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The September 11th Victim Compensation Fund of 2001

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Summary

The Air Transportation Safety and System Stabilization Act, P.L. 107-42, which is designed to aid the airline industry after the terrorist attacks of September 11, 2001, was signed into law on September 22, 2001. Title IV of this statute, titled the "September 11th Victim Compensation Fund of 2001," creates a federal program to compensate victims of the September 11 attacks. A victim or, if he is deceased, his "personal representative," may seek no-fault compensation from the program or may bring a tort action against an airline or any other party, but may not do both, unless the other party is a terrorist. This exception was enacted on November 19, 2001, by the Aviation and Transportation Security Act, P.L. 107-71, section 201 of which amended P.L. 107-42.

The number of people who may bring tort actions may be limited, however, as the statute caps some defendants' liability to the limits of their liability insurance coverage. P.L. 107-42 capped air carriers' liability in this manner, and P.L. 107-71 did the same for any "aircraft manufacturer, airport sponsor ["the owner or operator of an airport (as defined in section 40102 of title 49, United States Code"], or person with a property interest in the World Trade Center, on September 11, 2001 . . . or their directors, officers, employees, or agents." P.L. 107-71 also provided that these caps shall apply if the United States exercises its right of subrogation against any of these parties with respect to claims it pays under the compensation program.

The final two sections of this report discuss, respectively, the interaction of the USA PATRIOT ACT of 2001, P.L. 107-56, with the September 11th Victims Compensation Fund of 2001; and the final rule issued by the Special Master on March 7, 2002 to implement the September 11th Victim Compensation Fund of 2001; it replaced the interim final rule that had taken effect on December 21, 2001.

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The Air Transportation Safety and System Stabilization Act, P.L. 107-42 (2001), which is designed to aid the airline industry after the terrorist attacks of September 11, 2001, was signed into law on September 22, 2001. This report discusses Title IV of the Act, which is titled the "September 11th Victim Compensation Fund of 2001." Title IV created a federal compensation program, which took effect December 21, 2001, for the victims of the September 11 attacks. A victim or, if he is deceased, his "personal representative," may seek no-fault compensation from the program or may bring a tort action against an airline or any other party, but may not do both, except that a victim or his estate may recover under the program and sue "any person who is a knowing participant in any conspiracy to hijack an aircraft or commit any terrorist act."[1] This exception was added by the Aviation and Transportation Security Act, P.L. 107-71, § 201(a).

Section 408(a) of P.L. 107-42 capped air carriers' liability to the limits of their liability insurance coverage,[2] and P.L. 107-71 amended section 408(a) to do the same for any "aircraft manufacturer, airport sponsor ["the owner or operator of an airport (as defined in section 40102 of title 49, United States Code"], or person with a property interest in the World Trade Center, on September 11, 2001 . . . or their directors, officers, employees, or agents."[3] Therefore, if any of these parties, on

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[1]Some parties besides the airlines who might be sued are listed in footnote 15 of this report.

[2]Section 201(b) of Public Law 107-42, which is not part of the September 11th Victim Compensation Fund of 2001, confers a liability limitation on air carriers for *future* terrorist attacks. It provides that, "[f]or acts of terrorism committed on or to an air carrier during the 180-day period following the date of enactment of this Act, the Secretary of Transportation may certify that the air carrier was a victim of an act of terrorism and . . . shall not be responsible for losses suffered by third parties (as referred to in section 205.5(b)(1) of title 14, Code of Federal Regulations) that exceed $100,000,000, in the aggregate, for all claims by such parties arising out of such act." If the Secretary so certifies, making the air carrier not liable for an amount that exceeds $100,000,000, then "the Government shall be responsible for any liability above such amount. No punitive damages may be awarded against an air carrier (or the Government taking responsibility for an air carrier under this paragraph) under a cause of action arising out of such act." Public Law 107-42 was enacted on September 22, 2001, and § 201(b) is therefore scheduled to sunset on March 21, 2002. The section in the Code of Federal Regulations that § 201(b) mentions refers to "persons, including non-employee cargo attendants, other than passengers"; these are apparently the "third parties" to whom § 201(b) refers.

[3]P.L. 107-71 provides explicitly that the cap does not apply to the "liability of any person who is engaged in the business of providing air transportation security and who is not an airline

(continued...)

September 11, had a per-incident ceiling on its coverage, and victims can prove it to have been negligent, then the victims who wish to sue rather than to receive compensation under the program may have to participate in a "race to the courthouse" to recover damages before the policy limit is reached.[4] P.L. 107-71 also capped the liability of New York City at "the greater of the city's insurance coverage or $350,000,000."

Section 409 of P.L. 107-42 gives the United States a right of subrogation with respect to any claim it pays under the compensation program. This means that the United States can recover amounts it pays under the compensation program from any party whom the victim could sue (*i.e.*, a terrorist) or would have been able to sue had he not filed a claim under the program. The United States' subrogation rights, however, are limited to the caps prescribed by section 408. In other words, a party whose liability to victims is capped by section 408 to the limits of its insurance coverage has the same protection against subrogation actions by the government.

Compensation Fund

Section 404 provides that the Attorney General shall appoint a Special Master who shall "administer the compensation program," "promulgate all procedural and substantive rules" for its administration, and "employ and supervise hearing officers and other administrative personnel."[5] The Special Master, pursuant to section 407, shall promulgate regulations with respect to forms to be used to submit claims, hearing procedures, and other matters. The statute of limitation for filing claims with the Special Master is two years after the date on which the regulations are promulgated under section 407, and the statute requires that the regulations be promulgated within 90 days after enactment of the statute. The regulations – an interim final rule – were published on schedule, on December 21, 2001; the final day for filing claims, therefore, is December 21, 2003. The interim final rule was replaced by a final rule on March 7, 2002; it is discussed in the final section of this report.

Section 405(c)(2) provides that persons who may file claims under the compensation program are those who were present at the World Trade Center, the Pentagon, or the site of the crash in Pennsylvania at the time of the crashes or in the immediate aftermath, and who suffered physical harm or death as a result of a crash. Persons who were members of the flight crew or passengers on any of the four flights that crashed on September 11 may also file claims, unless they are identified by the

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[3](...continued)
or airport sponsor or director, officer, or employee of an airline or airport sponsor."

[4]As discussed in the text accompanying footnote 14 of this report, it is conceivable that some victims who were injured or killed while in the World Trade Center or the Pentagon, or on the ground near them, might not have to prove negligence to recover from the airlines. This report in several places uses the word "negligence" or "negligent" for convenience, without meaning to exclude this possibility.

[5]On November 26, 2001, Attorney General John Ashcroft appointed Kenneth R. Feinberg Special Master.

Attorney General to have been a participant or conspirator in the crashes. In the case of a deceased individual, "the personal representative of the decedent" may file a claim "on behalf of the decedent," but "[n]ot more than one claim may be submitted . . . on behalf of a deceased individual."

Under § 104.52 of the Special Master's final rule (discussed below), "[t]he Personal Representative shall distribute the award in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction." In other words, state law shall determine which individuals receive a share of the award. However, "in the event that the Special Master concludes that the Personal Representative's plan does not appropriately compensate the victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse, children, or other relatives [notwithstanding state law]."

There is no provision in the statute for family members of victims to file claims with the Special Master on their own behalf, for damages that they, as opposed to the deceased, have suffered or will suffer as a result of the death of a victim of the terrorist attacks of September 11.

Section 405(c)(3)(B)(i) provides that, to be eligible to recover under the compensation program, a claimant will have to waive his right to sue anyone for damages caused by the terrorist attacks, except to recover "collateral source obligations," which means money due from sources such as "life insurance, pension funds, death benefit programs, and payments by Federal, State, or local government related to the terrorist-related aircraft crashes of September 11, 2001." Section 201(a) of the Aviation and Transportation Security Act, P.L. 107-71, which was enacted on November 19, 2001, provides that a claimant need not waive his right to sue "any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act." Section 408(a)(3), as added by P.L. 107-71, § 201(b), repeats that a person who files a claim under the compensation program waives the right to file a civil action for damages sustained as a result of the September 11 crashes. It also repeats the exception with regard to "collateral source obligations," but does not repeat the exception with regard to terrorists.

"[A]n individual who is a party to a civil action" in connection with the September 11 hijackings may not submit a claim to the fund unless he withdraws from the civil action within 90 days after the date on which the Special Master promulgates regulations. The Special Master did so on December 21, 2001; 90 days from then is March 21, 2002. Neither the statute nor the Special Master's final rule explicitly addresses whether an individual who files a lawsuit after March 21, 2002, and loses it or withdraws from it, may thereafter (before the statute of limitations ends on December 21, 2003) submit a claim to the fund.

Section 405(b)(3) provides that the Special Master's determination of claims "shall be final and not subject to judicial review."

Amount of Compensation. Section 405(b) provides that recovery under the compensation program will be no-fault (*i.e.*, the claimant will not have to prove "negligence or any other theory of liability"), and the Special Master will determine

"(i) the extent of the harm to the claimant, including any economic and noneconomic losses; and (ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant." "Economic losses" includes "the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities," "to the extent recovery for such loss is allowed under applicable State law." "Noneconomic losses" means losses "for physical and emotional pain . . . and all other nonpecuniary losses of any kind or nature"; the statute does not limit these to those allowed under applicable state law. (Some states have statutory caps on noneconomic damages.)

The fact that the Special Master will determine both (i) the harm to the claimant, and (ii) the amount of compensation due the claimant implies that these are not necessarily the same amounts. This is also implied by the fact that the amount of recovery will be "based" only in part on the harm to the claimant; it will also be based on "the facts of the claim, and the individual circumstances of the claimant." The statute does not specify what sort of facts or circumstances the Special Master should consider, but, presumably, these facts and circumstances would guide him in *reducing* the recovery to an amount below the total economic and noneconomic losses. It does not appear that the Special Master could award an amount greater than the total economic and noneconomic damages, as the statute prohibits him from awarding punitive damages, and they are the only other type of damages generally awarded in personal injury cases. Though the statute does not explicitly prohibit the Special Master from awarding damages above the total economic and noneconomic damages, any amount above them would effectively amount to a gift rather than to compensation, and the statute authorizes only "compensation."

Section 405(b)(6) provides that the Special Master "shall reduce the amount of compensation . . . by the amount of the collateral source compensation the claimant has received or is entitled to receive . . . ." Collateral source compensation, as noted above, includes "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."

Section 405(b)(3) provides that the Special Master must make a determination and provide written notice to the claimant within 120 days after a claim is filed, and must authorize payment within 20 days after he makes a determination. Determinations are final and not subject to judicial review. The *New York Times* reported: "Lawmakers said today that they had no idea how much the provision [the compensation program] could ultimately cost, but with the death toll presumed to be in the thousands insurance experts said claims could easily rise to $18 billion."[6] On December 21, 2001, after the Department of Justice issued its interim final rule, the *New York Times* reported that the cost of the Fund (after collateral source deductions) could be "roughly $4.8 billion."[7] On March 8, 2002, after the Department issued its

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[6]N. Y. TIMES, Sept. 22, 2001, at A1.

[7]N. Y. TIMES, Dec. 21, 2001, at A1.

final rule, the *Washington Post* reported that the cost of the Fund has been estimated at $6 billion.[8]

Section 406(b) provides: "This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title." Section 406(c) authorizes the Attorney General to accept private contributions to help meet this obligation.

Lawsuits Against the Airlines or Others

A victim who does not file a claim under the compensation program may sue an air carrier or any other third party (and may sue a terrorist even if he does file a claim under the compensation program). An air carrier or other business would generally be liable only if one or more of its employees had been negligent (but see below). Section 408 would create a federal cause of action, which would be the exclusive remedy for damages arising out of the September 11 hijackings. The law of the state in which the crash occurred would govern, and all suits would have to be brought in the U.S. District Court for the Southern District of New York.[9] The fact that state law would govern means that these lawsuits would be no different from lawsuits that could have been brought in the absence of this statute, except for the fact that they now must be tried in a particular federal court. The reason that P.L. 107-42 created a federal cause of action, rather than simply requiring state causes of action to be brought in the U.S. District Court for the Southern District of New York, appears to be that it might have been unconstitutional to allow state causes of action between plaintiffs and defendants from the same state to be brought in federal court.[10]

Although family members of victims are not eligible to recover under the compensation program for losses on their own behalf, nothing in the statute prohibits them from bringing wrongful death or other tort actions to recover such losses.

Section 408, as noted, provides that "liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier [and the other parties listed in P.L. 107-71] shall not be greater than the limits of the liability coverage maintained by the air carrier [and the other parties listed in P.L. 107-71]." Therefore, the airlines and other parties will pay damages on a "first-come-first-served" basis.

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[8]WASH. POST, Mar. 8, 2002, at A1.

[9]Section 408(b)(2) provides that the state law to be applied includes its "choice of law principles." That means, for example, that, in a suit arising out of the crash in Pennsylvania, if Pennsylvania law provides that New Jersey law should apply because the plane that crashed in Pennsylvania originated in New Jersey, then the federal court, in applying Pennsylvania law, would actually apply New Jersey law.

[10]*See*, In Re TMI Litigation Cases Consol. II, 940 F.2d 832, 848-851 (3d Cir. 1991).

Negligence or Absolute Liability. "For the most part, airline accident law is airline negligence law."[11] Negligence law may impose varying standards of care. "The traditional view, followed by most states, is that a common carrier airline is held to 'the highest degree of care.' . . . In 1986, [however,] the New York Court of Appeals . . . held that a common carrier is held to the same standard of care as any other alleged tortfeasor – it must exercise 'ordinary care commensurate with the existing circumstances.'"[12]

In applying negligence law in airline accident cases, states usually apply the doctrine of *res ipsa loquitur*. This doctrine provides that "if an instrumentality [in this case, an airplane] involved in an accident is within the exclusive control of the defendant [the airline] and if the accident is one which would ordinarily not have happened in the absence of negligence, then the jury may infer, from the mere happening of the accident, that the defendant was negligent."[13] The defendant, however, may rebut this inference, and in the case of the September 11 crashes, the airlines can obviously show that the planes were not within their exclusive control, but were in the control of hijackers. The victims, then, would have to show that the airlines were negligent in some respect other than in causing the crashes, such as in allowing the hijackers on the plane.

"At one time, about half the states in the United States had statutes imposing absolute liability on the part of an owner or lessee of aircraft for injuries or damages caused to persons or property on the ground. . . . Since 1943, the number of states imposing such absolute liability has steadily decreased. Presently, only Delaware, Hawaii, Minnesota, New Jersey, South Carolina, and Vermont" impose it.[14] The September 11 deaths occurred in New York, Pennsylvania, and Virginia, which are not among these states and so apparently require proof of negligence. As noted in footnote 9, however, the law of the state in which a crash occurred may in some cases require the application of another state's law. Therefore, in some suits brought under P.L. 107-42, the federal court, in applying the law of the state in which a crash occurred, may have to apply another state's law.

The *Washington Post* reports that "[s]ome lawyers representing families of people killed in the Sept. 11 terrorist attacks are balking at [the compensation program] and plan to file their own lawsuits against airlines and other defendants, perhaps in a matter of weeks. . . . Lee Kreindler, a New York lawyer who has represented victims of the TWA Flight 800 and the Pan Am Flight 103 air disasters [and is the author of the treatise cited in footnote 11] said airline passengers who died on Sept. 11 may be able to recover more money in court from such defendants as security companies, training schools, air carriers and terrorist groups than through a victims fund. But, Kreindler said, those who were hurt while inside the Pentagon or the World Trade Center might be better off applying to the compensation fund

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[11]Lee S. Kreindler, AVIATION ACCIDENT LAW (2001), § 2.06.

[12]*Id*. at § 2.07.

[13]*Id*. at § 2.09[1].

[14]*Id*. at § 2.12[9][a].

because it could be more difficult to win a case on grounds that an airline could have foreseen and prevented hijackers from crashing into a building."[15]

Interaction with the USA PATRIOT ACT of 2001

On October 26, 2001, President Bush signed the USA PATRIOT ACT of 2001, P.L. 107-56.[16] Sections 621-624 of this statute amended the Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10608. The Victims of Crime Act of 1984 established in the Treasury the Crime Victims Fund, which distributes money to state crime victim compensation programs. Section 622(c) and (e) of P.L. 107-56 refers to P.L. 107-42.

Section 622(c) provides that, "[n]otwithstanding any other law (other than title IV of P.L. 107-42)," if a federal, state, or local program that provides medical or other assistance using federal funds has a "maximum allowed income, resource, or asset eligibility requirement," then any crime victim compensation that an applicant receives shall not count toward his eligibility under the program that provides medical or other assistance using federal funds. The parenthetical phrase, "other than title IV of P.L. 107-42," indicates that compensation received under that law is an exception – *i.e.*, it will count in determining one's eligibility under a program that receives medical or other assistance using federal funds.

Section 622(c) also provides that crime victim compensation shall not reduce the amount of assistance available to an applicant under a program that provides medical or other assistance.[17] Again, however, compensation under title IV of P.L. 107-42 is an exception. This is consistent with the provision of P.L. 107-42 that provides that the Special Master shall reduce the amount of compensation by the amount of collateral source compensation that the claimant is entitled to receive.

Section 622(e)(1) amended section 1403(e) of the Victims of Crime Act of 1984, 42 U.S.C. § 10602(e), which now provides that, "if compensation paid by an eligible crime victim compensation program would cover costs that a Federal program, including the program established under title IV of P.L. 107-42, or a federally financed State or local program, would otherwise pay," then the crime victim compensation program shall not pay, and the federal or federally financed program

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[15]WASH. POST, Sept. 26, 2001, at E1, E5. Another article lists other potential defendants, besides the airlines, security companies, training schools, and terrorist groups: the Port Authority of New York and New Jersey (if it was negligent in evacuating the World Trade Center), architects and engineers of the World Trade Center (if the towers should have withstood the impact of the airliners), airports (if their security was lax), the federal government (if it failed to enforce safety regulations), and Boeing Co. (if sturdier cockpit doors in the planes it manufactured could have prevented the hijackers from taking control of the airliners). NATIONAL LAW JOURNAL, Oct. 1, 2001, at A13.

[16]The title is an acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism."

[17]Section 622(c) has an exception: crime victim compensation shall reduce the amount available if "the total amount of assistance that the applicant receives from all such programs is sufficient to fully compensate the applicant for losses suffered as a result of the crime."

shall. The amendment added the reference to the program established under title IV of P.L. 107-42.

Section 622(e)(2), consistently with section 622(e)(1)'s providing that a crime victim compensation program shall not cover costs that P.L. 107-42 covers, provides that a crime victim compensation program that does not pay in such circumstances shall not become ineligible for future grants under the Victims of Crime Act of 1984.

Department of Justice Final Rule[18]

On November 5, 2001, the Department of Justice published a request for comments on six topics it was considering in connection with the regulations that P.L. 107-42, § 407, required it to issue by December 21, 2001.[19] "One of the most hotly debated issues" it would address, according to the *Washington Post*, was "whether life insurance payments, pensions and retirement savings accounts, and gifts from charities should be deducted from the awards families receive from the government fund."[20] In fact, however, life insurance and pensions are explicitly named in the statute (§ 405(b)(6)) as collateral sources that the Special Master must deduct from the amount of compensation otherwise available under the compensation program. The statute does not, however, explicitly mention gifts from charities, and the Special Master, finding "ambiguity in the statute" as to this question, decided that they will not be deducted from compensation awards.

An article in the *New York Times* provided some pros and cons on this question.[21] Some say that awards should be reduced by the amount of charity a victim's family accepts because "[t]he point of the federal fund . . . is to make victims' families financially whole, not to enrich them at the expense of American taxpayers, millions of whom have already made donations." Those who disagree say that these taxpayers "pledged donations to help victims, not the government's balance sheet. And if fund awards are reduced by the amount of charity that is accepted, what incentive will Americans have to provide charity to future victims of terrorism?" The present uncertainty on this question raises concerns as to whether victims' families should "keep painstaking records of every charitable penny they receive," and whether charitable organizations should direct their funds "toward those not eligible [under the

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[18]The statute, the interim final rule, the final rule, the Presumed Loss Calculation Tables Before any Collateral Offsets, and other material, are available at [http://www.usdoj.gov/victimcompensation/index.html].

[19]66 Fed. Reg. 55901-55905 (Nov. 5, 2001), 28 C.F.R. Part 104. The request for comments is formally called a "Notice of inquiry and advance notice of rulemaking." The six topics on which comments were sought were "The Forms To Be Used in Submitting Claims Under This Program and the Information To Be Included on the Claims Form," "Procedures for Hearing and the Presentation of Evidence," "Procedures to Assist an Individual in Filing and Pursuing Claims Under This Title," "Claimant Eligibility," and "Nature and Amount of Compensation."

[20]WASH. POST, Nov. 5, 2001, at A10.

[21]N.Y. TIMES, Nov. 6, 2001, at A1, B7.

compensation program] – those who lost their jobs or homes, or suffered severe mental trauma? . . . Whether awards from the fund are reduced to reflect the charitable gifts families receive will be an important factor in its ultimate cost to American taxpayers, budget analysts said."

On December 21, 2001, the Department of Justice released an "Interim final rule with request for comments."[22] The rule states that it "will have the force and effect of law immediately upon publication," but is designated "interim" "because the Department is also seeking further comment for a period of 30 days as part of its further review and may expand or adjust aspects of the rule after receiving additional comments." On March 7, 2002, the Department, after reviewing the comments it received, released a final rule.

The final rule authorizes persons who are eligible to recover under the Fund to apply for immediate "**Advance Benefits**" in the amount of $50,000 for personal representatives of people who died as a result of the September 11 hijackings (to be distributed among their survivors), and $25,000 for people who suffered a physical injury that required hospitalization for one week or more. The amount of any advance benefits received will be deducted from the final award under the program.

Section 405(c) of P.L. 107-42 authorizes compensation to persons who suffered physical harm, or the survivors of persons who died, as a result of the hijackings. The final rule, § 104.2(c), defines "**physical harm**" as a physical injury "that was treated by a medical professional within 24 hours of the injury having been sustained or within 24 hours of the 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 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 in-patient for at least 24 hours; or (ii) caused, either temporarily or permanently, partial or total physical disability, incapacity or disfigurement."[23]

The final rule, § 104.4, defines "**personal representative**" as "[a]n individual appointed by a court of competent jurisdiction as the Personal Representative of the decedent or as the executor or administrator of the decedent's will or estate," or, if no court has made such an appointment, then the Special Master may name as personal representative "the person named by the decedent in the decedent's will as the executor or administrator of the decedent's estate." If no will exists, the Special Master may "determine that the Personal Representative . . . is the first person in the line of succession established by the laws of the decedent's domicile governing intestacy" – in other words, the first person entitled under state law to inherit in the absence of a will. This will usually be the spouse, though, if there is no spouse, but

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[22]66 Fed. Reg. 66273-66291 (Dec. 21, 2001), 28 C.F.R. Part 104.

[23]The italicized language was not in the interim final rule, but is in the final rule (unitalicized). The Special Master states in the final rule that the language was added because some individuals "were severely injured in the immediate aftermath of the terrorist attacks, yet would not be eligible for the Fund because they were not 'treated by a medical professional within 24 hours of the injury having been sustained.'"

there are parents, grandparents, siblings, or offspring, then there could be more than one person in the same spot in the line of succession, and the final rule does not address how this would be handled.

As noted above, "[t]he Personal Representative shall distribute the award in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction." In other words, state law shall determine which individuals receive a share of the award. However, "in the event that the Special Master concludes that the Personal Representative's plan does not appropriately compensate the victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse, children, or other relatives [notwithstanding state law]." § 104.52.

The final rule does not address the eligibility of **unmarried partners** of victims to be personal representatives or beneficiaries of awards. Therefore, they may be appointed or named personal representative in the manner described above, or may be eligible for an award in the manner described above. However, when a person dies without a will, the line of succession under state law generally includes only relatives. Therefore, if the personal representative in a particular case is the first person in the line of succession, then an unmarried partner may be precluded from being that person. And, if the victim died without a will, then an unmarried partner may be ineligible to receive an award.

Amount of Compensation. The final rule, § 104.41, provides: "In no event shall an award (before collateral source compensation has been deducted) be less than $500,000 in any case brought on behalf of a deceased victim with a spouse or dependent, or $300,000 in any case brought on behalf of a deceased victim who was single with no dependents."

The final rule describes how the Special Master will determine economic and noneconomic loss, for victims who died and for victims who suffered physical harm but did not die. In determining economic loss, for either category of victim, the Special Master, in accordance with P.L. 107-42, § 402(5), will not "compensate claimants for those categories or types of economic losses that would not be compensable under the law of the state that would be applicable to any tort claims brought by or on behalf of the victim." § 104.42. The statute contains no comparable limitation on awards for noneconomic loss.

In determining economic loss for victims who died, the Special Master will consider loss of earnings or other benefits related to employment, medical expense loss, replacement services loss ("[f]or decedents who did not have any prior earned income, or who worked only part time outside the home"), loss due to death, including burial costs, and loss of business or employment opportunities. § 104.43. As for noneconomic loss for victims who died, the Special Master will award "$250,000 plus an additional $100,000 for the spouse and each dependent of the deceased victim." § 104.44.[24]

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[24]The interim final rule had $250,000 plus an additional $50,000 for the spouse and each (continued...)

In determining economic loss for victims who suffered physical harm but did not die, the Special Master will consider loss of earnings or other benefits related to employment, the extent to which any disability prevents the victim from performing his or her usual profession, medical expense loss, replacement services loss, and loss of business or employment opportunities. § 104.45. As for noneconomic loss for victims who suffered physical injury but did not die, the Special Master will "rely[ ] upon the noneconomic losses described in § 104.44 [$250,000 plus an additional $100,000 for the spouse and each dependent] and adjust[ ] the losses based upon the extent of the victim's physical harm." § 104.46.

As noted, the above amounts will be reduced by the amounts of **collateral source compensation** received, except for those consisting of charitable gifts. The final rule, however, added language to § 104.47 providing that:

> 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 on 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 prevent beneficiaries from having their awards reduced by collateral source compensation that they will not receive.[25]

The final rule also added to § 104.47 a provision that "[t]ax benefits received from the federal government as a result of the enactment of the Victims of Terrorism Tax Relief Act [of 2001]" shall not be deducted from awards under the Fund. The Victims of Terrorism Tax Relief Act of 2001, Public Law 107-134, provides income and estate tax relief to families of victims of the September 11 attacks, of anthrax attacks that occurred between September 11 and the end of 2001, and of the bombing of the Murrah Federal Building in Oklahoma City on April 19, 1995.[26]

Under the final rule, "the average award would climb to about $1.85 million from $1.65 million [under the interim final rule], before life insurance and other death benefits would benefits would be deducted. . . . [T]he awards would range from a low of about $384,000 to a high of $4.5 million, before the required deductions, which could run in the hundreds of thousands of dollars."[27] The Special Master wrote: "Although we still anticipate that awards in excess of $3 or $4 million will be rare, we

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[24](...continued)
dependent.

[25]The final sentence would apply, for example, where the beneficiary of a victim's life insurance policy was not a beneficiary of an award under the Fund because he was not named in the victim's will or was not in the line of succession if the victim died intestate.

[26]H.R. 3633, 107th Congress, would compensate victims of the Oklahoma City bombing on the same basis as September 11 victims.

[27]WASH. POST, Mar. 8, 2002, at A1.

emphasize again that there are no 'caps' under this program."[28] The Special Master also wrote that he anticipates that "it will be very rare that a claimant will receive less than $250,000, except in unusual situations where a claimant has already received very substantial compensation from collateral sources."[29]

[28]Page 8 of the pdf version of the final rule, available as a link at the Web page cited in note 18, *supra*.

[29]*Id*. at 6-7.