By Noah H. Kushlefsky

The Choice between the Victim Compensation Fund and Litigation

September 11

families must

thoroughly

evaluate their

situation

n September 11, 2001, nearly 3,000 people were killed in the worst terrorist attack this country has ever seen. The victims left behind families that are suffering monumental personal and pecuniary losses. Traditionally, the legal system has been the avenue of compensation for families suffering the loss of a loved one. In response to the tragedy, however, federal legislation was quickly passed to aid the victims of September 11 with an alternative source of compensation—the September 11 Victim Compensation Fund of 2001. As a practical and a political necessity Congress created the fund as part of a

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broader effort to protect the financial viability of the nation's airlines.1 Families of victims must now choose between civil litigation and this fund. Both options carry risks that must be carefully considered.

Within days of the hijackings of two American Airlines and two United Airlines flights, lobbyists for the airlines were on Capitol Hill seeking financial aid and financial protection. The lobbying efforts resulted in a statute that provided both. The Air Transportation Safety and System Stabilization Act authorized \$5 billion in direct aid to the airlines and another \$10 billion in loans.2 It also limited the liability of American and United for claims resulting from the attacks to their insurance coverage.3 Each aircraft carried approximately \$1.5 billion in liability insurance.4 Later legislation limited the liability of other potential civil defendants.5

Given the number of victims killed and injured in the terrorist attack on the World Trade Center and the potential for massive property and business claims, many believed that limiting claims to insurance coverage was tantamount to denying the rights of victims to sue the airlines for damages. To answer this criticism, the September 11 Fund was designed not to replace civil litigation but rather to be an attractive alternative. In that respect, it is a rare piece of legislation. Generally, when states and the federal government have leg-

> islated away the right to sue, they have replaced it with a mandatory administrative resolution system. For example, the workers' compensation laws of states provide workers with an alternative com-

pensation method for workplace injuries. For the most part these laws prohibit lawsuits against the employer, making workers' compensation the exclusive available remedy. In contrast, the victims of September 11 have a choice between the fund and civil litigation. Families of victims cannot choose both, however; in order to enter the fund, a family must give up its right to sue. The exception is filing a civil lawsuit against the terrorists and coconspirators, which is expressly preserved.⁶

The decision whether to accept payment from the fund or to pursue civil litigation is difficult in some cases and quite easy in others. Numerous factors must be considered, and those factors vary dramatically from case to case and from family to family. For those who consider litigation, the liability of domestic defendants is uncertain, and there are limited insurance funds to satisfy judgments. Also, lawsuits could take 10 years or more to resolve. On the other hand, the fund is new, untested, and unproven. No one knows whether it will be fair and reasonable to the victims' families. The statute and regulations that control the fund give unlimited discretion to the special master, who is appointed by the Justice Department, and there is no right to appeal any perceived abuse of that discretion.

Families should decide which path to take only after gaining an understanding of the risks and uncertainties of both options. Victims on the ground and in the World Trade Center, for example, face legal circumstances that are different from those faced by victims in the four hijacked airplanes. The litigation risks facing the victims of American Flight 11 and United Flight 175 (which hit the World Trade Center) differ from those of the victims of American Flight 77 (which crashed into the Pentagon) and

from those of the victims of United Flight 93 (which crashed in Pennsylvania). The Stabilization Act's limitation of liability to insurance coverage looms large for the World Trade Center flights, because thousands of ground victims (and property damage and business loss claimants) could be vying for the same limited insurance coverage. On the other hand, coverage should be sufficient for the Pentagon and Pennsylvania crashes. Even the families of those victims, however, may be better off selecting the fund, which in some cases can be more generous than the wrongful death damages available under state law. (See "The Choice-of-Law Question," page 14.)

Considering the Fund

For many, the most attractive feature of the fund is likely to be that fault does not have to be proven.7 The Department of Justice has indicated that "the fund is designed to provide a no-fault alternative to tort litigation."8 The families of any individual, other than a terrorist, whose life was lost at the World Trade Center, the Pentagon, or Pennsylvania are eligible.9 For those who were injured in the attacks, the requirements are 1) that they were at the crash sites and were treated by a medical professional within 24 hours of injury or rescue—or for those who did not realize the extent of their injury, within 72 hours of injury, and 2) that the injury required at least 24 hours of hospitalization or was a cause of a temporary or permanent partial disability, incapacity, or disfigurement.10

The fund statute permits victims to recover economic and noneconomic losses. The language of the statute is as generous as any state's law permitting these types of damages. Economic loss is defined as any pecuniary loss recoverable under the applicable state law.11 The definition of noneconomic loss is broad: "non-economic losses' means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium...hedonic damages...and all other nonpecuniary losses of any kind or nature."12 For many of the victims' families, noneconomic damages under the fund seem to go beyond what would be recoverable in wrongful death litigation.

For example, all four hijacked flights were bound for California, and dozens of California residents were killed in the attacks. Under California law, noneconomic damages are recoverable for loss of companionship and loss of society, but compensation for the grief or the emotional distress of the survivors is disallowed.¹³ Under a strict reading of the fund statute, however, damages for these losses should be recoverable. The majority of the victims of the September 11 attacks resided in New York and New Jersey. In both states, wrongful death damages are limited to pecuniary loss to survivors, and there is no

recovery for noneconomic losses at all.¹⁴ Another attraction of the fund is that it is required to be quick. The special master has only 120 days to issue a written decision after a claim is fully submitted.15 During that 120day period, the claimant has a right to a hearing and to present evidence and documents.¹⁶

Finally, the statute does not place any limitations on the amounts that can be awarded under the fund, and there are no damages caps in an individual case.17 No specific amount of money has been set aside to compensate the victims.

Why then, with all these apparent benefits, did less than 10 percent of the families of victims choose the fund in the first several months that it was accepting applications? The answer is likely to involve two factors. First, the fund is a brand new creation with no track record, and families are uncertain how their cases will be treated. So much discretion rests with the special master that families are loath to waive their rights to litigate when they do not know what entry into the fund really implies. Second, awards under the fund will be offset by a number of collateral payments to victims' families-including life insurance, which is not an offset in civil litigation.¹⁸ These and other presumptive restrictions on noneconomic loss contribute to a general skepticism among families and the lawyers representing them.

The fund requires that "all collateral sources, including life insurance, pension funds, death benefit programs, and payments made by Federal, State, or local governments" be deducted from any award. 19 The parameters for these offsets are described in interim final rules and final rules, which have been published by the Justice Department and the special master.20 The interim final rules and the final rules must be read together because they supplement each other. The rules not only set out the regulations but also contain narrative interpretations of the statute that will be used in setting awards.

The rules provide guidance on how the collateral source provision will be implemented. For example, in the interim final rules it is determined that charitable donations received by a family would not be considered an offset to a fund award.21

Most of the victims in the World Trade Center were killed in the course and scope of their employment, and their families are eligible for workers' compensation benefits. Both workers' compensation and Social Security benefits will be a deduction under the fund, but the final rules make it clear that "contingent" benefits will not be an offset.22 Benefits to widows are contingent, for example, because under both workers' compensation and Social Security rules, if a widow

The Choice-of-Law Question

Families choosing civil litigation over the September 11 Victim Compensation Fund face the question of which state's law will govern damages awards. Each case will require a choice-of-law analysis in which the court will consider the laws of various states that have a connection to the litigants and litigation.

For example, the families of California residents killed in the crashes of American Airlines Flight 11 and United Airlines Flight 175 have four potential jurisdictions: New York (the place of the crashes), California (the domicile of the victims), either Texas or Illinois (the principal places of business for American Airlines and United Airlines, respectively), and Georgia (the principal place of business of Argenbright Security). The Air Transportation Security and System Stabilization Act provides that New York's choice-of-law rules apply because the crash occurred there. New York, in turn, uses a flexible approach in order to apply the law of the jurisdiction with the most significant interest in or relationship to the case.1

In wrongful death cases, New York focuses on the state that has the most significant interest in the particular issue to be decided and distinguishes between liability and damages.² When damages are the issue, New York courts will usually look to the law of the domicile of the parties, which in the example are California and Texas or Illinois.³ In New York, when those laws are in conflict, a rebuttable presumption is raised in favor of the law of the place of injury, with the rationale being that the parties intentionally associated there. This rationale does not make sense when applied to interstate air travel, because the place of the injury is often fortuitous. Neither the airlines nor the passengers on Flights 11 and 175 voluntarily associated with New York on September 11, so it is not a center of the relationship of the parties. Nevertheless, a presumption of New York law will be raised. Attorneys may overcome the presumption by showing that an application of domicile law (in the example, California) will advance the purposes of the laws without impairing the multistate system or producing uncertainty.4

In a general sense, the state in which the injury occurred and the defendant's home state have a greater interest in regulating a defendant's conduct, but this understanding is not set by rule. Another premise is that the home state of a victim has a greater interest in assuring adequate compensation for the injury. Under that premise, California damages law should apply to the cases involving California residents. More generous than New York law, California law permits recovery for loss of companionship and loss of society in addition to recovery for economic loss. New York law limits recoveries to economic loss.

Choice-of-law analysis is very subjective, and courts have tremendous discretion, so the ultimate selection is uncertain. When one disaster leads to cases involving victims from many states, another factor to consider is a court's preference for uniformity, which in the example would argue for application of New York law. Ultimately, the choice-of-law analysis adds another burden of uncertainty for families of the victims of September 11.—N.H.K.

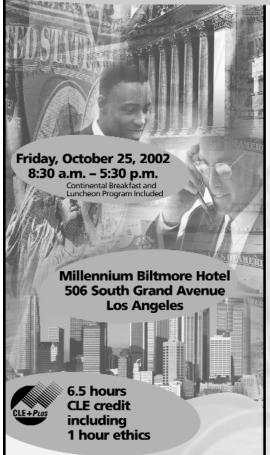
¹ Brink's Ltd. v. South African Airways, 93 F. 3d 1022, 1030 (2d Cir. 1996).

² Schulz v. Boy Scouts of Am., Inc., 65 N.Y. 2d 189, 197, 491 N.Y.S. 2d 90, 480 N.E. 2d 679 (1985).

³ Brink's, 93 F. 3d at 1031 (quoting Cooney v. Osgood Machinery, Inc., 81 N.Y. 2d at 72, 595 N.Y.S. 2d 919, 612 N.E. 2d 277 (1993))

⁴ Neumeier v. Kuehner, 31 N.Y. 2d 121, 335 N.Y. S. 2d 64 (1972).

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remarries the benefits stop. The final rules recognize that contingent benefits are not capable of calculation and cannot be an offset. To the extent that benefits have already been paid, they will be a deduction. Benefits to children, which continue until they reach 18, will be an offset because they are calculable.

Pension programs are also a collateral source offset under the fund. This is particularly onerous for the families of the hundreds of New York City Fire Department and Police Department personnel killed in the collapse of the buildings, because the families are eligible for substantial line-of-duty death pensions that could greatly diminish their compensation under the fund. The final rules do make the allowance that to the extent that a pension is self-funded, it will not be an offset.²³ Life insurance is the collateral offset that will send the most families into courtrooms. For families with life insurance, it can have a devastating effect on recovery from the fund. Depending on the economic loss claim and the amount of life insurance, when combined with other collateral sources, the fund may in some cases provide no benefit at all.

Another disadvantage of the fund lies in its treatment of noneconomic loss. What the statute gave, the Justice Department took away. New York and New Jersey do not recognize noneconomic losses in wrongful death cases, but even so, the fund offers families in those states only an illusory advantage over litigation. New York and New Jersey both provide for survival causes of action, which are separate from wrongful death claims.24 Under the survival statutes, personal injury claims that a decedent had before death survive the death. Both states recognize claims for physical and emotional pain and suffering and fear of impending death.²⁵ For the victims in the hijacked aircraft and in the World Trade Center, the claims for pain and suffering and fear of death are substantial. Take, for example, the World Trade Center occupants on floors above where the airplanes hit. After the planes hit, North Tower occupants were trapped for an hour and a half and South Tower occupants for over an hour before the towers collapsed. The survival claims for pain and suffering are staggering—likewise for the airplane passengers who witnessed the murders of crew members and experienced the hijackings. But the fund lumps these survival claims together with the noneconomic loss claims and then sets the standard for recovery at only \$250,000, a fraction of what could be awarded in litigation.26

Perhaps the most troubling aspect of the fund is the special master's unfettered discretion. Families that accept the fund waive their right to a jury trial, and there is no right to appeal the special master's determination.²⁷

The statute, the interim rules, and the final rules place unlimited authority in the special master in setting awards and arguably allow the official to disregard every other provision of the statute and the regulations. Section 405 of the statute states that the special master shall review a claim and make an award "based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant."28 This statutory provision was translated into a needs test when the rules were published. The interim and the final rules state that simply calculating economic loss and noneconomic loss will be insufficient relative to the needs of the families of some victims and excessive relative to the needs of others.²⁹ The special master has the unbridled power to reduce or erase an award under the fund, and the claimant has no ability to challenge that decision. The master has the authority to determine that a family has no need and that there should be no award. The special master's power trumps all other provisions of the victim compensation fund and creates a risk that does not exist in civil litigation. This is not to say that civil litigation does not present substantial risks of their own. The risks of litigation must be weighed against the risks of the fund before making a choice between the two.

The Litigation Option

Families who choose to litigate face myriad potential problems, which can be placed into two categories: proving liability and collecting the damages. There are numerous potential defendants, but almost all with deep pockets have been protected by federal legislation. Potential defendants that have not been protected have limited insurance and scant assets. 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, ranging from injured occupants of the towers and people on the streets to residents of lower Manhattan. The fund is only available to personal injury claimants who sought immediate medical care, so thousands of injured victims do not have the fund as an option. 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.

The original Airline Stabilization Act limited the exposure of the airlines to liability. A later amendment greatly expanded the protection to the manufacturers of the aircraft, owners and operators of the airports involved,

and any entity or person with a property interest in the World Trade Center. The city of New York, which is self-insured, had its liability capped at \$350 million.³⁰ The statute specifically excludes the private companies that provided security at the airports.³¹

It seems clear that no one victimized in the World Trade Center tragedy will collect full damages in litigation. Once all the claims in litigation are evaluated and valued, the limited funds that are available will likely be awarded on a proportional basis. It is impossible to predict what percent of the actual damages in each case will be awarded. This is not so for the victims of the Pentagon and Pennsylvania crashes. The insurance coverage for those crashes likely will be sufficient to satisfy all successful claims.

The limited funds will likely also cause the civil case to drag on for years. Even if liability is not contested and some defendants or insurers decide to pay the policies into the court for later distribution rather than litigate, tens of thousands of claims will have to be evaluated before the funds can be allocated. This is in stark contrast to the required expediency of the fund.

If the defendants or their insurers choose to contest liability, the victims are in for a long and complicated fight. Potential defendants include American Airlines and United Airlines; the operators of Logan Airport, Newark Airport, and Dulles Airport; the companies that provided airline security for the flights; the domestic flight schools that trained the terrorist pilots; the owner and lessee of the World Trade Center; the architects, engineers, and material suppliers for the World Trade Center; and the city of New York. It is doubtful that World Trade Center occupants have viable theories of liability against the city of New York, but rescue workers sent to ground zero may.

The success of a suit against any of these potential defendants requires proof that they had a duty to the plaintiffs, that there was negligence (or a breach of the duty), and that the negligence was a proximate cause of the injury. Proximate cause includes an element of foreseeability.³² The fund does not present claimants with these hurdles because it does not address liability.

The elements of duty, proximate cause, and foreseeability greatly distinguish claims. For example, it is clear that the airlines had a duty to the passengers on the airplanes, but did they have a duty to the occupants of the WTC and the Pentagon or to the people on the street in New York killed by falling debris? What about business owners on the ground? An argument can be made that an airline has a duty to everyone on the ground, but it is by no means a certainty.

Likewise, while it was certainly foreseeable to the airlines that negligent passenger security could cause harm to passengers on the airplane, it is more of a challenge to prove that poor security on a flight from Boston to California could cause harm to occupants of the World Trade Center or others on the ground. The same analysis applies to the security companies and the operators of the airports. In short, while the \$3 billion in aviation insurance may be the largest source of compensation available in litigation, it may not be available to anyone but the airline passengers.

The victims in the Twin Towers may look to Silverstein Properties and the Port Authority of New York and New Jersey, the lessor and owner of the buildings, on the theory that they provided no proper emergency evacuation route or plan. In fact, after the first hijacked airplane struck Tower One, occupants of Tower Two were told to remain in their offices, and many families of the victims in Tower Two are incensed by that instruction. Nonetheless, the decision by the building management to keep occupants in the building is probably protected by New York's emergency doctrine.33 Building managers were faced with an emergency not of their making, and under that condition the emergency doctrine allows decision makers wide latitude to act reasonably under the circumstances.34 These defendants will likely argue that debris and bodies were falling to the street from Tower One, they had no information about a second hijacked airplane, and they reasoned that under the circumstances staying in the building was the safest course of action.

Another major risk of litigation is juror reaction to a lawsuit against American companies in response to an attack against this country. Tort litigation is always more complicated when a nonparty actor is the direct cause of the injuries because a defendant can point to the nonparty as the sole or primary cause. Plaintiffs' attorneys, however, routinely deal with this issue. In the case arising out of the terrorist bombing of Pan American Flight 103 over Lockerbie, Scotland, a jury found that Pan Am was guilty of willful misconduct for inadequate security, despite the fact that terrorists, not Pan Am, destroyed the aircraft.35 Nevertheless, September 11 has galvanized the country, and how a jury will react to a civil lawsuit against U.S. companies is difficult to predict.

For some families the choice between the fund and litigation is a simple one, because certain cases are valued higher in the fund. Take, for example, the case of an unmarried adult victim who is survived only by parents. Under New York and New Jersey law this type of case may be valued well under \$1 million, since the standard for wrongful death damages is economic loss, and the decedent was not supporting anyone. On the other hand, the fund presumes financial support in every case and simply increases the deduction for the victim's personal consumption when there was no spouse or children to support. In some of these cases the fund may award well over \$2 million, depending on the victim's age and earnings at the time of death.36

The speed of the fund makes it a necessary choice among families facing economic hardship. For others, the decision is not as simple, and an analysis should be prepared. No decision can be made between litigation and the fund until the economic loss is meticulously analyzed and the claim is prepared. In the preparation of the claim, no distinction should be drawn between the fund and litigation. Once the claim is complete, the collateral offsets must be considered to determine how much they will affect the value of the claim in the fund. With the offsets reviewed, families should have a reasonable idea of what the fund would likely award and can compare this result with what may become available through litigation. Even then, families must still rely heavily on legal advice, because the litigation process will take years, and a decision between the fund and litigation must be made within the statute of limitations.37

For many, the decision will be based on an immediate need for money. For others, the decision will be based on an unwillingness to deal with years of litigation and uncertainty. Still others will balance the risks and potential rewards of each choice and make the decision they believe is best. Lawyers representing the families will have to help their clients make an informed choice between the uncertainty of the fund and the uncertainty of litigation—a choice affecting the rest of their lives.

- 2 Id. §101(a).
- 3 Id. §408(a).
- ⁴ A Nation Challenged: The Insurers; Sales Are Resumed for Coverage of Airlines for Terror Damage, N.Y. TIMES, Sept. 25, 2001, at C4.
- ⁵ Aviation and Transportation Security Act, Pub. L. No. 107-71 (Nov. 19, 2001).
- 6 Air Transportation Safety and System Stabilization Act. §405(c)(3)(B)(ii). Families and victims who choose the fund are permitted to sue terrorists and terrorsponsoring nations. 28 C.F.R. pt. 104, AG Order No. 2564-2002, 1105-AA79 at 11246.
- 7 "[T]he Special Master shall not consider negligence or any other theory of liability." Air Transportation Safety and System Stabilization Act §405(b) (2).

- 8 September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,237 (2002) (to be codified at 28 C.F.R. pt. 104).
- 9 Air Transportation Safety and System Stabilization Act \$405(c)(2)
- 10 28 C.F.R. §104.2(c) (1). At the discretion of the special master appointed to administer the fund, rescue personnel can seek compensation even if they do not meet these time requirements. See Final Rule, 28 C.F.R. pt. 104, CIV 104F, AG Order No. 2564-2002 at 11234 (2001). ¹¹ Air Transportation Safety and System Stabilization Act §402(5).
- 12 Id. §402(7).
- ¹³ Carr v. Pacific Tel. Co., 26 Cal. App. 3d 537 (1972).
- 14 N.J. STAT. ANN. §2A:31; N.Y. EST. POWERS & TRUSTS. ¹⁵ Air Transportation Safety and System Stabilization Act §405(b)(3)
- ¹⁶ Id. §405(b) (4), (b) (5).
- 17 28 C.F.R. pt. 104, CIV 104F, AG Order No. 2564-2002, 1105-AA79 at 20. Presumptions for noneconomic loss (\$250,000 per decedent plus \$100,000 per dependent) will act as de facto caps in the majority of cases. 28 C.F.R. §104.44; 28 C.F.R. pt. 104, CIV 104F, AG Order No. 2564-2002, 1105-AA79 at 17.
- ¹⁸ Air Transportation Safety and System Stabilization Act §402(4).
- 20 See Final Rule, 28 C.F.R. pt. 104, CIV 104F, AG Order No. 2564-2002 (2001) and Interim Final Rule with Request for Comments, 28 C.F.R. pt. 104, CIV 104P, AG Order No. 2541-2001 (2001), available at http://www .usdoj.gov/victimcompensation/civil_01_txt.html. The attorney general is responsible for setting regulations for administration of the fund. Air Transportation Safety and System Stabilization Act §404(a)(2).
- ²¹ 28 C.F.R. pt. 104, CIV 104P, AG Order No. 2541-2001, 1105-AA79.
- ²² 28 C.F.R. pt. 104, CIV 104F, AG Order No. 2564-2002, 1105-AA79 at 11233.
- 23 Id. at 11234.
- ²⁴ N.J. Stat. Ann. §2A:15-3; N.Y. Est. Powers & Trusts §11-3.2.
- ²⁵ Shu-Tao Lin v. McDonnell Douglas Corp., 742 F. 2d 45, 53 (2d Cir. 1984); Schiavo v. Owens-Corning Fiberglass Corp., 660 A. 2d 515 (N.J. Super. A.D. 1995). 26 28 C.F.R. §104.44.
- ²⁷ Air Transportation Safety and System Stabilization Act §§405(b)(1)(B)(ii), 405(b)(3).
- 28 Id. §405(b) (1) (B) (ii).
- ²⁹ 28 C.F.R. pt. 104, CIV 104P, AG Order No. 2541-2001, 1105-AA79 at 66274; 28 C.F.R. pt. 104, CIV 104F, AG Order No. 2564-2002, 1105-AA79 at 11234.
- ³⁰ Air Transportation Safety and System Stabilization Act §201(b)(2)(a)(1) and (3).
- 31 Id. §201(b) (2) (a) (3) (c).
- 32 Nallan v. Helmsley-Spear, Inc., 50 N.Y. 2d 507, 429 N.Y.S. 2d 606, 407 N.E. 2d 451 (1980).
- 33 Amaro v. City of New York, 40 N.Y. 2d 30, 386 N.Y.S. 2d 19, 351 N.E. 2d 665 (1976).
- 34 *Id*.
- $^{\rm 35}$ In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988, 37 F. 3d 804 (1994), cert. denied sub nom., Pan Am. World Airways, Inc. v. Pagnucco, 513 U.S. 1126, 115 S. Ct. 934, 130 L. Ed. 2d 880 (1995).
- ³⁶ The final rule includes a chart of presumptive awards in various types of cases and includes the methodology employed by the fund for calculating the loss. The chart for cases involving adults survived by parents range from \$300,000 for elderly victims to \$2.5 million for younger victims with high earnings, 28 C.F.R. pt. 104, CIV 104F, AG Order No. 2564-2002, 1105-AA79 at 11233
- 37 Families have two years from December 21, 2001, to file with the fund, and state statutes of limitations will apply in litigation.

¹ Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42 (Sept. 22, 2001), available at http://www.usdoj.gov/victimcompensation/civil_01_txt html