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## The Victim Compensation Fund - Looking a Gift Horse in the Mouth

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# THE VICTIM COMPENSATION FUND — LOOKING A GIFT HORSE IN THE MOUTH

*Kenneth P. Nolan and Jeanne M. O'Grady\**

## INTRODUCTION

In the immediate aftermath of the terrorist attacks at the World Trade Center, Pentagon, and Shanksville, Pennsylvania, Congress passed the Air Transportation Safety and System Stabilization Act (the Act).<sup>1</sup> In addition to limiting the exposure of the airlines (and other defendants in a later amendment) in any civil litigation to their insurance coverage and providing the aviation industry with \$15 billion in loans and guarantees, Title IV of that Act creates the September 11th Victim Compensation Fund of 2001 (the Fund).<sup>2</sup> The stated purpose of the Fund is to provide compensation to eligible individuals

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1. Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (signed into law by President George W. Bush September 22, 2001).

2. The full text of Title IV is as follows:

### TITLE IV—VICTIM COMPENSATION

Sec. 401. Short title.

This title may be cited as the "September 11th Victim Compensation Fund of 2001."

Sec. 402. Definitions.

In this title, the following definitions apply:

(1) Air carrier. The term "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation and includes employees and agents of such citizen.

(2) Air transportation. The term "air transportation" means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.

(3) Claimant. The term "claimant" means an individual filing a claim for compensation under section 405(a)(1).

(4) Collateral source. The term "collateral source" means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.

(5) Economic loss. The term "economic loss" means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.

(6) Eligible individual. The term "eligible individual" means an individual determined to be eligible for compensation under section 405(c).

(7) Noneconomic losses. The term “noneconomic losses” means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

(8) Special Master. The term “Special Master” means the Special Master appointed under section 404(a).

Sec. 403. Purpose.

It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.

Sec. 404. Administration.

(a) In general. The Attorney General, acting through a Special Master appointed by the Attorney General, shall—

- (1) administer the compensation program established under this title;
- (2) promulgate all procedural and substantive rules for the administration of this title; and
- (3) employ and supervise hearing officers and other administrative personnel to perform the duties of the Special Master under this title.

(b) Authorization of Appropriations. There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Special Master in carrying out this title.

Sec. 405. Determination of eligibility for compensation.

(a) Filing of Claim.

(1) In general. A claimant may file a claim for compensation under this title with the Special Master. The claim shall be on the form developed under paragraph (2) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.

(2) Claim form.

(A) In general. The Special Master shall develop a claim form that claimants shall use when submitting claims under paragraph (1). The Special Master shall ensure that such form can be filed electronically, if determined to be practicable.

(B) Contents. The form developed under subparagraph (A) shall request—

(i) information from the claimant concerning the physical harm that the claimant suffered, or in the case of a claim filed on behalf of a decedent information confirming the decedent's death, as a result of the terrorist-related aircraft crashes of September 11, 2001;

(ii) information from the claimant concerning any possible economic and noneconomic losses that the claimant suffered as a result of such crashes; and

(iii) information regarding collateral sources of compensation the claimant has received or is entitled to receive as a result of such crashes.

(3) Limitation. No claim may be filed under paragraph (1) after the date that is 2 years after the date on which regulations are promulgated under section 407.

(b) Review and Determination.

(1) Review. The Special Master shall review a claim submitted under subsection (a) and determine—

(A) whether the claimant is an eligible individual under subsection (c);

(B) with respect to a claimant determined to be an eligible individual—

(i) the extent of the harm to the claimant, including any economic and noneconomic losses; and

(ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.

(2) Negligence. With respect to a claimant, the Special Master shall not consider negligence or any other theory of liability.

(3) Determination. Not later than 120 days after that date on which a claim is filed under subsection (a), the Special Master shall complete a review, make a determination, and provide

physically injured as a result of the attacks, or to the personal repre-

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written notice to the claimant, with respect to the matters that were the subject of the claim under review. Such a determination shall be final and not subject to judicial review.

(4) Rights of claimant. A claimant in a review under paragraph (1) shall have—

(A) the right to be represented by an attorney;

(B) the right to present evidence, including the presentation of witnesses and documents; and

(C) any other due process rights determined appropriate by the Special Master.

(5) No punitive damages. The Special Master may not include amounts for punitive damages in any compensation paid under a claim under this title.

(6) Collateral compensation. The Special Master shall reduce the amount of compensation determined under paragraph (1)(B)(ii) by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001.

(c) Eligibility.

(1) In general. A claimant shall be determined to be an eligible individual for purposes of this subsection if the Special Master determines that such claimant—

(A) is an individual described in paragraph (2); and

(B) meets the requirements of paragraph (3).

(2) Individuals. A claimant is an individual described in this paragraph if the claimant is—

(A) an individual who—

(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and

(ii) suffered physical harm or death as a result of such an air crash;

(B) an individual who was a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175, except that an individual identified by the Attorney General to have been a participant or conspirator in the terrorist-related aircraft crashes of September 11, 2001, or a representative of such individual shall not be eligible to receive compensation under this title; or

(C) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent.

(3) Requirements.

(A) Single claim. Not more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.

(B) Limitation on civil action.

(i) In general. Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations.

(ii) Pending actions. In the case of an individual who is a party to a civil action described in clause (i), such individual may not submit a claim under this title unless such individual withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 407.

Sec. 406. Payments to eligible individuals.

(a) In General. Not later than 20 days after the date on which a determination is made by the Special Master regarding the amount of compensation due a claimant under this title, the Special Master shall authorize payment to such claimant of the amount determined with respect to the claimant.

(b) Payment Authority. This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title.

(c) Additional Funding.

sentatives of those killed.<sup>3</sup> Touted as an “unprecedented expression of compassion on the part of the American people to the victims and their families,”<sup>4</sup> critics call it an unprecedented airline bailout package created at the expense of the September 11th victims and their families.

(1) In general. The Attorney General is authorized to accept such amounts as may be contributed by individuals, business concerns, or other entities to carry out this title, under such terms and conditions as the Attorney General may impose.

(2) Use of separate account. In making payments under this section, amounts contained in any account containing funds provided under paragraph (1) shall be used prior to using appropriated amounts.

Sec. 407. Regulations.

Not later than 90 days after the date of enactment of this Act, the Attorney General, in consultation with the Special Master, shall promulgate regulations to carry out this title, including regulations with respect to—

- (1) forms to be used in submitting claims under this title;
- (2) the information to be included in such forms;
- (3) procedures for hearing and the presentation of evidence;
- (4) procedures to assist an individual in filing and pursuing claims under this title; and
- (5) other matters determined appropriate by the Attorney General.

Sec. 408. Limitation on Air Carrier Liability.

(a) In General. Notwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages arising from the terrorist-related aircraft crashes of September 11, 2001, against an air carrier shall not be in an amount greater than the limits of liability coverage maintained by that air carrier.

(b) Federal Cause of Action.

(1) Availability of action. There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of title 49, United States Code, this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.

(2) Substantive law. The substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.

(3) Jurisdiction. 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.

(c) Exclusion. Nothing in this section shall in any way limit any liability of any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

Sec. 409. Right of subrogation.

The United States shall have the right of subrogation with respect to any claim paid by the United States under this title, subject to the limitations described in section 408.

September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 237-41 (codified as amended at 49 U.S.C.A. § 40101 (West 2003)).

3. See § 403, 115 Stat. 237; September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,274 (Dec. 21, 2001) (codified as amended at 28 C.F.R. § 104.1 (2001)). Arguably, another purpose of the Fund is to save the nation's major airlines from bankruptcy. Excluded from the Fund are participants in the September 11th hijackings and their personal representatives.

4. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66,274 (comments of Special Master).

The Fund is a no-fault alternative to litigation, with a stated purpose of providing compensation to the victims of the terrorists. In return, it bars lawsuits against all except the terrorists and their organizations.<sup>5</sup> The importance and future impact of the Fund cannot be underestimated. The Fund and how it is administered has the very real potential to become a model for future large tort matters. More than a year and a half after the attacks, only a handful of awards had been announced.<sup>6</sup> So, we can still speculate on the fairness and viability of the Fund as such a model and whether it is a workable substitute for contentious and often lengthy litigation.

The Act that created the Fund authorized the Attorney General to designate a Special Master of the Fund and promulgate procedural and substantive rules for the administration of the Fund.<sup>7</sup> On December 21, 2001, the Attorney General's designee, Special Master Kenneth R. Feinberg, and the Department of Justice released their Interim Final Rule, a set of regulations that was intended to be the substantive rule for the Fund, delineating who could make claims and how much they could collect, as well as the procedural rule, outlining the method by which claims would be made and awards granted.<sup>8</sup> After much comment and criticism, the Final Rule was released on March 13, 2002, with provisions only slightly more generous than the Interim Rule.<sup>9</sup>

Though the Fund is not promoted as a substitute for tort litigation, it is publicized as a more attractive and expedient alternative to litigation;<sup>10</sup> victims and families who wish to enter the Fund must waive all rights to bring civil suit to recover damages and must withdraw from already pending litigation.<sup>11</sup> This bar to civil litigation does not, how-

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5. See § 408, 115 Stat. 240-41.

6. See U.S. DEP'T OF JUSTICE, COMPENSATION FOR PERSONAL INJURY VICTIMS, available at [http://www.usdoj.gov/victimcompensation/payments\\_injury.html](http://www.usdoj.gov/victimcompensation/payments_injury.html) (last visited Dec. 18, 2003). This statement was made in reference to April 2003.

7. § 404(a)(2), 115 Stat. at 238. Attorney General John Ashcroft appointed Kenneth R. Feinberg Special Master.

8. 66 Fed. Reg. 66,274.

9. See September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified as amended at 28 C.F.R. § 104 (2002)).

10. See *id.* at 11,233. (statement by the Special Master).

11. § 405(c)(3)(B). Judge Alvin K. Hellerstein of the Southern District of New York made an exception to this rule with respect to the Port Authority of New York and New Jersey. In light of the running of the one year statute of limitations for civil actions against the Port, Judge Hellerstein ruled that potential Fund claimants could file suit against the Port and keep the suit in a sort of artificial suspension without waiving their right to file a claim with the Fund. The suit could remain in suspension until the deadline for filing a claim with the Fund. The effect of the ruling was to buy the families an additional year within which to decide whether to enter the Fund or actively pursue litigation. See Judge Hellerstein's Order of September 6, 2002, Mulligan

ever, apply to suits brought against the hijackers, their estates, or any conspirators to the hijackings or terrorism.<sup>12</sup> If, however, any victim should choose litigation, the Act requires that suit be brought in Manhattan, in the United States District Court for the Southern District of New York.<sup>13</sup> That the Fund is not intended as a substitute may explain why its provisions do not mirror the recovery that would be available to eligible claimants had they pursued litigation; they are more generous in some respects and far more restrictive in others. The most salient aspects of the Fund detailed in the Department of Justice Regulations include the determination of eligibility, the calculation of economic and noneconomic losses, the offset of collateral sources of compensation, and the procedure for claims evaluation and payment.

Kenneth Feinberg's is an educated audience that understands some of what has been taken from it in the limitations placed on potential recovery in civil litigation. The victims and their families are not convinced that the program that has been established is the gift that the Special Master would have them believe it is and, faced with an uncertain economic future, they will not be led blindly into the Fund. Although the regulations are specific, many await the application of these regulations to individual claims.<sup>14</sup> Others await the outcome of *Colaio v. Feinberg*, a lawsuit brought against the Special Master alleging that his administration of the Fund has been an abuse of the discretion given him by Congress; or they await rulings on motions made to dismiss the pending negligence actions brought by ground victims against the airlines and security defendants.<sup>15</sup>

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v. Port Authority of N.Y. & N.J., No. 02-CIV-6885, 2002 U.S. Dist. LEXIS 17182, at \*1 (S.D.N.Y. Sept. 6, 2002).

12. § 405(c), 115 Stat. at 239-40.

13. § 408(b)(3), 115 Stat. at 241. The civil litigation pending in the Southern District of New York has been consolidated before Judge Alvin K. Hellerstein under master docket numbers 21-MC-97 and 21-MC-100. In that consolidated litigation, the airlines and airport-related defendants have moved the Court to dismiss the actions brought by victims on the ground, claiming these defendants owed no duty to those on the ground, or in the alternative, that these victims were not foreseeable. A decision on this motion is expected in early May 2003. If Judge Hellerstein chooses to dismiss the action, the choice for many families between litigation and the Fund may have been made. *In re* Sept. 11 Litig., No. 21-MC-97, 2003 U.S. Dist. LEXIS 14411, at \*1 (S.D.N.Y. July 22, 2003); *In re* World Trade Ctr. Disaster Site Litig., No. 21-MC-100, 2003 U.S. Dist. LEXIS 10397, at \*1 (S.D.N.Y. June 20, 2003).

14. According to the Department of Justice website, as of December, 17, 2003, 402 awards have been accepted. See U.S. DEP'T OF JUSTICE, *supra* note 6.

15. *Id.* The outcome of this action may be decided as this Article goes to press. Similarly, a decision on the motion to dismiss the negligence actions is expected shortly after press time. See *In Re* September 11th Litigation, 2003 U.S. Dist. LEXIS 14411, at \*1.

Special Master Feinberg has met repeatedly with family groups in an attempt to explain the Fund's provisions and encourage families to file claims. However, his often contradictory statements, coupled with a few very public and very insensitive remarks,<sup>16</sup> have done little to engender the families' confidence in his ability or willingness to do right by them. With the statute of limitations on wrongful death actions expiring on the second anniversary of the attacks, time is wearing thin for many families forced to make the choice between litigation and the Fund. A detailed examination of the Fund's provisions and the issues that are of concern to victims and their families follows.

## II. ELIGIBILITY

Though the regulations leave the ultimate determination of who is an eligible claimant to the Special Master, both the Act and the regulations provide a definition of eligibility.<sup>17</sup> The definition of eligibility, with respect to claims brought on behalf of an individual killed in the attacks, essentially mirrors state law regarding wrongful death actions, with a few, more generous, exceptions. The rules regarding eligibility of injured claimants, however, are far more restrictive than those that would apply to potential personal injury actions.

The Fund relies on state law (or relevant foreign law), presumably that of domicile, to determine who is an eligible claimant bringing a claim for an individual killed in the attacks on the World Trade Center and the Pentagon, or at Shanksville.<sup>18</sup> As a result, eligible claimants will generally be the court appointed or approved administrators or executors of the deceased victims' estates, the same individuals who would be eligible to bring wrongful death actions and who are likely the intestate distributees, much to the dismay of the victims' same sex partners, live-ins, and fiancés. This feature of the Fund has remained unchanged from the Interim Final Rule, despite the significant outcry from many individuals and activist groups during the period of public comment asking for recognition of same-sex partners. The regulations suggest that distribution of the awards will also be governed by state

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16. Feinberg has been quoted as referring to Staten Island, home of hundreds of victims' families, as a "Third World country" and as telling family members weighing the options of litigation versus the Fund that his Fund was "the only game in town." Elizabeth Kolbert, *The Calculator*, *NEW YORKER*, Nov. 25, 2002, at 42, 45. For young widows facing the prospect of raising their young children without their husbands and fathers, this certainly is not a game.

17. See § 405(c), 115 Stat. at 239-40; September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,242-43 (Mar. 13, 2002) (codified as amended at 28 C.F.R. § 104 (2002)).

18. See 67 Fed. Reg. at 11,242. As previously discussed, the September 11th hijackers and their families are not counted among the eligible.



law, alluding to court approval of distribution in accordance with will terms or state intestacy statutes.<sup>19</sup> Though the Special Master has indicated that only he need approve of a distribution plan, some surrogate and probate courts have insisted upon court approval of any compensation scheme that involves a minor.<sup>20</sup>

The regulations relieve the Special Master of any obligation to “arbitrate, litigate, or otherwise resolve disputes as to the identity of the personal representative.”<sup>21</sup> Strangely, the regulations also provide for designation of a personal representative by written agreement of disputing parties, or by the Special Master.<sup>22</sup> Presumably, this would have to be done in accordance with state law, designating that same individual who would otherwise be eligible to serve as executor or administrator. This feature is peculiar, not only because the various states’ laws most likely do not allow for designation of an estate representative by agreement among the beneficiaries, but also because it is not entirely clear that this would not allow an otherwise “ineligible claimant” to become eligible.<sup>23</sup>

The eligibility rules relating to victims injured, but not killed, in the attacks are far more restrictive. Three key phrases limit who is an eligible claimant to those who suffered “physical harm” while “present at” one of the three locations at the time of the attacks, or in the “immediate aftermath.”<sup>24</sup> The terms “present at” and “immediate aftermath” were defined in the Interim Final Rule and are not addressed any further in the Final Rule.<sup>25</sup> Of these three terms, the Final Rule only focuses on the further definition of “physical harm.”<sup>26</sup>

The Fund limits compensation only to those suffering physical injury who sought medical treatment within seventy-two hours of their

19. *See id.* at 11,243.

20. This appears to be the only way, with the consent of the decedent’s estate beneficiaries, a same sex partner is eligible for compensation—Special Master Feinberg can approve a distribution scheme that includes payment to a same-sex partner. *See* Steve Vogel, *U.S. Awards Lesbian 9/11 Compensation for Loss of Partner*, WASH. POST, Jan. 23, 2003, at B1.

21. 67 Fed. Reg. at 11,242.

22. *See id.* at 11,242-43.

23. It is not clear, but this may be another means by which same-sex partners can participate in the Fund.

24. *See* September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified as amended at 28 C.F.R. § 104 (2002)).

25. *See* September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,273, 66,282 (Dec. 21, 2001) (codified as amended at 28 C.F.R. § 104 (2002)). “Present at” is defined as physically present at the buildings destroyed in the crashes or in the contiguous area such that there was a demonstrable risk of harm from the crash. “Immediate aftermath” is defined as a period of twelve hours after the particular crash for civilians, and ninety-six hours for rescue workers. *See id.*

26. *See* 67 Fed. Reg. at 11,233.

injury or rescue.<sup>27</sup> This has been expanded from the original requirement that victims sought medical treatment within twenty-four hours.<sup>28</sup> The regulations further limit recovery to those suffering injury that required hospitalization for at least twenty-four hours, or injury causing temporary or permanent, partial or total, physical disability, incapacity, or disfigurement, and they require proof in the form of “contemporaneous” medical records.<sup>29</sup> They do not offer compensation to those suffering mental or emotional harm without physical injury.<sup>30</sup>

The regulations, though, allow the Special Master to consider injuries suffered, or discovered, after this seventy-two hour period, primarily by rescue workers or those unable to seek treatment within the first three days.<sup>31</sup> However, with the two-year limitation on the filing of claims, benefits are apparently not extended to those rescue workers who will suffer long-term effects of exposure to the environmental conditions at any of the sites.<sup>32</sup>

It is this aspect of the regulations that will deny otherwise eligible personal injury litigants the benefits of the Fund. And the limits placed on the liability of most potential defendants will leave the less severely injured victims essentially without remedy.<sup>33</sup>

### III. ECONOMIC LOSS

The Act that creates the Fund defines economic loss as any pecuniary loss resulting from harm, to the extent available under state law.<sup>34</sup> The Act also provides an exemplary list of what may be economic losses, including earnings, employment benefits, replacement services, and burial costs, to name a few.<sup>35</sup> The regulations go further to state that “the Special Master is not permitted to compensate claimants for those categories or types of economic losses that would not be compensable under the law of the state that would be applicable to any tort claims brought by or on behalf of the victim.”<sup>36</sup> Economic loss to

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27. See 67 Fed. Reg. at 11,234, 11,242.

28. See 66 Fed. Reg. at 66,282.

29. See 67 Fed. Reg. at 11,237; 66 Fed. Reg. at 66,282.

30. See 67 Fed. Reg. at 11,242.

31. *Id.*

32. September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42 § 405(a)(3), 115 Stat. 238 (codified as amended at 49 U.S.C.A. § 40101 (West 2003)).

33. See *id.* § 408, 115 Stat. at 240-41.

34. *Id.* § 402 (5), 115 Stat. at 237.

35. *Id.*

36. 66 Fed. Reg. 66,274, 66,286 (Dec. 21, 2001) (codified as amended at 28 C.F.R. § 104 (2002)).

injured victims is described as loss of earnings or other employment benefits, medical expenses, replacement services, and lost opportunities.<sup>37</sup>

In addition to the regulations discussed, the Special Master released presumptive loss calculation tables, based on age and current income levels, together with explanations for the calculation of those presumptive awards.<sup>38</sup> The tables, the Special Master insists, are only presumptions, and do not indicate a minimum or maximum award amount.<sup>39</sup> However, the presumptive award tables only calculate loss for income levels as high as the ninety-eighth percentile of individual income in the United States.<sup>40</sup> Victims earning at levels above that ninety-eighth percentile have the choice of accepting an award at that level or providing proof of extraordinary circumstances that would warrant an award higher than that level.<sup>41</sup> He insists each award will be calculated based on the individual circumstances of the claimant, while also maintaining that an award above the ninety-eighth percentile presumptive award amount would “rarely be necessary to ensure that the financial needs of a claimant are met.”<sup>42</sup>

Many of the families of those earning more than \$231,000, which is the ninety-eighth percentile for the year 2000, are extremely wary of how the Special Master will calculate their economic loss. Nowhere in the statute is a requirement of extraordinary circumstances suggested, or is “need” mentioned. It is particularly distressing, therefore, that the Special Master has determined that these families are less deserving of both compensation and an opportunity to preserve a sense of normalcy than their lower-earning counterparts. The Special Master relies upon the authority granted to him to consider the “individual

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37. See U.S. DEP'T OF JUSTICE, VICTIM COMPENSATION FUND FREQUENTLY ASKED QUESTIONS, available at <http://www.usdoj.gov/victimcompensation/faq6.pdf> (last visited Dec. 18, 2003).

38. See U.S. DEP'T OF JUSTICE, EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS, available at [http://www.usdoj.gov/victimcompensation/vc\\_matrices.pdf](http://www.usdoj.gov/victimcompensation/vc_matrices.pdf) (last visited Dec. 18, 2003). There are no presumptive tables for injured victims, because, apparently, unlike the victims killed, the Special Master considers each injured victim “unique.” See U.S. Dep't of Justice, *supra* note 37.

39. See 67 Fed. Reg. 11,233, 11,237 (codified as amended at 28 C.F.R. § 104 (2002)).

40. Tables for income levels above the ninety-eighth percentile, like the Loch Ness Monster, are rumored to exist, but there has been no concrete evidence shown that they do indeed.

41. See 67 Fed. Reg. at 11,237. What the regulations do not provide is an explanation of what constitutes an extraordinary circumstance. Victims' families have been critical of what they deem a cap on awards because of this “extraordinary circumstance” language, particularly in New York's World Trade Center, where income at or above the ninety-eighth percentile may not be such an extraordinary circumstance.

42. *Id.*

circumstances” of the victim and claimants in calculating an award.<sup>43</sup> It is hard to imagine that Congress granted the Special Master this authority so that he could make subjective value judgments as to the “needs” of the wealthy. Many of the traders at the brokerage houses like Cantor Fitzgerald, which lost 658 employees, made much more than \$231,000. The argument by their widows is simple: by limiting the table calculations to the ninety-eighth percentile and by stating that an award above the ninety-eighth percentile would “rarely be necessary,” the Special Master is penalizing the financially successful. Indeed, many families of those successful securities traders believe that the Towers were targeted because they symbolized American financial success.

In any event, the rules indicate the relevant figures that will go into the calculation of an award and aspects of the formulas by which those calculations will be made.<sup>44</sup> The calculation of any award will begin with loss of income, using as a guide the victim’s income for the years 1998 through 2000.<sup>45</sup> The Special Master may also, in his discretion, choose to examine the victim’s prorated income for the year 2001.<sup>46</sup> The Fund rules require that the victim’s income be immediately adjusted for taxes.<sup>47</sup> The Special Master will consider both Internal Revenue Service data and the victim’s actual tax returns in order to determine the appropriate tax rate. Income in this sense appears to refer to actual monetary compensation and not the value of fringe benefits, such as pension contributions and the value of health insurance.<sup>48</sup> The regulations provide presumed values for certain benefits

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43. See U.S. DEP’T OF JUSTICE, STATEMENT OF THE SPECIAL MASTER REGARDING THE PROGRESS OF THE VICTIM COMPENSATION FUND, available at [http://www.usdoj.gov/victimcompensation/sp\\_statement.pdf](http://www.usdoj.gov/victimcompensation/sp_statement.pdf) (last visited Dec. 18, 2003).

44. Charts of the presumptive awards and explanations for their calculations are available at [http://www.usdoj.gov/victimcompensation/vc\\_matrices.pdf](http://www.usdoj.gov/victimcompensation/vc_matrices.pdf) (last visited Dec. 18, 2003). Further text explanations are available at 67 Fed. Reg. at 11,237-39.

45. See 67 Fed. Reg. at 11,237-39.

46. See *id.*

47. See *id.* This requirement is among those challenged in *Colaio v. Feinberg*, 262 F. Supp. 2d 273 (S.D.N.Y. 2003).

48. The regulations do, though, permit the Special Master to consider as income the non-cash forms of compensation received by military personnel, such as housing and subsistence allowances. 67 Fed. Reg. at 11,237. As further evidence in support of the premise that the presumptive awards are out of touch, the Final Rule states that in the preparation of the presumptive tables, \$2,400 per year was the value of medical benefits. See U.S. DEP’T OF JUSTICE, EXPLANATION OF PROCESS FOR COMPUTING PRESUMED ECONOMIC LOSS, available at [http://www.usdoj.gov/victimcompensation/vc\\_matrices.pdf](http://www.usdoj.gov/victimcompensation/vc_matrices.pdf) (last visited Oct. 17, 2003). While that figure may be accurate with respect to a single individual without dependents, that same figure is used also in the charts relating to married decedents with two children. The value to an employee of employer health benefits for a family of four is likely closer to about \$12,000 per year.

when claimants do not provide actual figures, but when provided, calculations will be based on figures furnished.<sup>49</sup> The values of these benefits do not appear to be reduced on account of taxes in this calculation.

The remaining work-life expectancy of the victim is then computed using the victim's age.<sup>50</sup> In response to extensive public comment, the Special Master has determined that the published work-life expectancies for "all males" will be used for female victims as well because they provide a more generous recovery than the published work-life expectancies for the female population.<sup>51</sup> But the Special Master will not use sixty-five years of age in calculating the retirement age for all the victims. For a twenty-five year-old, the presumed retirement age is fifty-nine. For a victim earning in excess of \$231,000, will the Special Master claim an even shorter work-life expectancy than the tables? The regulations leave this to the discretion of the Special Master.

The next step in calculation is determining the victim's earnings growth rate. The overall rates, which range from 9.744% for an eighteen year-old victim to 3.000% for a victim over the age of fifty-two, are also applied on a gender-neutral basis. The Special Master again applies the "all males" real life cycle percentage change for all victims, male or female. To that figure is added a cost of living or inflation increase of 2.0% per year and a productivity adjustment of 1.0%, to reach the overall rates discussed above.<sup>52</sup>

In using these tables, it remains unclear whether the Special Master is considering the type of employment of many of those lost in the World Trade Center. Compensation in the securities industry is very volatile and lucrative with increases well in excess of these statistics. Many of those killed were educated, hard-working entrepreneurs whose incomes skyrocketed in a few years from a very modest sum to hundreds of thousands of dollars. The tables relied on by the Special Master are more geared to those salaries that increase gradually over time.<sup>53</sup> Perhaps this is one of the "individual circumstances" the Special Master might consider in claims evaluation.

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49. See *id.* The value of a pension has a presumed value of four percent of pension-eligible compensable income.

50. The Fund's work-life expectancy tables are taken from James Ciecka et al., *A Markov Process Model of Work-Life Expectancies Based on Labor Market Activity in 1997-1998*, J. LEGAL ECON., Winter 1999-2000, at 33; See U.S. Dep't of Justice, *supra* note 48; see 67 Fed. Reg. at 11,238.

51. See U.S. DEP'T OF JUSTICE, *supra* note 48.

52. See *id.*

53. See Ciecka et al., *supra* note 50.

Reductions then begin. To account for the risk of unemployment that victims may have faced, future earnings are reduced by a rate of three percent.<sup>54</sup> Interestingly, the figures used to calculate work-life expectancies already factor in the risk of unemployment as they contemplate years of expected workforce participation. The concept of estimating workforce participation presumes that individuals will not be participating in the workforce at times for a variety of reasons, including unemployment. That the Fund then reduces future earnings by an additional three percent results in a duplicative reduction to the further disadvantage of claimants. Is this another example of hastily drawn regulations, or is it another example of the Special Master attempting to minimize the payments made under the Fund at all costs?

A personal consumption rate is then determined based on the victim's income, age, and household characteristics.<sup>55</sup> Household characteristics include the victim's marital status and the number of individuals living in the victim's home.<sup>56</sup> The reduction rate is determined as a percentage of after-tax income, which the regulations state results in a lesser rate of reduction.<sup>57</sup> Certain assumptions were made that would maximize recovery for claimants, such as that children remain in the household until age eighteen, and when consumption exceeds income, other forms of support would be available to cover the costs of consumption.<sup>58</sup>

The lost future income is then reduced to present value, using discount rates based on current yields of mid- to long-term U.S. Treasury bonds, and income is adjusted for income taxes at a median rate of 18.44%.<sup>59</sup> The result is three discount rates, applied according to the victim's age: 4.2%, 3.9%, and 3.4%.<sup>60</sup> The after-tax discount rates are almost one percentage point lower than the pre-tax rates.<sup>61</sup> While these rates are more generous to claimants than the discount rates proffered in the Interim Final Rule,<sup>62</sup> they still far exceed the 2% discount rate utilized by the Second Circuit, the only alternate forum

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54. *See id.*

55. *See id.*

56. *See id.*

57. *See* 67 Fed. Reg. at 11,233, 11,238 (Mar. 13, 2002) (to be codified as amended at 28 C.F.R. § 104 (2002)).

58. *See* U.S. DEP'T OF JUSTICE, *supra* note 48.

59. *See id.*; 67 Fed. Reg. at 11,238-39.

60. *See* U.S. DEP'T OF JUSTICE, *supra* note 48. 4.2% applies to victims age thirty-five and under, 3.9% to victims thirty-six through fifty-four and 3.4% to victims fifty-five and over.

61. *See* U.S. DEP'T OF JUSTICE, *supra* note 48.

62. The Interim Final Rule's presumptive award calculations are no longer available on the Department of Justice website.

available to these claimants.<sup>63</sup> Again, one must question why the Special Master has deliberately ignored Second Circuit law on this issue and used discount rate numbers detrimental to the families.

#### IV. NONECONOMIC LOSS

Unlike the Act's provisions for economic losses, claimants' noneconomic losses are not governed by state law. Instead, the Act quite specifically provides for the availability of noneconomic losses, setting forth a laundry list of the types of noneconomic losses available, including: physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, and loss of consortium, among others.<sup>64</sup> These are elements of damage that in the tort system would warrant awards in the millions. Unlike the Act, the Fund's regulations provide for a flat-rate noneconomic loss award, \$250,000 per victim, with an additional \$100,000 award for the victim's surviving spouse and each dependent child.<sup>65</sup> Again, this noneconomic compensation figure is called a mere "presumption," but the Special Master's repeated comments about his reluctance to "play Solomon" and distinguish among victims by placing a value on each life on an ad hoc basis indicate that there is little chance that a claimant will successfully overcome this "presumption" and prove noneconomic losses greater than this amount.<sup>66</sup> It should be noted that there is no presumed noneconomic damage figure for injured victims because there, each victim's injury is deemed "unique."<sup>67</sup>

The basis for the \$250,000 figure is the death benefit paid to the families of public safety officers and military personnel killed in the line of duty.<sup>68</sup> The relevance of this figure to the measure of elements of noneconomic damages as delineated in the Act has escaped the Fund's detractors. But again, the Special Master insists that the figure

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63. See *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980). Recall that the Southern District of New York is given exclusive jurisdiction over any lawsuit commenced as a result of the terrorist attacks. See September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230, 241 (codified as amended at 49 U.S.C.A. § 40101 (West 2003)).

64. § 402(7), 115 Stat. at 237.

65. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,239 (Mar. 13, 2002) (codified as amended at 28 C.F.R. § 104 (2002)). The Interim Final Rule awarded only \$50,000 per spouse and child, but in response to absolute outrage from victims' families, the Final Rule has doubled that amount.

66. See *id.*

67. See U.S. DEP'T OF JUSTICE, *supra* note 37.

68. See 67 Fed. Reg. at 11,239 (citing 38 U.S.C.A. § 1967 (West 2003) & 42 U.S.C.A. § 3796 (West 2003)).

is only a presumption and is certainly not a cap.<sup>69</sup> Using the federal uniformed services death benefit as a starting point for the valuation of noneconomic loss in an aviation disaster seems questionable when there is relevant case law available as a guideline for the valuation of the delineated elements of noneconomic damages.<sup>70</sup>

With respect to the \$100,000 award per spouse and dependent, the Final Rule modifies the definition of “dependent” to include those who fit the Internal Revenue Service definition of dependent, regardless of whether that individual was claimed on the victim’s most recent federal tax return.<sup>71</sup>

## V. COLLATERAL SOURCE

Clearly the most controversial aspect of the program, and the most damaging to potential claimants, is the requirement of collateral sources offsets. The Fund is touted as an unprecedented demonstration of support and generosity by the American people—and yet it gives with one hand and takes away with the other. The Act does not define collateral sources, but instead, provides examples, such as life insurance, pension funds, death benefit programs, and payments by federal, state, or local governments, related to the terrorist-related aircraft crashes of September 11th.<sup>72</sup> It is in this aspect that recovery under the Fund differs most dramatically from potential recovery in litigation. This is also the most highly debated aspect of the program.<sup>73</sup>

In response to criticism of the collateral source deductions, the Special Master in his Final Regulations relied on the language of the Act to justify the deduction of collateral sources of compensation from an award made under the Fund.<sup>74</sup> The bulk of the criticism is related to the deduction of life insurance proceeds and pension benefits because, in many cases, the value of these two benefits would be greater than the value of the “presumed awards” published. Like the Act, the Fi-

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69. *See id.*

70. *See, e.g.,* *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 18-19 (2d Cir. 1996) (discussing in detail the loss of society awards made by juries in the Lockerbie cases, arising out of the terrorist bombing of Pan Am Flight 103, before affirming an award of \$5 million for loss of society).

71. *See* 67 Fed. Reg. at 11,239.

72. September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42 § 402(4), 115 Stat. 230, 237 (codified as amended at 49 U.S.C.A. § 40101 (West 2003)).

73. 67 Fed. Reg. at 11,239 (discussing the public comments received from both sides of the debate, those calling the deductions a penalty to the fiscally responsible and those who praised the deductions as ensuring that claimants are not unjustly enriched).

74. 67 Fed. Reg. at 11,239 (emphasizing that Congress required that such deductions be made).



nal Rule does not define “collateral source,” but rather refers to examples of what will and will not be deducted from awards made under the Fund and clarifies how deductions will be made.<sup>75</sup> The six most important collateral sources discussed are: tax benefits under the Victims of Terrorism Tax Relief Act of 2001, life insurance, Social Security, workers’ compensation, pension benefits, and charitable donations.<sup>76</sup>

In addition to passing the Act that created the September 11th Victim Compensation Fund of 2001, Congress also passed a statute that would relieve the tax liability of victims and their estates for the years 2000 and 2001.<sup>77</sup> The law ensures a minimum tax relief benefit of \$10,000 to the victims’ families.<sup>78</sup> So as not to undermine the benefit the tax legislation provides, the Final Rule states that this tax benefit will not be treated as a collateral source.<sup>79</sup> The Rule does, however, allow the Special Master to consider this tax benefit in the context of a hearing in order to determine “financial need.”<sup>80</sup> The implications of this final provision are unclear, but many believe that the Special Master will consider any tax relief in calculating an award. Many family groups who are active in these legal issues believe the Special Master will seek to minimize awards despite there being no such mandate in the Act.

Social Security, as a federal government program, clearly falls within the limited definition of collateral source provided in the Act.<sup>81</sup> In the Final Rule, though, the Special Master recognizes that Social Security benefits paid to a spouse are contingent, ceasing if he or she remarries.<sup>82</sup> Because the likelihood of that contingency cannot be determined with reasonable certainty, the Special Master has determined that Social Security and workers’ compensation survivor benefits paid to a spouse will not be deducted.<sup>83</sup> Benefits paid to a victim’s child or children will, however, be deducted, because they can

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75. *See id.* at 11,240 (The section entitled “Definition of Collateral Source Compensation Offset” begins with the statement, “[I]t is not possible to define in advance every possible collateral source deduction . . .”).

76. 67 Fed. Reg. at 11,233-34.

77. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (codified as amended at 26 U.S.C.A. § 692 (West 2003)).

78. *See id.*; 67 Fed. Reg. at 11,241.

79. 67 Fed. Reg. at 11,241.

80. *Id.*

81. *See* September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, § 405(b)(6), 115 Stat. 230, 239; 67 Fed. Reg. at 11,241.

82. *See* 67 Fed. Reg. at 11,241.

83. *See id.*

reasonably be computed.<sup>84</sup> The future benefits will be discounted to present value before being offset, though the Final Rule does not provide a specific rate by which the funds will be reduced.<sup>85</sup> One would assume these benefits would be discounted to present value at the same rate lost future income will be discounted. If one calculates the present value of a toddler's social security and workers' compensation benefits, the value is often two or three hundred thousand dollars. The effect of a Fund that offers \$100,000 to a young child who has lost his or her parent in these attacks, and then offset \$300,000, is to assess a \$200,000 penalty against such a child for the privilege of losing a parent.

Despite the protests of many victims' families, the two most substantial collateral offsets remain in the Final Rule. Any award made under the Fund will still be offset by life insurance and pensions, though the Final Rule reduces those offsets to the extent that they reflect contributions or premium payments made by the victim.<sup>86</sup> This adjustment was in response to the allegations that the Fund punished those victims who had acted responsibly in purchasing life insurance and paying into retirement plans. The Final Rule's concessions, though, are not as generous as they might seem. First, the premiums paid for a life insurance policy are miniscule in relation to the benefit they provide, and second, many, if not most, victims' life insurance policies were provided by the victims' employers. So, to reduce the life insurance offset by this amount is, sadly, not much more than a token gesture. With respect to pensions, the Final Rule's provisions seem to save only victims' defined contribution plans, but only to the extent of the victims' payments into the plans. Any "matching" contributions made by victims' employers will still be offset. The Final Rule also requires that essentially all of a defined benefit pension be offset, as an employee's contribution to such a plan is little or nothing.

In the aftermath of the attacks, the American people displayed overwhelming generosity, donating hundreds of millions of dollars to established and newly formed charities that aided the victims and families of September 11th. Most victims and families have been able to avail themselves of at least some of these funds, which have helped them get through the weeks and months following the attacks, after many lost their household's primary breadwinner. Families of victims

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84. *See id.*

85. *See id.*

86. *See* 67 Fed. Reg. at 11,240-41. The Rule also gives the Special Master the discretion to decline the offset of life insurance proceeds when the proceeds were paid to someone other than a beneficiary of the victim's estate. *See id.*

and individuals who had donated alike decried the offset of these funds, as the effective result of an offset would be that the individuals who donated funds to these families would have donated to the federal government. Many charities even expressed to the Special Master their intention to withhold grants to victims' families until after Fund awards were made, so that offsets would be impossible. Though the Special Master has insisted that he will not deduct as a collateral offset any monies received from charity, the Final Rule states that these types of funds are not collateral sources, but it reserves the right of the Special Master to determine that they are.<sup>87</sup> Again, claimants must wait and see how this provision is utilized when the Special Master actually processes claims, after victims' families have already committed to the fund.

There is an exception, however, to some collateral source offsets. After much highly publicized protest, the Special Master redefined pension and death benefits, but only as applied to the firefighters and police who were killed in the attacks. Neither their line of duty death benefit (similar to employer-provided life insurance), nor their vested pension will be offset. Indeed, the vested pension has been redefined as lost income. This concession made by the Special Master demonstrates quite clearly that he is not bound by the terms of the Act, as both benefits are specifically required to be offset by the Act.<sup>88</sup> While no one begrudges the families of the firefighters and police victims any benefit, it is fair to request that what the Special Master does for one he must do for all. He has not made similar concessions to the civilian families, which has added to the perception of a callous governmental fund.

## VI. CLAIMS EVALUATION AND PAYMENT

Sections 404 and 405 of the Act provide a specific framework for the claims process within which the Special Master was required to develop the evaluation and payment procedure.<sup>89</sup> Among the details addressed in the Act are the requirement of a claim form, the contents of that form, the issues that may be reviewed and determined by the Special Master (including eligibility and amount of loss), and the time frames for processing and payment.<sup>90</sup> The Act ensures the rights of claimants to be represented by an attorney, to present evidence to the

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87. *See id.* at 11,241, 11,246.

88. September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, § 402(4), 115 Stat. 37 (codified as amended at 49 U.S.C.A. § 40101 (West 2003)).

89. *See id.* §§ 404-405, 115 Stat. at 237-40.

90. *See id.* § 405, 115 Stat. at 238-40.

Special Master, and it preserves “any other due process rights determined appropriate by the Special Master.”<sup>91</sup> The Act also mandates that the findings of the Special Master are not subject to judicial review.<sup>92</sup>

Within this framework, Special Master Feinberg has developed a two track system for claims processing. If a claimant chooses Track A, a claims evaluator will determine eligibility and the claimant’s presumed award based upon the documentary evidence supplied, and within forty-five days of the date the claim was deemed filed (the date all required documentation is submitted) the claimant will be informed in writing of the evaluator’s determinations.<sup>93</sup> At that time, the claimant may accept the award and request payment, or request a review before the Special Master or his designee.<sup>94</sup> At this review hearing, the claimant may submit additional evidence of “extraordinary circumstances” indicating that the presumed award does not adequately address the claimant’s losses.<sup>95</sup> This review by the Special Master is the only appeal available and must be completed within 120 days of the claim filing.<sup>96</sup> The result of this hearing is not subject to any further review or appeal. In any event, within twenty days of the final determination, whether the acceptance of the presumed award or completion of the Special Master’s review, payment must be issued.<sup>97</sup>

Should a claimant choose Track B, upon determination of eligibility (within forty-five days of claim filing), the claimant will proceed directly to a hearing with the Special Master or his designee.<sup>98</sup> At this “nonadversarial” hearing, the claimant can produce evidence, by way of documentary evidence and witness testimony, of the “extraordinary circumstances” that demonstrate why the presumptive award amounts do not provide adequate compensation.<sup>99</sup> The claimant can, but need

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91. *Id.* § 405(b)(4)(C), 115 Stat. at 239. The only due process rights that are guaranteed to these claimants are those Kenneth R. Feinberg determines appropriate. How is that for power?

92. *See id.* § 405(b)(3).

93. *See* September 11th Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,278-79 (Dec. 21, 2001) (codified as amended at 28 C.F.R. § 104 (2002)).

94. *See id.*

95. *See id.* There is no indication of the meaning of the term “extraordinary circumstances.” It sounds like it might reflect an insurmountable burden of proof, but the Special Master maintains it does not. *See* 67 Fed. Reg. 11,233, 11,243-44 (Mar. 13, 2002) (codified as amended at 28 C.F.R. § 104 (2002)).

96. *See* § 405(b)(3), 115 Stat. at 239.

97. *See id.* § 406(a), 115 Stat. at 240.

98. *See* 66 Fed. Reg. at 66,279.

99. *See id.* at 66,279-80. Again, the Special Master uses the phrase “extraordinary circumstances” without explanation of what might constitute such an extraordinary circumstance. Additionally, it may be naïve to call the hearing “nonadversarial.” A hearing at which a claimant

not, be represented by counsel at such a hearing.<sup>100</sup> The Interim Final Rule had limited the length of such a hearing to an arbitrary two hours, but the Final Rule dispensed with that provision.<sup>101</sup> There is no appeal or review of the findings made in a Track B hearing.<sup>102</sup>

The Special Master has recognized that it may be unfair to ask claimants to waive all rights to litigation before they have any idea what they might recover within the Fund. In an effort to help claimants make a more informed decision as to whether or not to enter the Fund, the Final Rule provides for a preliminary, non-binding, estimate of recovery within the Fund.<sup>103</sup> Though an actual award may be less than this estimate, the claimants would have had at least a ballpark figure before they committed to the Fund. Many families are trying to take advantage of this provision, scheduling informal sit-downs with the Special Master at which they present evidence that would be part of their official claim and obtain a range within which they might expect to receive their award. While the information obtained at these meetings may be helpful, some widows complain that the Special Master remains clearly unmoved by their devastation, even recoiling at the sight of raw emotion, and often issues awards more than twenty percent less than the figures given during preliminary sit-downs.

## VII. CONCLUSION

In addition to the role that Special Master Feinberg and the September 11th Victim Compensation Fund of 2001 will play in the healing of over three thousand devastated families, this program has the potential to serve as a role model for future governmental compensation schemes and mass tort disaster litigation. The success or failure of the Fund depends as much on fair compensation as it does on validation and compassion. This program must validate the lives of those killed and ease the wounds of those who loved them, rather than merely minimize government spending. In this sense, the Fund is failing. And this government, which failed these victims so horribly on September 11th, owes it to their families not to fail them again here.

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must convince the individual who holds the purse strings that he should pay more than he has made clear he wishes to pay is certainly adversarial.

100. *See id.* at 66,280.

101. *See id.*; September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified as amended at 28 C.F.R. § 104 (2002)).

102. *See* 66 Fed. Reg. at 66,279.

103. 67 Fed. Reg. at 11,234.