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LITIGATION

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Congress Responds to Terrorist Attacks

Families of victims can begin to decide whether to litigate or to participate in the Federal Claim Compensation Program

In response to the tragedy of Sept. 11, Congress has enacted legislation to provide benefits to those injured and to the families of those who have died. The Federal Claim Compensation Program is apparently intended to provide a mechanism for immediate relief without litigation. Lawyers must make clients aware of the choice they have and the differences between handling their cases through the program or through a traditional lawsuit.

Leo Boyle, as president of the Association of Trial Lawyers of America, and Christopher Placitella, president of ATLA-NJ, have requested that attorney members honor a moratorium on litigation. They have also

The author is a member of Goldsmith Richman Levinson & Harz, of Englewood Cliffs, Edison and New York. The firm will act only as pro bono counsel to those who need assistance as a result of the terrorist attacks.

requested that their members make themselves available for pro bono assistance to those in need.

This will not preclude, at a subsequent point in time, the initiation of litigation against those directly responsible for the attacks or those responsible for allowing the attacks to occur. However, those attorneys who are willing to do the pro bono work will have to agree that they will not handle any cases where there may be compensation or do work on cases for other attorneys who will receive compensation.

Whether an attorney agrees to do pro bono work or work on cases where there may be a fee involved, the starting point is an analysis of the legislation so that some initial information can be given to potential clients. It is clear that this is only a preliminary analysis that will be supplemented as regulations are promulgated. More will be learned and understood as cases begin to pass through the Federal Claim Compensation Program.

The act Congress passed within days of the tragedy is titled the "Air Transportation Safety and System Stabilization Act." The sections relevant to those killed or injured are to be found in "Title IV-Victim Compensation."

Regulations

Section 407 of the act provides for

the formulation of regulations. The regulations appear to be directed to the process — the forms to be used, the procedures to be used and the documentation to be required — but not the manner in which decision-making is to occur. Section 407(5) provides for regulations concerning "other matters determined appropriate by the Attorney General." Until such regulations are promulgated anything else is strictly speculation.

Special Master

The special master will, with the attorney general, devise a form for claimants to complete. A claimant is "an individual filing a claim." There are specific groups of individuals who will comprise the claimant pool.

The special master has the authority to decide whether or not an individual may be a claimant. If you are a claimant you give up your rights to sue. If the special master determines that you are not an appropriate claimant but have filed a claim, will you then be precluded from entering into litigation? The legislation is silent on this issue.

If the special master determines that you do have a claim, you would be precluded from filing a separate suit if dissatisfied with the determination made by the special master.

The decision made by the special master will be final, and there will be no

appeal or review of the special master's decision. Therefore, if a recommendation is to be made to an individual or a family, the risks and benefits have to be reviewed and considered. But at this time, only limited information can be provided to them.

Decision-Making Process

Two basic groups are to be considered as potential claimants: Those who were "present at the World Trade Center ... the Pentagon ... or the site of the aircraft crash at Shanksville, Pennsylvania ... and those who were on the planes that crashed." The individuals so affected would either have been killed or suffered physical harm as a result of the crashes. Claims could be brought either by the individual or by those with the legal right to bring a claim on behalf of another or a deceased individual.

If the individual falls within the above categories then a claim could be made. However, the next step would be to decide whether or not a claim should be made.

Two basic claims may be made: (1) wrongful death and (2) pain and suffering. New York law will apply for those cases arising out of the World Trade Center. Pennsylvania law will apply for those cases arising in Pennsylvania. The law of the commonwealth of Virginia will apply to the actions arising out of the Pentagon crash. Comments here will be restricted to New York law.

New York's law on wrongful death is very similar to that used in New Jersey. Specific details can be located either in Estates Powers and Trusts Law sections 5-4.1 through 5-4.6 or New York Pattern Jury Instructions, PJI 2:320. New York law will apply the statute of limitations strictly so that any and all actions would have to be commenced by Sept. 11, 2003.

The special master will consider economic and noneconomic damages and will look at the harm suffered by the claimant, the facts of the claim and the individual circumstances of the claimant.

It is not known how the special master will consider claims for pain and suffering for those who died. Individuals on the planes may well have been aware of what was going to occur

prior to the crashes. Individuals on the ground, in particular in the World Trade Center, may well have been aware prior to their death of the collapse of the towers. Those individuals who leapt to their deaths were most certainly aware of what was occurring.

Calculating damages for an individual who expired becomes a predictable process if pain and suffering are not included. If consideration is to be given to the pain and suffering that each decedent suffered, then until either regulations are formulated or some cases are resolved, there is no way to predict how such claims will be compensated.

In another section of the air transportation safety act the words "suffered physical harm" are used. Does an individual have to have suffered physical harm in order to recover for psychological harm? It is not known whether or not an individual who may have been in the World Trade Center and survived suffering no physical injury, but who did suffer severe psychological trauma, would be included. Psychological trauma could include multiple syndromes including survivor guilt or post-traumatic stress disorder.

The special master will not consider punitive damages and will diminish any potential award by any collateral source that the claimant is entitled to receive.

Collateral Sources

Funds received as collateral sources will be deducted from the sums that might be awarded by the special master. No list of collateral sources has been supplied, but consideration must be given to the following:

- applicable insurance including life, accidental death, disability and the like;
- Social Security payments;
- bonus income — the firm of Cantor Fitzgerald has announced that it would be compensating their deceased employees the sum of \$100,000 plus earned bonuses, and Marriott deceased employees will be receiving three months of pay;
- pension benefits; and
- charitable contributions.

The special master will consider

sums from collateral sources that should be received even if not received. It will be the responsibility of the claimant to recover all funds due and owing as collateral sources.

Ultimately, if those collateral funds are not received, the figure will still be deducted from the claim amount awarded by the special master.

Filing of a Claim

The following list of materials potentially needed has been prepared by the author without any direct knowledge of what will be required by the special master:

- all items that would be required to prove collateral sources;
- birth certificate;
- passport;
- marriage certificate;
- death certificate;
- funeral bills;
- all past and present medical records and bills; and
- tax returns.

Factors To Be Considered

Against whom can potential litigation be brought? Suits can be brought against airline security companies, the airlines, the World Trade Center architects for failing to properly construct a building and the funds in accounts linked to the terrorists.

Considering the numbers of individuals who could potentially bring a lawsuit, what is the amount of money available to pay those claims, and what is the likelihood of success in the litigation?

What will be the costs associated with the litigation? Will the family or the plaintiff be required to advance sums to cover the costs of the litigation as they are incurred? What will be the actual costs to the claimants and their families?

Damages in the above suits might include compensatory and punitive damages. If punitive damages are awarded, what would be the ability of the affected companies to pay the punitive damages? Punitive damages can be awarded without limit for conduct that was wanton, reckless and malicious in New York state. However, punitive

damages are rarely awarded.

Applicable Law

The New York wrongful death law will consider the age of the individual, the marital status of the individual and whether there are any children of the marriage below the age of 18. It also will consider the earnings of the individual and the amount that taxes and other costs would reduce income from those earnings.

This would then leave the amount of that income that was used to support and benefit others. If the individual were single with no dependents, then regardless of the income earned, the economic value of the life would be limited.

As an example, consider a 35-year-old male earning \$30,000 per year. A work life of earnings would earn a gross amount of \$900,000. The taxes on the

\$30,000 for a single male would approximate \$10,000, and, thus, the earnings would provide a sum of \$600,000.

That single individual supported himself and contributed nothing to the support of others. If the claimant under the wrongful death act were to receive the benefits of a life insurance policy, a pension and Social Security benefits, then the award by the special master could be minimal if only economic losses were considered. The income figure of the same individual could be \$100,000 per year with the same result.

However, if pain and suffering were considered and were appropriately higher, then the award could be higher.

Consider the fireman or policeman who is married with children. Obviously, the greater portion of the individual's income would be spent on the maintenance of his family, and there

also would be loss of parental and spousal guidance.

However, because of pension benefits, there may be no actual loss of income. Again, the question of pain and suffering would have to be given consideration as well as the noneconomic losses, such as parental and spousal guidance. There is no way of determining at present how these factors will be considered.

When speaking with families and survivors, they must be made to realize that the process will be slow and that no decision about opting for the Federal Claim Compensation Program can or should be made at this time. However, the materials that will probably be needed either for filing a claim or for beginning litigation can be compiled. Once the regulations are released, a second step can be taken in the decision-making process. ■