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Compensation for 9/11 Health Effects: Hearing  
Before the H. Comm. on the Judiciary, 110th  
Cong., Apr. 1, 2008 (Statement of Kenneth  
Feinberg, Adjunct Prof. of Law, Geo. U. L. Center)

Kenneth R. Feinberg  
*Georgetown University Law Center*

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**Testimony of Kenneth Feinberg**

**Adjunct Professor, Georgetown University Law Center**

**Hearing: How To Improve Regulatory Accounting: Costs, Benefits and Impacts of Federal Regulations**

**April 1, 2008**

**Committee on House Judiciary**

**Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

**Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law**

Mr. Chairman,

My name is Kenneth R. Feinberg, and I served as the Special Master of the Federal September 11th Victim Compensation Fund of 2001. Appointed by the Attorney General of the United States, I was responsible for the design, implementation and administration of the 9/11 Fund. I served in that capacity for 33 months, until the Fund expired by statute on December 22, 2003.

If statistics are any barometer of success, the 9/11 Fund served its purposes in providing an efficient and effective administrative no-fault alternative to tort litigation against alleged domestic tortfeasors. Over \$7 billion in public taxpayer funds was paid to 5,560 eligible claimants. Families of 2,880 victims received \$5,996,261,002.08 in compensation; in addition, 2,680 physical injury victims were paid \$1,053,154,534.56 by the 9/11 Fund. Some 97% of all eligible families who lost a loved one on September 11 voluntarily agreed to enter the 9/11 Fund rather than litigate. The average award for a death claim was \$1,267,880.49; the average award for a physical injury claim was \$392,968.11. And all of this was accomplished with 9/11 Fund administrative and overhead costs of less than 3%. I point with pride to the fact that this was one of the most efficient, streamlined and cost effective government programs in American history.

It was also totally bipartisan. During the thirty-three months that I served as Special Master, I had the complete cooperation of the Department of Justice, Office of Management and Budget, the Administration, and the Congress. I also received unqualified support from various state and local governments, including, particularly, the City of New York and the Department of Defense. All government entities worked at my side to make sure that the 9/11 Fund was a success and that prompt payments were made to all eligible claimants.

I also worked closely with Federal Judge Alvin Hellerstein, who continues to preside over all the federal 9/11 related cases in Manhattan. Judge Hellerstein worked tirelessly with me in coordinating the litigation and the 9/11 Fund claims in an effort to maximize the number of individuals who elected to enter the Fund rather than litigate. I am in his debt for his extraordinary work, then and now, in coming to the aid of families and victims in distress.

When the Program expired, in December of 2003, only 94 lawsuits were filed by families of deceased victims who decided to litigate rather than enter the 9/11 Fund. It is my understanding that almost all of these wrongful death lawsuits have since been settled and that there are currently only a handful of cases still being litigated in federal court in Manhattan.

The same cannot be said for the 9/11 physical injury victims, particularly the responders working after September 11 during rescue and clean-up operations at the World Trade Center. As already indicated, the 9/11 Fund paid over \$1 billion to 2,680 eligible physical injury claimants. The vast majority of these physical injury victims were responders suffering various respiratory ailments at the World Trade Center site in the days, weeks and months following the September 11 attacks. Almost all of these responders were compensated by the Fund for respiratory ailments rather than traumatic physical injuries. The 9/11 Fund eligibility criteria recognized that these respiratory ailments were often latent, that physical manifestations of injury often did not occur until months or years after first exposure to hazardous substances at the World Trade Center. That is why the 9/11 Fund modified its eligibility criteria to permit the valid filing of claims years after the terrorists attacks, when these physical manifestations first appeared and became apparent.

However, as already indicated, the 9/11 Fund expired by statute on December 22, 2003, before thousands of responders, and possibly other individuals exposed to the toxic air at the World Trade Center site, manifested any physical injury. This large group of individuals could not be paid from the 9/11 Fund since there was no longer any Fund to process and pay their claims. Accordingly, they have exercised the alternative option of litigating before Judge Hellerstein. It is estimated that 11,000 responders will file suit by the end of this year, and that as many as an additional 29,000 individuals may yet manifest physical injuries in the next few years. It is anticipated that these affected individuals might file suit as well.

I take no position on the merit of these lawsuits, which involve complex issues of liability, legal immunity of governmental entities, medical causation, and valuation of individual damage claims. But I do believe that these lawsuits should be resolved, that protracted and uncertain litigation is in nobody's interest. That is why the 9/11 Victim Compensation Fund was established by Congress in the first place, a recognition that a prompt and efficient alternative to tort litigation constituted a better way.

It is ironic that these very individuals who have filed lawsuits seeking compensation are the same type of individuals who received payments from the 9/11 Fund; had these thousands of individuals manifested a physical injury before the 9/11 Fund expired, they, too, would have received compensation without litigating. It is perfectly understandable, therefore, why they seek to be treated the same way and in the same manner as their brethren. It is my understanding that their decision to litigate is directly related to the fact that there is no longer a 9/11 Fund to process their physical injury claims.

What should be done to resolve this problem, and the costly and uncertain litigation, and provide prompt compensation to eligible claimants physically injured in the aftermath of the September 11 attacks? I offer two proposals for your consideration, both of them controversial and challenging and neither easy to achieve. But I believe that either of my proposals are preferable to the existing uncertainty and expense associated with the ongoing litigation.

#### I. Renew and Extend the Federal September 11th Victim Compensation Fund

One option would be simply to reenact the law establishing the Federal September 11th Victim Compensation Fund for an additional period of years in order to provide the same public compensation to eligible physical injury claimants. This could be justified on grounds of basic fairness; Congress would simply declare that the same eligibility criteria and compensation should be made available to those currently suffering respiratory injuries who were not paid by the earlier 9/11 Fund solely because they did not manifest a physical injury until after the earlier Fund had expired. Congress could simply reopen the 9/11 Fund to encompass all such claims during a "window" of five years during which time all September 11 related respiratory physical injuries could be evaluated and processed. (medical evidence would need to be considered by Congress in deciding how long this "window" would be open, permitting the filing of such physical injury claims).

But one should not underestimate the philosophical, political, and practical problems associated with reenactment and extension of the 9/11 Fund. First, any attempt to reenact and extend the 9/11 Fund should be initiated with the understanding that there would be no changes in the rules and regulations governing the original Fund, that the new law would simply be a "one line" reaffirmation of the law which established the original 9/11 Fund. This will not be easy. Various interested parties, while championing the reenactment of the 9/11 Fund, have called for statutory modifications and additions, e.g., indemnity protection for contractors at the World Trade Center site; compensation for claimants suffering mental trauma without accompanying physical injury; elimination of the collateral offsets rule which was an integral part of the original Fund; and subsequent Fund payments for eligible claimants who received compensation from the earlier Fund, but whose physical condition has subsequently worsened resulting in a demand for additional compensation. These and other well intentioned requests have all been asserted in

connection with any attempt to reenact and extend the original 9/11 Fund. But I suggest that any attempt to modify the statutory provisions and accompanying regulations of the original Fund will lead to the type of controversy and disagreement that will undercut political consensus and prevent reenactment of the Fund.

Second, even a "one line" extension of the original 9/11 Fund poses fundamental philosophical and political questions of fairness. Why should Congress be reenacting the 9/11 Fund, providing millions in additional public compensation to the physical injury victims of the September 11 attacks, while no such Fund exists at all for the victims of the Oklahoma City bombing, the victims of the African Embassy bombing, the victims of the first World Trade Center attack in 1993 or, for that matter, the victims of the unprecedented disaster associated with Hurricane Katrina? Why should Congress, which has already enacted legislation authorizing over \$7 billion in public compensation to the families of those who died on September 11, or who were physically injured as a result of the attacks, now authorize additional millions or even billions in compensation for the remaining September 11 victims, while failing to do anything similar to the other victims of life's misfortunes? It is a fundamental question posed to our elected officials in a free democratic society. Why some victims but not others? On what basis should such distinctions be made? Are some victims more "worthy" than others?

I have maintained that the original 9/11 Fund was the correct response by the American people to the unprecedented terrorist attacks on September 11, 2001. It was sound public policy, reflecting national solidarity towards the victims and expressing a national sense of compassion not only to the victims, but to the rest of the world. The September 11 statute was an expression of the best in the American character. It could be justified, not from the perspective of the victims, but, rather, from the perspective of the Nation. But whether or not it should be reenacted instead of being considered a unique singular response to an unprecedented national tragedy is a fundamental question better left to the consideration of Congress.

## II. Settlement of the Current and Future Physical Injury Litigation

Even if Congress decides not to extend and reenact the 9/11 Fund, this does not mean that the current litigation should continue. Fortunately, there is a path open for the comprehensive resolution of the litigation, while protecting all defendants against the likelihood of similar future litigation. As I understand it, Congress created a September 11 related captive insurance company for the City of New York and its contractors in an amount approximating \$1 billion. This money is readily available at the present time to resolve the physical injury claims currently pending in federal court against the City of New York, the contractors, and other defendant entities. Two problems have been raised, however, about the availability of these funds and the challenges posed in securing a comprehensive settlement of the litigation.

First, is the obvious question as to whether or not the \$1 billion is sufficient to resolve all of the pending claims? After all, it is noted, the 9/11 Fund paid over \$1 billion in resolving just 2,680 physical injury claims; how can \$1 billion be sufficient to resolve some 11,000 current similar claims? A fair question. But there are answers. Nobody knows how many of the 11,000 pending claims are eligible for compensation, what the eligibility criteria might be, or what the compensation levels should be for valid physical injuries. In addition, how many of the existing plaintiffs are already receiving health related reimbursement? What role will collateral offsets play in any settlement negotiation? Most importantly, it is not clear to me that the \$1 billion is the sole source of compensation in the event that a comprehensive settlement is sought. What about financial contributions over and above the \$1 billion from other defendants and their insurers? If settlement negotiations do commence, to what extent is it possible and likely that all defendants, not just the City of New York and the captive insurer, will contribute settlement proceeds in an effort to secure "total peace" through a comprehensive resolution of the dispute? These are important questions that can only be answered in the context of meaningful settlement negotiations.

Second, creative settlement terms and conditions can be negotiated which might provide additional financial security to eligible claimants over and above immediate compensation. For example, plaintiff attorneys involved in the litigation have been meeting with officials of the insurance industry to determine whether some type of individual insurance policy might be made available to each eligible plaintiff. Premiums would be paid from the captive insurance fund; in return, each eligible plaintiff would receive an insurance policy to be paid by the insurer if and when the individual plaintiff develops a future cancer or some other related illness. This approach, and other similar creative ideas, might be advanced during settlement negotiations to maximize financial protection for plaintiffs while taking advantage of relatively limited settlement dollars.

Third, is the perplexing and legitimate problem of future physical manifestations resulting in additional litigation. I agree with the City of New York and other defendants that it makes little sense to settle all 11,000 current cases only to find that additional lawsuits are filed by future plaintiffs who do not manifest a physical injury until years after a current settlement. But, again, there are answers to this vexing problem which should help ameliorate defendant concerns. For example, it might be possible to set aside a portion of all available settlement proceeds, to be used if and when additional individual physical injury claims are presented for payment. Alternatively, it might be possible for all current eligible plaintiffs to be paid in installments, with additional funds due and owing depending upon the filing rate of future claims; this is exactly what Federal Judge Jack B. Weinstein did in reorganizing the Manville Trust involving individual asbestos claims. A down payment was made, with future payments depending upon the filing rate of subsequent individual asbestos claims. Another idea is to provide some type of claims registry; an eligible individual exposed to toxic fumes at the World Trade Center, but not

yet manifesting any physical injury on the date of the settlement, might receive a modest payment immediately and "register" for participation in the settlement. This potential future plaintiff would immediately receive the available insurance policy in addition to the modest down payment; in return, the individual would surrender all future rights to litigate.

These are just some personal concepts which may be supplemented by other similar creative settlement terms and conditions. Some may work, others may not. What is important is that all interested parties come to the negotiation table with the flexibility, creativity, and determination to secure a comprehensive settlement. This approach is vastly preferable to the ongoing costly and uncertain litigation lottery.

Mr. Chairman, I believe that either of the approaches which are the focus of my testimony today, are better alternatives than the existing litigation currently proceeding in federal court in New York City. Whether Congress decides to reenact the Federal September 11th Victim Compensation Fund, or whether it encourages all interested parties to commence intense negotiations designed to resolve all current and future September 11 related physical injury litigation, I am convinced that the courtroom is not the best place to resolve these disputes. I am prepared to assist the Congress and the parties in any manner requested, and to do so pro bono. What is important is that the litigation be brought to an end and that eligible claimants receive the compensation necessary to move on with their lives as best they can. We do not have the power to change history and prevent the September 11 terrorist attacks. But it is the responsibility of the Congress and the American people to try and bring some degree of financial security to the victims of September 11. I hope I have offered a blueprint and some food for thought to all interested parties.

I thank you for the opportunity to testify here today.