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The September 11th Victim Compensation Fund of 2001: A Better Alternative to Litigation?

Wendy Floering*

Kenneth Feinburg is traveling the East Coast to deliver the news: for the first time ever, the government will write large checks to victims without the hassles of prolonged litigation and lawyer’s fees.1 The September 11th Victim Compensation Fund is the recent effort by the government to pay the thousands of victims of the September 11, 2001 terrorist attacks and their families without placing blame.2 Kenneth Feinburg was appointed special master and given the task of administering the Fund.3 This, however, is not the first time an administrative scheme has been used to resolve mass tort cases.4 In the past these schemes were created when removing great burdens on the courts and achieving closure for parties outweighed the concerns of due process and abiding by strict rules of law.5

On September 11, 2001, terrorists hijacked four planes and crashed them in a suicide attack into the World Trade Center, the Pentagon, and a rural area in Western Pennsylvania.6 “There are potentially thousands and thousands of cases,” said U.S. District Judge Jack Weinstein.7

* J.D. candidate, 2003, Pepperdine University School of Law; B.A., Denison University, 1999. I would like to dedicate this article to my family for encouraging and supporting me in everything I do. I would like to specially thank Richard A. Regnier for his invaluable guidance and wisdom, and for bringing out his red pen for an earlier draft of this article.

2. Id.
3. Id.
5. Id.
7. Id.
"They'll be scattered all over, with different judges burdened by the same essential facts in the law. It is much more efficient from the point of view of the plaintiffs, the defendants and the court system to consolidate." Consolidating claims would streamline their way through the courts, result in speedier resolutions and insure against overlapping claims, inconsistent pretrial rulings by different judges, and widely different compensation for similarly situated plaintiffs.

Yet an administrative scheme consolidating cases raises some concern. Is mass justice really better for the individual? Will a claimant receive a bigger award going to trial? Will a jury provide a fairer hearing? What is a special master? Why even use a special master? Is there a limit to the special master's authority?

This article will explore the alternative to mass tort litigation found in administrative compensation schemes and the use of special masters. Specifically, the concern of this paper is whether The September 11th Victim Compensation Fund of 2001 is fair, and possibly better, for the victims of the September 11th terrorist attacks than litigation. To answer this question, it is important to understand the historical background of administrative schemes (Part I), the historical background of using special masters (Part II), the details of the Fund (Part III), the effect of mass justice on individual rights (Part IV), the concerns with using a special master (Part V), and the concerns of individual rights and using a special master in the context of the Fund (Part VI). Part VII discusses the impact of the Fund's ability to provide a better alternative to mass litigation.

I. THE ADMINISTRATIVE SCHEME APPROACH TO MASS TORTS: HISTORICAL BACKGROUND

A. Administrative Schemes Arising from Litigation

1. Dalkon Shield

A personal injury compensation trust fund was set up to handle the Dalkon Shield litigation. Five court-appointed trustees were

8. Id. (quoting Weinstein, J.).
9. Id.
10. Weinstein & Hershenson, supra note 4, at 319. The trust, which will eventually total around $2.5 billion, was funded mostly from the merger of A.H. Robins and another
responsible for designing and implementing a Claims Resolution Facility for the purpose of resolving claims. The Dalkon Shield Trust will exist until the first of three events happen: "(1) the end of the year 2008; (2) the date on which all claims against Robins have been resolved; [or] (3) the date on which the trustees have put in place irrevocable insurance policies and established claims procedures adequate to discharge all future obligations and expenses." The fund, by establishing procedures for distributing modest awards with very little proof of injury, was designed to quickly resolve cases at a minimal cost to claimants. Special Master Francis McGovern developed a damage schedule plan. Using the damage schedule, claimants could assess the compensation they would receive by looking at the relevant classification. A claimant could increase the size of their award with additional documentation. If there is money remaining in the trust when the compensatory damage claims are satisfied, punitive damages will be awarded. A claimant could accept this payment or take their chances at trial.

2. Agent Orange

In Agent Orange litigation, claimants consisted of millions of veterans of the United States, Australia and New Zealand armed forces, who served in or near Vietnam from 1961 to 1972 and claimed they or their families were injured by exposure to Agent Orange. The settlement and distribution plan resulted in a fund of $240 million. Amounts from the fund were allocated to the Payment Program, Class

corporation. Id.
11. Id.
12. Id.
13. Id.
15. Id.
17. Id. at 320.
18. Rosenberg, supra note 14, at 705. McGovern anticipated that most claimants in the Dalkon Shield case would choose to go to trial. Id. Rosenberg offers three theories for this: 1) claimants are not receiving full information and loyal representation from their attorneys, 2) claimants expect to get an "overly sympathetic jury" and 3) claimants "insist on the sensation of controlling their own suits." Id.
20. Id.
Assistance Plan, Australian and New Zealand Trusts, and plaintiffs' lawyers' fees.\textsuperscript{21} Victims were compensated through the Payment Program, administered by Aetna Insurance Company, while the Class Assistance Plan funded various organizations that gave legal, medical or other assistance to victims or their families.\textsuperscript{22} The fund hoped to quickly compensate the neediest class members.\textsuperscript{23} Thus, a claimant was not required to show causation, only that he was totally disabled from a nontraumatic injury, and served in a branch of the armed forces where records show Agent Orange was sprayed during a certain period of time.\textsuperscript{24} Kenneth Feinburg was appointed special master to oversee the planning and development of the Payment Program and the Class Assistance Plan.\textsuperscript{25} In addition, he considered whether special circumstances warranted a deviation from the plan's fixed criteria.\textsuperscript{26}

\section*{B. Administrative Schemes Arising from Legislation}

\subsection*{1. The Price-Anderson Act}

The legislature has attempted several times to devise a no-fault alternative to the tort system.\textsuperscript{27} The Price-Anderson Act "imposes a set of statutory constraints on possible catastrophic tort liability in the event of a nuclear accident."\textsuperscript{28} There is a set limit on the total liability, which is financed by private insurance and mandatory contributions to a common fund.\textsuperscript{29} Upon the occurrence of a nuclear disaster, claims will be consolidated in federal court located in the district where the accident occurred.\textsuperscript{30} Each claimant must establish "causation and particularized

\begin{itemize}
\item 21. Id.
\item 22. Id. at 320-21.
\item 23. Id. at 321.
\item 24. Id.
\item 26. Weinstein & Hershenov, supra note 4, at 321.
\item 28. Id. at 955.
\item 29. Id. Nuclear licensees are required to purchase $160 million of private liability insurance and must contribute $63 million to a common compensation fund. Id.
\item 30. Id. at 956.
\end{itemize}
proof of economic loss and intangible harm."31 Despite the apparent
benefits, this Act is criticized for being just as expensive and time-
consuming as the common tort law approach it is trying to avoid.32

2. The National Childhood Vaccine Injury Act

The National Childhood Vaccine Injury Act of 1986 is a no-fault
compensation scheme providing relief to children injured by exposure to
government-mandated vaccines.33 An excise tax on each dose of
vaccine finances the compensation fund.34 The procedural process
consists of two parts.35 First, a plaintiff files a claim “in federal court,
where a special master is appointed to gather evidence and determine
the award.”36 In an attempt to eliminate the issue of causation, the Act
provides an irrefutable presumption of liability when the claimant
establishes the conditions on the Vaccine Injury Table.37 The Act
provides unlimited actual medical expenses, the costs of rehabilitation,
and compensation for lost earning power.38 Damages for pain and
suffering are awarded at the discretion of the special master up to a limit
of $250,000.39 Second, the claimant is entitled to reject the special
master’s award and seek tort relief instead.40 However, since an
appropriate warning provides a good defense, claimants are deterred
from going to trial. The manufacturer needs only to provide notice to
the person administering the vaccine, and if in compliance with the
Federal Food, Drug, and Cosmetic Act, the manufacturer is protected.41

31. Id.
32. Id.
33. Id. at 958. “Congress passed the Act in response to the concerns of the vaccine
manufacturers, who had threatened to withdraw from the market because of anxieties about
the possibility of crushing liability resulting from the infrequent but unavoidable injuries
from exposure to vaccines.” Id.
34. Id.
35. Id.
36. Id.
37. Id. at 958-59. “The claimant must establish injury from a vaccine listed in the
Vaccine Injury Table, demonstrate that the malady is on the list provided in the table, and
prove that the adverse reaction occurred within an exposure period designated in the table.”
Id.
38. Id. at 959.
39. Id.
40. Id.
41. Id.
3. Superfund Section 301(e) Study Group Report

The Superfund Section 301(e) Study Group Report is a proposal for a no-fault compensation scheme for injuries arising due to exposure to hazardous waste released from a site qualified for cleanup under the Act.42 The Superfund proposal relies on a tax on the production of toxic chemicals, crude oil and the disposal of hazardous waste for financing.43 A statutory rebuttable presumption exists if:

[T]he claimant establishes that (1) the alleged source of the toxin was engaged at the time of exposure in the generation, transportation or disposal of hazardous waste, (2) the claimant was exposed to the hazardous waste, and (3) the injury suffered by the claimant was of the kind known to result from such exposure.44

To assess the claimant’s right to recovery, the fund uses a Toxic Substance Document similar to the Vaccine Injury Table.45 The proposal provides for all medical expenses and two-thirds of lost income, but there is no recovery for pain and suffering.46 A claimant is able to file a tort claim if the no-fault award is dissatisfying.47 However, similar to the vaccine statute, there are disincentives for choosing this option.48

II. THE SPECIAL MASTER: HISTORICAL BACKGROUND

A. The Roles of Special Masters

A “special master” is defined as a parajudicial officer “appointed to assist the court with a particular matter or case.”49 Historically, special

42. Id. at 960.
43. Id. at 961.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id. If the tort award is less than twenty-five percent greater than the no-fault award, the plaintiff must pay court costs and expert witness fees of the defendant and all funds disbursed under the scheme must be reimbursed. Id. at 961-62.
49. BLACK’S LAW DICTIONARY 990 (7th ed. 1999). A special master does not have to be an attorney. Lance Wilfred Shoemaker, The Use of Equitable Tools in Freeway Construction Litigation, 28 TRANSP. L.J. 15, 20 (2000). A special master may be someone who has special expertise and can help the court evaluate scientific, highly technical, or
masters were used as administrative assistants.\textsuperscript{50} Recently, judges have used special masters in large-scale commercial litigation, mass torts and public law cases\textsuperscript{51} to assist with a variety of tasks in order to lighten the burden placed on the courts and to provide a personal sensitivity to injured claimants.\textsuperscript{52}

1. Discovery Master

Special masters are appointed sometimes in complex cases "to limit massive discovery requests, to rule on claims of privilege and to make factual determinations necessary to rule on the admissibility of evidence."\textsuperscript{53}

2. Case Managers

In addition to helping with discovery, some judges appoint special masters to manage a case in its pretrial stage and advise them on scientific and technical issues.\textsuperscript{54} In cases where there are a large number of claimants special masters are used to handle the massive amounts of non-technical information.\textsuperscript{55}

3. Settlement Facilitator

Courts sometimes appoint special masters to achieve settlements.\textsuperscript{56}

4. Expert Advisors

Courts may appoint a special master as an expert in the subject of the litigation and to serve as a neutral advisor to the court.\textsuperscript{57} They are

\textsuperscript{50} Shoemaker, supra note 49, at 21. Their duties as administrative assistants included selling property to settle judgments, holding evidentiary hearings, and calculating damages. \textit{Id.}

\textsuperscript{51} \textit{Id.} at 19.

\textsuperscript{52} Farrell, supra note 49, at 238.


\textsuperscript{54} \textit{Id.} at 949.

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.} at 950.

\textsuperscript{57} \textit{Id.} at 951.
similar to court appointed experts, but the special master is not subject to cross-examination and he or she has greater case management powers.58

5. Remedial Masters

After a finding of liability, special masters may advise the court in reports and make recommendations for remedial orders.59 Some remedial masters, authorized to retain experts and make informal findings of fact, serve more as investigators.60

6. Claims Evaluators

A special master may be appointed to evaluate claims in both the pretrial and trial stages.61 In pretrial, special masters profile the characteristics of claims using expert consultation and questionnaire methodology.62 Special masters are appointed post liability to develop technically complex means of evaluating claimants' damages, keeping in mind fund limits.63

B. Rule 53(b) and other Authority to Appoint a Special Master

In 1938, the drafters of the Federal Rules of Civil Procedure codified the use of special masters in Rule 53(b),64 which authorizes the appointment of special masters in jury cases "only when the issues are complicated" and in non-jury cases only "in matters of account and of difficult computation of damages . . . [or] upon a showing that some exceptional condition requires it."65 However, Rule 53(b) is not the only legal authority for federal courts to appoint a special master.66

58. Id. at 952.
59. Id.
60. Id. at 953.
61. Id. at 954.
62. Id.
63. Id.
64. Shoemaker, supra note 49, at 21-22. Rule 53 addresses the issue of using a special master in discovery and in settling factual issues of a case, not in remedial contexts. Id. at 22.
master may also be appointed by consent of the parties,\textsuperscript{67} the inherent authority of the court,\textsuperscript{68} or the Magistrates Act.\textsuperscript{69} Recently, the Air Transportation Safety and System Stabilization Act gave Attorney General John Ashcroft the power to appoint the special master for The September 11th Victim Compensation Fund.\textsuperscript{70}

\textit{C. Special Masters at Work in Case History}

1. Ohio Asbestos Litigation (Discovery Master, Case Manager, and Claims Evaluator)

In the Ohio asbestos litigation, the judge appointed two special masters, Eric Green and Francis McGovern, to develop a case management plan that would streamline the pleading and discovery process.\textsuperscript{71} In addition, they were asked to develop a quantified system for assessing individual claims and allocating financial responsibility among defendants.\textsuperscript{72} The masters used a database of several terminated asbestos cases to propose outer limits for settlement negotiation.\textsuperscript{73} The masters plugged in data from the pending case into a computer that then located the three most similar cases in its file, listed the characteristics of those cases, and revealed the amounts of their settlement.\textsuperscript{74} With the help of special masters, the court was able to gather and analyze large

\textsuperscript{67} "[L]itigants may waive their personal right to have an Article III judge preside over a civil trial." \textit{Id.}

\textsuperscript{68} Courts have inherent power to provide themselves with appropriate instruments for the performance of their duties, including the authority to appoint persons unconnected with the court, such as special masters, auditors, examiners and commissioners, with or without consent of the parties, "to simplify and clarify issues and to make tentative findings." \textit{Id.} at 937 (quoting \textit{Ex parte Peterson}, 253 U.S. 300, 314 (1920)).

\textsuperscript{69} Under section 636(b)(2) of the Magistrates Act, magistrates can be appointed as special masters upon consent of the parties without regard to FRCP Rule 53(b). \textit{Id.;} 28 U.S.C. § 636(b)(2) (2001).

\textsuperscript{70} Air Transportation Safety and System Stabilization Act, H.R. 2926, 107th Cong. §404(a) (1st Sess. 2001).


\textsuperscript{72} \textit{Id.} at 400.

\textsuperscript{73} \textit{Id.} at 401.

\textsuperscript{74} \textit{Id.}
amounts of empirical data.\textsuperscript{75}

2. The Alabama DDT Cases (Discovery Master)

The Alabama DDT case is an example of how a special master was used to simplify complex litigation.\textsuperscript{76} The 9,000 claims filed against the same defendant asserted the same facts as to liability, but differed concerning damages.\textsuperscript{77} The special master, Francis McGovern, randomly selected twenty cases for detailed development.\textsuperscript{78} Counsel was given the opportunity to inquire into the evidentiary basis of causation, standards of care, credibility of competing expert analyses, choice of law, and statute of limitations for those twenty cases.\textsuperscript{79} Counsel worked together to create a survey questionnaire for the remaining claimants, which were administered through personal interviews.\textsuperscript{80} At any stage parties could raise significant legal issues by motion, which would be handled by the judge.\textsuperscript{81} Although McGovern determined all pretrial motions, he recognized that motions concerning substantive law were outside his area of expertise.\textsuperscript{82}

3. Early Neutral Evaluation (Claims Evaluator and Settlement Facilitator)

The Early Neutral Evaluation program in the United States District Court for the Northern District of California uses special masters as evaluators.\textsuperscript{83} Within 150 days of filing a complaint, clients and counsel must attend an evaluation session with the special master.\textsuperscript{84} After each side presents its case, the special master evaluates the strengths and weaknesses of each side and “suggests an overall case valuation

\textsuperscript{75} Farrell, \textit{supra} note 53, at 949.


\textsuperscript{77} \textit{Id}.

\textsuperscript{78} \textit{Id}.

\textsuperscript{79} \textit{Id}.

\textsuperscript{80} Brazil, \textit{supra} note 71, at 403. A plaintiff who missed two scheduled interviews without adequate excuse would have their claim dismissed. \textit{Id}.

\textsuperscript{81} \textit{Id} at 405.

\textsuperscript{82} \textit{Id}.

\textsuperscript{83} \textit{Id} at 407.

\textsuperscript{84} \textit{Id}. Evaluation within 150 days ensures that money was not wasted on poorly focused discovery. \textit{See id}. at 408.
range." The special master then facilitates negotiations if the parties so choose. If there is no settlement, then the special master helps parties plan discovery. The evaluation session remains confidential. A special master is necessary, instead of a judge, "because of the great time commitment and because the evaluator is expected to be more assertively probing, more frank, and more judgmental" than a judge. In addition, since the special master has no power over the case, the program provides a less formal gathering, which allows the client to be more candid.

4. The Boston Sewage Case (Expert Advisor and Remedial Master)

In City of Quincy v. Metropolitan District Commission, the Commission was "violating state and federal pollution control laws" by dumping excessive sewage in the Boston Harbor. The possibility that water degeneration would become irreversible demanded a quick solution. The special master's assignment was to "investigate, conduct hearings, find the relevant facts, analyze possible solutions and within thirty days, draft a set of proposed remedies in the form of an injunction." The special master and his staff conducted an extensive investigation of "the history and current operation[s] of the area's sewage system." Although the special master informed the parties of his investigation and his report identified written sources, the parties were not given the opportunity to challenge the reliability and diversity of the sources or add to them. Nevertheless, the report was so well-received by both parties that the remedies proposed in the report became

85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id. at 409.
92. Brazil, supra note 71, at 414.
93. Id.
94. Id.
95. The special master, with permission of the judge, hired a deputy special master and research assistants, and consulted financial experts and law professors with relevant technical expertise.
96. Id. at 415.
97. Id.
the settlement. Consequently, the judge never had to rule on the motion for an injunction.98

III. THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001:
TODAY’S ADMINISTRATIVE SCHEME AND SPECIAL MASTER

A. Goals of the Fund

For the first time in history, a mass disaster has led to the creation of a taxpayer-supported fund: The September 11th Victim Compensation Fund (“the Fund”).99 The Fund was created shortly after the September 11, 2001 terrorist attacks as part of the Air Transportation Safety and System Stabilization Act100 in an attempt to keep airlines from going bankrupt and to provide aid to the victims.101 Once a claim is filed with the Fund, “the claimant waives the right to file a civil action in Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001.”102

On November 26, 2001, Attorney General John Ashcroft appointed Kenneth Feinburg as Special Master to administer the Fund.103

98. Id. at 416.
103. Press Release, Department of Justice, Attorney General Ashcroft Names Special Master to Head September 11th Compensation Program (Nov. 26, 2001), at http://www.usdoj.gov/victimcompensation/dojpr2.pdf. Confirmation by the Senate or other body was not needed for Attorney General Ashcroft’s appointment. Lee S. Kreindler, Pros and Cons of Victim’s Fund: Compensation Provisions may Bring Salvation or Frustration,
Special Master is the nucleus of the Fund.\textsuperscript{104} He “administers the compensation program, promulgates all procedural and substantive rules for the [F]und’s administration, and employs and supervises hearing officers and other administrative personnel.”\textsuperscript{105} The Department of Justice, on December 21, 2001, issued procedural rules as an “Interim Final Rule” in order to begin the program quickly, yet allow a thirty-day period for review.\textsuperscript{106} The regulations intend to provide “fair, predictable, and consistent compensation... and to do so in an expedited, efficient manner without unnecessary bureaucracy and needless demands on the victims.”\textsuperscript{107}

B. Advanced Benefits

Needy eligible claimants may apply for Advance Benefits, an advance payment provided before the lengthy “Personal Injury Compensation Forms” or “Death Compensation Forms” are filed.\textsuperscript{108}

\begin{itemize}
\item N.Y. L.J., Nov. 27, 2001, at 5.
\item 104. Kreindler, \textit{supra} note 103.
\item 105. \textit{Id.}
\item 106. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66274. Although the “Interim Final Rule” will have the force and effect of law upon publication, it may be adjusted during the thirty-day period as the Department receives additional comments. \textit{Id.} On March 13, 2002 the final rule took effect. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11233.
\item 108. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66284. When the “Personal Injury Compensation Forms” or “Death Compensation Forms” are filed and deemed complete, a final determination must be made within 120 days. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66284.; see also Air Transportation Safety and Stabilization Act § 405(b)(3) (stating that “the Special Master shall complete a review, make a determination, and provide written notice” to a claimant within 120 days of the date the claim was filed). A claimant waives the right to file a civil action in state or federal court for damages upon application for Advance Benefits. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66284.
\end{itemize}
Advance Benefits are fixed amounts of $50,000 for deceased individuals and $25,000 for severely injured individuals.\(^9\)

**C. Procedural Track A**

When the "Personal Injury Compensation Form" or "Death Compensation Form" is filed the claimant has a choice of two procedural tracks: Track A or Track B.\(^0\) Under Track A, the Claims Evaluator will determine eligibility and the claimant’s presumed award.\(^1\) The Claims Evaluator will then notify the claimant of these decisions in writing within forty-five days of the date the claim was filed.\(^2\) After notification “the claimant may either accept the presumed compensation as the final and request payment, or may instead request a review before the Special Master.”\(^3\) At the hearing, “the claimant may request that the Special Master or his designee review any evidence relevant to the determination of the award.”\(^4\) The length of the hearing will be determined by the Special Master, but generally will not exceed two hours.\(^5\) The Special Master will “notify the claimant in writing of the final” award.\(^6\) The Special Master need not create or provide a

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111. Id.
112. Id. The Special Master published charts of presumed determinations for economic and noneconomic losses to provide general dollar ranges so potential claimants can make an informed decision on whether to apply for the Fund or file a lawsuit. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66278. In addition, an advisory service will be available to provide additional information to potential applicants as to how different types of collateral source compensation will be treated. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11233 at 11234.
114. Id. Such evidence includes “[f]actors and variables used in calculating economic loss; the identity of the victim’s spouse and dependents; the financial needs of the claimant; facts affecting noneconomic loss; and any factual or legal arguments that the claimant contends should affect the award.” September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66285; see also Air Transportation Safety and System Stabilization Act § 405(b)(1) (listing factors upon which the Special Master makes his determination). Liability will not be considered. Air Transportation Safety and System Stabilization Act § 405(b)(1). Claimants may present witnesses, including expert witnesses, and are entitled to be represented by an attorney. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66285.
115. Id. The two-hour hearing limitation was eliminated in the final rule. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11234.
written record of the deliberations, but must "notify the claimant in writing of the final" award. There will be no review or appeal from this determination. The Special Master reserves the right to publicize the amounts of the awards. Published awards are not binding precedent on the Special Master, but are intended to assist potential claimants in deciding whether to file a claim with the Fund or file a lawsuit in tort.

D. Procedural Track B

Under Track B, the Claims Evaluator determines eligibility within forty-five days of the date the claim was filed, but will not determine the claimant's presumed award. Once he or she determines eligibility, the claimant proceeds to a hearing in front of the Special Master, which will be conducted in the same manner as the hearing in Track A. There is no review or appeal from this determination.

IV. DOES MASS JUSTICE DESTROY INDIVIDUAL RIGHTS?

Special Master Francis McGovern established a damage schedule in the Dalkon Shield case in order to address the problem of distributing compensation to tort victims without adjudicating thousands of individual claims. He used statistical sampling methods to compile claims data regarding information about losses suffered by victims. Damage schedules are part of the movement toward "bureaucratic justice." Under the bureaucratic method, the decision-maker has "collectivizing authority over issue agenda, diversity of parties and interests represented, and the format and extent of the discovery and

117. Id.
118. Id.
119. Id.
120. Id.
122. Id.
123. Id.
124. Rosenberg, supra note 14, at 695.
125. Id.
126. Id. at 698.
presentation of evidence."\textsuperscript{127} Bureaucratic processing maximizes the resources available for compensation by cutting administrative expenses.\textsuperscript{128} In addition, it aids individuation by reducing inconsistent and discriminatory decisions\textsuperscript{129}

Some criticize the aggregation of claims as destroying important values of our justice system, i.e., the lawyer-client relationship, the litigant's ability to control the litigation, the opportunity to receive a full and fair adjudication in a court of law before the judge and jury, and a lower recovery for the individual tort claimants.\textsuperscript{130} However, collective processing is closer to achieving individual justice than traditional individual adjudication.\textsuperscript{131}

\textbf{A. The Lawyer-Client Relationship}

One of the criticisms of aggregation is that it creates a less personal lawyer-client relationship.\textsuperscript{132} A Rand Corporation study found that "a relatively small number of attorneys represent the majority of mass tort plaintiffs;" and, as a result, the lawyer-client relationship resulting from informal aggregation was no different from that of court-imposed aggregation.\textsuperscript{133} In addition, since courts can require more extensive communication with clients, allowing the court some control over the plaintiff class may actually result in a better flow of information between lawyers and clients.\textsuperscript{134}

\textbf{B. Client Control}

Another criticism of aggregation is that victims lose control over litigation.\textsuperscript{135} However, even when a tort claim is litigated separately, the expert lawyer retains control, often financing the claim in return for a contingent percentage.\textsuperscript{136} Although the system projects the image of

\textsuperscript{127} Id.
\textsuperscript{128} Id. at 700.
\textsuperscript{129} Id.
\textsuperscript{130} Weinstein & Hershenov, supra note 4, at 324.
\textsuperscript{131} Rosenberg, supra note 14, at 697-98.
\textsuperscript{132} Weinstein & Hershenov, supra note 4, at 325.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Rosenberg, supra note 14, at 701.
\textsuperscript{136} Id. at 701-02.
autonomy, in reality, individual victims do not control their actions.\textsuperscript{137} Even assuming a claimant has control, it is likely he would trade it for a more cost-efficient and predictable outcome.\textsuperscript{138}

\textbf{C. Jury Trial Advantage}

Others criticize collective processing for putting claimants at a disadvantage by not requiring juries to pass on each individual’s claim.\textsuperscript{139} Some claimants insist on a jury trial with the hope that by utilizing a jury they will obtain a generous award.\textsuperscript{140} However, the jury may also be aware that many claimants are in the same or similar position as the claimant before them, and, by giving a generous award in the present case, they may deny another equally deserving claimant part or full compensation.\textsuperscript{141}

Moreover, the vast majority of massive tort claims never actually reach a jury.\textsuperscript{142} This is partly because judges desire to avoid mass tort trials.\textsuperscript{143} There are several reasons for this behavior. First, judges are concerned about the frequent irrationality and inconsistency of mass tort verdicts.\textsuperscript{144} Second, mass tort litigation has “large docket-clogging” implications.\textsuperscript{145} Mass tort cases may take months or years to try and they use up a lot of the court’s administrative resources.\textsuperscript{146} Third, mass tort litigation is difficult to organize for trial.\textsuperscript{147} Usually multiple defendants are involved and judges have a difficult time accommodating and coordinating their activities.\textsuperscript{148} Documentation and scientific evidence are usually so massive and complex that the judge and jury need help to retrieve and comprehend it.\textsuperscript{149}

\begin{enumerate}
\item \textsuperscript{137} \textit{Id.} at 702.
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} \textit{Id.} at 703.
\item \textsuperscript{140} \textit{Id.} at 703-04.
\item \textsuperscript{141} \textit{Id.} at 704.
\item \textsuperscript{142} Peter H. Schuck, \textit{Judicial Avoidance of Juries in Mass Tort Litigation}, 48 DePaul L. Rev. 479, 482 (1998). “Approximately 95% of all tort cases are resolved short of trial.” \textit{Id.}
\item \textsuperscript{143} \textit{Id.} at 487.
\item \textsuperscript{144} \textit{Id.} “This variability in outcomes for cases that appear similar on their facts or that implicate identical dispositive legal principles or facts should trouble any system of justice that aspires to rationality, fairness, and predictability.” \textit{Id.} at 485.
\item \textsuperscript{145} \textit{Id.} at 488.
\item \textsuperscript{146} \textit{Id.} at 487-88.
\item \textsuperscript{147} \textit{Id.} at 488.
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} \textit{Id.} at 489.
\end{enumerate}
One managerial tactic used by judges to discourage weak claims, avoid jury trials, and forge settlements, is the appointment of a special master.\textsuperscript{150} As explained earlier, “special masters . . . provide [judges] with procedural flexibility, multiple channels of communication with the parties, and other administrative resources that can be used to expedite the litigation, clarify issues and claim values, and facilitate settlement negotiations.”\textsuperscript{151} Some judges, such as Judge Weinstein in the Agent Orange Case, use special masters to pressure lawyers into settling their case.\textsuperscript{152}

\section*{D. Lower Recovery?}

Although some seriously ill victims may receive less from a mass settlement fund than they would at trial, those plaintiffs who may get little or nothing at trial would fare better.\textsuperscript{153} Compensation between similarly situated victims would not vary as widely as it would through the trial system.\textsuperscript{154} In addition, for seriously ill victims, it is possible that after deducting transactional costs and lawyer's fees, the net award given at trial may be equal to the award which would have been given under the fund.\textsuperscript{155}

\section*{V. THE SPECIAL MASTER: CAVEAT EMPTOR}

\subsection*{A. Supervision}

There are two views about how courts should supervise masters.\textsuperscript{156} The first view argues that orders of reference should be general.\textsuperscript{157} Advocates for this approach argue that this approach allows the master to tailor to evolving needs, act quickly and informally, and acquire the influence over litigants and counsel that is needed to serve effectively.\textsuperscript{158} If special masters were required to make lengthy reports and obtain

\begin{footnotesize}
\textsuperscript{150} Id. at 491.
\textsuperscript{151} Id. at 491-92.
\textsuperscript{152} Id. at 492. Six special masters were used in the Agent Orange case. Id.
\textsuperscript{153} Weinstein & Hershenov, supra note 4, at 326.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Brazil, supra note 71, at 417.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\end{footnotesize}
judicial approval, it would take more time and cost more money. The other view is that orders of reference should specifically describe the master's duties. Requiring the master to file reports educates the judge about the relevant facts, law and the lawyers' behavior. With this information, a judge will rule properly on appeals from the master's decision. Otherwise a special master will have a great deal of power that is susceptible to abuse.

B. Ethical Problems

The use of a special master raises issues concerning ethics and conflicts of interest. United States judges must abide by judicial ethics, which are embodied in the Code of Conduct for United States Judges, federal disqualification statutes, financial disclosure requirements, and the judicial oath of office. It is unclear, however, what standards apply to special masters. Some courts have held that masters should not be held to the standards that apply to judges since they are subject to the control of the court and are needed for their expertise. Other courts believe that special masters are subject to the judicial ethics rules.

C. Informality

Special masters proceed more informally than a judge in managing case development, fostering settlement, and implementing equitable

159. Id.
160. Id. at 418. Rule 53 states:

    The order of reference to the master may specify or limit the master’s powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report.

FED. R. CIV. P. 53(b).
161. Brazil, supra note 71, at 418.
162. Id.
163. Id.
164. Farrell, supra note 53, at 956.
165. Id.
166. Id. (citing Morgan v. Kerrigan, 530 F.2d 401, 426 (1st Cir. 1976)).
167. Id. at 956-57 (citing In re Joint E. & S. Districts Asbestos Litigation, 737 F. Supp. 735, 739 (E. & S.D.N.Y. 1990)).
Although informality opens communication and cuts down on time and expense, there are several negative aspects as well. Informality may create imprecision. Imprecise decisions result in breaches, disputes, disillusionment, and allow dishonest counsel to take advantage of others. Absence of a record may make the special master feel less constrained in arriving at and articulating his decision. The most likely abuse is not born of malice or bias, but of sloppiness or sloth. Thus risks arise that the master’s reasoning will be faulty and that the parties will disparage his rulings because of the failure to understand the reasoning underlying them. In our system, power is illegitimate unless we expose the basis upon which it is exercised.

VI. INDIVIDUAL RIGHTS AND SPECIAL MASTER CONCERNS UNDER THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001

A. Lower Recovery?

The average amount a victim’s family will receive under the fund is $1.6 million. This estimation is considerably low when compared to an August 2001 jury award of $1.25 million to a woman claiming to suffer post-traumatic stress after a mechanical problem resulted in a successful emergency landing. It is even lower when compared to a childless widow receiving a $17.5 million verdict against Pan Am for the 1988 terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. Although $1.85 million was the average award in the Lockerbie cases, plaintiffs waited seven to eight years before they received their money, one-third of which went to their lawyers. According to a Rand Corporation study, $1 million in current dollars is

168. Brazil, supra note 71, at 420.
169. Id.
170. Id.
171. Id.
172. Id. at 421.
173. Id. at 422.
175. Ranalli, supra note 101.
176. Ripley, supra note 1.
the average award for victims who went to trial in twenty-five major aviation accident cases between 1970 and 1984.\textsuperscript{177}

Under the Fund, the special master and the Department of Justice developed a methodology for calculating presumed economic and noneconomic losses to ensure that similarly situated claimants receive similar treatment.\textsuperscript{178} The Fund has no dollar limit.\textsuperscript{179} Departure from the presumed award may arise if a claimant presents evidence of extraordinary individual circumstances.\textsuperscript{180} In all cases a deceased victim with a spouse or dependent will receive at least $500,000.\textsuperscript{181} Mass tort litigation, on the other hand, will likely result in huge discrepancies in the awards received by similarly situated plaintiffs.\textsuperscript{182} The availability of punitive damages diminishes the probability of similar awards for those in similar circumstances.\textsuperscript{183} Even compensatory damages for like injuries vary greatly.\textsuperscript{184} Moreover, it is

\textsuperscript{177} Id.

\textsuperscript{178} September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66273, 66278 (December 21, 2001) (to be codified at 28 C.F.R. pt. 104). One of the main objectives of the Fund is to provide fair, predictable and consistent compensation. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66274. To determine presumed economic loss for decedents the methodology uses easily identified factors such as age, prior income levels, marital status, and the number and ages of dependants. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66274. Presumed noneconomic loss compensation will be $250,000 for each deceased victim, plus $100,000 for the spouse and each dependent. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 11237. The $250,000 figure for presumed noneconomic losses was chosen because it was the same amount offered by existing federal death benefit programs, such as those for police and firemen. \textit{NPR: All Things Considered} (National Public Radio, Inc. broadcast, Dec. 21, 2001).


\textsuperscript{181} September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. at 66286. Although there is no official limit to the size of any award, the Special Master has deemed that awards in excess of $3 million are rarely appropriate. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. at 66274.

\textsuperscript{182} Weinstein & Hershenov, \textit{supra} note 4, at 317.


\textsuperscript{184} Id. In a six-week asbestos personal injury trial with a jury of six and six alternates, the judge allowed the six alternates to deliberate concurrently with the main jury, but in a separate room. Lester Brickman, \textit{The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?}, 13 CARDozo L. REV. 1819, 1859 n.169 (1992). The alternates came out first and announced their verdict of no punitive damages and a $20,000 to $30,000 award. \textit{Id}. The defendant lawyers were congratulating themselves, but when the main jury came out they announced a verdict of $1.3 million and punitive damages. \textit{Id}.
possible that available insurance and other assets will be exhausted before all plaintiffs are compensated.\textsuperscript{185} This is likely to happen to September 11th victims since The Air Transportation Safety and System Stabilization Act limits the total damages from all court claims against American and United to $6 billion, the limits of their liability insurance coverage.\textsuperscript{186}

One of the Fund's main objectives is to get compensation to needy families quickly.\textsuperscript{187} Claimants who file for Advance Benefits will receive payment within 15 days after eligibility for Advance Benefits is determined.\textsuperscript{188} The Special Master of the Fund guarantees claimants a final award decision within 120 days of filing a claim.\textsuperscript{189} Victims of the World Trade Center bombing in 1993 have yet to go to trial\textsuperscript{190} or are in court trying to establish liability.\textsuperscript{191} It will be difficult for people inside the World Trade Center and the Pentagon to prove that the airlines or other defendants should have foreseen, and prevented, the deaths on the ground.\textsuperscript{192} The 266 passengers and crew of the hijacked planes will have the strongest claims.\textsuperscript{193}

Prolonged litigation can be a costly option, both emotionally and financially. It would require victims to frequently revisit the events of September 11.\textsuperscript{194} Lawyers that are recommending lawsuits over the

\textsuperscript{185} Weinstein & Hershenson, \textit{supra} note 4, at 317.
\textsuperscript{189} Air Transportation Safety and System Stabilization Act, H.R. 2926, 107th Cong. § 405(b)(3) (1st Sess. 2001).
\textsuperscript{190} Freedman, \textit{supra} note 99.
\textsuperscript{191} Mary Jacoby, \textit{Lawyers Say Suits May Benefit Clients}, ST. PETERSBURG TIMES, Nov. 15, 2001, at 1A. Establishing liability can keep claimants in court for a decade or more. \textit{Id}.
\textsuperscript{192} Van Voris, \textit{supra} note 186.
\textsuperscript{193} \textit{Id}.
Fund are criticized as "looking for a big payday."\textsuperscript{195} Contingency fees are typically one-third of the award.\textsuperscript{196} Some lawyers are offering their services at a discounted price: 10\% of total award under the Fund or 15\% of the award of a lawsuit.\textsuperscript{197} Lawyers of the New York State Trial Lawyers Association have pledged to perform services pro bono for claimants who choose to file with the Fund.\textsuperscript{198} Although the regulations do not set a limit on the amount of attorney's fees, the Department of Justice recommends that a claimant not accept contingency arrangements exceeding 5\% of the claimant's award from the Fund.\textsuperscript{199}

\textbf{B. Jury Trial}

Some critics of the Fund believe that the use of charts to determine damages violates a claimant's right to a jury trial. "The right to jury trial is more precious to the American way of life than setting up a grid."\textsuperscript{200} However, under the regulations for the Fund, claimants may request a hearing in front of the Special Master, in which a claimant may present information or evidence that a claimant feels is necessary to understand his claim, including expert witnesses.\textsuperscript{201} The Special Master may modify the presumed award methodology if the claimant presents individual circumstances not addressed by the presumed award.\textsuperscript{202}

\textbf{C. Ethical Problems}

Critics of the Fund are concerned with the impartiality of the Special

\textsuperscript{195} NPR: All Things Considered (National Public Radio, Inc. broadcast, Oct. 16, 2001).
\textsuperscript{196} William Sherman, Survivors Face a Tough Decision: Either Sue or Accept Government Aid, N.Y. DAILY NEWS, Oct. 18, 2001, at 40.
\textsuperscript{197} Id.
\textsuperscript{198} NY Lawyers Pledge Not to Make a Penny from WTC Victims, THE LAWYER, Oct. 15, 2001. Some attorneys feel this scheme will only provide inferior representation although much is at stake. Cindy Krischer Goodman, THE MIAMI HERALD, Oct. 4, 2001 at Professions Column. "I don't think there are 12,000 great lawyers out there experienced in wrongful death cases." Id. (quoting Aaron Podhurst, a prominent aviation attorney who is offering a reduced contingency rate of 20\% of the final lawsuit judgment). Some lawyers feel that in order to do an effective job a dedicated presence is required; thus, to do the work pro bono would be too costly. Freedman, supra note 99.
\textsuperscript{200} Jacoby, supra note 191 (quoting Tom Demetrio, an attorney in Chicago and an airplane crash specialist).
Master. Aaron Broder, a New York lawyer, has bought front-page ads in the New York Times urging victims’ families to avoid the fund.\(^{203}\) Broder warned that the Special Master, given absolute discretion and appointed by the Bush Administration, is bound to consider the impact to the government in making compensation determinations.\(^{204}\) However, Attorney General Ashcroft appointed Feinburg, a highly experienced liberal Democrat.\(^{205}\) Feinburg, a Washington attorney specializing in mediation, arbitration, and negotiation, was instrumental in achieving settlement in giant class-action lawsuits over the adverse effects of breast implants, asbestos,\(^{206}\) and, as Special Master, settled more than 100,000 claims of injured Vietnam veterans exposed to Agent Orange.\(^{207}\)

**D. Supervision**

The Special Master will have great power over the amount of compensation awarded.\(^{208}\) There will be no review or appeal from the Special Master’s determination.\(^{209}\) “[The Special Master] has become, instantly, the most important human being on the planet to 5,000 devastated families.”\(^{210}\) A critic of the Fund claims, “[n]o king since the Magna Carta has had the power invested in the special master. He will have the power of the monarch….”\(^{211}\) Special Master Feinburg admits, “I have wide discretion . . . to [make] the tough decisions, which

\(^{203}\) Ranalli, *supra* note 101. Broder won a $17.5 million verdict for a childless widow against Pan Am for the 1988 terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. *Id.*

\(^{204}\) *Id.* He adds: “There is no secondary mission to shortchange the victims for some long-term budgetary goal.” *Id.* (quoting Aaron Broder).

\(^{205}\) Milo Geyelin, *Manager and Managing: Mass Liability Specialist Picked to Administer Sept. 11 Fund*, WALL ST. J. EUROPE, Nov. 28, 2001, at 11. Mr. Feinburg is a former administrative assistant to Edward Kennedy, the Democratic Senator of Massachusetts and an adamant opponent of Ashcroft’s power to appoint the Special Master. *Id.*


\(^{207}\) Geyelin, *supra* note 205.

\(^{208}\) *Id.*


\(^{210}\) Meyer, *supra* note 101 (quoting Leo Boyle, president of the Association of Trial Lawyers of America).

\(^{211}\) Ranalli, *supra* note 101 (quoting Aaron Broder).
I am prepared to make.” Feinburg says he took the job to make sure victims receive just compensation and are treated fairly.

E. Informality

The Special Master does not have to create or provide a written record of the deliberations. Nor is the Special Master bound to his prior determinations. However, regulations for the Fund explain the factors the Special Master will consider in his decision and provide charts for presumed determinations of economic and noneconomic losses. This ensures that claimants have an understanding of how their award will be calculated before they submit a claim to the Fund.

VII. IMPACT OF THE SEPTEMBER 11TH VICTIM COMPENSATION FUND

September 11th victims who use the Fund will be better off financially than many asbestos victims for whom decisions come after needless delays and in unpredictable amounts. Forty-two companies, who made or sold asbestos products, have gone bankrupt, thereby delaying judgments. Juries have awarded asbestos victims anywhere from $55.5 million dollars to a few thousand dollars. Special Master of the Fund, Kenneth Feinburg, said, “[f]airness in this case is consistent treatment of similar claimants—that coupled with speed, the idea that we will not get bogged down in a lot of bureaucracy and red tape.”

Perhaps the Fund will provide a useful model for other mass tort litigation.

When we have faced massive problems of personal injuries before, like with tobacco or asbestos, we’ve

212. Meyer, supra note 101 (quoting Kenneth Feinburg).
213. Id.
215. Id.
217. Id.
218. Exiting the Asbestos Trap, L.A. TIMES, Dec. 30, 2001, at M4. Breathing asbestos fibers, which were used in products as a insulator and fire retardant, can cause serious respiratory diseases, including cancer. Id.
219. Id.
220. Id.
222.Exiting the Asbestos Trap, supra note 218.
tended to duck and say ‘Let the courts figure it out.’
Now, the government is stepping forward and saying,
‘We will compensate on a dollar-for-dollar basis.’ It’s
the fair and decent thing, and we may be taking a big
step forward in the law.223

Plaintiffs’ lawyers, because they take a percentage of monetary
judgments, fear that the Fund will set a precedent for awards in future
mass-injury cases, resulting in a loss of income.224

The economic futures of claimants who file under the Fund depend
on the Special Master.225 The Fund will be their salvation or cause more
frustration.226 Fair treatment under the Fund will result in appropriate
compensation and some measure of comfort to victims.227 “Sept. 11th is
one of the defining events in the history of the world . . . and [the
Special Master] is going to get to write one of the closing chapters in
that event. These families need to heal. And [the Special Master] is
going to be a part of that.”228

VIII. CONCLUSION

“The process for determining awards for individuals [under the Fund]
is fair in light of the alternatives.”229 Victims or their family members
must decide whether to take their chances in court with a jury or file a
claim with the Fund and receive an award immediately.230 “With the
fund there’s a bird in the hand, an assured monetary award that can be
used immediately. Litigation is more like two in the bush . . . a chance
for greater compensation, but not a certainty of it, and the award many

SENTINEL, Oct.7, 2001, at 6A (quoting DePaul University Law School Professor Stephan
Landsman).
226. Kreindler, supra note 103.
229. Leslie Casimir & William Sherman, Kin Begin Eyeing Gov’t Fund Forms, NEW
YORK DAILY NEWS, Dec. 22, 2001, at 6 (quoting Michael Rozen, deputy Special Master for
the Fund).
years away.”

Perhaps the success of the Fund lies with the Special Master, Kenneth Feinburg. His enormous power under the Fund might raise concerns, however, Feinburg’s experience and reputation as a compassionate but tough and dogged mediator should put some of these fears to rest.

I took on [the special master position] because in my experience over the last 30 years as an attorney, getting involved in matters like this, I get a tremendous amount of satisfaction trying to bring peace to very emotional litigations, very emotional disputes... it will be a challenge, but one that I am very interested in trying to help people with.

Or perhaps the claimants themselves will measure the true success of the Fund. David Gordenstein lost his wife, Lisa, on American Flight 11. The message that carries his family through this tragedy is a saying by Charles Swindoll that Lisa slipped under the door of David’s home office the night before she died. It read: “Attitude, to me, is more important than facts. It is more important than the past, than education, than money, than circumstances, than failures, than successes, than what other people think or say or do... It will make or break a company, a church, a home.”

231. Id. (quoting Victor Schwartz).
232. Geyelin, supra note 205.
233. Id.
235. Ripley, supra note 1.
236. Id.
237. Id.