

The Building Blocks of Successful Victim Compensation Programs*

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Thank you very much. I've been eager to come to Ohio State for a number of years, not only to see my old colleague and friend from law school, Professor Stulberg, who is in the audience somewhere, but also to have a chance to participate in a program sponsored by the number one school in the country when it comes to ADR and dispute resolution. So, I really am happy to be here today and meet some of the experts and tomorrow's experts.

The subject really is post-conflict reparations. Now, when you talk about the 9/11 program, you had better not use that word, reparations. The 9/11 program has nothing to do with reparations. The United States government has admitted nothing in terms of responsibility for 9/11. It has admitted responsibility for Japanese internment, and set up a reparations program by federal law. The German government and German industry have admitted responsibility in part for the Holocaust, and have set up reparations programs.

The 9/11 program is not a reparations program. It is a compensation program designed to compensate the victims and their families; not out of guilt, but by assuming the high road of generosity and compassion exhibited by the American people. Or, if you want to take the low road, as consideration for enacting legislation to immunize, in effect, the airlines and the World Trade Center from a flood of lawsuits. Either way, it is not the United States admitting anything.

Now, when we designed the program for 9/11, we had to deal with three issues, three fundamental building blocks that enter into any compensation scheme—any effective one at least. If you remember these three building blocks, you will remember, I think, the foundation of any program designed to compensate post-conflict victims.

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** Mr. Feinberg is an attorney and expert on mediation and alternative dispute resolution. He is currently the Special Master of the federal September 11 Victim Compensation Fund, appointed by the Attorney General of the United States. In this capacity, he has developed and promulgated the Regulations governing the administration of the Fund and is presently administering all aspects of the program, including evaluating applications, determining appropriate compensation, and disseminating awards. He received a B.A. from the University of Massachusetts and a J.D. from the New York University School of Law.

First, what are the substantive criteria that make a claimant eligible? How do you decide who can recover through a no-fault administrative compensation and who cannot? What is the universe of eligible claimants? That is a substantive issue. Now, 85% of that question was decided for me by the Congress of the United States. The Congress, in a very provocative manner, established a special no-fault, no-tax compensation scheme *only* for 9/11 victims. Not for the Oklahoma City victims, not for the African Embassy bombings, not for those killed on the U.S.S. Cole, not even for the families of those who died in the 1993 World Trade Center attack committed by the very same people. No, only 9/11.

Congress also said in the statute the only people eligible for 9/11 compensation are those families who lost a loved one or victims who were physically injured. Post-traumatic stress by itself—mental suffering—was ineligible for compensation. Physical injury is required. Now, the regulations that we promulgated under the Administrative Procedure Act were designed to flesh out what that means by adding some further clarity. On the death side, the regulations spell out eligibility: 2,976 people died on 9/11 on the airplanes, at the Pentagon, and at the World Trade Center.

Note, also, that there is not a word in the statute about *who* can file a claim. Or, I might add, there's not a word in the statute as to who receives the money. If you don't think that's controversial—who gets the money—look at some of these applications: “Mr. Feinberg, make sure that the first spouse doesn't get a dime. The victim hated her brother; make sure the brother doesn't get a nickel. Mr. Feinberg, I'm the biological father of the victim; he was living with a same-sex partner, make sure the same-sex partner gets zero.” Then you get a letter from the same-sex partner: “Dear Mr. Feinberg, I understand the biological father wants the money. Do you know that when I moved in with the same-sex partner 11 years ago, his father disowned the victim?” So this question—eligibility—is very critical. Who's eligible to get the money and who files the claim? That, in any design of any compensation scheme, is a critical substantive issue.

The second critical issue in the design of a post-conflict program concerns the process for filing a claim. Now, this becomes very important. Your civil procedure teachers explained how procedure can determine a just outcome. Absolutely true. Let me give you one example from the 9/11 program. The 9/11 statute says that anybody who files a claim and gets an award has no right to appeal that award. The statute says, whatever the Special Master says you're entitled to, that's it. You cannot have any access to the courts.

Our regulations modify what would be a very harsh outcome. If you tell 9/11 families, “You get an award; that's it, you can't go to court,” every

intuitive bone in my body says, "That won't work. It will never work." There has to be a sense of fairness and openness to the program. Do not underestimate the importance of procedure in the design of these programs. You must give claimants a sense that they are involved in the process. This idea that an award will come on down from on high and you'll take it and like it doesn't sit well with families or with any consumer of a designed program.

This is a whole area that Professors Kriger, Cole, and Stumeyer know about—designing a compensation system, even if it's an administrative one—that has due process protections promoting the perception of fairness. What did we do? The statute says no appeals *to the courts*. We established an administrative appeal, an administrative agency appeal just like you see at the FCC or EPA. If you don't like your award that has been computed and calculated by some green eye-shade person, you have the right to appeal administratively within the program and see the Special Master or his designee. I can personally handle only so many appeals a day. But this second point goes hand and glove with substantive criteria. It's very important. The Special Master or his designee will see any family that wants to visit for any reason; the door is open. If any family wants to come in and get a comfort level about the Fund before deciding whether to participate, we'll do it. Process. Openness. Sunshine. Sunlight. All very important.

Then there's the third area that nobody in this room really cares much about, but it, too, is very important. It's not the subject of a law school seminar the way the first two are, but, believe me, it's very important. And that is, developing the practical mechanics for processing claims. Think about it. You know I cannot personally process 7,000 envelopes. I cannot personally lick stamps and address envelopes. That is not what the Attorney General asked me to do. The Attorney General asked me to design and implement the first two parts of the program and design the third part which is the actual mechanics, *e.g.*, the 1-800 number, the toll-free hotline, the web site, which is fabulous, the mechanism for calculating awards. This is boring detail, but woe be unto the success of the program if envelopes are getting lost, letters are getting misfiled, and the computer is three weeks behind schedule. I did a very sensible thing on this third aspect of the program—I went out and contracted with Pricewaterhouse to do it, and Pricewaterhouse does this on contract to the Department of Justice. And, they've done it extremely well considering that the program really is unprecedented.

Now those three design variables: substantive criteria, due process protections, mechanics, are always important in the design of an ADR facility. I don't care what your program is—it can be a class action where there's a corpus to be distributed to class members under Rule 23; it can be

an international holocaust compensation fund designed to compensate the families and the next generation of those murdered in World War II. It doesn't matter. It can also be a compensation scheme for Iraqi victims. All such programs have to deal with these three elements, assuming we're talking about compensation or it's equivalent.

Now, in the 9/11 Fund, we designed such a successful system. The statistics speak for themselves. On the death side, there were 2,976 people who lost their lives as a result of the 9/11 attacks; ninety-seven percent of the surviving families entered the Fund. And, as you know from experience and study, a third of them signed up the last thirty days of the deadline. That's the way it is. Senator Leahy said to me: "Ken, shouldn't we extend the program?" This was three months ago. Extend the program? You extend the program and the procrastinators will wait until the new deadline of the extension. That's human nature, that's the way it works. No, don't extend the program. Well, what if some people miss the deadline? Then extend the program after the fact.

All but about seventy people came into the Fund; sixty of them are suing instead of coming into the Fund. Sixty lawsuits against the airlines. The program worked. Then there are about thirty people who did nothing; they didn't sue and also missed the deadline. They decided to do nothing. Grief—some people can't get out of bed, paralyzed with grief. We tried to reach all those people and reached most of them. Fear—there are a few people who I think were afraid to apply to the Fund because they were undocumented worker families and were afraid they would be deported. I tried to explain to them that we have a ruling from the INS and from the Attorney General that you will not be sanctioned. There will be no sanction if you apply to this program. And most of them did apply. There were also a couple of people that probably didn't want us to look at their tax returns. I would say, "Look, we're looking at the tax returns just to calculate economic loss; we're not going to give the IRS anything." But I think a few people probably didn't want us to look at their tax returns.

But almost everyone came into the Fund. And why wouldn't they come into the Fund, other than for those reasons. The average death award under this program is \$1.8 million, tax free. I am intrigued when people say to me this is a precedent for other torts. It is? This is not a precedent. Sure, you could solve every tort, every mass tort, with a 9/11 type program. Just give every victim \$1.8 million of the taxpayers' money, tax free. There won't be any mass torts. But, I think that's highly unlikely that the way we solve torts in this country is to have the taxpayer pay \$1.8 million on average. So, I don't think this is much of a precedent for tort reform.

Well, reformers might say, “Let’s adopt the structure for tort reform. Let’s develop a no-fault alternative to the tort system. That’s unique.” It is? There have been workers’ compensation programs for over 100 years that are an alternative to the tort system. There’s been a federal employee liability law on the books since 1936 that’s an alternative to the tort system. There’s a federal black lung program that’s been on the books since the late sixties that compensates victims of coal mines in West Virginia that’s an alternative to the tort system. The beauty is in the details and the devil is in the details—the details that make up the program.

The 9/11 Fund is a fascinating experiment. I think it’s unlikely to be replicated in its details, but it raises a host of fascinating political, social, and philosophic issues. But, if you want to hear about these philosophic issues, you’re going to have to come to lunch.

