afflicted with cancer was minimal, reflecting the difficulty of linking these injuries with on-site exposures.[221] Although the judge acknowledged that such early-onset cancers would present difficult causation problems at trial and would be subject to *Daubert* challenges, he nevertheless felt that adjustments should be made and that they would require monies in excess of the existing overall settlement amount to provide for even modest increases in direct cash payments to those suffering from cancers.[222]

The next section of this Article discusses Judge Hellerstein's authority to reject the settlement. At this juncture, suffice it to say that the judge made clear that the 9/11 litigation did not simply present an instance in which private parties in a lawsuit have agreed to a settlement and the judge has no power to review it on the merits.[223] The judge, in rejecting the settlement, flatly stated that the court had the power to control the litigation, including the settlement, and that he had every intention of doing so.[224] It should come as no surprise that the court's actions greatly disgruntled counsel.[225] They believed they had reached a mutually acceptable deal and that Judge Hellerstein

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218 *Id.* at 55.

219 *Id.* at 56. Indeed, the judge insisted that the fees should be reduced and believed that the Captive should pay them rather than deducting them from the plaintiffs' recoveries. *Id.* at 55–56. In the end, the Captive never paid plaintiffs' attorneys' fees because the judge accepted as sufficient counsels' agreement to reduce their fees from thirty-three percent to twenty-five percent. Transcript of Status Conference (June 10, 2010), *supra* note 201, at 40.

220 Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 59–60. The settlement did contain, however, a cancer insurance policy that would provide plaintiffs that had not already contracted cancer with up to $100,000 if they were diagnosed with certain cancers by the year 2025. DEPALMA, *supra* note 2, at 318–19.

221 Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 59–60.

222 *Id.* (revealing that the judge felt that, because the claims arose out of the 9/11 tragedy and Congress appropriated funds for plaintiffs' claims, the settlement should provide more for those suffering from cancer, even though it would be difficult for plaintiffs to prove causation).

223 *Id.* at 54, 63.

224 *Id.* at 62–63.

225 *See* DEPALMA, *supra* note 2, at 324.

exceeded his authority in rejecting their agreement.[226] Defendants knew that, when they returned to the negotiating table, they would have to put up substantial new sums of money. Thus, defendants filed notice of appeal on April 14, 2010, challenging the authority of a judge in a nonclass context to reject such a settlement.[227] Although they did not prosecute the appeal at that juncture, defendants preserved their right to challenge the district court's authority to review and to reject any terms of the settlement agreement or the attorney-client fee agreements.[228]

Nonetheless, the earlier-described reasons for agreeing to a settlement continued to weigh heavily on the parties.[229] Neither side relished the idea of appellate review of the judge's authority.[230] All parties involved wanted finality and understood that they would be required to make adjustments in order to avoid protracted appellate litigation.[231] So, with this in mind, they returned to the bargaining table,[232] at several junctures calling on the special masters to assist in working out a revised settlement that would meet court approval.[233]

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226 Memorandum in Support of Motion on Short Notice for Stay Pending Appeal at 2, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100(AKH), 21 MC 102(AKH), 21 MC 103(AKH) (S.D.N.Y. Apr. 16, 2010); DEPALMA, *supra* note 2, at 324.

227 Memorandum in Support of Motion on Short Notice for Stay Pending Appeal, *supra* note 226, at 2; DEPALMA, *supra* note 2, at 324.

228 Transcript of Status Conference (June 10, 2010), *supra* note 201, at 3–4.

229 DEPALMA, *supra* note 2, at 324.

230 *Id.* at 324–25; *see* Transcript of Status Conference (June 10, 2010), *supra* note 201, at 5.

231 Transcript of Status Conference (June 10, 2010), *supra* note 201, at 5.

232 Order Regulating Proceedings, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100(AKH), 21 MC 102(AKH), 21 MC 103(AKH) (S.D.N.Y. May 27, 2010).

233 *See* Transcript of Status Conference (June 10, 2010), *supra* note 201, at 25, 35. The revised settlement, which the parties agreed to on June 10, 2010, increased the settlement's value to the plaintiffs by $125 million. Order Acknowledging, and Setting Hearing on, Modified and Improved Agreement of Settlement, *supra* note 208, at 1; DEPALMA, *supra* note 2, at 325. The Captive agreed to place an additional $50 million into the settlement agreement. Transcript of Status Conference (June 10, 2010), *supra* note 201, at 7. The City of New York and its workers' compensation insurer agreed to waive its liens on any recovery a plaintiff will receive from the settlement, resulting in an additional $20 million for plaintiffs. DEPALMA, *supra* note 2, at 325. Furthermore, plaintiffs' counsel voluntarily agreed to reduce its fee from thirty-three percent to twenty-five percent, resulting in plaintiffs receiving an extra $55 million. *Id.* The agreement required at least ninety-five percent of all eligible plaintiffs to participate for it to take effect. *Overview of Settlement Process*, *supra* note 7. Under the agreement, the Captive agreed to contribute between $625 million and $712.5 million, depending upon various contingencies. *Id.* Specifically, for every one percent of plaintiffs that opt in after the ninety-five percent benchmark was reached, the Captive agreed to contribute another $12.5 million. *Id.* In addition, the Captive agreed to pay an additional $25 million if future lawsuits were limited to a certain number and its payouts to future claimants or to those that opt out of the settlement fall within fixed limits. *Id.* There were several components to the agreement. *Id.* Every eligible plaintiff was to receive an initial payment of $3,250 and could apply for a cancer insurance policy offered by the Metropolitan Life Insurance Company. *Id.* Under the policy, plaintiffs would receive

VII
ASSESSING THE DISTRICT COURT'S MANAGEMENT OF THE 9/11 RESPONDERS' LITIGATION: THE SPECIAL MASTERS' PERSPECTIVES[234]

A. Early Phases of the Litigation: Traditional Approaches Did Not Move the Litigation Towards Settlement

When it became clear that more than ten thousand plaintiffs were bringing tort claims against the City of New York and its contractors based on allegations of 9/11-related injuries and that the claims would be heard in a single federal district court, it also became clear that parties would have to settle most of the claims.[235] Only a relatively small number of cases could have ever been brought to trial.[236] Admittedly, trials of bellwether claims might have encouraged a small number of settlements by helping to place value on other claims.[237] But absent a comprehensive database that allowed for categorization of claims based on the answers to a host of questions reflecting a mul-

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up to $100,000 if they are diagnosed with certain types of blood and respiratory cancers by June 2025. *Id.*

234 This part expresses the special masters' view as to the judge's role and authority in managing the litigation.

235 *See* Transcript of Status Conference (Nov. 3, 2006), *supra* note 87, at 24; Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 482–83 (1998). Attorneys for both plaintiffs and defendants are reluctant to try mass tort cases because of the potential consequences of suffering an early decisive defeat at trial. *Id.* at 483.

236 *See* Transcript of Status Conference (Jan. 21, 2010), *supra* note 176, at 9.

237 In mass litigation not involving an extensive database, bellwether trials aim to accomplish several goals. First, bellwether trials create momentum toward a broad settlement. Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 631 (2012). Second, they inform settlement discussions by indicating potential jury awards. Fallon et al., *supra* note 159, at 2338. In the 9/11 litigation, it is doubtful that bellwether cases would have performed this second function given the great disparity of the injuries suffered by the plaintiffs. Finally, they provide counsel with the opportunity to organize the products of discovery, evaluate the evidence and the strengths and weaknesses of their arguments, and comprehend the risks associated with proceeding to trial. *Id.* at 2337–38. To ensure that the bellwether trials are representative of the many individual cases, courts have required the parties to produce a limited amount of information on each individual action to identify the major variables that the cases selected for early trial ought to represent. *See id.* at 2344 ("In the Vioxx MDL, this was achieved with limited case-specific discovery through the exchange of plaintiff and defendant profile forms."); *see also In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 790–91 (E.D. La. 2007) (presenting a scenario in which plaintiffs alleging a cardiovascular injury submitted to Merck a Plaintiff Profile Form containing certain biographical and medical information and, upon receipt of these materials, Merck disclosed the contacts it had with plaintiffs' doctors and any other relevant information it had on individual plaintiffs). *See generally* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 588 (2008) ("[B]ellwether trials are a far more palatable method for resolving mass litigation than the alternatives: standing on the sidelines waiting to be heard or settling en mass."); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992) (noting that adjudication through sampling and aggregative procedures is advantageous to resolving mass tort cases).

titude of factors, the trial of such bellwether claims would, at most, have brought about settlements in individual claims or small clusters of claims. The parties would not have had sufficient information to effect a wholesale global settlement; such retail settlements would have stretched over many decades.[238] Most plaintiffs would have grown old or died before the resolution of their claims—many, no doubt, from the effects of their 9/11 exposures. Thus, the objective of the federal district court had to be to conduct the pretrial phases in a manner that facilitated simultaneous settlement of large numbers of similarly situated cases rather than the sporadic settlements of individual cases.[239] For this to occur, the parties on both sides required information on the overall factual parameters of the litigation.[240]

Working through liaison counsel for both sides, in 2005, Judge Hellerstein had begun to try to coax out the data necessary for aggregate categorization by using pleadings as a means of obtaining the relevant facts—times and lengths of on-site exposure, types and severities of injuries, alleged wrongs of defendants, and the like—and sorting the claims into comparable groupings by using check-off complaints.[241] The federal Manual for Complex Litigation explicitly approved of some of the techniques.[242] In other respects, the judge introduced innovative approaches in an effort to sort out the claims factually. For example, the court utilized the aforementioned check-off complaints to ascertain which claims from the master complaint applied to each plaintiff.[243] For a number of reasons, all of which could have been predicted—and some of which this Article considers subsequently—these preliminary efforts failed.[244] The district court once again tried to assert control over the litigation by issuing a core discovery order asking questions of both sides designed to generate specific responses sufficient to categorize the thousands of claims for purposes of reaching large-scale settlement.[245] Again, although other courts had used this technique in different settings, it proved insufficient.

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238 *See generally* Schuck, *supra* note 235, at 482–83 (touching upon the global nature of settlements generally reached in mass tort cases).

239 *See In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 505 (S.D.N.Y. 2009); Transcript of Status Conference (Nov. 3, 2006), *supra* note 87, at 25.

240 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 505.

241 *Id.* at 499–500; Case Management Order No. 4 at 1–3, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. May 13, 2005).

242 *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, FOURTH §§ 11.444, 40.52 (4th ed. 2004), *available at* https://public.resource.org/scribd/8763868.pdf (acknowledging the use of master complaints and the creation of an electronic depository to store information produced during the course of the litigation).

243 *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH), 2006 WL 3858393, at *1 (S.D.N.Y. Dec. 28, 2006).

244 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 501.

245 *Id.*; Clarifying Order, *supra* note 93, at 1.

By mid-2006, the litigation had reached an impasse, with the only viable option being to schedule some of the claims for trial and hope that they and others would settle, most likely one by one or in small groups, all over a substantial time period.[246] Broadly speaking, it was not that counsel on either side deliberately sought to frustrate the court's efforts to bring order out of chaos. Impasse certainly did not serve the plaintiffs' attorneys' interests,[247] even though plaintiffs' unhelpful responses to the court's queries contributed as much as anything to the stalemate.[248] Instead, the primary contributor to the roadblock was the fact that counsel for both sides were, understandably enough, approaching their roles in traditional fashion, with the marginal best interests of their clients as their paramount priority.[249] Sacrificing those interests even slightly in the name of collective welfare would have been, from the traditional viewpoint of the American adversarial process, inappropriate. Traditional approaches to pretrial discovery do not require plaintiffs to sacrifice their own interests in an effort to allow the court to develop an aggregated, useful perspective on the litigation as a whole.[250] Thus, limitations built into the traditional processes of pleading and discovery, rather than vindictive recalcitrance on the part of liaison counsel, led to destructive impasse. In this regard, the parties faced a situation not unlike the classic prisoners' dilemma. Without some kind of significant extension of, or even departure from, traditional judicial processes, it was difficult to see how the 9/11 litigation would result in large-scale, wholesale settlement.[251] From this discouraging perspective, thousands of ostensibly seriously injured responders, many of them true heroes, had little prospect of receiving their just due. What was called for, the following discussions will argue, was aggressive managerial judging, using all the powers given to a federal judge, even to a degree beyond those customarily invoked in prior mass tort cases.

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246 *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 501.

247 Judge Hellerstein told plaintiffs' attorneys that he would not grant them accelerated trials. Thus, the only way plaintiffs' attorneys could earn their contingency fee is if the cases were ready for either trial or settlement. Transcript of Status Conference (Nov. 16, 2007), *supra* note 98, at 24–25.

248 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 501 ("The inability of counsel to style useful pleadings . . . made it necessary to develop an alternative manner of proceeding.").

249 *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §§ 10.3.1–3.2 (Hornbook Series Practitioner's ed. 1986) (discussing traditional American attorneys' professional zeal).

250 *See id.* § 10.3.1, at 578–79.

251 *See* Transcript of Status Conference (Nov. 3, 2006), *supra* note 87, at 25 (stating that, because of the number of complaints, employing traditional methods would result in the litigation lasting "for two lives in being plus 21 years" without any resolution).

B. A Brief Historical Overview of Managerial Judging in the Federal Courts

The meaning of the phrase "managerial judging" is somewhat elusive.[252] After all, to a significant extent, judging is inherently and unavoidably managerial.[253] Thus, trial judges routinely control evidentiary and procedural aspects of the cases brought before them and are traditionally given fairly broad discretion to rule on these matters.[254] Of course, judges have less discretion and are bound to a greater degree, as are the parties, to the guidance of the applicable law governing the substantive issues presented in litigation.[255] Nevertheless, with respect to the procedural conduct of the trial, judges have considerably greater leeway. Moreover, the boundaries of what is considered appropriate are moving outward.[256] The "new normal" would have been considered almost radically activist thirty years ago.[257] It follows that the types of managerial judging of interest in this context are nonroutine assertions of judicial authority in which the court takes over significant substantive aspects of the litigation ordinarily left to the parties to manage. The special masters believe that Judge Hellerstein engaged in managerial judging, beginning when he ordered the parties to develop a Severity Chart and a database to select and prepare cases for trial.[258] Before assessing the legitimacy and effectiveness of these management techniques, it is necessary to briefly consider relevant aspects of managerial judging as they have played out over the last several decades.

Perhaps the most remarkable historical examples of extraordinary managerial judging involve what might be termed "public law" or "structural reform" litigation, which were aimed at reforming public facilities such as prisons, mental health hospitals, and school systems.[259] The plaintiffs in these cases are persons who allege harm

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252 *E.g.*, E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309 (1986). The phrase "managerial judges" appears to have been coined by Professor Judith Resnik in her widely cited 1982 article. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).

253 *See* Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1261–63, 1275–76 (2010).

254 *Id.*

255 *See* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 53–55 (1995).

256 *See* Elliott, *supra* note 252, at 322–23; Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 29 (2003).

257 *See* Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—And the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 192–93 (2007); Thornburg, *supra* note 253, at 1268.

258 *See supra* Part IV.

259 *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (discussing the "characteristic features of the public law model"); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV.

from abusive, entrenched institutional behaviors.[260] Once a court decides that such a facility has deteriorated so badly that its perpetuation denies inmates, patients, and students their fundamental rights and that judicial intervention is required in order to break the impasse, the task of redesigning the deficient facility is clearly beyond the traditional capacity of a court to accomplish.[261] Writers have identified several factors that arguably distinguish this type of adjudication from others.[262] Thus, by recognizing the rights of otherwise powerless victims of institutional abuse and by concluding that such abuse is likely to continue indefinitely without judicial intervention, the court delegates the task of redesigning the institution to an extrajudicial process involving public dialogue, bargaining, and compromise among interested parties acting through their representatives.[263] On this view, institutional reform is achieved through extrajudicial bargaining in a specialized market that the court's intervention, by breaking the impasse, helps to create. Rather than federal courts actually redesigning the facilities, judges, typically aided by special masters, enter orders that make the extrajudicial decision-making processes possible.[264] Examples of this sort of judicial intervention, which commentators often explicitly refer to as managerial judging, recur infrequently and are controversial.[265] But federal judges have clearly responded to the need to rescue otherwise helpless victims from harm caused by self-perpetuating, unjust institutional impasses, and a number of legal scholars seem to approve of such a practice.[266]

C. The District Court's Managerial Judging in the 9/11 Litigation Was Justified

In the fall of 2006, after three years of largely fruitless struggling with traditional approaches to pleading and discovery, Judge Hellerstein appointed special masters to assist in building an expansive, electronically-searchable database that would allow the court and the parties to access and recover reliable information about each plaintiff's claim and each defendant's defenses and to obtain big picture

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1, 2–4 (1979) (discussing structural reform); James A. Henderson, Jr., Comment, *Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1017–18 (1995) (providing examples and discussing the contours of public law litigation).

260 Fiss, *supra* note 259, at 2; Henderson, Jr., *supra* note 259, at 1017.

261 James A. Henderson Jr., *Contract's Constitutive Core: Solving Problems by Making Deals*, 2012 U. ILL. L. REV. 89, 120.

262 Chayes, *supra* note 259, at 1314–15; Henderson, Jr., *supra* note 259, at 1017–18.

263 Henderson, Jr., *supra* note 259, at 1017.

264 Henderson, Jr., *supra* note 261, at 119–20.

265 *See* Resnik, *supra* note 252, at 391, 425–31 (observing that managerial judging results in the trial judge becoming "a consort of the litigants" as opposed to being "a detached oracle").

266 *See* Chayes, *supra* note 259, at 1303, 1316; Fiss, *supra* note 259, at 2–4, 9.

overviews of the 9/11 responders' tort claims.[267] In doing so, the court clearly entered a managerial-judging phase of the litigation, which ultimately included judicial review and rejection of the settlement reached by the parties.[268] Was Judge Hellerstein justified in asserting such broad control? For the reasons that follow, the special masters answer in the affirmative.

As one of the authors has previously observed, four factors justify judicial intervention in "structural reform" or "public law"[269] litigation: (1) the interests that the court sought to protect involve important civil rights;[270] (2) an impasse has occurred—unless the court intervenes, presumably valid rights-based claims will never be vindicated for structural, processual reasons that do not relate to the underlying merits;[271] (3) judicial intervention will make it possible for an extrajudicial process of arm's length bargaining among interested parties to break the impasse and reach settlement;[272] and (4) the court is able to serve as an impartial stakeholder and guarantor of basic fairness.[273] The authors submit that these four factors were present in the 9/11 first responders' tort litigation.

Regarding the first factor, the rights of the 9/11 plaintiffs to receive meaningful days in court may be characterized as fundamental civil rights.[274] Most of the plaintiffs were threatened with more than the usual moderate-term delays. Congress had denied their inclusion in the VCF[275] and had sent all 10,000-plus to pursue tort remedies in a single federal jurisdiction—the Southern District of New York—where most of them appeared destined to wait for trials or settlements that would never occur.[276] The plaintiffs had no choice but to join the bottleneck; they could not spread themselves over a number of state and federal courts in other jurisdictions that, in the absence of the federal 9/11 statute, might have been able to hear their claims more expeditiously.[277]

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267 *See In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 502 (S.D.N.Y. 2009); *In re* World Trade Ctr. Disaster Site Litig, No. 21 MC 100(AKH), 2006 WL 3627760, at *1 (S.D.N.Y. Dec. 12, 2006); *supra* Part IV.

268 *See* Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 54, 60.

269 Henderson, Jr., *supra* note 259, at 1017–18.

270 *Id.* at 1017.

271 *Id.*

272 *Id.*

273 *Id.* at 1017–18.

274 *See* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1060–61 (2012).

275 September 11th Victim Compensation Fund of 2001, 28 C.F.R. §§ 104.2–.3 (2003) (providing compensation only to rescue workers who were physically harmed within ninety-six hours of the aircraft crashes).

276 *See* ATSSSA, Pub. L. No. 107-42, § 408, 115 Stat. 230, 241 (2001).

277 *See id.*

The second factor—the existence of a seemingly unbreakable impasse in federal district court—was clearly presented.[278] Interestingly, it occurred inside, not outside, the court.[279] Rather than a prison or a school system that requires redesign, the federal civil procedure system's design itself would not function to give the plaintiffs the opportunity to have their claims heard or to join in a fair settlement.[280] It can be argued that what Judge Hellerstein did in managing the 9/11 litigation was consistent with a liberal interpretation of Rule 16 of the Federal Rules of Civil Procedure.[281] In any event, what threatened to

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278 *In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 500–01 (S.D.N.Y. 2009) (noting that ordinary procedural methods were incapable of advancing the litigation).

279 *See id.*

280 *See id.*; *see generally* Elliott, *supra* note 252, at 332–33 (noting that, in cases with unnecessarily high litigation costs, careful managerial judging can produce the most just resolution).

281 Rule 16 of the Federal Rules of Civil Procedure states that:

> In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:
>
> (1) expediting disposition of the action;
>
> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
>
> (3) discouraging wasteful pretrial activities;
>
> (4) improving the quality of the trial through more thorough preparation; and
>
> (5) facilitating settlement.
>
> (b) Scheduling . . .
>
> (3) Contents of the Order . . .
>
> (B) *Permitted Contents.* The scheduling order may:
>
> (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
>
> (ii) modify the extent of discovery;
>
> (iii) provide for disclosure or discovery of electronically stored information;
>
> (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;
>
> (v) set dates for pretrial conferences and for trial; and
>
> (vi) include other appropriate matters.
>
> *(c) Attendance and Matters for Consideration at a Pretrial Conference . . .*
>
> (2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:
>
> (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;
>
> (F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37; . . .
>
> (H) referring matters to a magistrate judge or a master;
>
> (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule; . . .
>
> (K) disposing of pending motions;
>
> (L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; . . .
>
> (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

happen to the 9/11 plaintiffs would have constituted no less an institutional breakdown than would the failures of a prison or a school system. As for the third and fourth factors identified above—that the court can make it possible for the parties to settle and can guarantee the fairness of the settlement—the federal district court before whom Congress had required the cases to be brought was exclusively in a position to act effectively.[282] Once the court ordered the parties and the special masters to construct the database and to begin to identify individual cases for trial,[283] and once the court began to generalize and categorize regarding the database as a whole, the court had empowered the parties to reach a global settlement and had positioned itself to act as an impartial guarantor of the fairness of any settlement that the parties might reach.

One might question whether, once the parties reached agreement, Judge Hellerstein possessed the authority to review the settlement and determine its fundamental fairness or to reduce the fees to be paid to plaintiffs' lawyers. After all, this was not a class action in which Rule 23 of the Federal Rules of Civil Procedure gives trial judges authority to pass on the fairness of a settlement or to reduce attorneys' fees.[284] But even acknowledging that Rule 23 did not cover the 9/11 litigation, it presented an equally inappropriate fit with Rule 41, which broadly allows parties to terminate litigation by means of voluntary settlements.[285] Rule 41 presumes a relatively close attorney-client relationship in which the attorney deals with the client as an individual who, based on fairly detailed information and counseling, has substantial input into the decision regarding whether to settle and on what terms.[286] In the 9/11 litigation, each of the ten thousand plaintiffs could only decide—on little information and after the settlement had been reached—whether to opt into an arrangement that rested on predetermined categories of injuries and concomitant fixed-dollar-amount recoveries for each category. A plaintiff's decision to opt out meant facing years of uncertain litigation with the very real possibility of receiving nothing in the end.

Judge Hellerstein thus had recourse to only two federal rules, neither of which he could apply sensibly to the litigation. Given this vacuum, he struck a balance. He approved the essential structure of an elaborate settlement agreement but set aside those portions that

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FED. R. CIV. P. 16(a)(1–5), (b)(3)(B)(i–vi), (c)(2)(A, F, H, I, K, L, P).

282 *See generally* Elliott, *supra* note 252, at 332 (giving examples of cases involving inexperienced counsel or unnecessarily high litigation costs as instances when involved managerial judging may be appropriate).

283 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 502.

284 FED. R. CIV. P. 23(e), (h).

285 FED. R. CIV. P. 41(a).

286 *See id.*

he believed were manifestly unfair to plaintiffs.[287] He certainly had sufficient factual grounds for his selective challenge to, and revision of, some aspects of the agreement.[288] As noted earlier, in ordering construction of the Severity Chart and the database, Judge Hellerstein was privy to information about the litigation that gave him a unique perspective. Having played a managerial role in bringing about the settlement discussions, he was invested to see that the process leading to settlement was fair. In this regard, he had reason to believe that it might not have been—that the plaintiffs' lawyers were not sufficiently pressured to obtain the best deal for their clients.

Historically, in the context of so-called "settlement class actions," plaintiffs' counsel have been criticized for "selling out" their clients.[289] In those cases, plaintiffs' lawyers have brought mass tort claims seemingly for the purpose of threatening large corporate defendants with financial destruction and then settling, with court approval after class action certification, for low per claim amounts and high attorneys' fees.[290] Such was certainly not the case here[291]: the 9/11 litigation was not a class action and did not, after congressional intervention, seriously threaten the defendants with financial destruction.

Why, then, may the judge have been concerned with the plaintiffs' lawyers settling too low in the 9/11 litigation? The case had gone on for seven years (four of which were devoured by costly appeals on

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287 *Compare* Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 54–57 (questioning the fairness of the proposed settlement), *with* Transcript of Status Conference (June 10, 2010), *supra* note 201, at 39–41 (lauding improvements in the new settlement proposal).

288 There has been considerable discussion on the subject of nonclass, consolidated mass tort litigation and its shared characteristics with class actions. Accordingly, nonclass, consolidated mass tort cases have been referred to as quasi-class actions, subject to the court's power to ensure justice and fairness. For more, see *In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d 268, 271–72 (E.D.N.Y. 2006); L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 240–42 (2004); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 113–20 (2010); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480–81 (1994).

289 Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1050–56, 1147 (1995); *see Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1811 (2000); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 39–41 (2002); Shimon Sternhell, The Judiciary's Role in Consolidated Litigation 12–19 (Jan. 24, 2011) (unpublished manuscript) (on file with authors).

290 *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801–03 (3d Cir. 1995) (rejecting a class action settlement, the court noted that "class counsel effected a settlement that would yield very substantial rewards to them after what, in comparison to the $9.5 million dollar fee, was little work"); Koniak, *supra* note 289, at 1051–56.

291 In fact, some 9/11 plaintiffs are receiving settlement awards that exceed $1 million. Telephone Interview with Matthew Garretson, Esq., 9/11 Settlement Allocation Neutral, Garretson Resolution Grp. (Aug. 29, 2011).

the issues of jurisdiction and immunity).[292] It was reasonable to assume that plaintiffs' liaison counsel were under extraordinary financial pressure to settle.[293] Indeed, plaintiffs' lawyers had borrowed substantial sums of money to finance the litigation.[294] Undoubtedly under intense pressure from the City of New York, the Captive had decided to retain almost $500 million to protect against future claims.[295] Given the judge's perception of the doubtful likelihood of plaintiffs' success in future litigation, he viewed the amount of the retained reserve to be excessive.[296] Outside insurance, covering a substantial portion of defense costs up to the time of settlement, placed defendants in a far better financial position to continue the litigation.[297] Thus, Judge Hellerstein had a solid foundation for wanting to

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292 *See* Plaintiffs' Memorandum Responding to the Court's Sua Sponte Order of August 4, 2010 at 11–14, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Aug. 24, 2010), *available at* http://www.877wtchero.com/wtcverdict/8-25-10/9-docs/Final-Memorandum-Responding-to-Aug-4-2010-Order.pdf; Mark Hamblett, *Hellerstein Praises 'Very Good' WTC Deal*, N.Y. L.J., June 11, 2010, at 1.

293 *See In re* World Trade Ctr. Disaster Site Litig., 769 F. Supp. 2d 650, 652 (S.D.N.Y. 2011).

294 By 2010, plaintiffs' attorneys, Napoli Bern Ripka and Worby Groner Edelman, had borrowed more than $30 million to help finance over seven years of litigation. Mireya Navarro, *Already Under Fire, Lawyers for 9/11 Workers Are Ordered to Justify Some Fees*, N.Y. TIMES, Aug. 27, 2010, at A16. The partners of the firm personally guaranteed these loans, which had interest rates ranging from six to eighteen percent. Worby Groner Edelman & Napoli Bern LLP, Statement to Our Clients About Litigation Interest Charges, *available at* http://www.877wtchero.com/wtcverdict/STATEMENT-TO-OUR-CLIENTS-ABOUT-LITIGATION-INTEREST-CHARGES.pdf (last visited Sept. 29, 2012). By August 2010, the interest on these loans amounted to a staggering $6.1 million. Navarro, *supra*.

295 *See* DEPALMA, *supra* note 2, at 317–18.

296 *See* Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 59.

297 *See* WTC Captive Ins. Co. v. Liberty Mut. Fire Ins. Co., 549 F. Supp. 2d 555, 557–60 (S.D.N.Y. 2008). In the wake of the massive cleanup effort that the September 11 attacks necessitated, the City of New York obtained insurance protection from several insurance companies. *Id.* at 557–58. The insurers "undertook to 'defend and indemnify the City and its contractors against claims of bodily injury, property damage, personal injury or advertising injury' arising from the clean-up efforts at the World Trade Center covering the period from September 11, 2001 to December 31, 2002." *Id.* at 558. Ultimately, however, some of the insurers "disclaimed liability and any obligation to provide a defense." *Id.* at 559. Consequently, on February 16, 2007, the Captive filed a lawsuit against the insurers "seeking a declaration that the . . . [i]nsurers had a duty to defend the City and its contractors in the 21 MC 100 litigation, [as well as] damages—essentially, reimbursement of defense expenses advanced by WTC Captive." *Id.* at 560.

On May 27, 2008, Judge Hellerstein entered final judgment in favor of the Captive, holding that the insurers had an ongoing duty to defend the City and its contractors. Rule 60(b)(5) Order Satisfying Final Judgment, and Releasing and Discharging Excess Insurers and Supersedeas Bond at 1, WTC Captive Ins. Co. v. Liberty Mut. Fire Ins. Co., No. 07-1209(AKH) (THK) (S.D.N.Y. Jan. 29, 2010). Subsequently, the insurers appealed to the Second Circuit. Notice of Parties' Joint Consent Motion Pursuant to FRCP 60(b)(5) to Relieve Excess Insurers from the Final Judgment and to Discharge Supersedes Bond at 2, WTC Captive Ins. Co. v. Liberty Mut. Fire Ins. Co., No. 07-1209(AKH) (THK) (S.D.N.Y. Jan. 29, 2010). However, before their appeal was heard, the parties reached a confidential settlement agreement and requested the Second Circuit to dismiss their appeal. *Id.* The dismissal was granted on January 19, 2010, and the case was remanded to Judge Heller-

ensure that the plaintiffs received, and were generally perceived to have received, a fair settlement. After all, the plaintiffs in these cases were public heroes, many of whom were severely injured; thus, any widespread perception that the settlement was unfair was to be avoided, within reason.

Regarding the court's reduction of plaintiffs' attorneys' fees, since most of the cases would not go to trial, Judge Hellerstein believed that allowing a contingent fee of one-third was not justified in light of the work that had gone into reaching the settlement.[298] The defendants certainly had no interest in monitoring the fairness of the plaintiffs' lawyers' fees. Their concern was to minimize the amount of money to be paid out of the Captive's $1 billion-plus fund. Because plaintiffs' attorneys' fees were deducted from their recoveries, defendants were indifferent as to the amounts of these fees. Ultimately, the plaintiffs' lawyers agreed to a reduction of their contingent fees from thirty-three percent to twenty-five percent.[299] They did so following Judge Hellerstein's stern admonition that he would not allow a contingent fee of one-third.[300]

Ultimately, Judge Hellerstein approved a revised settlement package that gave the plaintiffs $125 million more—from the Captive fund and in reduced attorneys' fees—than they would have received in the original settlement.[301] Judge Hellerstein had considered that even more could be added to the plaintiffs' package but realized that at some point his authority would be challenged on appeal, resulting in years of delay and depriving plaintiffs of recoveries they were long waiting for. Having reached what he perceived to be an acceptable level of benefits, he approved the revised settlement.[302]

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stein. *Id.* On January 29, 2010, after conducting an in-camera review of the settlement and after being informed that plaintiffs' attorneys did not object to the settlement, the judge declared the final judgment satisfied. Rule 60(b)(5) Order Satisfying Final Judgment, and Releasing and Discharging Excess Insurers and Supersedeas Bond, *supra*, at 3. The special masters, who co-author this Article, estimate the settlement agreement to be in the neighborhood of $200 million.

298 Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 56. In addition to the fees generated from the settlement with the Captive (on behalf of the City and its contractors), it was expected that plaintiffs' counsel would generate substantial additional fees from ancillary settlements with the Port Authority, the Fresh Kills defendants, the Weeks Marine insurer, and Survivair, Inc. *See supra* note 38. This expectation materialized when the ancillary settlements yielded over $100 million to plaintiffs. *See supra* note 38.

299 Transcript of Status Conference (June 10, 2010), *supra* note 201, at 8.

300 Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 56.

301 Order Acknowledging, and Setting Hearing on, Modified and Improved Agreement of Settlement, *supra* note 208, at 1; *see supra* note 233.

302 *See* Order Proposing Amendment to Special Masters' Agreement at 1–2, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100(AKH), 21 MC 102(AKH), 21 MC 103(AKH) (S.D.N.Y. June 29, 2010) (order approving modified and improved agreement of settlement).

VIII

THE PERSPECTIVES OF THE DISTRICT JUDGE[303]

In 2002, the Clerk's Office randomly assigned to me the case of a first responder at the WTC disaster site, alleging injuries from exposure to the toxins at the site.[304] Further assignments followed, accelerating over time, until I came to preside over more than thirteen thousand cases related to the 9/11 disaster while carrying a normal load of civil and criminal cases that are the daily fare of a federal district judge.[305] As the 9/11 cases grew in number, I struggled with the task of how to manage this complex litigation.

I looked for guidance in the Federal Rules of Civil Procedure and the Manual for Complex Litigation. But aside from general language that appears to give a district court judge considerable leeway in "adopting special procedures" to manage pleadings, schedule discovery, and exercise control over the litigation,[306] I found myself trying to manage litigation in which many persons had suffered a wide array of injuries from exposures in hundreds, if not thousands, of different circumstances.

After appointing liaison counsel for plaintiffs and defendants and instituting procedures for effective communication among counsel and with the court, I began to realize that there were simply too many plaintiffs and defendants in this litigation. Too many plaintiffs, as yet uninjured, had signed contingent fee agreements believing that they had nothing to lose and might have something to gain, particularly if

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303 This Part presents the viewpoints of Judge Hellerstein, and is recounted from his perspective.

304 Hickey v. City of New York, No. 02 Civ. 08434(AKH) (S.D.N.Y. Oct. 23, 2002); Taha v. City of New York, No. 02 Civ. 05288(AKH) (S.D.N.Y. Oct. 18, 2002); *see* Effron, *supra* note 10, at 2431. As early as January 2002, I was assigned cases alleging commonplace construction injuries suffered at the WTC site that were removed to federal court pursuant to the ATSSSA. *See supra* note 39. In *Graybill v. City of New York* and *Spagnuolo v. Port Authority of New York & New Jersey*, I held that federal jurisdiction did not lie for injuries arising from activities and risks typically associated with construction sites and remanded the cases to the New York State Supreme Court. 247 F. Supp. 2d 345, 346 (S.D.N.Y. 2002); 245 F. Supp. 2d 518, 521 (S.D.N.Y. 2002).

305 I was assigned many other 9/11 cases. Local Court Rule 13 provides that in order to promote justice and efficiency the same judge should handle related cases. As a result, I was assigned ninety-five wrongful death and personal injury actions brought against the aviation companies, and other categories of cases relating to the September 11 attack: the personal injury actions brought by the first responders (the subject of this Article); the property damage suits against those same defendants; the lawsuits arising from the collapse of Tower Seven and the consequent destruction of the Con Ed power station beneath the tower; the lawsuits of the construction and cleanup workers in buildings adjacent to the WTC; the disputes among insurers and reinsurers to sort out the potential liability and expense for destroyed property and business in the WTC; and a lawsuit contending that the WTC debris covering the garbage in the Fresh Kills landfill made the landfill hallowed ground, requiring a cemetery to be made of the landfill.

306 FED. R. CIV. P. 16(c)(2)(L); *see* MANUAL FOR COMPLEX LITIGATION, FOURTH § 10.1 (4th ed. 2004).

they later become ill due to their exposure to the WTC site.[307] And too many defendants were implicated because plaintiffs' counsel appeared to be suing every contractor who had anything whatsoever to do with the work site. As my concern in these regards mounted, I found no easy way to winnow the docket to focus on more meritorious claims or claims of substantial injury.

Advocates look for leverage. Plaintiffs exert leverage by bringing large numbers of cases, often with inadequate regard to the merits of the claims. They believe that the *in terrorem* effect of mass claims may lead to quick settlements. Plaintiffs' counsels' assumption is that large numbers of claims produce added exposure to defendants, in potential liability and defense expenses, increasing incentives to settle. Plaintiffs' counsel also tend to join as many defendants as possible to increase the number of potential contributors to settlement and to create opportunities for cross pleadings by defendants against one another, adding additional expense to defendants and creating the risk of one defendant seeking to prove fault against other defendants.[308]

Defendants also seek to gain leverage. Defendants exert leverage by pressuring the plaintiffs' contingent fee structure. Defendants' counsel is paid on a current and hourly basis and staff liberally.[309] The result leads to extensive discovery, numerous motions, and a general prolongation of proceedings. It becomes expensive for plaintiffs' counsel to fund the litigation, and a practice has grown of financing mass tort actions at high compound interest rates with repayment deferred until a settlement or recovery is accomplished.[310]

Discovery proceedings cannot be conducted in connection with ten thousand claims. In other cases, judges have used sampling techniques to select a few claims for early discovery and trials and then, if the mass did not settle, another few, and so on.[311] But this procedure did not seem appropriate for the WTC claims. The illnesses alleged by the workers were too varied and too numerous, and the causal relationships of the workers to their worksites were too controversial to

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307 *See generally* Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 95 (1997) (noting that, due to contingent fee arrangements, "plaintiffs have an incentive to file lawsuits whenever an attorney is willing to represent them").

308 I did not allow cross pleadings and third-party pleadings.

309 *See* Molot, *supra* note 307, at 69.

310 Binyamin Appelbaum, *Putting Money on Lawsuits, Investors Share in the Payouts*, N.Y. TIMES, Nov. 15, 2010, at A1; Ben Hallman & Binyamin Appelbaum, *Betting on Justice: Borrowing to Sue*, CENTER FOR PUB. INTEGRITY (June 16, 2011, 6:59 PM), http://www.iwatchnews.org/2010/11/15/2320/betting-justice-borrowing-sue (noting that lenders provided $35 million to fund the lawsuits brought by the injured Ground Zero workers and earned approximately $11 million).

311 *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 452 (E.D. La. 2006); Fallon et al., *supra* note 159, at 2232–35 (stating that six bellwether trials were conducted in the Vioxx litigation and one bellwether trial was conducted in the pharmaceutical Propulsid litigation).

lend themselves to useful sampling techniques.[312] I believed that a system should be devised to allow basic discovery by court-ordered interrogatories addressed to all plaintiffs and defendants, with the goal of creating a reliable database that counsel and the court could access. With such a database, the court could select bellwether claims, not blindly or as one or another counsel conceived, but according to criteria that focused on merits and severity of injury, for those were the claims that most merited resolution and that would most likely affect similarly situated claims.[313]

With the help of the special masters and the involvement of counsel, a database was designed and a set of approximately 368 questions were propounded that each litigant was required to answer separately, responsively, and under oath as Federal Rule of Civil Procedure 33 required to provide a common core of information about each claim and all claims that the court and all counsel could access.[314] The information revealed the relative severity of the most commonly alleged injuries and the length and timing of each plaintiff's exposure to the site. The database also showed plaintiffs' preexisting conditions, smoking habits, and the safety equipment that was or was not used at the WTC site.[315] The database provided the court and the parties with an overview of the entire plaintiff population.[316]

Using the database, we established a procedure to choose a sample of claims for intensive discovery, motions, and trial, sequenced according to a master schedule covering all filed claims.[317] Thus, we were able to choose plaintiffs for early discovery[318] and trials with a

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312 *See supra* note 305.

313 *See, e.g.*, Case Management Order No. 8, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100(AKH) (S.D.N.Y. Dec. 12, 2008) (establishing a method by which bellwether cases were to be selected based on factors including the severity of injury, duration of exposure, and others).

314 *See In re* World Trade Ctr. Disaster Site Litig., 598 F. Supp. 2d 498, 501–02 (S.D.N.Y. 2009); Transcript of Status Conference (Nov. 28, 2006), *supra* note 124, at 33–34.

315 *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 506–22; *supra* Part IV.C.

316 *See supra* Part IV.E.

317 *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 503–05; *supra* Part IV.D.

318 Various management techniques facilitated the efficient and orderly progress of the accelerated discovery program. I provided that all discovery disputes should come to me directly, without preliminary reviews by special masters or magistrate judges, and that discovery disputes be presented to me by joint letter rather than by formal motion, with each side stating its separate positions within twenty-four hours of receiving the other side's position. And I committed to rule within twenty-four hours, if possible, to resolve the dispute. My individual Rule 2E was the model. *See* Hon. Alvin K. Hellerstein, Individual Rules of the Honorable Alvin K. Hellerstein, *available at* http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=575. Rule 2E provides:

> Unless directed otherwise, counsel shall describe their disputes in a single letter, jointly composed. Separate and successive letters will be returned, unread. Strict adherence to Fed. R. Civ. P. 37(a)(2)(A), the meet

wide variety of injuries and lengths of exposure.[319] Moreover, we not only set a schedule for discovery and trials for the first thirty plaintiffs but also set a comprehensive plan for discovery and trial for all ten thousand plaintiffs over a period of two years.[320] There was to be no respite[321]: the schedule was relentless and unforgiving.

As more and more plaintiffs answered the interrogatories, the database provided an overview of the entire litigation: How many suffered severe injuries, light injuries, or no injuries at all? From which illnesses did plaintiffs suffer from? How many plaintiffs smoked or had preexisting conditions? How long did each plaintiff work and at which subsite? Which employers did each plaintiff work for and was protective equipment provided? The inquiries could continue indefinitely. The special masters prepared a survey report and, at my suggestion, gave copies to the attorneys.

Soon after, the parties produced a proposed settlement for the 21 MC 100 cases, the Settlement Process Agreement, described earlier in this Article.[322] Incident to the court's obligation to exercise judicial management to supervise the litigation for fairness and efficiency, I saw my task as twofold: First, I had to determine whether the proposed settlement agreement was fair to the plaintiffs, substantively and procedurally.[323] And second, I had to make sure that proper mechanisms were in place to allow all plaintiffs to receive adequate information upon which to base their decisions regarding whether to join the settlement. Regarding the first issue, after review, I disapproved the proposed settlement plan because, considering the amount of reserves that the Captive intended to keep for future claims and the percentages going to the lawyers, too little would end up being paid to the plaintiffs.[324] If ever there were to be a mass tort settlement that had to be fair and be perceived to be so, this was it.[325] The parties renegoti-

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> and confer rule, is required, and should be described in the joint submission as to time, place and duration, naming the counsel involved in the discussion. The Court will not resolve disputes not brought to its attention in conformity with this rule.

Id. The rapid turnaround time of twenty-four hours promoted efficiency by eliminating most of the incentive for objecting to discovery and filing discovery motions.

319 *See supra* Part IV.D (stating that thirty cases were scheduled to be tried on May 17, 2010).

320 *See In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 524.

321 *See id.* (setting forth that Judge Hellerstein required strict adherence to the schedule and did not permit deviations because of weekends or legal holidays).

322 *See supra* Part V.

323 *See* Order Acknowledging, and Setting Hearing on, Modified and Improved Agreement of Settlement, *supra* note 208, at 1–4; Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 61–63; *supra* Part VI.

324 *See* Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 55–56, 59; *supra* Part VII.

325 *See* Transcript of Status Conference (Mar. 19, 2010), *supra* note 10, at 53, 63; DEPALMA, *supra* note 2, at 321.

ated and returned with a more attractive package—fair in my mind, although not perfect—and I approved it.[326] The result was an increase of more than $125 million in plaintiffs' recovery, of which $50 million reflected an additional cash contribution by the Captive, another $50 million (approximately) reflected a reduction in contingent-fee-percentage by plaintiffs' attorneys, and $25 million to $50 million reflected agreements by workers' compensation and disability insurance carriers to waive liens they held against plaintiffs' recoveries.[327] One aspect of the settlement was crucial to my approval. I had insisted from the start that most of the compensation must be directed to those most seriously injured. Unlike some settlements in which the plaintiffs' counsel allocates the gross amount as they see fit, this settlement allocated different amounts for each category of injury.[328] The net result was that ninety-five percent of the settlement went to those most seriously hurt.[329]

Regarding the second issue of whether plaintiffs received adequate information to decide whether to opt into the settlement, I appointed an ethics specialist to review written communications[330] and various special counsel to communicate with and advise both those plaintiffs who had stopped taking calls from liaison counsel[331] and those who continued to be represented by liaison counsel even though they had previously given releases that purportedly barred them from suing.[332]

Several judges have taken note of the phenomenon of the quasi-class action in mass torts.[333] And some commentators have observed

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326 *See* Order Approving Modified and Improved Agreement of Settlement at 1–4, *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100(AKH), 21 MC 102(AKH), 21 MC 103(AKH) (S.D.N.Y. June 23, 2010); DEPALMA, *supra* note 2 at 325; *supra* Part VII.

327 *See* Transcript of Status Conference (June 10, 2010), *supra* note 201, at 8.

328 *Id.* at 9.

329 *See* DEPALMA, *supra* note 2, at 325.

330 Order Acknowledging, and Setting Hearing on, Modified and Improved Agreement of Settlement, *supra* note 208, at 1–4 (appointing Professor Roy D. Simon to review communications to plaintiffs regarding amended settlement agreement); Hamblett, *supra* note 292.

331 Michael Hoenig was appointed special counsel to assist hundreds of plaintiffs who had not decided whether to opt into the amended settlement agreement. *In re* World Trade Ctr. Disaster Site Litig., 762 F. Supp. 2d 631, 650 (S.D.N.Y. 2010). "These Eligible Plaintiffs consisted of several subgroups; persons who could not be located despite diligent efforts; persons who declined to communicate with their counsel; persons who expressed a desire to opt into the SPA but who had not completed their paperwork; and persons who were on the Eligible Plaintiffs list but who expressed a desire to withdraw from the lawsuit." *Id.*

332 Mark Hamblett, *9/11 Plaintiffs Firm Is Ordered to Work with Conflicts Counsel*, N.Y. L.J., Mar. 15, 2011, at 1.

333 *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 612–13 (E.D. La. 2008); *In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (assuming the characterization as a quasi-class action); Weinstein, *supra* note 288, at 480–81 ("What is clear from the huge consolidations required in mass torts is that they have many of the characteristics

differences between classic class actions and this newer, hybrid creature.[334] Most of mass tort litigation takes place within the framework of multidistrict litigation (MDL) consolidation of cases for discovery that often results in global settlements.[335] In the 9/11 responders' litigation, the claims were consolidated because Congress mandated that all of them be brought in the Southern District of New York.[336] But the underlying problems are similar. Inadequate attention has been paid to the enormous complexities that attend these claims. Though I believe that I acted consistently with the federal rules, the litigants believe that I overstepped the boundaries. It is time for the Judicial Conference of the United States, the American Law Institute, and the Federal Judicial Center to address the issues raised in this Article. On the one hand, if I was right in asserting supervisory control of the litigation and rejecting the initial settlement, then those powers should be clearly set forth so that the next judge who faces these issues does not feel overly constrained for fear of appellate reversal.[337] On the other hand, if I was wrong, then an explicit rule should define the proper constraints. In any event, if this Article contributes to a more thorough, informed analysis by those charged with formulating policy and articulating a rule (one way or another), our efforts in writing it will have been rewarded.

CONCLUSION

This Article has focused on the innovative strategies that Judge Hellerstein developed in order to bring about a settlement in the 9/11 responders' tort litigation, one of the most complex and symbolically significant mass tort cases in the history of American jurisprudence. For those who question whether the judge exceeded his authority in managing a nonclass mass tort litigation, it is unclear what alternative he might have embraced. Earlier efforts to stay within

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of class actions. . . . It is my conclusion . . . that mass consolidations are in effect quasi-class actions.").

334 *See* Chamblee, *supra note* 288, at 160–161; Silver & Miller, *supra* note 288 at 109–10; Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 803–04 (2010) ("[Procedural rules] force nonclass settlements 'awkwardly within either the class action device or the traditional model of the one-on-one lawsuit' when they are in fact hybrids of the two litigation models.").

335 Silver & Miller, *supra* note 288, at 108.

336 ATSSSA, Pub. L. No. 107-42, § 408, 115 Stat. 230, 241 (2001).

337 Chamblee, *supra* note 288, at 235 (noting that the adjudication of mass torts should require judicial approval of all postaggregation settlements and that, to ensure such judicial regulation, the Judicial Panel on Multidistrict Litigation (JPML) statute should be amended); Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 858 (1997) ("Judges should be obliged to structure settlement negotiations (ex ante) and to evaluate settlements (ex post) in all aggregates, be they called class actions, MDLs, consolidations or whatever.").

more traditional bounds had inexorably led to impasse. To have allowed the cases to grind their way to individual trials and settlements would have extended the litigation over decades and had the potential of doing substantial injustice to plaintiffs who had placed their lives on the line to help the city and the country through an unprecedented crisis. The comprehensive settlement that Judge Hellerstein made possible resulted in ninety-nine percent of plaintiffs opting to accept the settlement, no mean accomplishment.[338] That the federal court forced revision of the original settlement and put its imprimatur on the revised agreement were essential factors in achieving the high opt-in percentage.

In any event, the 9/11-tort-litigation saga is not yet complete. A small number of plaintiffs opted out of the settlement. If they do not enter into the Zadroga compensation scheme, their cases will proceed to settlement or trial. Other plaintiffs filed new tort claims after the settlement was completed and their cases will also have to be resolved. And future plaintiffs who manifest injuries in the years to come will almost certainly press their claims. If they do not join Zadroga, they, too, will have to litigate or settle their cases. Finally, some 1,500 plaintiffs, most of whom worked in the cleanup of approximately sixty buildings near the 9/11 site, are claiming injuries from the various toxins that emanated from the collapse of the twin towers.[339]

Although we can hope that this country will never again face the horrors of a 9/11-type attack, it is certain that nonclass mass tort cases will continue to be brought to our courts. One does not have to posit a case with over three hundred different types of physical injuries to test the capacity of courts to manage such litigation. Cases that involve the interaction of several different drugs resulting in a host of different injuries will raise similar questions even when, as with the 9/11 litigation, they are based on traditionally recognized tort theories. Defendants will include pharmaceutical manufacturers, medical practitioners, hospitals, and managed care insurers. Complex environmental cases involving multiple defendants and thousands of plaintiffs will continue to challenge our courts. Absent meaningful guidance from the Federal Rules of Civil Procedure, nothing short of creative judicial management will save these cases from dragging on

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338 As of this writing, only one of the eighty-five original respiratory and cancer cases that were eligible for the settlement remains. Of the newly filed cases (those filed after the date set by the settlement agreement), only nine remain. In addition, eight cases alleging physical injuries incurred at the WTC worksite remain pending.

339 The defendants in these cases, classified under master docket 21 MC 102, are the owners, tenants, and managers of the buildings in which the cleanup crews worked. Plaintiffs claim these defendants violated the New York safe place statute and are thus liable to plaintiffs for their injuries. With so many plaintiffs who worked in different buildings under different conditions, these cases are proving to be very complex.

for decades. The 9/11 litigation suggests that, with strong judicial management, these cases can be resolved fairly and expeditiously. By February 2012, almost all participating plaintiffs had received the payments due to them under the 9/11 revised settlement.[340] That is an accomplishment worthy of emulation and replication.

340 As of September 29, 2012, two disputes remain unresolved: one regarding mandatory bonus payments and another regarding mandatory contingent payments, both under the terms of the settlement agreement. The agreement provides that the Captive is required to disburse bonus payments when the plaintiffs' opt-in percentage reaches certain benchmarks, and contingent payments in each of the five years following the settlement if newly filed cases, or payments by the Captive to discharge judgments or settlements, do not exceed certain other benchmarks. The district court ordered the Captive to make both these categories of payments to the settling plaintiffs. *In re* World Trade Ctr. Disaster Site Litig., 834 F. Supp. 2d 184, 196 (S.D.N.Y. 2011); *In re* World Trade Ctr. Disaster Site Litig., Nos. 21 MC 100(AKH), 21 MC 102, 21 MC 103, 2012 WL3029637, at *1 (S.D.N.Y. July 11, 2012). The district court's orders add approximately $60 million to the settlement. Appeals by the defendants from both these orders are pending before the U.S. Court of Appeals for the Second Circuit.