

THE SEPTEMBER 11 VICTIM COMPENSATION FUND: LEGISLATIVE JUSTICE SUI GENERIS

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On September 22, 2001, after only two hours of debate and less than two days of hearings, both the House and the Senate passed the Air Transportation Safety and System Stabilization Act (“ATSSSA” or “Act”).¹ The Act was introduced on September 14, 2001, as an immediate legislative solution to what seemed to be the imminent liquidation of the airline industry.² Three days earlier, the Federal Aviation Agency (“FAA”) had grounded all airplanes and closed down the airspace above the United States for over twenty-four hours in response to the attacks on the World Trade Center (“WTC”) and the Pentagon.³ The bill was stymied in House debate on the fourteenth⁴ and taken up in hearings when Congress reassembled on Wednesday the nineteenth. On Thursday night, September 20, ranking members of the Senate Judiciary Committee added a last-minute Victim Compensation Fund⁵ (“VCF” or “Fund”) to the Act.

The overarching purpose of the VCF is to provide victims with a no-fault alternative to tort litigation⁶ through “compensation to any individual (or relatives of a deceased individual) who was physi-

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1. See Air Transportation Safety and System Stabilization Act of 2001 Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. §§ 40101, 44302-44306).

2. See 147 CONG. REC. H5684-85 (daily ed. Sept. 14, 2001).

3. Rick Brooks, *A Day of Terror: Air-Cargo Systems Face Logjam Following Halt of Airline Traffic*, WALL ST. J., Sept. 12, 2001, at A3.

4. See 147 CONG. REC. H5684, H5690, H5691 (daily ed. Sept. 14, 2001).

5. See Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 401, 115 Stat. 230, 237 (2001).

6. See September 11 Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,275 (Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104) [hereinafter Interim Rules].

cally injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.”⁷ In order to receive compensation, however, victims are required to waive all rights to file a civil action in any court for damages sustained as a result of the September 11 attacks.⁸ As an alternative for those who choose not to participate in the Fund, the Act establishes an exclusive cause of action for all claims “arising out of the hijacking and subsequent crashes” of September 11, limiting potential plaintiffs to exclusive federal jurisdiction in the Southern District of New York.⁹ Additionally, the cause of action provision mandates the application of the substantive law of the state in which the crash associated with the victim occurred.¹⁰ Importantly, Title IV of the Act also establishes a liability cap on behalf of the airline industry, limiting any tort recovery against the airlines for damages sustained as a result of the events of September 11 to the maximum level of insurance coverage held by the airlines before the disaster.¹¹ The amount of the insurance policies held by American and United Airlines for such terrorist-related incidents is estimated to be approximately \$1.5 billion per plane, resulting in a total of \$6 billion in accessible funds for those seeking remedies against the airlines in tort.¹²

This groundbreaking foray into federal tort compensation is unique both legally and within the context of the federal administrative system. Although legislative analogs exist in the areas of no-fault limited liability caps,¹³ administrative compensation, and relief

7. See Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237 (2001).

8. *Id.* § 405(c)(3)(B)(i)-(ii).

9. *Id.* § 408(b)(1), (3).

10. *Id.* § 408(b)(2).

11. *Id.* § 408(a).

12. Interview with Kenneth Feinberg, Special Master, September 11 Victim Compensation Fund, in New York, N.Y. (March 2002); see also Christopher Oster, *Questions of Security: Property Claims Linked to Attacks to Hit \$16.6 Billion*, WALL ST. J., Nov. 5, 2001, at A14 (reporting the total insurance liability stemming from September 11 at somewhere between \$40 billion and \$70 billion, including the \$5 billion to \$9 billion in airline liability). The insurance policies held by the airlines are also a source for business interruption and business coverage claims against the airlines in addition to claims filed by victims of the airline crashes. Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 408(a), 115 Stat. 230, 240 (2001) (“[L]iability for all claims . . . arising from . . . September 11, 2001 against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.”).

13. See Black Lung Benefits Act of 1969, 30 U.S.C. § 901 (2000); National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (1976) (codified in scattered sections of 42 U.S.C.); Clean Water Act of 1977, 33 U.S.C. § 1251 (1977); SuperFund Amendments and Reauthorization Act of 1986, Pub. L.

to victims of terrorism,¹⁴ Congress has never before established this type of direct compensation to victims of a national disaster or any other type of mass tort. Congress has never before offered compensation contingent upon complete abdication of the right to sue in a court of law. Most importantly, Congress has never before done this in conjunction with a retroactive liability cap limiting victims' tort recovery as well as a jurisdictional limitation on both the location and the type of court in which a plaintiff may sue.

This article will argue that although the motives for the Victim Compensation Fund may be commendable and its foundations loosely traceable, the means by which Congress attempted to deal with the myriad legal issues surrounding the victims of September 11 may be constitutionally flawed. It is unfortunately clear that the twenty-first century brings with it new and challenging situations of mass disaster inevitably requiring a "two-track" approach that integrates administrative measures and judicial procedures.¹⁵ However, the integration must not be made hastily and must constantly balance the benefits of efficiency with the constitutional requirements of individual justice. In the case of the ATSSSA, the legislative limitations placed on the cause of action in tort created pressure to fully integrate traditional elements of tort litigation into the hastily drawn administrative compensation scheme.¹⁶

Part I of this article will present an analysis of how the Fund operates, from its statutory foundation to the rules governing its administration. It also will address judicial alternatives to the Fund and explain how a victim's claim possibly would proceed. Part II will explore the federal legislative analogs constituting the foundation upon which Congress drew in creating the Fund. This section

No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C.); Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988) (codified in scattered sections of 42 U.S.C.).

14. See Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (1986); Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, For Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act of 1995, Pub. L. No. 104-19, 109 Stat. 194 (1995) [hereinafter Oklahoma Appropriations Act]; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

15. See generally Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947 (2001). Note that the "third-track" of criminal restitution discussed by Weinstein is outside the scope of this paper, although extremely relevant to September 11 in the context of trying criminal defendants, unless, of course, such trials proceed in military tribunals.

16. See *infra*, Part III.

will also explain how the VCF differs from other legislative attempts to deal with liability limitations and victim compensation and why these differences may be problematic. Part III will discuss potential constitutional problems with the ATSSSA and the VCF. Finally, Part IV will argue that although the Fund recognizes the necessity of coordinating administrative and judicial processes in the wake of mass disasters, this particular hybrid is flawed. Instead, a more integrated federal two-track solution is suggested.

I. THE SEPTEMBER 11 VICTIM COMPENSATION FUND

A. *Terms of the Deal*

Title IV of the ATSSSA sets up Congress's legislative scheme for compensating victims of September 11 for their loss while also limiting potential liability for the catastrophe. By legislative fiat, the VCF is to be administered by the Attorney General acting through a Special Master¹⁷ who is charged with promulgating all procedural and substantive rules for the administration of the statute.¹⁸ On November 26, 2001, Attorney General John Ashcroft appointed prominent mediator Kenneth R. Feinberg as Special Master of the Fund.¹⁹ Under statutory command, Feinberg was required to have the first set of "interim final rules" governing the fund promulgated by December 21, 2001 (within 90 days of enactment), after notice of such promulgation was made and comments were invited and received from the public.²⁰ In the Advance Notice of Rulemaking, the Department of Justice ("DOJ") explained why such quick action was required by the Special Master:

One reason for making the set of regulations to be published in December as comprehensive as possible is the possibility that there are some potential claimants who have already filed or will soon be filing civil actions seeking damages arising out of the September 11 incidents. Section 405(c)(3)(B)(ii) of the Act provides that, if any individual is already a party to a civil

17. Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 404(a), 115 Stat. 230, 247 (2001).

18. *See id.* § 404(a)(2).

19. Kenneth Feinberg is one of the forerunners in third party dispute resolution. He was the Special Master in the Agent Orange proceedings as well as the Powerhouse asbestos consolidations and the DES suits in the late 1990s. Feinberg was administrative assistant to Senator Edward Kennedy on the Senate Judiciary Committee and also served in the U.S. Attorney's Office for New York.

20. *See* Interim Rules, *supra* note 6, at 66,287-88.

action when the regulations enumerated in section 407 are promulgated, the individual cannot submit a compensation claim under this federal program unless he or she withdraws from the legal action within 90 days from the date the rules are promulgated. Without having information about how the compensation program works, such individuals might not be able to assess whether the compensation program is a viable alternative to continuing their litigation.²¹

Accordingly, the Interim rules, released on December 21, came with instructions that they would “have the force and effect of law immediately upon publication.”²²

In releasing the Interim rules, Feinberg declared that their purpose was “[t]o provide fair, predictable and consistent compensation to the victims of September 11 and their families through the life of the program,” and “to do so in an expedited, efficient manner without unnecessary bureaucracy and needless demands on the victims.”²³ As required by statute, the rules specified 1) the forms to be used in submitting claims under the title; 2) the information to be included in such forms; 3) procedures for hearing and presenting evidence; 4) procedures to assist an individual in filing and pursuing claims under the title; and 5) any other matters determined appropriate by the Attorney General.²⁴ Following an additional comment period, the DOJ released the Final Rules (“Rules”)

21. See Notice of Inquiry and Advance Notice of Rulemaking, the September 11 Victim Compensation Fund of 2001, 66 Fed. Reg. 246-66274 (to be codified at 28 C.F.R. pt. 104) (Nov. 5, 2001).

22. See Interim Rules, *supra* note 6, at 66,274.

23. *Id.* Commenting on the benefits of the Fund over traditional tort litigation, Feinberg states:

The regulations highlight a fast track administrative compensation program, eliminating the red tape, time and expense of a traditional lawsuit. . . . To succeed in the courtroom, a victim of the September 11 tragedy, or his or her representative, would be compelled to litigate, probably for many years at excessive cost, and with all the uncertainty of result which is part of the litigation process. Among the hazards of such a court proceeding are: Would liability be demonstrated? Against whom? Would sufficient funds be available to pay in full any resulting tort award? Would the verdict, even if favorable, withstand appellate challenge?

Trade-offs are required in developing Fund procedures that are different than those in the more conventional lawsuit. It is possible to develop an alternative administrative scheme, providing speedy and efficient compensation, which will help bring some closure to the events of September 11.

Id.

24. See Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 407(1)-(5), 115 Stat. 230, 240 (2001).

governing the Fund on March 13, 2002. These Rules altered the interim rules in only a few minor respects.²⁵

Several aspects of the Rules are particularly relevant for the purposes of this paper. First, under the Rules, Feinberg narrowed the eligibility of claimants through statutory interpretation. In order to be eligible, a potential claimant must have been present at one of the sites listed above at the time of the crashes or in their "immediate aftermath." This is interpreted as the twelve hours following the crash, or, with respect to rescue workers, ninety-six hours after the crash.²⁶ "Present at the site" is defined as in the buildings or the aircrafts destroyed by the crashes or "in any area contiguous to the crash sites that the Special Master determines was sufficiently close to the site."²⁷ Additionally, "physical harm" is narrowly defined to include only the most serious injuries and only those treated within several days of the catastrophes, thus ruling out any future latent claims.²⁸

25. See generally September 11 Victim Compensation Fund of 2002, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (to be codified at 28 C.F.R. pt. 104) [hereinafter Final Rules]. Changes included raising the non-economic damages for each dependent child from \$50,000 to \$100,000 (104.44) and extending the "physical injury" duration from 24 hours to 72 hours after the crashes (104.2(c)(1)).

26. See *id.* § 104.2(b).

27. *Id.* § 104.2(e). Note that for the second category, there must have been a "demonstrable risk of physical harm resulting from the impact of the aircraft or any subsequent fire, explosions, or building collapses." *Id.* § 104.2(e)(2).

28. *Id.* § 104.2(c) Physical harm.

1. 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, or within such time period as the Special Master may determine for rescue personnel who did not or could not obtain treatment by a medical professional within 72 hours; and
 - (i) Required hospitalization as an inpatient for at least 24 hours; or
 - (ii) Caused, either temporarily or permanently, partial or total physical disability, incapacity or disfigurement.
2. In every case not involving death, the physical injury must be verified by contemporaneous medical records created by or at the direction of the medical professional that provided medical care.

It seems that this particular provision was created in response to the recommendation by the head of the state Victim Compensation Fund in the Oklahoma City bombings, that such specificity of proof of injury was required in that case to prevent false or frivolous claims and to lessen the burden on the administrators of the fund to sort through circumstantial proof as to validity of injuries and proximate cause issues:

After addressing the eligibility requirements, the Rules deal with the logistics of filing a claim and respond to the Attorney General's mandate that the Fund "help the neediest of victims as quickly as possible"²⁹ by setting up a system for advanced benefits.³⁰ Once a claim is filed, it will be placed on one of two tracks, depending on the claimant's preference: Track A or Track B. The primary difference between the two tracks is that if a claimant proceeds along Track A, his or her award will first be calculated by a Claims Evaluator at which point he or she may request a hearing, whereas on Track B, the claimant proceeds immediately to a hearing in order to determine the amount of the award.³¹ The procedures for

It will be difficult to positively confirm if someone was injured at the WTC and other affected areas. The only way the compensation program was able to do this in OKC was through verification of a visit to the ER. ER records typically show where the victims sustained the injury and can be obtained through hospital medical records. If the Department chooses to consider non-serious injury, the possibility of fraud will be much higher.

29. Memorandum from Oklahoma Crime Victims Compensation Board to Kenneth L. Zwick, Director, U.S. Department of Justice, *available at* <http://www.usdoj.gov/victimcompensation/W000300.html> (Nov. 8, 2001).

Interim Rule, *supra* note 6, at 66,274.

30. Under Feinberg's scheme, a victim can apply for advance benefits in the form of \$50,000 to eligible claimants for death and \$25,000 for eligible personal injury claimants, by filing an eligibility form and indicating on that form that he or she is applying for such benefits. *See* Final Rule, *supra* note 25, § 104.22(a). Upon a finding that the Eligibility Form is "substantially complete" by a Claims Evaluator for such advanced benefits, a claim shall be deemed "filed" for purposes of § 104.22. *See id.* § 104.21(a). Otherwise,

a claim shall be deemed 'filed' for purposes of § 405(b)(3) of the Act [requiring a waiver of civil litigation rights] (providing that the Special Master shall issue a determination no later than 120 days after the date on which a claim is filed) . . . when a Claims Evaluator determines that both the Eligibility Form and either a Personal Injury Compensation Form or a Death Compensation Form are substantially complete.

Id. Also, "a claim shall be deemed submitted for purposes of section 405(c)(3)(B) of the Act when the claim is deemed filed pursuant to § 104.21, regardless of whether any time limits are stayed or tolled." *Id.* § 104.21(d).

31. If the claimant chooses "Track A," his or her eligibility and presumed award shall be determined by a Claims Evaluator, and within forty-five days he or she shall be notified in writing of the eligibility determination, the amount of the presumed award, and the right to request a hearing before the Special Master or his designee. At this point, the claimant may either accept the award and receive payment or request review by the Special Master. Claimants found ineligible may also request a review at this point. *See id.* § 104.31(b)(1). If the claimant chooses "Track B," eligibility shall likewise be determined within forty-five days, but no presumed award will be calculated by the Claims Evaluator. Instead, upon notification of eligibility, the claimant will proceed immediately to a hearing. The claimant can use this hearing to persuade the Special Master to depart from the presump-

review hearings on Track A and *de novo* hearings on Track B are identical.³² In both cases, the Special Master's determinations after the hearings are final and not subject to further review or appeal. Moreover, the Special Master is not required to provide the claimant with any written record of deliberations or an explanation for the final award. He may, however, indicate at his discretion what percentage of the award represents economic rather than non-economic loss.³³

The final portion of the Rules deals with the actual amount to be provided to each claimant. In making this determination, the Act directs the Special Master to consider "the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant," reduced by any collateral source compensation received or to be received by the claimant.³⁴ The Rules specify different methods of calculation for compensation to deceased victims and to those with physical injuries. For deceased victims, the Rules set a compensation floor of \$500,000 for any claim brought on behalf of a victim with a spouse or a dependent and \$300,000 for any claim on behalf of a victim who was single with no dependents.³⁵ The

tive award methodology upon a showing of "extraordinary circumstances not adequately addressed by the presumptive award methodology." There is no review or appeal from this determination. *See id.* § 104.31(b)(2).

32. The claimant may use the hearings to present information or evidence that the "claimant believes is necessary to a full understanding of the claim." The claimant may submit *any* evidence for review, but the hearings are limited in length to a time period determined by the hearing administrator. Evidence may include without limitation: "Factors and variables used in calculating economic loss; the identity of the victim's spouse and dependents; the financial needs of the claimant; facts affecting non-economic loss; and any factual or legal arguments that the claimant contends should affect the award." *Id.* § 104.33(b). Additionally, the claimant may bring in witnesses or experts to supplement his or her claim, on the condition that they are subject to questioning by the Special Master. *Id.* Finally, a claimant "shall be entitled to be represented by an attorney in good standing, but it is not necessary that the claimant be represented by an attorney." *Id.* § 104.33(d).

33. Final Rules, *supra* note 25, § 104.33(g).

34. Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 405(b)(1)(B)(ii), (b)(6), 115 Stat. 230, 238-39 (2001).

35. *See* Final Rules, *supra* note 25, § 104.41. It is important to note that the floor is designated as a combination of funds from the VCF and collateral compensation, so that if someone receives \$500,000 in collateral compensation and he is at the lowest level of the Fund's matrices, he could receive \$0 from the Fund. Additionally, the awards made under the Fund as directed by the statute must be such that recovery for such economic loss is allowed under applicable state law. The Special Master interpreted this to mean that he 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

scheme determines economic losses for decedents by adding up loss of earnings, medical expense loss, replacement services loss, loss due to death/burial costs, and loss of business or employment opportunities.³⁶ Once economic loss is calculated, the non-economic loss for decedents is a flat award of \$250,000 plus an additional \$100,000 for the spouse and each dependent of the victim. Here, Feinberg looked to administrative rather than tort precedent.³⁷ Finally, the economic and non-economic losses are added and then discounted by all collateral source compensation. This includes only those sources specifically outlined in the statute: “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.”³⁸ It does not include any

brought by or on behalf of the victim.” *Id.* § 104.42. This invocation of the traditional tort model of compensatory damages under state law will become relevant later in the discussion of the implications of the collateral compensation clause, a concept specifically rejected by the majority of state tort law when calculating compensatory damages.

36. *See id.* § 104.43. Using a presumptive award methodology, Feinberg released a number of tables with both the interim and final rules that provide a matrix of presumptive awards for victims based on such factors as age, marital status and number of dependents. These various calculations invoke several theories of economies of scale that are also explained in detail on the DOJ website. *See* Explanation of Process for Computing Presumed Economic Loss, *available at* http://www.usdoj.gov/victimcompensation/vc_matrices.pdf (last modified Aug. 27, 2002). Note that the calculations regarding presumed economic losses were changed in the Final Rules as a result of lobbying by victims of families and their representatives to increase compensation. An in-depth discussion of the method of calculating economic damages can be found in the explanation of the Final Rules.

37. *See* Statement of the Special Master, 66 Fed. Reg. 66,279 (Dec. 21, 2001) (stating that the amount for non-economic loss is “roughly equivalent to the amounts received under existing federal programs by public safety officers who are killed while on duty, or members of our military who are killed in the line of duty while serving our nation”) (citing 38 U.S.C. § 1967 (military personnel); 42 U.S.C. § 3796 (Public Safety Officers Benefits Program)). Note that this amount was raised from \$50,000 per spouse and dependent in the Interim Rules. *See* Interim Rules, *supra* note 6.

38. *See* Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 402(4), 115 Stat. 230, 237 (2001). The Final Rules attempted to lessen the amounts of collateral offsets to be deducted by including the following definition:

§ 104.47(a) *Payments that constitute collateral source compensation.* The amount of compensation shall be reduced by all collateral source compensation, including life insurance, pension funds, death benefits programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001. In determining the appropriate collateral source offset for future benefit payments, the Special Master may employ an

charitable gifts or donations.³⁹

Economic losses for claimants who suffered physical harm, rather than death, are handled on a case-by-case basis. These determinations include review of factors such as loss of earnings or other benefits related to employment, disability, total permanent disability, partial disability, medical expense loss, replacement services loss, and loss of business or employment opportunities.⁴⁰ Non-economic determinations for these claimants are similarly ad hoc and are roughly based on the \$250,000 figure used for deceased victims, but may be adjusted based on the extent of the victim's physical harm.⁴¹

The final important interpretation of Title IV in the Rules is the limitation on civil actions.⁴² Taken directly from section 405(3)(B) of the ATSSSA, the Rules mandate that

upon the submission of a claim under the Fund, the claimant waives the right to file a civil action (or 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, except that this limitation does not apply to civil actions to recover collateral source obligations.⁴³

Additionally, potential claimants must withdraw from any action in which they are currently involved within ninety days of enactment of the Rules in order to be eligible to file a claim with the Fund.⁴⁴

appropriate methodology for determining the present value of such future benefits. In determining the appropriate value of offsets for pension funds, life insurance and similar collateral sources, the Special Master may, as appropriate, reduce the amount of offsets to take account of self-contributions made or premiums paid by the victim during his or her lifetime. In determining the appropriate collateral source offset for future benefit payments that are contingent upon one or more future event(s), the Special Master may reduce such offsets to account for the possibility that the future contingencies may or may not occur. In cases where the recipients of collateral source compensation are not beneficiaries of the awards from the Fund, the Special Master shall have discretion to exclude such compensation from the collateral source offset where necessary to prevent beneficiaries from having their awards reduced by collateral compensation that they will not receive.

Final Rules, *supra* note 25, § 104.47(a).

39. Final Rules, *supra* note 25, § 104.47(b).

40. *Id.* § 104.45.

41. *Id.* § 104.46.

42. *Id.* § 104.61.

43. *Id.* § 104.61(a).

44. *Id.* § 104.61(b); *see also* Southern District of New York, Order 02 Civ. 6885 (Sept. 6, 2002) (Hellerstein, J.) (explaining that filing a claim for compensation with the VCF shall preclude any such person from proceeding with a lawsuit against the Port Authority).

B. The Litigation Alternative

Since it is reasonable to assume that some victims will opt out of the Fund, it is important to briefly understand how their civil suits would proceed through the judicial system.⁴⁵ In section 408(b)(1), the Act declares that

[t]here 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. . . . [T]his cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.⁴⁶

As noted earlier, this cause of action is limited by the directive that the airlines shall be liable in such suits only up to the level of insurance policies held prior to September 11, 2001.⁴⁷ While the cause of action initially included only the airlines as defendants, Congress subsequently amended Title IV to extend liability to virtually every other possible defendant to such a suit.⁴⁸ Additionally, the Act establishes that the substantive law governing any federal action will be derived from choice-of-law principles of the state in which the relevant crash occurred,⁴⁹ and that all such actions shall be brought exclusively in the Southern District of New York.⁵⁰

45. As of January 9, 2004, 7230 claims had been filed with the VCF. One thousand four hundred ninety awards have been issued to families of deceased victims, with an average award of \$1.8 million. See http://www.usdoj.gov/victimcompensation/payments_deceased.html (last visited Jan. 12, 2004). The Fund had also issued awards for 428 personal injury claims, with awards ranging from \$500 to \$7.9 million. See http://www.usdoj.gov/victimcompensation/payments_injury.html (last visited Jan. 12, 2004).

46. See Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 408(b)(1), 115 Stat. 230, 240-41 (2001).

47. See *id.* § 408(a).

48. See Aviation and Transportation Security Act, Pub. L. No. 107-71 § 201, 115 Stat. 597 (Nov. 19, 2001) (limiting the liability of Larry Silverstein, the leaseholder of the WTC; the Port Authorities of New York and New Jersey; the owner of the complex; Boeing Company; General Electric Aircraft Engines; and the airport authorities for Logan and Dulles); see also John H. Haley, *The Airline Industry and Insurance after September 11*, 16 AIR & SPACE LAW 1, 12 (2002) (giving a breakdown of the total insurance money available from all of these sources compared to the total amount of liability that might be brought to bear against the policies).

49. See Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 408(b)(2), 115 Stat. 230, 241 (2001).

50. *Id.* § 408(b)(3). Congress's motivation for imposing the jurisdictional limitation is unclear. It may have considered the fact that the majority of past claims against international terrorists have been brought in the Southern District of New York or that the majority of suits likely would arise from the attacks in New York rather than those in Pennsylvania or Virginia. As of November 5, 2003, the

As of March 26, 2003, ninety-six plaintiff representatives of those killed on September 11 had filed lawsuits against United and American Airlines.⁵¹ It is important to note that Title IV of the ATSSSA contains a subrogation clause that authorizes the Federal government to seek restitution for any payments made through the Fund from parties later held to be responsible for the disasters, including the airlines. However, the government will only be able to claim such restitution from the airlines if, after all of the private lawsuits, there is any money left over from the \$6 billion for which the airlines were insured.

II.

FOUNDATIONS OF LEGISLATIVE INTERVENTION: NO-FAULT LIABILITY LIMITATIONS, ADMINISTRATIVE COMPENSATION, AND TERRORISM

In order to appreciate the unique nature of the ATSSSA, it is instructive to look at analogous legislation that served as the foundation upon which Congress drew in formulating the statute, primarily the combination of liability caps and administrative compensation schemes as well as aid to terrorism victims both domestically and abroad. In the area of liability limitation, the format of the ATSSSA is not new; Congress has combined such a cap with an administrative compensation scheme on previous occasions.⁵²

death toll (those missing and presumed dead) from the air craft crashes on September 11 was 2752 at the World Trade Center, including 175 on the two airplanes, 184 at the Pentagon, including 59 on flight 175, and 40 aboard Flight 93 which crashed in Shanksville, Pennsylvania. The potentially eligible number of deceased claimants therefore totals 2981. See Dan Barry, *About New York: A New Account of September 11 Loss, With 40 Fewer Souls to Mourn*, N.Y. TIMES, Oct. 29, 2003, at A1; <http://www.cnn.com/2002/US/08/22/911.toll> (last visited Nov. 5, 2003).

51. Interview with Kenneth Feinberg, Special Master, September 11 Victim Compensation Fund, in New York, NY (Mar. 26, 2003); Phil Hirschhorn, *Sept. 11 widow sues United Airlines*, at <http://www.cnn.com/2001/LAW/12/20/wtc.united.lawsuit/index.html>. (Dec. 20, 2001). Approximately seventy of the claims filed by those injured or by representatives of those killed have been consolidated before Judge Hellerstein in the Southern District of New York. See *In re September 11 Litig.*, 280 F. Supp. 2d 279 (S.D.N.Y. Sept. 9, 2003). The Second Circuit Court of Appeals upheld the dismissal of an abuse of discretion claim filed against Special Master Feinberg, Attorney General John Ashcroft, and the Department of Justice. See *Schneider v. Feinberg*, No. 03-6124, 03-6130, 2003 WL 22220520 (2nd Cir. Sept. 26, 2003).

52. The quintessential prototypes for this idea are, of course, state workers' compensation laws or no-fault automobile insurance plans. While state no-fault compensation schemes in both of these areas as well as no-fault divorce laws might provide an interesting contribution to this discussion, because the ATSSSA is a federal no-fault program this paper will focus instead on previous federal no-fault

However, in analyzing previous statutory schemes, several distinctions emerge that make the ATSSSA unprecedented in several regards. Primary among these differences are the retroactive rather than prospective nature of the liability cap, the nature of potential airline liability, and the comparative relationship of the federal government to the airlines warranting federal legislative protection. With regard to responses to terrorism, suffice it to say that the VCF is an entirely new federal precedent. Differences from previous terrorism response legislation include the direct compensation to individuals rather than appropriations to state and local governments and the required forfeiture of the right to sue in tort in order to receive federal aid.

A. No Fault Liability Caps and Administrative Compensation

Congress has chosen to step in and limit the liability of corporate actors on a federal level in several instances in the past. Generally, such action appears warranted when government legislation and an industry's liability are sufficiently related.⁵³ For example, the expansion of federal environmental and health regulation in the 1970s and 1980s created congressional concern for industries that might be hit with multitudes of litigation for potentially negligent behavior or ex post failure to conform to these regulations. To lessen the burden of these regulations on potentially negligent, high-risk defendants, Congress imposed no-fault liability caps on

schemes. As an aside, state workers' compensation laws might actually play a role in the distribution of funds, since they would be considered a collateral compensation offset as defined by the statute.

53. These types of no-fault tort liability and workers' compensation schemes differ from other mass exposure scenarios where Congress has refused to intervene, despite repeated calls from the judiciary, because Congress plays no role in mandating the negligent behavior. Asbestos is a prime example: after twenty-five years of clogging litigation and failed settlements, 95% of asbestos manufacturers are now in bankruptcy and entire collateral industries are defunct. When Congress did take notice of the medical and judicial crisis, it was only with benign legislation requiring the removal of asbestos from all public schools, or providing additional information about asbestos to the public. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628–29 (1997); see also Asbestos School Hazard Abatement Act of 1984, Pub. L. 98-377, 98 Stat. 1287 (1984); Asbestos Information Act of 1988, 15 U.S.C. § 2607 (1988). Note that mass exposure or “toxic torts” such as asbestos differ in many respects from a “traumatic” mass tort like that of September 11, where one incident generates multiple, immediate injuries.

suits arising from legislation such as workers' compensation laws,⁵⁴ mandatory vaccinations,⁵⁵ and environmental regulations.⁵⁶

With the Black Lung Benefits Act of 1969, Congress applied burgeoning notions of federal no-fault workers' compensation schemes intended to protect employers from multiple personal injury suits⁵⁷ to a mass exposure toxic tort scenario.⁵⁸ The Black Lung Disability Trust Fund was established to reimburse claims for damages due to the onset of pneumoconiosis in similarly situated coal miners in an efficient and equitable manner.⁵⁹ Like other workers' compensation schemes, the purposes were to protect the coffers of the important coal industry and to treat work-related injuries equitably, while also protecting the nation's vital energy supply. Because workers assumed the risk of exposure to dangerous toxins on-site and had the option of opting-in to the plan through continued employment, they could seek compensation from the trust fund only by waiving the right to bring suit for damages in court.⁶⁰ In return, the coal companies had to carry the requisite workers' compensation insurance, the premiums on which helped contribute to the federal fund.⁶¹ This scheme is an example of the traditional federal no-fault administrative "compensation in equity" model, in which compensation was invariable within a certain matrix of predetermined valuation.

54. See Black Lung Benefits Act of 1969, 30 U.S.C. § 901 (2000).

55. See National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (1976).

56. See Clean Water Act of 1977, 33 U.S.C. § 1251 (1977); SuperFund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986); Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988).

57. See *generally* Federal Employers' Liability Act, 35 Stat. 65, *amended by* 45 U.S.C. §§ 51-60 (2000).

58. See Black Lung Benefits Act of 1969, 30 U.S.C. § 901(a) (2000).

Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents.

59. See *id.*

60. See *id.* §§ 910(a), 933, 941-42; see also Black Lung Disability Trust Fund, 26 U.S.C. § 9501 (1981).

61. See Black Lung Disability Trust Fund, § 9501(a), (b); see also Black Lung Benefits Revenue Act of 1981, 30 U.S.C. § 934(a) (2000).

In 1976, the nation faced a flu epidemic that threatened to take on the proportions of the epidemics of 1957 and 1918.⁶² In order to prevent such a crisis, Congress passed the preventative Swine Flu Immunization Program, establishing a swift and coordinated federally funded vaccination effort throughout the country. In order to execute the program, Congress needed to ensure participation from the manufacturers, distributors, public and private agencies, and medical and health personnel who were necessary to administer the vaccinations.⁶³ Because of concern over the vaccination's possible side effects, Congress included a preemptive liability cap on all those participating with regard to any civil actions for negligence or wrongful death that might arise from the program.⁶⁴ In addition, the federal government took on vicarious liability for any and all participants in the program.⁶⁵ The cause of action against the government supplanted any other possible action by the victim against program participants, and any damages awarded in such a suit were final.⁶⁶ This system is a typical example of government indemnification in tort without additional compensation to victims outside of a litigation award.

In the environmental arena, three particular pieces of legislation exemplify liability limitations on corporate defendants whose actions are compelled by increased governmental regulation. The Clean Water Act of 1977⁶⁷ established a liability floor and ceiling for any oil industry participant involved in a negligent oil spill in federal waters.⁶⁸ Similarly, the SuperFund Amendments and Reauthorization Act of 1986,⁶⁹ which amended the Comprehensive

62. See generally ARTHUR M. SILVERSTEIN, *PURE POLITICS AND IMPURE SCIENCE: THE SWINE FLU AFFAIR* (1981). Silverstein notes that estimations far exceeded actualities. This quick and overbroad legislative response was a gamble that resulted in false positives.

63. See National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, § 2(k)(1)(A)(i), 90 Stat. 1113 (1976).

64. See *id.* § 2(k)(1)(A)(ii).

65. See *id.* § 2(k)(2)(A) ("The United States shall be liable with respect to claims submitted after September 30, 1976 for personal injury or death arising out of the administration of swine flu vaccine under the swine flu program and based upon the act or omission of a program participant in the same manner and to the same extent as the United States would be liable in any other action brought against it . . .").

66. *Id.* § 2(k)(3).

67. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

68. *Id.* § 58(a)(8) ("Any owner, operator, or person in charge of any vessel . . . from which oil or a hazardous substance is discharged . . .").

69. SuperFund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

Environmental Response, Compensation, and Liability Act of 1980,⁷⁰ eliminated the liability of any agency responding to a federally ordered environmental response in times of emergency.⁷¹ Under the doctrine of sovereign immunity, the Act also absolved from liability any agency acting at the request of the government.⁷² The Price-Anderson Amendments Act of 1988⁷³ (hereinafter “the Price Anderson Act”) amended the Atomic Energy Act of 1954⁷⁴ to further protect private nuclear power plants created by federal statute from liability in the event of a nuclear incident.⁷⁵ The amendments indemnify the plants up to a specific level,⁷⁶ and provide additional guidance for exigent circumstances should the damages from a particular incident exceed the liability cap.⁷⁷

The liability-limiting scheme most similar to the ATSSSA is the 1929 Warsaw Convention clause limiting international air carrier liability in cases of international aviation disasters.⁷⁸ This clause capped air carrier liability at \$75,000 for each person killed or injured as a result of an airline disaster.⁷⁹ Although this scheme is analogous to the ATSSSA in that it limited air carrier liability, it did so prospectively, giving both air carriers and potential passengers

70. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 (2000).

71. SuperFund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

72. *See id.*

73. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988).

74. Atomic Energy Act of 1954, 42 U.S.C. § 2210 (1982).

75. After abandoning attempts at a governmental monopoly over nuclear power, the Atomic Energy Act of 1954 provided for the licensing of private operation of nuclear power reactors under the strict supervision of the Atomic Energy Commission. *See* Atomic Energy Act of 1954, 68 Stat. 919, *as amended*, 42 U.S.C. §§ 2011–2281 (1970); *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59, 63 (1978).

76. *See* Atomic Energy Act § 2210(e)(2); *Duke Power Co.*, 438 U.S. at 64–65 (“In its original form the Act limited the aggregate liability for a single nuclear incident to \$500 million plus the amount of liability insurance available on the private market—some \$60 million in 1957.”).

77. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 6(e)(C)(ii)(2), 102 Stat. 1066 (1988). Specifically the Act directs that in such a case, Congress will “take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.”

78. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. § 1502 (1988).

79. *See id.* ch. III, art. 22.

notice of future limits on recovery. Additionally, the Warsaw Convention left open an unconstrained tort action against the airlines, albeit with a slightly higher burden of proof on the plaintiffs as a trade-off for keeping the airlines out of bankruptcy in cases of international disaster.⁸⁰

There are five crucial distinctions between the no-fault schemes detailed above and the one created by Congress to handle the damages arising from September 11, each of these distinctions indicating a potential problem with the ATSSSA. First, all of the previous liability caps were prospective rather than retroactive, monitoring liability for ongoing activity in the future rather than for a past event. For example, the Black Lung Fund was set up to handle prospective claims from workers' on-going exposure to dangerous chemicals.⁸¹ The ATSSSA on the other hand is retroactive, limiting liability for claims that stem from a single event in the past. Because the prospective caps involved in the Black Lung Fund and other schemes served as notice to potential victims, their reliance interest in invoking a previously unfettered right remained unharmed. The reliance interests of the September 11 victims will be discussed in Part III.A.

The second distinction between the previous liability-limiting statutes and the ATSSSA is that the previous schemes all involved identifiable potential defendants whose liability was unquestionable. In comparison, when drafting the ATSSSA, Congress initially limited only the liability of the airlines but then scrambled to extend the cap to other industries for fear of displaced liability.⁸² It is still not clear whether liability can or will be proven against any of these defendants.⁸³

80. The Pan Am crash over Lockerbie demonstrates how this liability cap still feeds directly into the American tort system. If plaintiffs can prove "willful misconduct" on the part of the airline, they can receive unlimited compensatory and punitive damages from a jury. With the Lockerbie disaster, plaintiffs were able to prove this on several issues, and the consolidated damages trials in the Eastern District of New York resulted in substantially higher awards for victims' families than they would have received under the Convention. *See id.* ch. III, art. 25; *see also In re Air Disaster at Lockerbie, Scot.*, 811 F. Supp. 84 (E.D.N.Y. 1992).

81. *See* Black Lung Benefits Act of 1969, 30 U.S.C. § 901 (2000).

82. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71 § 201, 115 Stat. 597 (Nov. 19, 2001) (limiting the liability of Larry Silverstein, the leaseholder of the World Trade Center; the Port Authorities of New York and New Jersey; the owner of the complex; Boeing Company; General Electric Aircraft Engines; and airport authorities for Logan and Dulles).

83. Not only were the defendants identifiable in the other instances, but in each scenario the Government had an interest in protecting the relationship between the plaintiffs and defendants, particularly when the defendant was acting at

A third distinction between earlier no-fault schemes and the ATSSSA is that while earlier schemes recognized the fault or liability of corporate actors, the federal government had either required or motivated the action leading to such liability in an effort to benefit the general public. Essentially, citizens paid for industry protection through limited liability but also benefited from the scheme through the protective regulations imposed. Thus, Congress limited liability in exchange for cleaner water,⁸⁴ better immunization programs,⁸⁵ continued energy from coal production,⁸⁶ and increased protection from hazardous nuclear incidents.⁸⁷ In the case of ATSSSA, while citizens are paying for airline protection through the liability caps and the Victim Compensation Fund, it is unclear what benefit they are receiving in return. If the benefit is to prevent the airlines from going bankrupt, one might ask why that goal could not be accomplished by the bail-out portion of the Act alone.⁸⁸ If the benefit is the fair allocation of resources to those who bore the brunt of a national disaster, then one might ask why similar treatment was not extended to the victims of Oklahoma City, the Tanzania Embassy Bombing, or the World Trade Center bombing of 1993.⁸⁹

The fourth distinction between the ATSSSA and its predecessors is that the purpose of the earlier statutes was to limit liability once citizens brought suit, not to dissuade them from bringing suit in the first place. The purpose of the Swine Flu liability cap, for example, was to specify the way in which plaintiff tort claims would

the Government's behest. With the events of September 11, the government's role as arbiter is not yet clear. Additional issues of liability include foreseeability, government immunity of the FAA, and extension of liability to victims on the ground. *But cf.* Opinion and Order Denying Defendant's Motion to Dismiss, In Re September 11 Litigation, 21-MC-97 (S.D.N.Y. Sept. 9, 2003) (allowing litigation against the airlines and multiple other defendants to proceed in spite of these hurdles).

84. *See* Clean Water Act of 1977, 33 U.S.C. § 1251 (1977).

85. *See* National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (1976).

86. *See* Black Lung Benefits Act of 1969, 30 U.S.C. § 901 (2000).

87. *See* SuperFund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

88. Title I of the ATSSSA guarantees loans to the airlines in the amount of \$10 billion and direct compensation for September 11 in the amount of \$5 billion. Title II includes a provision for reimbursement of increased insurance rates as a result of the accidents. *See* Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, §§ 101(a)(1)–(2), 102(b)(1), 115 Stat. 230, 230-31 (2001).

89. *See* Peter H. Schuck, *Equity for All Victims*, N.Y. TIMES, Dec. 19, 2001, at A35.

proceed through the system, not to compensate the victim administratively without any judicial proceeding. While the Swine Flu Act specifically detailed how claims should be processed, administered, and tried within the traditional tort system, it did not limit the jurisdictional choices of potential plaintiffs.⁹⁰ In this and other schemes, Congress simply modified traditional tort procedures to facilitate program participation. In contrast to the Swine Flu Act, the Fund counterpart to the liability cap in the ATSSSA attempts to prevent plaintiffs from suing the airlines by offering immediate low-cost recovery. The Fund's rules and regulations strongly advise victims against filing a lawsuit by emphasizing the liability cap and the judicial delay involved.⁹¹

The final distinction between the ATSSSA and earlier schemes involves the method of calculating damages under the VCF. One of the fundamental problems with the ATSSSA's combination of the liability cap and the VCF is the departure the Fund takes from the administrative no-fault model in equity exemplified by programs like the Black Lung Act. As discussed above, this model provides victims with a fixed amount of compensation based upon a matrix of predetermined valuations. In contrast, the VCF attempts to draw some elements from the traditional tort recovery model into its calculus in an effort to hand-tailor justice for each victim based on his or her net worth.⁹² Congress attempts to justify this complex hybrid scheme by suggesting that more individual tailoring is required for the September 11 victims *because* their alternative to sue essentially has been curtailed.⁹³

B. Terrorism Response Legislation

In addition to no-fault liability caps and administrative compensation schemes, terrorism-response legislation is the final foundation of the ATSSSA. With the advent of modern terrorism, Congress has progressively stepped up efforts to assist victims of both international and domestic terrorism. In most of these scenarios, however, Congress has not compensated victims directly but

90. See National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, § 2(k)(3)–(8), 90 Stat. 1113 (1976).

91. See Interim Rules, *supra* note 6, at 66,274.

92. See Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 402(5), 115 Stat. 230, 237 (2001); see also Explanation of Process for Computing Presumed Economic Loss, *available at* http://www.usdoj.gov/victimcompensation/vc_matrices.pdf (last modified Aug. 27, 2002).

93. See, e.g., 147 CONG. REC. S9599 (daily ed. Sept. 21, 2001) (statement of Sen. Leahy); *cf. id.* at S9602 (statement of Sen. Nickles).

instead has granted funds to the various federal, state, and local administrative agencies responsible for providing victim aid.⁹⁴ In addition to congressional action, the Department of Justice also has facilitated the creation of funds for victims of mass crimes.⁹⁵ However, none of the previous measures taken by Congress or the Justice Department has in any way hindered or replaced the usual civil tort procedure for victims. In fact, prior responses have made it *easier* for victims to sue those responsible; the ATSSSA makes it harder.⁹⁶

After the Iran Hostage Crisis of 1979, it took Congress six years to develop a compensation package for the hostages.⁹⁷ Between 1986 and 1995, Congress made several aborted attempts to pass further antiterrorism legislation but was unsuccessful until 1995.⁹⁸ Following the bombing of the Alfred P. Murrah Federal Building in

94. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Antiterrorism Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, For Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act of 1995, Pub. L. No. 104-19, 109 Stat. 194 (1995).

95. See Responding to Terrorism Victims: Oklahoma City and Beyond, 2000 DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME REP. (Oct. 2000), <http://www.ojp.usdoj.gov/ovc/pdftxt/NCJ183949.pdf>.

96. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

97. Each hostage was entitled to recover \$50 a day for each day he or she was in captivity between November 4, 1979, and January 21, 1981, with a maximum total recovery of \$22,150 in direct compensation. Additionally, Congress included provisions in the Act to pay for the education of captives' dependants, as well as provide compensation for disability and death, discounted by any other collateral compensation for such disability or death, including insurance. See Victims of Terrorism Compensation Act of 1986, 5 U.S.C. §§ 5569(c), (f)(1)(A), 5570(b), (c), (e) (2000). This collateral offset could be one of the earliest foundations for the purely administrative offset components of the VCF. This is one of the aspects of the fund that most specifically diverges from the traditional tort model, in which compensatory damages are awarded above and beyond any additional source of compensation available to the victim. See Christian D. Saine, *Preserving The Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 CASE W. RES. L. REV. 1075, 1076 (1997) (explaining that under tort common law the traditional collateral source rule "provides that 'if an injured person receives compensation for his injuries from a source wholly independent (collateral) of the tort-feasor, the payment should *not* be deducted from the damages which he would otherwise collect from the tort-feasor'" (emphasis added) (quoting BLACK'S LAW DICTIONARY 262 (6th ed. 1990))). The Fund's offset provision also has been its most controversial to date.

98. See, e.g., Aviation Security and Antiterrorism Act of 1996, H.R. 3953, 104th Cong. (1996); Aviation Disaster Family Assistance Act of 1996, H.R. 3923, 104th Cong. (1996). Note also that there were appropriations made for victim relief in 1986 after the Lockerbie crash and again in 1993 after the first WTC bombing.

Oklahoma City, Congress enacted a rather extraordinary appropriation of funds towards the recovery of the city and its victims.⁹⁹ Not only did Congress specifically allocate funds to the recovery efforts, but it was unusually direct in specifying how the funds should be divided among the local, state, and federal agencies involved.¹⁰⁰ In addition to the congressional appropriation of funds, the Justice Department worked directly with an Oklahoma agency to distribute the funds to the victims.¹⁰¹ Despite all of this federal aid, it is important to note that there was no direct federal compensation to the bombing victims other than the funds allocated through the state agency.¹⁰² Moreover, on a *per capita* basis, this level of aid was certainly nowhere near the level of compensatory damages to be awarded by the VCF.¹⁰³

After the Oklahoma City bombing, both the House and Senate made major efforts to pass legislation dealing specifically with victims of terrorism. These efforts began with the passage of the Victims Justice Act of 1995¹⁰⁴ (“VJA” or “VJA of 1995”) in the Senate. Although the VJA never became law, a year later Congress incorporated several of its provisions in enacting the most sweeping federal antiterrorism legislation to date—the Antiterrorism and Effective

99. See generally Oklahoma Appropriations Act, *supra* note 14.

100. U.S. Attorneys were given supplements for overtime salary payments, as was the FBI. Federal courts were given supplements for security when defendants were tried. See *id.* tit. 3, ch. 1. The ATF, Secret Service, and Customs Service were given additional funds to investigate and prevent future similar incidents. The Federal Buildings Fund was given money for cleanup and memorialization of the Alfred P. Murrah Federal Building. See *id.* ch. II. HUD and Community Development Grants were given \$39 million “to assist property and victims damaged and economic revitalization due to the bombing.” *Id.* ch. III. Approximately \$3.5 million went to independent federal, state, and local agencies that deal with federal emergency management to increase “preparedness for mitigating and responding to the consequences of terrorism.” *Id.*

101. See Responding to Terrorism Victims: Oklahoma City and Beyond, 2000 DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME REP. (Oct. 2000), <http://www.ojp.usdoj.gov/ovc/pdftxt/NCJ183949.pdf>.

102. See Crime Victims Compensation Act, OKLA. STAT. tit. 21, § 142.1 (1981).

103. This discrepancy has been raised by several critics of the VCF who ask why similar compensation should not go to victims of Oklahoma City, the U.S.S. Cole, the Embassy Bombings in Africa, or even victims of any natural disaster. See Peter H. Schuck, *Equity for All Victims*, N.Y. TIMES, Dec. 19, 2001, at A35; see also Final Rules, *supra* note 25, at 11,236 (explaining the fact that several comments had been received regarding the inequity of compensation to other groups of terrorism victims).

104. See Victims Justice Act of 1995, S. 1503, 104th Cong. (1995).

Death Penalty Act of 1996 ("AEDPA").¹⁰⁵ The AEDPA included a portion of the VJA that allowed the federal government to provide state grants for the compensation and assistance of victims of both international and domestic terrorism.¹⁰⁶ In addition, the Act made it easier to try accused terrorists in the United States by 1) altering some of the civil and criminal procedural rules surrounding the trials of accused terrorists¹⁰⁷ and 2) giving American courts broader jurisdiction over foreign nation states that support or harbor terrorists in the event that criminal or civil suits are brought against them.¹⁰⁸ Finally, the AEDPA expanded on a portion of the VJA of 1995 that mandated the financial restitution of terrorism victims as a penalty for criminal conviction.¹⁰⁹ In sum, the AEDPA simultaneously opened up three different avenues of compensation to victims of terrorism: compensation from state and local agencies, a broader civil tort action alternative, and restitution through the criminal justice system.

Complementing congressional legislation to aid victims of terrorism, in 1993 the Department of Justice developed the Victims of Crimes Fund to help compensate victims when alternative compensation may be difficult to achieve. In its annual report in October of 2000, the DOJ explained how the federal government has used

105. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending the Victims Justice Act of 1995 and incorporating it in the Title II "Justice for Victims" section).

106. In addressing domestic terrorism, the act directed that federal funds may be granted to state organizations to provide

emergency relief, including crisis response efforts, assistance, training, and technical assistance, for the benefits of victims of terrorist acts or mass violence occurring within the United States and may provide funding to United States Attorney's Offices for use in coordination with State victims compensation and assistance efforts in providing emergency relief.

Id. § 1404B(b).

107. *Id.* tit. IV, VII.

108. *Id.* tit. II(B), § 221.

109. The method of restitution in the AEDPA follows the traditional tort model for calculating compensatory damages for physical injury and death—the same method relied on by Special Master Ken Feinberg and the DOJ in the calculation of economic loss to be compensated through the September 11th Victim Compensation Fund. Most important, like the methodology in tort, restitution is not offset by any collateral compensation received by the victim for property or physical damages from the crime, unless the victim brings a separate civil suit and actually recovers compensatory damages against the criminal defendant, in which case restitution would be discounted accordingly. Moreover, not only is the victim made whole, but any insurers or other collateral sources that might have already paid the victim for his or her loss get restitution from the defendant as well. See *id.* §§ 3663A(b)(2), (3), (4), 3664 (d)(6), (f)(1)(A), (B), (j)(1).

this fund to play a progressively larger role in assisting victims of mass crime.¹¹⁰ Nowhere in this report does the DOJ mention the direct financial compensation of victims.¹¹¹ Instead, the DOJ repeatedly suggests that federal funds should be distributed to state and local agencies that can use the funds to provide support services to victims. For example, agencies may use the funds to provide victims with job training, housing or community planning. Thus, federal relief efforts do not focus on financial compensation but on long- and short-term support for victims' needs.¹¹² From a due process standpoint, this bureaucratic scheme is superior to the September 11 plan as it does not interfere with victims' rights to bring civil actions for compensatory damages, focusing instead on structural support for victims—aid with housing, education and general rebuilding.

III. POTENTIAL CONSTITUTIONAL ISSUES

The fundamental flaw in the ATSSSA is that it forces a sui generis federal administrative compensation scheme to work in tandem with an unprecedented retroactive liability cap. In the rush to save the airlines from bankruptcy and to minimize litigation, the ATSSSA created a number of constitutional and policy concerns.¹¹³

110. In its annual report in October of 2000, the DOJ explained how the federal government was progressively playing a larger part in providing assistance to victims of mass crime:

In recent years, the Federal Government has been called upon to play a larger role in mitigating and responding to all types of human-caused violent events and disasters. The federal responsibility ranges from immediate disaster relief to long term assistance that helps communities to recover from the event. Moreover, because terrorist acts are federal crimes, investigated and prosecuted by federal law enforcement officials, federal criminal justice agencies have statutory responsibilities related to victim's rights and services in connection with terrorism criminal cases.

Responding to Terrorism Victims: Oklahoma City and Beyond, 2000 DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME REP. xi (Oct. 2000), <http://www.ojp.usdoj.gov/ovc/pdftxt/NCJ183949.pdf>.

111. *See id.*

112. *See id.*

113. One could come at the due process issue from several angles, including an analysis of the rule-making procedure and the administrative hearing procedure in light of *Chevron*. This could raise several issues including but not limited to proper procedures for notice, the role of representation and the authority of the Special Master, the opportunity to be heard and the hearing procedure, and comparisons of rules and weight of evidence, or any other due process mechanisms that fall within the purview of the Special Master under the Act.

First, the retroactive liability cap, although not amounting to a government taking, is at least arguably an arbitrary economic regulation that places an undue burden on the plaintiffs' right to sue. Second, because the statute vests jurisdiction exclusively in a federal court for what would predominantly be state causes of action, it is unclear that there is federal-question jurisdiction under section 1331 and Article III of the Constitution—and since the diversity requirements of section 1332 will often not be met, the court may lack subject matter jurisdiction. Third, the choice-of-law clause in the statute directs the Southern District of New York to apply the choice-of-law principles of the various states in which the actions occurred rather than allowing it to look to New York choice-of-law principles as directed by the constitutional limitations established in *Erie Railroad Co. v. Tompkins* and extended in *Klaxon v. Stentor*.¹¹⁴ Fourth, because the Rules and Act explicitly exclude restitution for any future manifestations of latent injury resulting from exposure to toxic substances, future claimants who do not manifest injury until after the two-year statute of limitations on making a claim with the Fund will only have the option of a capped future litigation recovery without notice, which raises a concern about substantive due process. Finally, from a policy perspective, there is concern about the extent to which the ATSSSA's no-fault liability cap and compensation scheme provide a public benefit. It is unclear why the financial burden for limiting the liability of the airlines should fall on taxpayers without even an attempt to show that the airlines were not negligent. In contrast to earlier liability caps, the airlines' liability in this case was not caused by government regulations providing a benefit to the public. Further, it may not be wise for the federal government to establish itself as a general insurer against mass disaster, particularly when there may be parties partially responsible for such damages, or state and private agencies capable of handling localized collateral support not in the form of direct cash awards.

In part, these flaws are an outgrowth of the speed with which the legislation was passed and the lack of due care paid to the details of the Act.¹¹⁵ Although Congress was speculative as to the

114. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938); *Klaxon v. Stentor*, 313 U.S. 487, 496–97 (1941).

115. When first introducing the bill on Friday, September 14, 2001, Representative Oberstar of Minnesota, co-sponsor of the original bill, described the situation as dire:

The events of Tuesday, as the chairman [Rep. Young, chair, House Committee on Transportation] has already expressed, have thrown the airline indus-

amount of actual loss, the majority of its members were convinced that an economic crisis loomed on the horizon. The choice at this point was either to take broad and unprecedented action with potentially heavy burdens, with the risk that no crisis would actually occur, or to do nothing and risk epic damages. The choice was clear on a general level.

On a more specific level, however, the debate over the liability cap and victim compensation fund as mechanisms for avoiding disaster posed a different gamble. It was unclear and remains unclear whether the airlines can be held liable for the events of September 11 and therefore what financial impact plaintiff litigation would

try, as the first line of target of terrorism, into an absolute tailspin. The industry has been shut down. It has no revenue streaming in, it has costs going out. It has to pay its pilots, its flight attendants, its mechanics, baggage handlers, and other personnel. They are under contract to do so. They have no revenue coming in. When air travel does resume, two revenue streams have already been denied the airlines: mail and cargo aboard passenger aircraft. Airlines are collectively losing some \$340 million to \$400 million a day. They have already lost over \$1 billion, and over this weekend will accumulate losses of up to \$5 billion. The industry could be in complete financial liquidation within a week or two.

147 CONG. REC. H5685 (daily ed. Sept. 14, 2001). Congress was on leave from Friday the 14th until Wednesday the 19th, hence the debate past midnight on that first Friday to get this legislation through that night. The other co-sponsor of the bill, Representative Young of Alaska, threatened his fellow Congressmen:

We have an airline industry on the verge of collapse, and if we do not lay down a mark in the sand and say, yes, we are willing, because of action of our government to back up those airline industries to allow some moneys, they will start going down and every other stock will start following it . . . I may be wrong, I hope I am wrong, but if you do not pass this tonight, and Thursday when we have a crash, I hope that those who object to this understand what I am saying because you have created it.

Id. Indeed, the airlines identified several areas for significant aid. See *To Preserve the Continued Viability of the United States Air Transportation System: Hearing on H.R. 2891 Before the House Comm. on Transp. and Infrastructure*, 107th Cong. 265–66 (2001) (statement of Kerry Skeen, Chairman and CEO of Atlantic Coast Airline Holdings, Inc.) (“The major airlines have identified several areas where airlines are in critical need of government assistance and are asking for \$24 billion in aid. . . . The Regional Airline Association estimates total industry short-term losses will equal roughly \$1.3 billion.”); see also *Financial State of Transportation Industry: Hearing Before the S. Comm. on Commerce, Sci. and Transp.*, 107th Cong. (2001) (statement of Leo F. Mullin, Chairman and CEO of Delta Air Lines, Inc.), 2001 WL 26186412:

[T]his industry has been destabilized by: a near-total four-day shutdown, steep declines in passenger demand, sharp increases in insurance premiums, and rising costs for essential heightened security measures Based on that, estimated daily losses for the four-day shutdown total \$3.36 billion. Added together, this brings September losses to \$4.7 billion.

have on the industry.¹¹⁶ Congress acted to hedge its bets with the ATSSSA.¹¹⁷ In the event that the victims might actually have a case against the airlines and be able to reap huge awards, the liability cap worked to cover the potential loss of wiping out the airlines through litigation. On the other hand, in the event that litigation might not be successful due to issues of foreseeability or other problems with meeting the negligence threshold, the Victim Compensation Fund worked to prevent the potential incident of zero recovery for innocent victims.

Although Congress was attempting to balance these two possibilities, by constraining the tort alternative they put too much pressure on the administrative fund to achieve some semblance of tort compensation—namely, tailoring awards to provide individual justice. This is a burden too heavy for what should be the appropriate method of federal no-fault compensation—awards in equity. As a result, Government administrators take on the role of a jury in deciding how to value one victim's life over another, the taxpayers take on the role of insurers for the airlines, and the victims must pick between two limited alternatives—an administrative scheme with little flexibility and no opportunity to appeal, or a tort alternative with no opportunity to be heard in a forum of their choice and a limitation on the amount that they can recover.

116. An analysis of the negligence case against the airlines based on the tort laws of New York, Pennsylvania, and Virginia is a separate subject, although it is arguable that liability will be hard to prove by a preponderance of evidence due to the foreseeability burden on the plaintiffs, among other issues.

117. See *Financial State of Transportation Industry: Hearing Before S. Comm. on Commerce, Sci. and Transp.*, 107th Cong. (2001) (statement of Leo F. Mullin, Chairman and CEO of Delta Airlines, Inc.), 2001 WL 26186412, which discusses the logic of a retroactive liability limitation:

[W]hile American, United, and any other airlines named as defendants will necessarily defend themselves in litigation, the massive response and uncertainty as to the outcome of litigation will almost certainly frustrate airlines' ability to raise needed capital in the short term. Therefore, we would propose as the second part of our program that legislation be passed by Congress that first reaffirms the right to bring claims against the airlines for the experiences and deaths of the airlines' passengers. However, such legislation should also stipulate, based on the fact that this was an act of war, that the airlines would be not liable for the damage to persons and property on the ground. This seems the fairest way to ensure that appropriate parties have the right to pursue [sic] their legal rights, that airlines are not further victimized by these terrorists, and that airlines can instead continue the work of rebuilding our nation's aviation system.

A. The Retroactive Liability Cap

There are two arguments against the retroactive liability cap. First, it raises a federalism concern insofar as it enables the federal government to limit the relief a citizen can get through his or her respective state tort law. Second, it undermines people's expectations and limits their rights to relief, thereby possibly violating due process as an arbitrary economic regulation.

To demonstrate the federalism concerns, take the case of a hypothetical Victim A who filed an action against the airlines sometime between September 11 and September 24 when the bill was signed into law. Victim A was not on notice during this period of the implications of the statute about to be passed.¹¹⁸ During this time, Victim A had every expectation of accessing the financial resources of either American or United Airlines, assuming that she could prove negligence against the airline and that the company's resources were not depleted by cross-claims from other industries and other actions by victims. Victim A also was under the impression that she could file in any forum in which there would be personal and subject matter jurisdiction. Thus, a resident of Virginia might bring suit in a Virginia state court under the substantive tort law of negligence for that state. The victim then would have the advantage of a jury made up of fellow Virginians and the application of a law with which she is entirely familiar.

After the statute was signed into law on September 21, however, Victim A's action in Virginia state court would be nonsuited. Assuming Victim A were still convinced that the airlines were negligent and that a tort action would be a better remedy for her particular damages, not only would Victim A have to re-file in the Southern District of New York, possibly requiring the retention of a New York attorney familiar with the New York federal court system (at a potentially higher cost to Victim A), but Victim A's possible jury award now would be severely limited by the retroactive cap in the statute.

The consequences above are problematic, for the federal government is infringing upon states' rights to shape their own common law. Simply put, it may be inappropriate for the federal government to retroactively limit the application of common law

118. At no point in the limited hearings on the 19th and 20th did Congress call forth any victims or victims' representatives for testimony on their response to the VCF, resulting in no notice or opportunity to be heard before the deprivation of property took place. See *Air Transportation Safety and System Stabilization Act: Hearings on H.R. 2926 Before House and S. Comms.*, 107th Cong. (Sept. 19–20, 2001).

rights vested in citizens by the state in which they live. This may be particularly invasive in the area of tort law, where many states formulate their rules of adjudication and remedy in order to attract certain citizens or corporate residents.¹¹⁹ These residents then shape their behavior based on expectations that the guarantees within state tort law will be applied to them if they are either the plaintiff or the defendant in any given tort suit. This retroactive liability cap infringes broadly on the states' ability to enact laws that are otherwise constitutional without giving the states the benefit of foresight that otherwise exists with the passage of prospective limitations. In the hypothetical case of Victim A, a national interest in saving the airlines runs roughshod over Virginia's constitutionally reserved power to establish and execute tort remedies for the citizens who chose to live within its borders.

In addition to infringing on states' rights, the liability cap also presents due process concerns. It seems clear that limiting the right to sue retroactively cannot amount to a taking under the Supreme Court's Takings Clause jurisprudence.¹²⁰ Moreover, because the right to sue is curtailed by Congress, there is no argument for property deprivation without due process. Accordingly, the liability cap must be analyzed as an economic regulation and subjected to the highly deferential presumption of constitutionality under rational basis review.¹²¹ The Due Process Clause protects those with standing against arbitrary and unreasonable government action that adversely affects property rights.¹²² Reliance on the benefit of the existing state common law right to sue in tort for compensatory damages after sustaining property loss is certainly a property interest that should not be arbitrarily undermined.¹²³

119. See *Klaxon v. Stentor*, 313 U.S. 487 (1941) ("Whatever lack of uniformity . . . between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.").

120. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978) ("The submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."). In the case of the ATSSSA, there is neither a physical property taking nor is an economic interest left completely voided by Congress' action.

121. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

122. See U.S. CONST. amends. V, XIV; see generally *Goldberg v. Kelly*, 397 U.S. 254 (1970).

123. Although the Court stated in *Munn v. Illinois*, 94 U.S. 113, 134 (1876) that people have no "vested interest in any rule of the common law," in discussing property rights the Court more recently stated:

The Supreme Court has upheld the constitutionality of some of the liability caps discussed above in the face of due process challenges. The most notable of these decisions is *Duke Power Co. v. Carolina Environmental Study Group*,¹²⁴ a challenge to the liability cap in the Price-Anderson Act. The Price-Anderson Act, passed pursuant to Congress' commerce power, was challenged as a violation of both the due process and equal protection guarantees of the Fifth Amendment. Accordingly, the Court subjected the prospective liability cap to rational basis review.¹²⁵

Under the *Duke Power* standard, the ATSSSA most likely would pass constitutional muster.¹²⁶ However, there is an argument within the Court's framework in this area that the means used to achieve the ends of preventing the airlines from going into bankruptcy were "arbitrary and unreasonable" in light of other less burdensome alternatives.¹²⁷ Specifically, if one were to follow the

[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

124. 438 U.S. 59 (1978). As noted earlier, the Price-Anderson Act limited the liability of private nuclear power plants in the event of a nuclear incident. See Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988).

125. See *Duke Power Co.*, 438 U.S. at 83.

126. "A person has no property, no vested interest, in any rule of the common law." *Mondou*, 223 U.S. at 50 (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)). "[T]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver*, 280 U.S. 117, 122 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). See also *Ariz. Employers' Liab. Cases*, 250 U.S. 400, 419–22 (1919). Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. See, e.g., *Silver*, 280 U.S. at 123 (upholding statute limiting the liability of automobile drivers for injuries caused to gratuitous passengers by negligent operation of the vehicle); *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 587–89 (1883) (upholding limitation of vessel owner's liability); *Indemnity Ins. Co. of N. Am. v. Pan Am. Airways*, 58 F. Supp. 338, 340 (S.D.N.Y. 1944).

127. The simplest argument that the retroactive cap was arbitrary rests on the fact that bankruptcy of the airlines through litigation was not immediately pending (unlike bankruptcy through flight shutdowns, layoffs, etc.), and could have been better avoided through prospective measures either limiting rebuttable presumptions within the pending litigation or promising government indemnification of any and all litigation, similar to the Price-Anderson model.

rationale of the Court in *Duke Power*, it is clear that the Court relied heavily on the fact that the liability cap in the Price-Anderson Act was not a strict bar to further recovery, but rather a “starting point” for victim recovery:

The reasonableness of the statute’s assumed ceiling on liability was predicated on two corollary considerations

. . . .

. . . [B]oth the extremely remote possibility of an accident where liability would exceed the limitation and Congress’ now statutory commitment to “take whatever action deemed necessary and appropriate to protect the public from the consequences of” any such disaster¹²⁸

While the *Duke Power* Court based its consideration of the reasonableness or arbitrariness of the cap on the above two factors, neither of these elements can be said to be true for the cap in the ATSSSA. In fact, the situations are quite opposite. The *Duke Power* Court found that the cap in that case was not arbitrary because the risk of an accident creating liability that exceeded the cap was so small.¹²⁹ In contrast, risk was not a factor when determining the ATSSSA liability cap; the event requiring compensation and liability limitation had already occurred. Moreover, it is clear beyond dispute that the amount of the cap in the ATSSSA is not sufficient for all possible claims that could arise out of September 11.¹³⁰ The *Duke Power* Court also relied heavily on the fact that the sum was not arbitrary because it was not final. In other words, once the cap was reached, if victims were still under-compensated Congress would presumably step in to enact further compensation.¹³¹ At first blush, this might seem to be exactly what Congress did with the ATSSSA; however, the critical difference is that in *Duke Power*, the Court was counting on Congress to provide aid *in addition* to the liability maximums imposed on the nuclear power plants, not *instead of* any such recovery as is the case with the ATSSSA.

Beyond this, however, the *Duke Power* Court itself noted when striking down the due process challenge that

[a]ppellees’ only relevant right prior to enactment of the Price-Anderson Act was to utilize their existing common-law

128. *Duke Power Co.*, 438 U.S. at 85–86.

129. *Id.*

130. See discussion of insurance claims, *supra* note 12.

131. See *Duke Power Co.*, 438 U.S. at 85 (“The limitation of liability serves primarily as a device for facilitating further congressional review of such a situation, rather than an ultimate bar to further relief of the public.”) (quoting H.R. Rep. No. 883, 89th Cong., 1st Sess., 6–7 (1965)).

and state-law remedies to vindicate any particular harm visited on them from whatever sources. After the Act was passed, that right at least with regard to [prospective] nuclear accidents was replaced by the compensation mechanism of the statute.¹³²

The problem with the retroactivity of the cap in the ATSSSA is that it hampers this “relevant right” even *before* the Act was passed.

B. *The Jurisdictional Limitation*

The jurisdiction provision in the ATSSSA establishes an exclusive federal cause of action¹³³ in the Southern District of New York.¹³⁴ By making jurisdiction exclusively federal, the Act raises questions regarding the extent to which federal jurisdiction should preempt state jurisdiction where it rightly exists, and whether, in certain cases, a federal court would even have jurisdiction over claims arising from September 11.

In cases in which there is complete diversity in accordance with § 1332, the Southern District of New York would clearly have subject matter jurisdiction.¹³⁵ However, in the case of a New York plaintiff suing a defendant that does business in New York, the lack of diversity jurisdiction would require that the Southern District of New York have federal question jurisdiction under Article III and § 1331. Assuming that the majority of suits will involve substantive contract and tort law, it is difficult to see what dispute could arise under the “Constitution, the laws of the United States and Treaties made,” giving the court statutory jurisdiction under § 1331,¹³⁶ or, what federal issue could even form an “ingredient” of the claim, as required by *Osborn v. Bank of the United States*, to give the court constitutional jurisdiction under Article III.¹³⁷

The Court has repeatedly held that a jurisdictional grant by Congress is not enough in itself to create jurisdiction where it

132. *Id.* at 88 n.33.

133. Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 408(b)(1), 115 Stat. 230, 240-41 (2001).

134. *Id.* § 408(b)(3).

135. *See* 28 U.S.C. § 1332 (2000).

136. 28 U.S.C. § 1331 (2000).

137. *See* U.S. CONST. art. III; *Osborn v. Bank of the United States*, 22 U.S. 738 (1824). The *Osborn* Court held that “when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.” *Osborn*, 22 U.S. at 823.

might otherwise not exist under Article III.¹³⁸ In other cases, the Court has held that a jurisdictional grant is enough to create a federal question where Congress is either legislating to create a cause of action¹³⁹ or implicitly creates a federal cause of action or remedy through a complex federal regulatory scheme.¹⁴⁰ With the ATSSSA, Congress did neither of these things. Although the cause of action, as a procedural matter, is created and exclusively vested in the Southern District by the Act, the substantive causes of action are created by state tort and contract law and will be governed by such state law by statutory directive. The ATSSSA simply fails to create any substantive federal law or remedy beyond the federal jurisdictional grant. In fact, the jurisdictional grant, which on its own might bolster an argument for federal question jurisdiction based on an implied federal common law scheme, explicitly directs the federal courts to apply state law.¹⁴¹

While four creative arguments could be made for federal question jurisdiction, all of them push even the bounds of the general “ingredient” test under *Osborn*. First, one could argue that there is a particular, overwhelming federal proprietary interest in hearing these claims. Such an argument would have to assert that any claim against the airlines or other potentially negligent party was in and of itself a matter of national security and federal policy because of the underlying events of September 11.¹⁴² Taken to a logical extreme, however, it is difficult to imagine any purely state claim that would not inevitably implicate some sort of federal policy or proprietary interest.

A second argument follows Justice Frankfurter’s conception of “protective jurisdiction,” which he rejected in his dissent in *Textile Workers Union v. Lincoln Mills*.¹⁴³ The argument for “protective jurisdiction” pushes Article III to its very limits and some would say beyond—vesting Article III jurisdiction over any area that Congress

138. See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 44, 451–53 (1852); *Mossman v. Higginson*, 4 U.S. 12 (1800).

139. See *Verlinden B. V. v. Cent. Bank of Nig.*, 461 U.S. 480, 496 (1983).

140. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Bell v. Hood*, 327 U.S. 678 (1946).

141. See Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 408(b)(2), 115 Stat. 230, 241 (2001).

142. Similar reasoning seems to lurk in the background of *Verlinden B.V.*, 461 U.S. 480.

143. See *Lincoln Mills*, 353 U.S. at 474 (Frankfurter, J., dissenting) (“‘Protective jurisdiction,’ once the label is discarded, cannot be justified under any view of the allowable scope to be given to Article III.”).

could conceivably legislate under Article I.¹⁴⁴ In this case, in other words, because Congress could conceivably create a federal tort regulatory system, federal courts can exercise jurisdiction over a purely state tort claim. This is particularly hard to swallow in light of the historical reluctance of Congress to legislate in a manner preemptive of state tort law—a bastion of state and local policy. Even under Professor Mishkin’s more muted theory of protective jurisdiction, in which federal courts may take federal question jurisdiction over claims “arising under” an area of law in which Congress has “an articulated and active federal policy regulating a field,”¹⁴⁵ it is difficult to see a federal policy with regard to tort recovery outside of the Federal Tort Claims Act—a statutory scheme of little relevance to the present question.

A third argument is structural: the jurisdictional grant should be enough for jurisdiction because of the collateral impact of any such controversy arising out of the events of September 11 on the rest of the ATSSSA, namely on the liability cap or the Victim Compensation Fund. It is true that a negligence issue against the airlines might indeed raise these issues, but it seems likely that they would only be raised as a defense or in anticipation of a defense—that a damages claim is egregious or impracticable in light of the liability cap or that a plaintiff has already filed a claim with the VCF. In such a case, the well-pleaded complaint rule would defeat statutory jurisdiction.¹⁴⁶ Assuming that statutory jurisdiction does not exist, such an argument might perhaps pass muster under the *Osborn* “ingredient” test, assuming that such a collateral statutory issue was at some point an issue in the case.

The final argument for jurisdiction is unpersuasive. Assuming that the language of the statute authorizing jurisdiction and directing which state law is to apply is meant to incorporate the state law standards into the statutory cause of action, one could argue that the ATSSSA creates some sort of hybrid federal question jurisdiction over a federal scheme similar to the Federal Torts Claims Act. This argument relates to the choice-of-law issue discussed below, but in essence fails on the same point—if Congress were truly

144. See HART AND WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* pp. 744–747 (1st ed. 1953); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *LAW & CONTEMP. PROBS.* 216, 224–25 (1948).

145. See Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 *COLUM. L. REV.* 157, 192 (1953).

146. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908) (holding that a claim made in anticipation of a defense predicated on a federal statute did not constitute a federal question on the face of plaintiff’s complaint).

exercising its Article III power to lay down rules of decision for federal courts through incorporation of state law principles, it would certainly not direct a federal court to apply the choice-of-law principles of three different states.¹⁴⁷ Any argument for a common federal choice-of-law scheme is defeated by this multiplicity, which inevitably leads to different outcomes for the same group of plaintiffs under the federal Act.

C. *Choice of Law*

The cause of action created by the statute directs the Southern District of New York to apply the substantive law, including choice-of-law principles, from the state in which the accident relevant to the particular claim occurred.¹⁴⁸ This choice-of-law directive, necessary because the Southern District will have only diversity jurisdiction in most of these cases, is in direct conflict with constitutional choice-of-law principles established by *Erie* and its progeny. These principles command that federal courts look to the choice-of-law principles of the state in which they sit to determine which substantive law shall apply.¹⁴⁹ In *Klaxon v. Stentor*, the Court declared that

[t]he conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts Any other ruling would do violence to the principle of uniformity within a state, upon which the [*Erie*] decision is based It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflicts of law.¹⁵⁰

147. The Supreme Court has heretofore rejected the notion that Congress has this power after the constitutional limitations imposed by *Erie*. In *Klaxon v. Stentor*, 313 U.S. 487 (1941) (discussed below), the Court reiterated that choice-of-law principles are the substantive domain of the state, not Congress or the federal courts.

148. Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 408(b)(2), 115 Stat. 230, 241 (2001) ("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.").

149. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

150. *Klaxon*, 313 U.S. at 496. The rationale in *Klaxon* was more recently reaffirmed by the Court in *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam), despite criticism from the academy that the Court in *Klaxon* wrongfully extended the constitutional basis of *Erie* to choice-of-law principles, and that, in fact, Congress is not limited by *Erie* when it comes to choice-of-law principles and may constitutionally lay down rules of decision for the federal courts:

If the Court in *Klaxon* proceeded on the assumption that, as in *Erie*, the result was constitutionally compelled, it was plainly mistaken. . . .

Under *Klaxon*, the Southern District would always look to New York choice-of-law principles to decide what substantive law should apply. Under the ATSSSA, however, the Southern District will look to choice-of-law principles in either New York, Virginia, or Pennsylvania, depending on where the accident in question occurred.¹⁵¹

The disparate outcomes dictated by *Klaxon* and the ATSSSA can be shown by taking the hypothetical case of a plaintiff from California suing American Airlines for wrongful death occurring out of the crash of Flight 77 into the Pentagon. American is headquartered and does most of its business in Texas. Under *Klaxon*, the Southern District would look to New York choice-of-law principles to determine which wrongful death statute to use.¹⁵² In *Neumeier v. Kuehner*, the Court of Appeals of New York established that if both parties are domiciled in different states, New York does not have an interest in the litigation, and the place of the accident was completely fortuitous, then New York will apply the law of the state that is closest in policy and purpose to that of New York.¹⁵³ In our hypothetical case, because Virginia is a fortuitous location for the accident¹⁵⁴ and California, like New York, has a policy of favoring compensation to victims of wrongful death, the Southern District likely would apply California law under New York choice-of-law principles. Under the California Wrongful Death Statute, a plain-

. . . Even assuming that the right to interest is substantive and thus to be governed by state law under Erie, the choice of *which* state's law applies in a federal court is clearly a matter of federal concern.

RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 697 (4th ed. 1996). *But cf.* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 714–15 n.125 (arguing that the *Klaxon* result is required by the Rules of Decision Act.).

151. Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, §408(b)(2), 115 Stat. 230, 241 (2001).

152. *See Klaxon*, 313 U.S. at 496.

153. *See Neumeier v. Kuehner*, 31 N.Y.2d 121, 128 (1972) (“In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants.”).

154. Although the crash site was arguably pre-determined by the hijackers, case law suggests that any air crash that occurs outside of the state of origin or departure results in a “fortuitous” place of the tort. *See Griffith v. United Airlines*, 203 A.2d 796, 806 (Pa. 1964); *Saloom v. Jeppesen & Co.*, 707 F.2d 671, 674–76 (2d Cir. 1983); *See generally* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, §§ 145(2) cmt. e, 146, cmts d–e (1971).

tiff may not recover damages for pain and suffering, but a domestic partner may recover as a personal representative.¹⁵⁵

Under the ATSSSA, the Southern District, rather than applying New York choice-of-law principles, is directed to apply Virginia choice-of-law principles to our hypothetical case.¹⁵⁶ Virginia, unlike many states in recent decades, has remained committed to the traditional common law choice-of-law theory of "*lex loci delicti*," application of the law of the place in which the tort occurred.¹⁵⁷ Regardless of policy or purpose, therefore, the Southern District would apply Virginia law and the Virginia Wrongful Death Statute to the hypothetical case. Under the Virginia Wrongful Death Statute, not only may a plaintiff recover for loss of income and services, he or she may also recover damages for pain and suffering, mental anguish, loss of society, and punitive damages. However, Virginia does not allow a domestic partner to recover on a survival or wrongful death claim.¹⁵⁸ Even the Justice Department has commented on the difficult position created by the statutory directive to allow recovery according to various state laws.¹⁵⁹

D. Inchoate Harm and the Problem of Futures

A third argument against the way the ATSSSA is structured is the problem of inchoate harm. This problem has created controversy in the field of mass torts since its beginnings in the late 1970s with Agent Orange.¹⁶⁰ Particularly with respect to asbestos, which ironically could be one of the major issues surrounding the WTC disaster, the issue of latent injuries has tripped up the courts time and time again. Problems arise particularly with class actions, the

155. See CAL. CIV. PROC. §§ 377.34, 377.60 (2002).

156. See Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 408(b)(2), 115 Stat. 230, 241 (2001).

157. See *McMillan v. McMillan*, 253 S.E.2d 662 (Va. 1979).

158. See VA. CODE ANN. § 8.01-52, -53. (Michie 2002).

159. See Final Rules, *supra* note 25, at 11,242:

One of the topics receiving the most comments was the eligibility of domestic partners The final rule continues to rely upon state law for the determination of the personal representative. Reliance on state law is necessary in part because those who file for recovery under the Fund waive their rights to recover through litigation, in which state law would determine the identity of the appropriate representatives of the decedent Thus, if the identity of personal representatives for purposes of this Fund were determined by federal regulation, there could be many situations in which the representative as defined by state law would choose litigation while the personal representative as defined by federal regulation would seek to recover from the Fund.

160. See *generally* PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (enlarged ed., Harvard Univ. Press 1987).

only real way to include exposure-only victims in any sort of settlement because they are unable to bring a claim on their own until the extent of their injury is known.¹⁶¹ In both *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*, the Supreme Court decertified classes in part because of the problem of futures, splintering hundreds of thousands of claims back to the original districts in which they were brought.¹⁶²

With September 11, there is much speculation over issues of toxic exposure that may or may not lead to injuries or illness in the future. Issues surrounding potentially fraudulent EPA air quality readings in the days and weeks after the attack raise questions about the health of those working diligently to try to recover victims, with little or no protection from the caustic air.¹⁶³ While there are multiple issues of inchoate harm surrounding September 11, the primary concern for the purposes of this paper are victims who may not manifest injuries for another ten or twenty years, in the form of asbestosis, mesothelioma or lung cancer.¹⁶⁴ As a result, 1) these victims will not know within the two-year statute of limitations for bringing claims under the fund¹⁶⁵ whether they have an injury arising from the events of September 11, and 2) even where they might currently suspect an injury, such a victim would not be able to prove

161. Courts have been divided over whether exposure is "injury in fact" to warrant standing to sue. See *Metro N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997).

162. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). In *Amchem*, the Court decertified out of concern for like treatment of a heterogeneous group of plaintiffs, the conflict of interest in having present and future claims represented in a single class, and possible due process/notice issues for future class members. See 521 U.S. at 622–28. In *Ortiz*, decertification followed a finding that the fund was not truly limited and that agreement of the settling parties cannot be an overriding justification for class certification. See 527 U.S. at 830, 848–61.

163. More than 1300 rescue workers have filed notice against New York City that they may sue for damages stemming from September 11. See John J. Goldman, *N.Y. Rescue Workers Move to Sue Over Respiratory Damage*, L.A. TIMES, Feb. 12, 2002, at A10:

In October [2001], the Fire Department arranged for a group of firefighters to undergo a specialized breathing test Physicians found 25% had airway irritation Approximately two-thirds of the firefighters with positive results in October continued to show irritation. In addition, 13% of those who tested normal in October showed irritation [in November and December], according to the study.

164. These are typical injuries manifested from exposure to asbestos. See *Amchem Prods., Inc.*, 521 U.S. at 624.

165. See Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 405(a)(3), 115 Stat. 230, 238 (2001).

“physical harm” in fact under the stringent and narrowly interpreted definition assigned by the Department of Justice.¹⁶⁶

To bring a claim for physical injury under the VCF, claimants are eligible only if they can prove that a) they were present at any one of the relevant sites either within twelve hours of the attack for civilians or ninety-six hours of the attack for rescue workers,¹⁶⁷ and b) that they sustained physical harm under the following definition:

The term physical harm shall mean a physical injury to the body that was treated by a medical professional within twenty-four hours of the injury having been sustained or within twenty-four hours of rescue; and (i) required hospitalization as an inpatient for at least twenty-four hours; or (ii) caused, either temporarily or permanently, partial or total physical disability, incapacity or disfigurement.¹⁶⁸

The rules further limit eligibility by providing that in all cases not involving death, “the physical injury must be verified by contemporaneous medical records created by or at the direction of a medical professional who provided the medical care.”¹⁶⁹ This statutory interpretation was made partially in response to comments and recommendations regarding fraud prevention from the Oklahoma City Fund administrators and partly in firm belief that Congress intended to leave out future injuries by including the language that it did.¹⁷⁰

Whatever the motive for drafting and interpreting the Act to exclude compensation for futures, this interpretation ignores the fact that the only alternative for future manifestations of injury or illness arising out the events of September 11 is the tort system, and that this path is significantly curtailed by the retroactive liability

166. See Final Rules, *supra* note 25, § 104.2(c).

167. *Id.* See also Interim Rules, *supra* note 6, at 66,276 (explaining that the special extension for rescue workers to 96 hours was in recognition of “their heroic efforts and their selfless reasons for being at the sites, and responds to a request by the Mayor of New York City that the program recognize the high level of danger and difficulty during the first four days of rescue operations”).

168. See Final Rules, *supra* note 25, § 104.2(c)(1).

169. *Id.* § 104.2(c)(2).

170. See Interim Rules, *supra* note 6, at 66,276:

Congress did not intend for this Fund to cover those who face only a risk of future injury (i.e. latent harm that does not fully manifest itself within the statutory time period for this Fund). Indeed, because participation in this Fund precludes claimants from recovering through tort litigation, those with latent injuries that later became manifest would likely be *undercompensated* if they sought compensation now from the Fund before the injuries became manifest. Conversely, those who recovered for latent injuries that did *not* later become manifest could be *overcompensated* if they recovered from the Fund.

cap. General concerns about the retroactive liability cap are compounded by the fact that these rescue workers will most likely be litigating their claims in ten, twenty, or thirty years, when there is much less of a chance that any insurance money in the limited fund will be left. This is especially true if more victims choose to litigate now than the ATSSSA originally anticipated (possibly in negative response to the structure of the Fund). Additionally, because the statute mandates that in any tort action arising out of September 11 the state law of the place the crashes occurred would apply, firefighters and policemen with potential future manifestations of illness are further curtailed in New York by the “firefighters’ rule.” This rule provides that firefighters and policemen generally are barred from bringing tort suits for work-related injuries because of the assumed risk and built-in compensation schemes in their jobs.¹⁷¹ In sum, because the VCF allows no recovery for future injuries and the liability cap severely limits the possibility that victims with latent injuries will recover anything from the traditional tort litigation process, the two provisions in tandem make it likely that victims with latent injuries will not be able to recover at all.

D. Policy Concerns

A fourth and final argument against the structure and implications of the ATSSSA is one of policy. A no-fault scheme in which taxpayers bear the burden of bailing out a potentially liable industry beyond structured loans and subsidies already taken from public coffers is problematic. The no-fault compensation and liability cap programs like those under the Black Lung Benefits Act or the SuperFund Act are arguably constitutional under the modern regulatory state theory of conditional consent.¹⁷² Under this theory, one could argue that the taxpayers, through their representatives, consent *ex ante* to their money being spent to protect certain industries that may be acting dangerously because to do so results in a greater benefit to the public welfare than the burden put in place by the administrative program. As noted above, liability is limited in exchange for cleaner water, better immunization programs, con-

171. See *Santangelo v. New York*, 521 N.E.2d 770, 770–71 (N.Y. 1988).

172. The theory of conditional consent is a theory of constitutional interpretation that holds that Congress is free to condition benefits and subsidies granted to state and local governments and citizens in ways that it would not be able to condition the enforcement of laws or the protection of individual rights. In the former category, the theory holds that Congress can impose conditions that favor certain groups over others as long as they do not infringe on any fundamental rights. See *NEA v. Finley*, 524 U.S. 569, 587–88 (1998).

tinued energy from coal production, or increased protection from hazardous nuclear incidents. Moreover, such no-fault schemes generally include some contribution from the industries involved in the risky behavior through the form of special tax contributions or insurance premiums.¹⁷³

In the case of the September 11 Victim Compensation Fund and liability cap, the benefit received as a result of the program by the airline industry is clear—the majority of victims will not sue because the government is giving them money, and those who do will be severely limited in their attempts. However, it is unclear what benefit the public is receiving in exchange for its tax dollars being used to protect the airlines through the liability cap and compensating victims through the fund. If the taxpayer benefit is an overwhelming showing of generosity and support to the victims in the face of national crisis, this goal might more equitably be left to individual choice and be better accomplished through traditional means of charitable organizations. In fact, Americans have voluntarily donated hundreds of millions of dollars to charities for this very purpose. If the benefit is the ability to continue flying on national airlines, this goal appears to be accomplished by the bailout portion of the Act alone. It is unclear why Congress felt the need to go above and beyond in protecting the airlines by limiting their private liability and luring potential plaintiffs away from the courtroom with an administrative compensation scheme. It is here that the conflicting yet insufficient goals of the ATSSSA and the VCF come into direct conflict, seemingly benefiting the airlines at the expense of both the victims and the public. The bottom line is that taxpayers may be paying for a no-fault scheme where there may be fault in exchange for no benefit that is not already being provided by general relief appropriations,¹⁷⁴ the airline loan guarantee program,¹⁷⁵ and through private mechanisms of charitable donations.¹⁷⁶

173. *See, e.g.*, Black Lung Benefits Act of 1969, 30 U.S.C. §§ 931–34 (2000) (coal companies have workers' compensation insurance and must contribute premium payments to the Fund); National Swine Flu Immunization Program of 1976, 42 U.S.C. § 247b(j)(3) (manufacturers contribute a fixed amount in special taxation); Price-Anderson Amendments Act of 1988, 42 U.S.C. § 2210(a), (b), (f) (nuclear power plants have insurance and make special tax contributions).

174. *See* Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220 (2001) (appropriating \$40 billion in general disaster relief).

175. *See* Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, §§ 101–301, 115 Stat. 230, 230-237 (2001).

176. Although it can be explained benignly as it is by the Special Master, that the Fund is “an unprecedented expression of compassion on the part of the Amer-

IV. AN ALTERNATIVE RECOMMENDATION

The juxtaposition of the VCF and the liability cap forces the Fund into the position of trying to provide tailored notions of individual justice to victims through throwbacks to traditional models of tort compensation. This individual approach, including highly varied valuation matrices and reformed procedures for individual evidentiary hearings, is further complicated by the inclusion of traditional administrative no-fault mechanisms such as the collateral offset clause,¹⁷⁷ the ban on punitive damages¹⁷⁸ and the equitable treatment of non-economic losses¹⁷⁹ (ironically, some of the provisions most contested by the victims and their families). The result, although intended to help victims, is a hybrid of administrative process that lacks a substantial appeal process as well as judicial review, and a diminished legal process that lacks jurisdictional choice and a traditional format of recovery that may actually hinder

ican people to the victims, and their families devastated by the horror and tragedy of September 11,” the alternate cynical story of taxpayer liability coverage is questionable in light of the hundreds of millions of dollars that Americans have voluntarily donated to charities for this very purpose. *See* Statement of Special Master, 28 C.F.R. Part 104 (Dec. 21, 2001).

177. The collateral compensation clause of the Act requires that “the Special Master shall reduce the amount of compensation determined . . . 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.” Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 405(b)(6), 115 Stat. 230, 239 (2001). The Act defines collateral source as “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.” *Id.* at § 402(4). If one looks to any state model for tort compensation, one finds that in no state is there a requirement of collateral compensation offsets. In fact, the majority of states have the inverse of the VCF collateral source rule—one requiring that tort-feasors compensate plaintiffs above and beyond any collateral compensation that they might receive from another source for the same harm. *See* Saine, *supra* note 98; discussion of collateral source rule, *supra* note 38.

178. Additionally, the Special Master is prohibited from making any punitive damages determinations under the most likely rationale that because it is a no-fault scheme, the airlines cannot and should not be punished. “The Special Master may not include amounts for punitive damages in any compensation paid under a claim under this title.” *See* Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, § 405(b)(5), 115 Stat. 230, 239 (2001).

179. *See* Interim Rules, *supra* note 6, at 66,274 (statement by the Special Master on interim final rule) (explaining the administrative root of the non-economic calculation).

them on both fronts.¹⁸⁰ In short, rather than maintaining the integrity of a traditional, equitable no-fault scheme by allowing a substantive tort alternative, Congress put too much responsibility on the Fund to replace tort recovery by intentionally limiting it through the cap.

A. *Integrated Two-Track Approach*

The administrative compensation scheme as it exists cannot equitably coexist with a retroactive liability cap. Such juxtaposition destroys the level playing field for plaintiffs and defendants by expanding administrative authority through the limitation of a judicial alternative. Without the liability cap, the government would be

180. Indeed, Feinberg admitted in his press conference at the time the interim rules were released that the Fund could result in a \$0 award for many families, even with the award floors put in place by the fund:

Q: So let's say you take a firefighter who, under this chart, would collect a million dollars, but when you take into consideration the collateral sources, a pension and so forth, it brings that number down to zero, is it possible that he could actually walk away without getting any money from the victims' compensation fund?

A: Absolutely, it's possible. . . . But don't forget, under your hypothetical, he already received a million dollars. Now, he didn't receive it from the federal government

. . . .

. . . [O]ne way to look at this is to say that that firefighter is guaranteed under the program a million dollars He or she will get it from the United States special master, under this program, or will get a million dollars from a federal death benefit; from life insurance; from other, collateral offset sources of income. But at least that firefighter or any individual will know that if those offsets don't bring you down to zero, whatever, there will be money available through this program.

Special Master Kenneth R. Feinberg Transcript, News Conference Announcing Regulations Concerning 9/11 Victim Compensation Fund, December 20, 2001, available at <http://www.usdoj.gov/ag/1220kenfeinbergnewsconference.htm> (Dec. 20, 2001). Additionally, tort rewards will likely be lower. The total awards to victims for any negligence on the part of the airlines is limited by the act: The airlines will not, under any circumstances, pay anything out of pocket for those crashes on September 11th. Even the Special Master admits that this is more than a rock and a hard place:

I personally believe that the way this statute is written, the alternative to this system—the litigation system—is ill advised. . . . The statute is written in such a way that if you decide to litigate, the likelihood of success, the likelihood of receiving a substantial award in court is substantially diminished by the statute, the liability caps placed on the airlines in the statute, the fact that the court—the proceeding will take years and years to litigate. . . .

I mean, on this particular set of facts, I do not believe the option of coming into this program or litigating is a level playing field. It is not.

Id.

2004] SEPTEMBER 11 VICTIM COMPENSATION FUND 555

free to design the federal compensation program in whatever way it wished because an unconstrained tort alternative would guarantee the plaintiff's right to his or her day in court. If this were the case, then it would be more consistent to abandon the tort methodology within the Fund in favor of a purely administrative no-fault approach. This would require eliminating the individualized determinations of economic losses and non-economic losses in totum in order to create a more pragmatic approach to treating similarly situated individuals equitably.

First, the scheme would quell criticism of the staunchly administrative aspects of the current hybrid and mitigate the problems engendered by various aspects of the ATSSSA interacting together. For example, the collateral compensation clause becomes problematic only once paired with the retroactive liability cap. Second, although this would result in lower and more equitable rewards for victims, it would better fit the societal trade-off justification for no-fault schemes generally. Apart from airline liability (now to be pursued separately on a tort track), the Government and the American populace generally feel a responsibility to compensate innocent victims of an unprovoked attack on the United States as a whole. This type of no-fault scheme would allow everyone to share a portion of the immediate burden felt by the families through tax appropriations entirely separate from funds underwriting the airlines. Third, this would open up a more viable, unlimited option for those who may carry a future burden of yet-to-manifest injury by allowing them to pursue tort recovery uninhibited.

If the liability cap remains, then abandoning the Victim Compensation Fund in favor of a more equal administrative-tort two-track approach to victim compensation would better serve individual victims' interests. In addition to legislating to save the airline industry through bailout provisions and liability limitations, Congress could have funneled appropriations from the initial \$40 billion relief package¹⁸¹ toward an administrative scheme for aiding bureaucratic institutions that deal with victims and their families. This appropriations scheme could be modeled after those made in the case of Oklahoma City or after the way Congress has handled aid and relief to victims of natural disasters under FEMA.¹⁸² The mechanisms for setting up these appropriations are largely in place

181. See Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220 (2001) (appropriating \$40 billion in general disaster relief).

182. See Oklahoma Appropriations Act, *supra* note 14; Disaster Relief Act Amendments of 1974, Pub. L. No. 93-288, 88 Stat. 143 (1974).

under the Antiterrorism and Effective Death Penalty Act of 1996, allowing Congress to funnel aid to state governments and local agencies for terrorism victims' relief.¹⁸³ Under such a scheme, federal funding would go to hundreds of federal, state, and local agencies and programs involved or potentially involved with helping victims and their families. This could include workers' compensation supplements, increased unemployment benefits, state Victims of Crime funds, housing agencies, adult education and job training programs, education vouchers, and estate tax breaks, among dozens of others. In this way, the individual rights of victims would not be compromised by having to make a choice between direct compensation from the government and their right to bring suit for fault in a court of law.

These administrative efforts would work in congruence with other federal, state, local, and private-sector efforts at relief. Collateral-source compensation would take place in the same manner. Pension funds, death benefits, workers compensation, insurance policies, inheritances, and other traditional methods of compensation would help ensure that victims are compensated appropriately. Additionally, even if all these mechanisms did not guarantee equitable relief, charitable donations from the American people to non-profit organizations and funds supporting the victims could work in tandem with these governmental and private efforts to provide the appropriate external structural support for victims attempting to rebuild their lives. The voluntary donation of hundreds of millions of dollars to victims after September 11 exemplifies the nationwide generosity and support that the VCF is supposed to represent. Altogether, this tripartite system of administrative, private-sector and charitable relief from disaster, as opposed to compensation for fault or wrongdoing, would resolve the problem of taxpayer responsibility.

With this coordinated federal and non-governmental "no-fault" support, the victims would be in a suitable position to pursue compensatory damages against the airlines and other potential domestic defendants, not to mention the terrorists and other responsible foreign parties not excluded by the ATSSSA, in an attempt to make them legally "whole." This issue of airline liability can and should be entirely separate from government efforts at relieving the victims. However, the government could still protect the airlines

183. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

through liability caps.¹⁸⁴ The nature of the liability caps sets a definitive limit on the amount of money that any given victim or number of victims can receive from the airlines and other defendants. Because of this structure, litigation could be handled most efficiently through a mandatory opt-in limited-fund class action settlement.¹⁸⁵ If airline liability is demonstrated, the funds available to the victims would then be legislatively limited through the existing liability cap. Here, the adversarial system ideally would work to establish the fairest result for all. If the airlines or other potential defendants such as manufacturers, port authorities and building security were negligent and at fault, then they will be held responsible. Victims, like shareholders or stakeholders in a limited trust, would then be compensated for their loss along a traditional tort-model scheme.

Under Federal Rule of Civil Procedure 23(b)(1)(B), an action may be certified as a limited fund class action if

the prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.¹⁸⁶

A limited insurance fund with a defined number of stakeholders divided into subclasses of deceased and injured clearly would meet these requirements. It is critical, however, that the issue of futures is handled by defining the class to include every victim and every rescue worker exposed to toxic elements at ground zero in the months following the attack. The settlement would have to establish a calibrated disease matrix for recovery as a result of potential illnesses, provide for medical monitoring of all exposure-only class members, and include an account in escrow for future manifestations beyond predictable costs. This solution would better address issues of due process for both the defendant and plaintiff and

184. In fact, the current bill in front of the judiciary committee that would expand the coverage of the VCF to include victims of the WTC 1993, Oklahoma City, Tanzania embassy bombings, and the U.S.S. *Cole* also contains a clause limiting the prospective federal compensation to victims of terror to \$250,000 coupled with an unhindered right to sue in tort. Kenneth Feinberg, Special Master, September 11th Victim Compensation Fund, Speech at the New York City Bar Association (Oct. 22, 2002).

185. See FED. R. CIV. P. 23(b)(1)(B).

186. *Id.*

would allow government intervention and relief without sacrificing legal rights.

B. Counter-Arguments

The three most compelling arguments against preserving an uninhibited tort action for victims of September 11 resonate with arguments made for tort reform. First, it is possible that allowing unfettered action against the airlines would put too much pressure on the traditional “duty of care” standard and result in wiping out the airlines indirectly through huge insurance premiums. Raising the ex ante duty to unprecedented levels systemically may place the airlines and other such vulnerable industries in the position of vicarious regulators of public safety—a duty typically left to the government. This might be the case for two primary reasons: first, the airlines could never have truly “foreseen” the events of September 11. Therefore any finding of negligence or liability on behalf of the airlines would create an ex post duty impossible to satisfy. Second, a strong argument can be made that the cost of a higher standard of care outweighs any benefits to society because the extreme situations guarded against are still so rare at this point.¹⁸⁷ The result will be a rise in insurance premiums within the airlines and other industries, which will eventually be passed on to the consumer in the form of dramatically heightened costs.

There are three responses to this argument. First, this cost-spreading phenomenon already happens all the time in other industries in the context of mass torts. In fact, similar results can be seen in the market simply from the events of September 11, aside from any litigation.¹⁸⁸ In most instances, market forces naturally absorb the cost of litigation and insurance borne by an industry and the industry remains viable.¹⁸⁹ If the industry is not fundamental to market demand, the costs of a higher standard of care will necessarily outweigh the benefits, and the industry might become defunct.¹⁹⁰ In the context of the airline industry, however, early commentators are forecasting that although reinsurance prices

187. See Stephen P. Watters & Joseph S. Lawder, *The Permanent Impact of September 11th*, BENCH & B. OF MINN., Sept. 2002, at 17, 20 (arguing that a heightened “reasonable man” standard would be a false positive reaction to the events of September 11 because of the unforeseeable and unique circumstances surrounding the attacks).

188. See Haley, *supra* note 48, at 12 (estimating that airline premiums have gone up 200–400% in the wake of the disaster).

189. This phenomenon of impact absorption has been true with the tobacco litigation as well as the Agent Orange class action, among others.

190. See discussion of asbestos bankruptcy, *supra* at note 53.

might artificially inflate initially, market forces will eventually absorb the bubble.¹⁹¹ Second, assuming, *arguendo*, that such insurance inflation was too heavy a burden for the airlines to bear, it is not unlikely that Congress will step in to increase regulation within the aviation industry as it already has with security measures.¹⁹² This is probable both because of the fundamental indispensability of air travel in this country, and because the regulatory infrastructure already partially exists. Indeed, Congress recently passed legislation signed into law by President Bush guaranteeing liability limitations for insurers in the event of massive claims arising from future terrorist attacks.¹⁹³ Third, one might argue that in an age of increasing mass disaster and international terrorism, a heightened duty of care, particularly within the airline industry, might be good. From a strictly legal perspective, it is difficult to specifically define the “duty of care” standard as it is empirically applied by juries in any given scenario. It is also hard to differentiate what is meant by heightening the duty of care *ex ante* as opposed to broadening the scope of foreseeability *ex post*. If events like September 11 truly result in the latter, it seems that no amount of preparation would suffice. Instead, the airlines and other industries learn the same lesson that every citizen has learned—that the twenty-first century requires a broadened sense of anticipation generally—for better or for worse.¹⁹⁴

The second argument against allowing common law tort doctrine to work in tandem with more traditional governmental intervention and regulation is that, quite simply, there are too many potential plaintiffs involved and not enough money as a result of the liability caps.¹⁹⁵ This argument assumes that liability will be proven and that a group of defendants will be held liable to the

191. See Haley, *supra* note 48, at 13 (“[T]he rush of new capital into the reinsurance arena at the moment could add substantial competition that may help generally to hold reinsurance prices down.”).

192. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 501, 115 Stat. 230, 241 (2001) (authorizing \$3 billion in federal spending on airline safety); see also Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (November 19, 2001).

193. See Terrorism Risk Insurance Act, Pub. L. No. 107-297, 116 Stat. 2322 (2002) (limiting claim pay-outs to \$500 million dollars, at which point the government would assume vicarious liability); see also Carl J. Pernicone & James T.H. Deaver, *Insurance Implications of the World Trade Center Disaster*, 31 BRIEF 23, 23–24 (2002).

194. See generally Weinstein, *supra* note 15.

195. See Van Voris, *supra* note 53 (estimating liability claims to exceed by far the amount of insurance held by airlines). See also Noah H. Kushlefsky, *The Choice between the Victim Compensation Fund and Litigation*, L.A.LAW., Sept. 2002, at 16:

statutory maximum. Under the suggested limited fund class action, this problem could be dealt with through numerous procedural mechanisms. The very definition of a “limited fund” class action assumes that the amount of money available to stakeholders is limited,¹⁹⁶ and in most cases, is likely less than is cumulatively owed to each stakeholder. A firm determination of the amount of money available under the ATSSSA for liability awards and an evaluation of the number and status of eligible plaintiffs or stakeholders after a finding of causation would work to insure a *pro rata* equitable distribution of the amount of money available.¹⁹⁷ This equitable distribution would serve the dual goals of allowing victims to be made whole for a wrong in tort and maintaining the financial integrity of the airlines and other defendants under the auspices of the retroactive liability cap.¹⁹⁸

In any liability case, even in a class action, the burden is on the individual plaintiff to prove actual harm. This burden itself would work to weed out many false or fraudulent claims at the early stages of litigation and implicitly would limit the number of plaintiffs within the class. Moreover, a class action would be able to better handle the various plaintiffs with cognizable claims. Typical of mass tort class actions, there will be different groups of plaintiffs who are differently situated due to varying degrees of age, wealth, employment, injury, or death, despite the fact that the class as a whole shares the common and typical circumstance of injury arising from one mass disaster.¹⁹⁹ This differentiation, which is proving to be the biggest problem for the Fund, can be handled quite easily

The class of wrongful death and personal injury claimants eligible to recover in litigation is boundless. Beyond the nearly 3,000 people killed in the terrorist attacks, tens of thousands of personal injury claims can be brought. . . . In addition to people, hundreds of businesses in the vicinity of the towers lost substantial business and property. The fund is also unavailable to them. In short, there could be tens of billions of dollars in claims, and only a fraction of that amount may be available to claimants.

196. See FED. R. CIV. P. 23(b)(1)(B).

197. Under *Ortiz*, the statutory mandates in this situation go far toward upholding the constitutionality of the finding of a truly “limited fund.” One of the fundamental flaws in the fund established in *Ortiz* was that it was not truly limited in the sense that all available money was not contributed to the settlement. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 850–51 (1999). With September 11, the amount of money available for any lawsuit or successful plaintiff is statutorily limited. See Air Transport Safety and System Stabilization Act § 408.

198. See generally Kushlefsky, *supra* note 195 (discussing the factors September 11 victims face in choosing between the Victim Compensation Fund and litigation).

199. See FED. R. CIV. P. 23(b)(1)(B).

through the class action mechanism of sub-classing to ensure that awards vary according to multiple factors.²⁰⁰ Moreover, by pooling defendants or even creating a class of liable defendants under Rule 23(b), these rewards could be enhanced—expanding the available funds from the \$6 billion in airline insurance to over \$12 billion in all.²⁰¹

The third and possibly strongest argument for the Fund and against allowing litigation against the airlines is that egregious attorney's fees will diminish the awards to deserving victims. Indeed, this is one of the foremost arguments for tort reform generally. This is a very practical argument, rooted in the very real phenomenon of ruthlessly inflated attorney's fees, particularly in the personal injury and mass tort context. Nevertheless, three facts undercut this argument for abandoning the traditional tort system in situations similar to September 11. First, even though the Fund was established as a mechanism to avoid paying attorneys for legal representation, the fact remains that over a third of claims filed to date with the Fund have been submitted with the assistance of a lawyer.²⁰² Although most of these attorneys are working pro bono,²⁰³ many of the higher net worth claimants are choosing instead to pay attorney's fees ranging from 25%–30% regardless of the fact that they are pursuing administrative compensation rather than litigation. Second, were litigation to ensue under a limited fund class action model, the judge has the discretion to determine what is sufficient for "adequate and fair representation" to class members under Rule 23(a)(4). As such, the presiding judge would have the latitude to accept only pro bono advocates on the plaintiff steering committee in order to ensure truly "fair" representation under these unique circumstances. Finally, the judge could also use his or her discretion to determine or cap attorney's fees.

200. See FED. R. CIV. P. 23(c)(4); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (indicating that sub-classing would aid a class action's legal viability under Rule 23).

201. See also Kushlefsky, *supra* note 195, at 13, 16 (detailing insurance pool available from possible defendants: \$6 billion from United and American Airlines, \$3.6/7.2 billion from the WTC leaseholder, \$350 million from NYC, etc., resulting in about \$12 billion total).

202. See Peter Woodin, Assistant to the Special Master of the September 11 Victim Compensation Fund, Statement to the New York City Bar Association, New York, New York (October 2, 2002).

203. The New York Bar Association established "Trial Lawyers Care" shortly after the establishment of the Fund to aid in claim filing. See Trial Lawyers Care, at <http://www.911lawhelp.org> (last visited Oct. 10, 2003).

V.
CONCLUSION

This article has argued that due to the unprecedented nature of the circumstances of September 11, Congress reacted too quickly in establishing the federal Victim Compensation Fund. The problems within the Act lie in part with the motivations to save the airlines and in part with an attempt to impose traditional tort notions of justice and due process onto what should have been a purely administrative, equitable program. An in-depth study of the legislative analogs and precedents for the Victim Compensation Fund demonstrates that Congress legislated far outside of its historical realm when creating this model of federal administrative compensation. A study of correlative constraints on the tort cause of action available through the ATSSSA demonstrates why some of the most problematic aspects of the Fund were included.

The burdens of the ATSSSA and the VCF extend beyond the due process rights of the individual victims, threatening the balance of power within the federalist system in general and in the context of federal intervention in mass disasters in particular. This article suggests that the ATSSSA should not become a model of future government action, but that instead the integrity of the state common law tort system should be utilized in conjunction with whatever broadening role the federal government will come to play in future mass disasters.