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March 24, 2002

Losses of Equal Value

By Michael I. Meyerson

BALTIMORE— The final rules for disbursing federal funds to the victims of Sept. 11 demonstrate the limits of mathematics in addressing the real but immeasurable values of human existence.

Kenneth R. Feinberg, the special master and administrator of the Victims Compensation Fund, announced earlier this month how money will be distributed to the victims and families of victims. For noneconomic loss, the lives lost are all treated alike. The rules value the pain and suffering of each individual who died at \$250,000 and the intangible harm to each spouse or child of a victim at \$100,000. But for economic loss there will be enormous differences in payments.

The formula bases awards for economic loss on an estimate of the wages the victim would have earned over the course of a lifetime, using his or her average salary for the preceding three years. Because of the formula's emphasis on economic loss, total payouts will vary from less than \$400,000 to more than \$4 million.

Critics frequently complain that calculations like these (which are often used in the courts) undervalue the loss suffered by people in lower-paying jobs. Even as a purely economic matter, the numbers are questionable. The salary-based calculation stubbornly presupposes that those in public service jobs, like military personnel, police officers, firefighters and emergency workers, would have stayed in those jobs, never changing their circumstances by moving on to other professions or going to medical or law school, for example. Nor does the formula consider that victims who worked only part-time or had left the job market to stay home with their young children might have returned to full-time work.

But even if the calculations were refined, why should lost income be the determining factor for payouts from this fund, permitting the family of one victim to recover more than 10 times what is given to that of another? The answer is that the compensation fund has been seen as a replacement for litigation. To shield the airlines from bankruptcy, the Air Transportation Safety and System Stabilization Act, which created the compensation fund, limits the liability of airlines in the Sept. 11 deaths largely to the amount of their insurance coverage. The act also requires that those who take money from the compensation fund agree up front to waive their right to sue.

Once the compensation fund was viewed as a surrogate for litigation, the calculations for disbursement fell into the same trap that has long plagued the legal system. In compensation calculations, concrete factors like lost wages tend to overwhelm intangible factors like emotional loss. It is all too easy to do the math with work hours rather than with heartbreak. How much simpler it is to pay the family that lost a stay-at-home parent for a housecleaning service and tuition at a day care center than to try to assess the lost value of the time the children would have spent with a parent: playing, learning, arguing, living.

The formula reflects the values of the tort system, which pragmatically reduces loss to a monetary calculation. But the purpose of the compensation fund is greater: to serve as a national expression of unity in the face of a tragedy unique in American history, as well as to help survivors. While juries are instructed routinely not to

permit their sympathy for victims to enter into their consideration of damage awards, this fund represents an attempt to embody our collective sympathy.

The families of the firefighter and the financier, the broker and the busboy, with their shared emotional losses, should be compensated equally. What ultimately unites the victims and their survivors with each other and with the nation is far greater than the differences in their last paychecks.