

TranSec World Expo 2009
Cause & Consequence
In an increasingly litigious world where does the buck stop
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Good afternoon.

It was President Truman who popularised the phrase “the buck stops here” way back in 1945.

The US Congress attempted to define with precision the point at which the buck actually stops, and the limitations to be applied to it, when they responded to the 9/11 attacks with the hastily conceived Air Transportation Safety and System Stabilization Act, which brought this industry substantive respite from the dark clouds hanging over it at that time.

A scant thirteen days after the attacks, President Bush, with the stroke of a pen, signed the Act quickly into Law.

That piece of legislation provided \$5 billion in direct aid to the airline industry, a further \$10 billion in loan guarantees, government aid with insurance, and capped the industry's financial liability. It also provided a framework through which those who lost loved ones or sustained injury during the attacks could be compensated for their loss.

The package of measures defined within the Air Transportation Safety and System Stabilization Act were clearly designed to keep a beleaguered industry afloat at a time of great uncertainty, ensure its continued survival and provide a means to early closure for those left behind to pick up the pieces of lives shattered by the events of that day.

It probably amounts to heresy in a forum such as this to question whether a rescue package of the kind specified in the Act should or would be put in place again to save this industry in the event of another terrorist attack of similar magnitude.

You might be surprised to learn that there is a body of potentially quite powerful opinion out there which argues that certain provisions of the Act were a step too far and which no future government should take again.

The significance of this is that it is quite possible that if an event of the severity of the September 11 attacks were to happen again, the protections

afforded this industry may not be available and the financial consequences unbearable.

Historical Background

I'll do a little historical recap here.

The Air Transportation Safety and System Stabilization Act took several steps to address the financial risks facing the airlines including limiting the liability of air carriers for all claims arising from the attacks to the limits of the insurance maintained by each air carrier of \$1.5 billion per aircraft.

Amendments to the Act latterly extended the limitation of liability to those engaged in airline security, aircraft and aircraft parts manufacturers, airport owners and operators, anyone with a property interest in the World Trade Center, and New York City itself.

The pot from which claims were to be settled therefore became fixed and finite.

These limitations on liability created the potential that in the event entities were judged to have been negligent and to have contributed to the losses experienced by individuals, corporations, and property owners on September 11, there would not be sufficient funds available to pay all compensatory damages awarded by the courts.

Congress added provision in the Air Transportation Safety and System Stabilization Act for establishment of the Victims Compensation Fund (VCF) to address this problem. It provided a path through which the dependents of those who lost their lives in the attacks and those who suffered physical injury could seek speedy redress.

Current Position

The court of adjudication in all matters related to September 11 is the Southern District Court of New York.

To date this court has heard and settled the small number of wrongful death and personal injury claims that have come before it.

Hearings in respect of the numerous corporations that suffered business interruption and property loss are continuing.

The court will then move on to the final and extremely vexed issue of liability

once all other matters have been settled.

The cases currently before the court are complex and protracted and the compensation sums being discussed are eye watering big.

At the end of March the owners of the World Trade Centre went back to Court over the matter of valuation of the properties which is variously put at between \$1.45 – 2.8 billion!

This illustrates succinctly just why the available pot from which the cases are to be settled will be rapidly emptied.

Victims Compensation Fund

The balance of claims for wrongful death and personal injury which did not come to the court were settled through the Victims Compensation Fund (VCF).

Figures released by the Office of the Special Master established to oversee the scheme reveal that 97% of those eligible to file a claim on behalf of those killed in the attacks ultimately did so via this method.

This totaled some 2880 claims.

Another 2,680 people filed claims for injuries sustained in the attacks.

The total entitlement was calculated at \$8.5 billion for death claims and \$1.5 billion for injury claims.

Offsets required by the legislation for insurance payments reduced the total amount actually distributed by the Fund to \$6.0 billion and \$1 billion respectively.

Total administrative costs for the Fund were \$87 million, the greater bulk of which (\$77 million) went to PriceWaterhouseCoopers, the firm selected to manage the claims processing and payment procedures.

The Office of the Special Master estimated it spent in excess of 19,000 hours valued at more than \$7.2 million, but provided all its services free of charge.

Public Disquiet

Victims Compensation Fund rules were relatively simple and straightforward and consisted the following:

- that compensation from the Fund be limited only to Wrongful Death and Physical Injury.
- that compensation be provided for both economic and non economic losses, but prohibiting any awards based on an assessment of punitive damages.
- that only one claim could be made on behalf of any person killed or injured in the attacks.
- that claims had to be filed within two years of the date on which the Fund's Special Master issued regulations governing it.
- that the Special Master had to determine an award within 120 days of the filing of a claim.
- that there was to be no judicial review of the Special Master's determination of an award.

Although no limits were placed on the amount that could be awarded either individually or in the aggregate, in accepting a determination and award of compensation from the Fund, victims were required to waive their rights to make a subsequent civil claim in the Courts.

Survey Findings

The fact that nearly all of the potential 9/11 litigants ultimately chose the Victims Compensation Fund (VCF) over the much less certain outcome of litigation in the Courts has been interpreted since as people choosing in the end to go with the money.

Recent detailed research by the University of Southern California School of Law indicates that this simplistic view is largely misguided.

In a survey of those who sought redress through the Fund researchers found that the decision was driven largely by a capitulation to reality and brute facts and has brought those who settled neither peace of mind or closure on a truly horrific period in their lives.

A sizable majority of the respondents to the survey (59%) found the Fund to be unfair or grossly unfair and stated that they felt bullied railroaded, pressured or coerced into accepting a settlement from the Fund and foregoing their rights to seek further redress through litigation in the Courts.

CLOUD 1

The word cloud you see behind me is derived from statements from those who went through the VCF process at the behest of their legal advisers.

It essentially illustrates how, when seeking advice in those dark personal times, the preponderance of advice received was to settle through the Fund.

I accept that is a somewhat unconventional and non scientific way of extracting raw data, but it does illustrate clearly that a conscious effort was made to divert the wrongful death and personal injury claims away from the courts, placed certain limits on settlements and removed a much cherished right of all claimants to seek further appropriate redress.

A significant majority of those who participated in the survey conducted by the University of Southern California School of Law, stated clearly that should they have the option to make the decision they did again then they would have chosen to sue in the courts.

The cynical amongst might think that the motivation driving this point of view is monetary greed. However, the majority of the respondents were satisfied with the settlement they received, and were driven by other motives.

CLOUD 2

This word cloud illustrates some of the factors driving that thought process. Many of the people surveyed felt they had somehow failed their husband, wife, girlfriend, boyfriend, son or daughter by not pursuing a claim through the courts and finding an answer to why a loved one, relative or friend lost their lives that day.

The predominant sentiment here is that those who settled through the Fund want information. They need to find answers and with those answers they might at last find closure.

CLOUD 3

A final driver, as can be seen here, is the need to seek accountability.

Those surveyed by the University of Southern California School of Law researchers, feel that in settling claims through the Victims Compensation Fund they accepted blood money or hush money to go away and keep quiet.

The want the hard and accurate facts and they want accountability.

The Blame Game

There was substantial agreement among respondents that airline security firms, the FAA, the intelligence agencies and the INS bore significant responsibility for the injuries by not “doing their job” to prevent the September 11 attacks.

The relatively broad support for the claim that security firms and intelligence agencies bore a significant share of responsibility for the losses suffered reflects the fact that the events that led to the death or injury of those harmed by the attacks on September 11 began in a common sequence.

Every one of those deaths or injuries began with the sequence of events investigated by the 9/11 Commission:

- the Al Qaeda planning and financing of the attacks
- the US-based flight training of the hijackers,
- the immigration and intelligence procedures that allowed the hijackers into the country,
- the airport security procedures that allowed the hijackers onto the planes,
- the airline security protocols that allowed the hijackers into the cockpits,
- the FAA responses that failed to detect or intercept the hijackings until the planes crashed.

For those killed on the planes or at the point of impact, the sequence ends there. But many who ultimately died in the World Trade Center or the Pentagon survived the initial impacts.

For these victims and for the injured, the cause of injury or death depends on where the victim was at the time of impact and what happened after impact.

For these victims, the answer to the question of who bears responsibility for the loss extends beyond the terrorists and those who bore responsibility for preventing the terrorists from succeeding in their plan.

In a form of analysis that is commonplace to tort law, the answer extends to those whose actions entered the chain of proximate cause.

Summary

In the survey I have highlighted today, the overriding opinion of all respondents is the limitation of liability, the effort to prevent lawsuits and the requirement that victims and their families choose between money and lawsuits are steps no future government should take.

Perhaps more worryingly, that sentiment is now beginning to be voiced in hushed tones within the corporate community since many claimants in this category are looking at the bleak prospect that recovery of their losses is strictly limited and may ultimately not be achievable.

So, what does this all mean?

Assuming an atrocity of similar magnitude were to happen again, then it could mean that a very large question mark hangs over whether a future government faced with the same issues would enact legislation to protect and underwrite this industry sector?

And would dependents opt for settlement or would they sue in the wake of another such event?

Much depends on personal circumstance, but if the findings from the survey highlighted today are representative of a wider public sentiment, then it's more than likely the courtroom will be the option.

Clearly, if something similar to the events of September 11 were to occur again, then this industry could find itself collectively trapped between a rock and a hard place and likely without a safety net.

Ends.