2009

The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes

Michael K. Steenson
Mitchell Hamline School of Law, mike.steenson@mitchellhamline.edu

Publication Information

Repository Citation
http://open.mitchellhamline.edu/facsch/107

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The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes

Abstract
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Keywords
torts, damages, remedies, insurance, disaster law, 9/11, September 11, bridge collapse, Minnesota law

Disciplines
Civil Law | Legal Remedies | Public Law and Legal Theory | Torts

Comments
This article is co-authored by Joseph Michael Sayler

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Mike Steenson† and Joseph Michael Sayler††

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† Mike Steenson is a Margaret H. and James E. Kelley Professor of Law, William Mitchell College of Law.
†† Joseph Michael Sayler graduated from William Mitchell College of Law, cum laude, in 2008. He is a law clerk for the Honorable Ellen L. Maas. Mr. Sayler wishes to thank Amie Penny for, among other things, her extraordinary work on this article.

The authors would like to thank Ryan Blumhoefer and Josh McBeain for their research assistance on this article.
I. INTRODUCTION

Catastrophic occurrences, whether local or national, typically prompt a variety of responses. Private responses usually follow rapidly in the form of private donations, often through charitable organizations. While our history has been one of essentially private responses to catastrophic occurrences, there have also been numerous legislative responses, state and federal, to a variety of disasters. In some cases, a framework was established to respond to continuing problems created by, for example, natural disasters, or recurring problems such as compensating victims of crime, or to provide means of compensation that are alternatives to tort litigation. While there are various types of frameworks for...
compensating victims of catastrophic occurrences, there is certainly no fixed formula to determine whether and in what form any legislative response, congressional or state, should be.

The 9/11 attacks provided the basis for unprecedented responses, both by the public at large and by Congress. Congress approved the 9/11 Compensation Fund ("the Fund" or "the 9/11 Fund") less than eleven days after the attacks. The goal of the Fund was threefold. First, the Fund was conceived out of a national sense of unity and compassion, ultimately leading to the compensation of the victims of an unprecedented tragedy in our nation's history. Second, it was designed to rescue the beleaguered airline industry from financial ruin. Third, the Fund provided an expedient means of compensating victims and reducing their inevitable legal fees.

In return, those seeking redress from the Fund were required to forego traditional tort remedies against any potential tortfeasors associated with the attacks; excluding, of course, any terrorists or highjackers found to be associated with the attacks. So, beyond the three goals, the Fund had the effect of keeping already crowded court dockets free from thousands of claims that would be both highly contentious and lengthy.

On August 1, 2007, the forty-year-old Interstate 35W bridge ("I-35W bridge") over the Mississippi River in Minneapolis collapsed, causing thirteen deaths and injuring numerous others.


2. Id. at 137.

3. Id. The airline industry faced billions of dollars in potential liability, not to mention legal costs. The airlines were already facing a major financial crisis with the three days of industry shutdown post-9/11 and imminent downturn in business that was anticipated because of the attacks. Id. at 143. With estimated losses in the coming year of $24 billion in addition to potential liability estimated at $40 billion, the entire airline industry would have been in a catastrophic situation. Janet Cooper Alexander, Procedural Design and Terror Victim Compensation, 53 DePaul L. Rev. 627, 631 (2003). In addition, due to the risks of future terrorist attacks, insurers threatened to withdraw coverage—without which the airlines could not fly. Thus, a somewhat cynical, but not unfounded, view of the Fund is that its main intention was to bail out the airline industry, and that the Fund was added only to make it palatable to the American public: not the altruistic goal of applying a bandage to the American soul.

4. Ackerman, supra note 1, at 137.

5. Id. at 145.

The collapse of the bridge, one of the most heavily traveled in the state, prompted public outrage; a tremendous outpouring of public support for the victims, survivors, and their families; an immediate search for explanations of what caused the collapse; and rapid legislative responses in the form of short-term relief and accelerated consideration by the legislature of a compensation scheme to address the longer-term needs of survivors of the collapse.

Private funds immediately began pouring into the Minnesota Helps—Bridge Disaster Fund. As of July 29, 2008, this private fund had collected contributions totaling $1.255 million and distributed more than $1.1 million to victims of the collapse. On October 25, 2007, the House held a hearing to hear from bridge-collapse victims. Representative Ryan Winkler already had a compensation bill drafted, modeled roughly on the 9/11 Fund, that he intended to introduce when the legislature reconvened in February. His bill, House File 2553, was officially introduced on February 12, 2008. Senators Latz, Cohen, Hann, Olseen, and Pogemiller introduced Senate File 2824, a compensation scheme with a somewhat different vision, in the Senate on February 18, 2008. A conference committee was appointed and the bill it reported passed the House and Senate on May 5, 2008. It was signed by Governor Tim Pawlenty on May 8, 2008.

The purpose of this article is to analyze and compare the 9/11 Fund and the Minnesota bridge-collapse compensation scheme for purposes of illustrating the necessary components of any future compensation schemes legislatures consider adopting in cases involving other catastrophes.

This article first sets out the primary issues that must be addressed when considering a compensation scheme. It then examines the choices made in the 9/11 Fund and Minnesota's...
bridge-collapse compensation scheme. A brief comparison of the two compensation schemes follows to provide the framework for considering the components of future compensation schemes.

II. DESIGNING A COMPENSATION SCHEME

Consideration of a compensation plan involves a number of issues.

1. The political question

Whether a legislative response to a catastrophic occurrence is justified—the political question—is the threshold issue in determining whether a compensation scheme is an appropriate response to the occurrence. The problem arises in defining the criteria for a legislative response, criteria that should be applicable in other similar cases. Additionally, the threshold question of whether there should be a legislative response at all—versus utilizing the tort system—must be answered.

2. Defining the compensable event

In no-fault schemes the compensable event is readily defined. In workers’ compensation it is workplace injury and in no-fault automobile insurance it is an accident resulting in loss arising out of the maintenance or use of a motor vehicle. In cases involving catastrophes, the catastrophic occurrence itself is the defining event, but defining the compensable event is only part of the problem.

3. Coverage

A third problem is determining who is entitled to recover under the compensation scheme. Beyond the immediate victims of the catastrophe are numerous individuals and entities who may sustain loss, including family members, people in close relationships with victims, or even people who are in business relationships with the victims. Choosing a model for compensation presents the potential for creating inherent inequities in the compensation scheme, depending on how the legislature defines

13. See infra Part IV.
14. See infra Part V.
individuals or entities who deserve compensation.

4. Compensation

Establishing the type and amount of compensation is also critical. Schemes might cover personal injury, loss of consortium, wrongful death, economic loss, and property damage. Damages might include only economic loss, or also cover damages for noneconomic loss.

5. Process

The procedure to be utilized in determining who actually receives compensation and in what amount is critical. A variety of processes might be implemented, ranging from trial forms to arbitration. The decision of the entity processing claims may be final, or there may be administrative or judicial appeal from the decision.

6. Impact on tort claims

The impact on tort claims is an important factor. A no-fault compensation scheme could result in a complete bar of actions against the government that created the compensation scheme, or the bar could be broader to include other entities as well.

7. Collateral sources

Anyone injured in a catastrophic occurrence will likely have other sources of compensation available. One of the problems in defining the amount of compensation to which a victim is entitled to recover is the treatment of collateral sources. What sources to deduct from the fund will be a critical factor in determining the amount of compensation. Deductions could be required from a variety of sources, including health and life insurance, workers' compensation benefits, social security benefits, or even funds received by victims through charitable contributions.

8. Third-party matters

Subrogation and reimbursement are key factors in designing a compensation scheme. There is a question as to whether the government providing the compensation should be subrogated to tort claims the victim has against other potential defendants and if
so, for what amount. That decision will turn on the type of compensation the compensation scheme pays, and on whether the legislation scheme permits subrogation even if the result is that the victim receives less than full compensation. Legislation may also provide for reimbursement of the compensation paid under a plan, even if no third-party claim is asserted. There is also a question as to whether other insurers will be entitled to exercise their subrogation rights against any tort recovery by a victim and if those subrogation rights are abridged, what the consequences will be.

9. Liability waiver

Legislation providing for compensation would likely include a waiver of liability against the government if compensation is accepted. It could condition acceptance on the waiver of other tort liability as well, or depending on the goals, allow third-party tort actions without limitation.

III. THE 9/11 FUND

The 9/11 terrorist attacks changed American life forever. Besides an unparalleled period of national mourning, our economy is in upheaval, our political system is in turmoil, and we are involved in a long-term foreign war. The 9/11 attacks, however, left behind more than just a generation-defining memory and a bitter taste in the mouths of our citizens.

The 9/11 attacks also left behind a magnanimous legacy, evidenced by an unprecedented outpouring of American sympathy and generosity. The residue of this outpouring manifested itself through Congress’ Air Transportation Safety and System Stabilization Act (ATSSSA). While ATSSSA covered various

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15. The 9/11 Fund was conceived in the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 (2006)). The primary purpose of creating ATSSSA was to provide assistance to the airline industry. Congress included the 9/11 Fund “to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.” Air Transportation Safety and System Stabilization Act § 403, 115 Stat. at 237. Congress also created an exclusive federal cause of action for damages arising out of the terrorist attacks. Air Transportation Safety and System Stabilization Act § 408(b)(1), 115 Stat. at 240–41. Thus, 9/11 victims have a choice to either file a claim with the Fund or to litigate their claim in federal court. See Air Transportation Safety and System Stabilization Act § 403, 115 Stat. at 237, § 408(b)(1), 115 Stat. at 240–41.
issues, it is best known for the provisions compensating the victims of the 9/11 terrorist attacks, commonly known as the September 11th Victim Compensation Fund. With the Fund now having run its course, the remaining question is how its legacy will impact future mass-tort/disaster compensation schemes. An analysis of the Fund, in conjunction with an analysis of the Minnesota Fund, is integral to the possible development of similar mass-tort/disaster schemes in the future.

A. The Scope and Procedural Highlights of the 9/11 Fund

Mass-tort lawsuits are not uncommon to the modern-American legal framework. In fact, the framework for the Fund was likely based on the Dalkon Shield litigation of the 1980s and 1990s. Fortunately, however, there had never been another event like the 9/11 attacks. Almost three thousand people lost their lives in the attacks, with thousands more injured, making it one of the single bloodiest peace-time days in our nation's history. Correspondingly, the scope of the Fund was massive. Unfortunately, this also meant that there was no blueprint for setting up an appropriate compensation fund.

But the number of potential plaintiffs is not what made the Fund so extraordinary; it was the very nature of the claims, a massive terrorist attack. The 9/11 attacks were not just attacks on the specific individuals who suffered, but an attack on the nation as a whole with the actual victims acting as surrogates for the rest of America. And that is how the United States and Congress responded to the tragedy. Instead of staggering in the face of unprecedented attacks, America sent a message to the world that the murderers of 9/11 would not achieve their long-term goal of paralyzing American society, but that instead America would rally
around the victims in a showing of patriotic solidarity.\textsuperscript{20}

Although swift and patriotic, it is obvious that very little time was spent discussing the Fund's underpinnings.\textsuperscript{21} The pressure to promptly enact legislation was intense.\textsuperscript{22} Unfortunately, this haste also meant that Congress spent very little time fleshing out the compensation scheme. The result was the Fund's single largest fundamental flaw; that is, very little was known about the Fund's particulars when it came time to implement them. This left the duty of fleshing out the Fund's particulars, both procedurally and substantively, to those implementing the Fund, primarily Special Master Kenneth Feinberg. No one, not even someone with Feinberg's impressive background, had a blueprint for creating and implementing a fund of this nature because the underlying events, mass-domestic terrorist attacks, were completely unique to the nation.

Two of the Fund's characteristics, however, were known from the outset. First, based on the legislative purpose of saving the beleaguered airline industry, the primary strategy behind the Fund was to persuade potential plaintiffs to opt out of the tort system.\textsuperscript{23} To carry this strategy out, compensation from the Fund had to be similar to an award obtained via the traditional tort system.\textsuperscript{24} Correspondingly, the Fund's compensation scheme, at least statutorily, was centered on the tort system's calculation of damages to make it attractive enough to potential claimants to entice them out of the civil-justice system.\textsuperscript{25}

Second, due mostly to political issues, the Fund was kept to a skeletal form. It lacked many substantive details that would have to be added later. This meant that little substance or procedure was built into the Fund for fear that an unsuccessful or exorbitant compensation scheme would create a political fallout. It also created a situation, however, in which voting against creating a

\textsuperscript{20} KENNETH R. FEINBERG, WHAT IS LIFE WORTH? 17 (2005) [hereinafter FEINBERG, WHAT IS LIFE WORTH?].
\textsuperscript{21} The act was passed eleven days after the attacks. Ackerman, supra note 1, at 143. The first mention of adding the Fund to ATSSSA, however, occurred just three days before ATSSSA's passing. Lisa Belkin, Just Money, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine), at 94, available at 2002 WLNR 4430211.
\textsuperscript{22} Alexander, supra note 3, at 636.
\textsuperscript{23} Id. at 633.
\textsuperscript{24} Id.
\textsuperscript{25} Id. The Fund's actual compensation scheme, however, differed significantly from the traditional tort system. This was due, in large part, to the actions of the Special Master. See infra Part III.A.1.a.
Fund would have been political suicide, due to a strong national obligation to aid victims. Moreover, the Fund had to appeal to the victims of 9/11 and to the nation as a whole. To do this it had to be both generous and expedient, but not a financial free-for-all that would be unpopular with the taxpaying public. In other words, it had to balance passion with prudence. As a result, many of the Fund’s initial features—imbedded in its constitution—are images of mass-tort settlement funds, which highlight the effort taken by Congress to strike a balance between the passion and impulse to support the 9/11 victims and the need to be prudent in creating a responsible compensation structure. While in a typical mass-tort settlement this would be done by defendants and plaintiffs reaching a mutually beneficial agreement through a negotiation process, the Fund was forced to do so artificially and quickly. The striking of this balance was due, at least in part, to the involvement of the American Trial Lawyers Association who helped Congress model the initial frame of the Fund after mass-tort settlements. 26 While this satisfied the need for balancing the passion to generously compensate the 9/11 victims, Congress was wildly ambiguous in fleshing out the specifics of the Fund. Much of this vagueness was the result of the Fund being added to ATSSSA at the eleventh hour and the pressure that was felt to quickly compensate the 9/11 victims. This was also likely due, however, to politicians wanting to create as vague a statutory framework as possible to avoid political fallout should the program prove controversial or inadequate. Instead, politically speaking, it made sense to create a statutory framework that put the onus of creating the Fund’s substantive provisions, and therefore the political liability, on the Special Master.

Because of the uncertainties created by Congress, many questions remained unanswered about the Fund when it was placed in Feinberg’s hands. The remainder of this section will discuss the few statutory guidelines provided and highlight the measures implemented by Feinberg when placing them into a workable framework.

26. FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 48.
1. The Fund’s Analytical Framework

The framework of the fund as created by Congress and fleshed out by Kenneth Feinberg provides an analytical framework that can be used in considering and structuring future compensation funds for catastrophic occurrences. The Fund’s framework consists of four parts: (1) establishing the fund; (2) qualifying for the fund; (3) submitting a claim; and (4) receiving an award. This framework analyzes, from alpha to omega, the vehicle that carried an award to the victims of 9/11. Each step is discussed below.

a. Establishing the Fund

As a preliminary matter, the specifics of the Fund needed to be determined before the compensation process could begin. Although Congress debated ATSSSA for days, it hastily added the Fund to the statute at the eleventh hour. As a result, the Fund’s particulars, while well-intentioned, were not well thought out. Because the Fund was created so quickly by Congress, it naturally lacked many details necessary for its implementation (i.e., who qualified, how awards were to be determined, any appeals process, etc.). Creating such details was left to the discretion of Special Master of the Fund: Kenneth Feinberg.

Congress created the Special Master position to not only oversee the Fund, but to determine most of the necessary internal and appeals processes as well. Because the statute lacked almost all substantive detail, Feinberg’s influence was integral in running the Fund. In addition to untrammeled discretion, there was no congressional or administrative oversight for the policies and regulations created by Feinberg. In fact, the only check on Feinberg’s authority came from the Attorney General of the United States, John Ashcroft. Both Feinberg and Ashcroft realized, however, that this check was almost entirely symbolic given the

27. See infra Part V for a concise comparison of the relevant portions of the Fund with those of the Minnesota Fund.
28. FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 20.
29. Id.
30. Rutherglen, supra note 16, at 674. Feinberg was not completely foreign to this assignment. He served as a trustee for the Dalkon Shield Trust and was appointed as the special master for the Agent Orange litigation. Id.
31. Id. at 675.
32. FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 65.
33. Id.
political realities of firing and replacing the Special Master combined with Ashcroft having extremely little time for oversight while embroiled in the post-9/11 war on terror. Unabated discretion and the lack of any meaningful oversight meant that the Fund had its own Leviathan in Feinberg.

Feinberg realized the implications of the power and discretion that Congress had vested in him. Not surprisingly, this virtually unchecked power was the source of some controversy; especially from families and victims that thought Feinberg had abused his discretion by doling out insufficient funds. Feinberg knew coming into the project, however, that he would have to be vigilant to create policies and processes that were both fair and easily understood by laymen. He also understood, despite the emotional and magnanimous underpinnings of the Fund, that he needed to appropriately exercise discretion in limiting the awards because, after all, taxpayers were footing the bill.

Unchecked power, however, was not without adverse consequences for Feinberg. His was the sole name on the masthead for complaints. Because of this, Feinberg knew that he alone would bear the lion’s share of the inevitable criticisms flowing from the Fund’s application. To offset some of this criticism, Feinberg volunteered to carry out the Special Master duties without compensation. He also took pains to implement processes to ensure that all potential claimants were well informed of the Fund’s particulars.

Feinberg, it is worth noting, was not foreign to large and challenging assignments. He had previously served as the Special Master for the Dalkon Shield litigation, the Special Master/head

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34. Id.
35. Id. at 25, 65. Placing this vast amount of power in the hands, albeit quite capable hands, of one person was a source of concern for many. This concentration of power was also a concern for many involved in the debates surrounding the Minnesota Fund. The Minnesota Fund addressed this issue by diluting the power of the position through a Special Master Panel. See infra Part IV.A.
36. FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 65.
37. Id.
38. Id.
39. Id.
40. See id.
41. Id. at 25.
42. See discussion infra Part III.A.1.c.v.
43. The term “Special Master” is a common-law term that refers to a judicial officer appointed to assist the court in some way. See BLACK’S LAW DICTIONARY
mediator in the successful settlement of Agent Orange litigation, an assistant to Ted Kennedy, and the founder of one of the nation's premier ADR firms. Nothing in Feinberg's illustrious career, however, prepared him for the challenges the Fund would present. As Feinberg remarked, his work with the Fund was the most challenging and rewarding experience in his legal career.

While the Fund received very little implementation guidance from Congress, there were some core statutory provisions that shaped the Fund from the outset. The remainder of this section will detail the statutorily created aspects of the Fund; the other three sections will detail the policy and procedural requirements that Feinberg installed.

The statutory underpinnings of the Fund were as few and powerful as they were ambiguous and unfinished. Or as Feinberg noted, "[t]he statute was deceptively simple." Without a doubt, one of the few realized statutory goals behind the Fund was that it had to be attractive enough to potential plaintiffs to make the tort system—and its potentially colossal awards—unattractive. Thus, the primary goal of the Fund was obvious: to create a statutory system of sticks and carrots to channel victims into the Fund. An overview of the relevant statutory provisions follows.

First, applying for a claim with the Fund constituted a release from any liability for all parties that could potentially be held liable through the tort system, minus, of course, the terrorists responsible for the tragedy. In other words, entering the Fund was equivalent to accepting an absolute settlement offer in lieu of litigation. Unlike the tort system and typical settlement funds, however,

1118 (8th ed. 2004).


45. Id. at XVI. While all mass-tort litigation and fund distribution is complicated and often emotional, nothing approaching the appalling and outrageous acts of 9/11 had ever occurred. Combining the hysteria of the attacks with the emotions and needs of the victims and their families created a unique situation that very few could have handled successfully. Further, the bitterness and hate that often surrounds mass-tort funds was heightened because of the nature of the attacks and because the Fund was created so soon after the attacks. Id. This left very little time for victims to grieve or for hate to subside; at least as opposed to typical mass-tort litigation which plays out for years, if not decades. Feinberg not only handled this daunting challenge, but excelled where few, if any, others could have.

46. Id. at 21.

entering the Fund took away any possible tort options for victims. Additionally, it also retroactively capped tort liability for any potential tortfeasors and set stringent jurisdictional and substantive-law restrictions. This meant that the Fund was offered as an alternative to the tort system, with teeth. This approach had the advantage of insulating the airlines, the World Trade Center (WTC) property owners, and perhaps the government, from liability. It also provided victims an alternative to litigation that was both light years faster than traditional litigation and much cheaper. Conversely, it was funded by billions of dollars of taxpayers' money that, theoretically, should have instead come from potential litigants, such as the airline industry, via the tort system. Many skeptics of the Fund saw it as little more than a government-backed bailout of the airline industry that warped traditional tort-settlement funds. This view isn't unfounded considering that ATSSSA was initially promulgated to save the beleaguered airline industry and considering the restrictions placed on the tort alternative. But the Fund's generous and sympathetic undertones quieted most of its critics, especially given the dismal chances the 9/11 victims faced at recovering via the tort system.

Second, financial incentives were created to discourage victims from pursuing their claims through the tort system. Those who opted to bring a lawsuit instead of a Fund claim were subject to damage limitations if the suit was against the airline industry or WTC property owners. Specifically, the airlines' liability was

48. The Fund is a much better choice for victims than tort litigation because applying the risk/utility equation developed by Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), will likely prevent victims from establishing proximate cause. Specifically, victims will be unable to prove the airlines were the proximate cause of their injuries. The inquiry will focus on three questions. Joe Ward, The September 11th Victim Compensation Fund: The Answer to Victim Relief?, 4 PEPP. DISP. RESOL. L.J. 161, 173 (2003). First, “what types of harm did the airlines reasonably foresee at that time of the allegedly tortious conduct?” Id. Second, “is the type of harm actually caused to the victims not physically in the planes . . . one of the types of harm identified in the first query?” Id. Third, “was the harm actually suffered sufficiently probable to occur and sufficiently grave to the extent that it is proper to render the airlines’ conduct tortious?” Id. Because it is unlikely that all three can be answered in the affirmative, proximate cause does not exist and victims would be unable to recover. Id. at 162, 173–74.

49. Id. at 166. All claims needed to be brought in the United States District Court for the Southern District of New York, in Manhattan. Id. Additionally, any liability for the airlines or other entities sued was limited to the amount of their insurance reimbursements. Id. Thus, filing a suit outside of the Fund was very unattractive.
capped at the policy limits of their respective insurance policies.\textsuperscript{50} Also, no punitive damages were allowed.\textsuperscript{51} Additionally, the costs and associated attorney's fees that would be incurred through litigation created a sizable deterrent in the face of the Fund. This was especially true given the alternative of entering the Fund's user-friendly and cost-effective environs. Thus, there is no doubt that entering the Fund was much cheaper for victims.

Third, the applicable substantive law and jurisdiction were set by statute for those choosing not to enter the Fund.\textsuperscript{52} Congress achieved this by reserving a tort remedy in the ATSSSA for those opting not to enter the Fund.\textsuperscript{53} This reservation, however, contained several restrictions that, once again, were likely meant to channel victims into the Fund. To begin, the government mandated that any lawsuits involving potential 9/11 tortfeasors had to be brought in federal court in Manhattan.\textsuperscript{54} In addition to giving exclusive jurisdiction to federal court in New York, it limited the substantive law to that of the respective crash sites (New York, Pennsylvania, or Washington, D.C.), except where preempted by federal law.\textsuperscript{55} Notably, the jurisdictional and substantive restrictions applied to all victims whose claims arose from the 9/11 terrorist attacks, not just those that could opt into the Fund but chose not to.\textsuperscript{56}

\textsuperscript{50} About $6 billion was available for those seeking tort remedies against American and United Airlines, the two airlines involved in the 9/11 crashes. Erin G. Holt, \textit{The September 11 Victim Compensation Fund: Legislative Justice Sui Generis}, 59 N.Y.U. ANN. SURV. AM. L. 513, 514 (2004).

\textsuperscript{51} Rutherglen, \textit{supra} note 16, at 690. The goal of punitive damages is to create a deterrent effect on the tortfeasor or future tortfeasors. When the source of the compensating fund is the federal government, however, the awarding of punitive damages has no deterrent effect at all—especially considering that the government did not admit fault and most do not think that it was at fault because the attacks were terror related. \textit{See id.}

\textsuperscript{52} Air Transportation Safety and System Stabilization Act § 408, 115 Stat. at 240–41.

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} As a result of the restrictions placed on the tort system and the lure of the Fund, approximately seventy claims have been brought by those that qualified for the Fund. George W. Conk, \textit{Will the Post 9/11 World Be a Post-Tort World?}, 112 PENN. ST. L. REV. 175, 188 (2007). As mandated by ATSSSA, all of these claims have been brought in the United States District Court for the Southern District of New York, located in Manhattan. \textit{See id.}

\textsuperscript{55} Air Transportation Safety and System Stabilization Act § 408, 115 Stat. at 240–41.

\textsuperscript{56} Conk, \textit{supra} note 54, at 188. To be subject to the jurisdictional and substantive restrictions, the named defendants in the complaint had to be an airline, airport security company, and/or the Port Authority of New York or New
Finally, unlike most mass-tort compensation funds, the Fund did not contain a limited amount of money; thus making the Fund more palatable by not limiting the amount of payments to potential claimants. Additionally, it also differed from most funds because the Fund creators and administrators did not have a financial incentive to award conservative payments.

Congress took steps through the Fund, although in a seemingly light-handed manner, to ensure that a compensation system would be put in place to adequately compensate the 9/11 victims in an efficient manner. Thus, because Congress seemingly had the best interests of the 9/11 victims in mind when promulgating the Fund and took several steps to ensure fairness, the Fund’s procedural integrity was entrenched from the beginning.

Jersey. *Id.* at 188-89. Thousands of these claims have been brought in the United States District Court for the Southern District of New York, and are now consolidated for discovery and other pre-trial proceedings. *Id.* at 189. Among these cases are: “(i) [I]n re September 11 Litigation, 21 MC 97 (AKH), claims brought by passengers and ground victims of the September 11 attacks; (ii) In re September 11 Litigation, 21 MC 101 (AKH), claims brought by property owners whose property was damaged as a result of the September 11 attacks; (iii) In re World Trade Center Disaster Site Litigation, 21 MC 100 (AKH), claims brought by those who came to the World Trade Center disaster site to assist with the debris removal effort following the September 11 attacks; (iv) In re World Trade Center Disaster Site Litigation, 21 MC 102 (AKH), claims brought by those who assisted with the debris removal effort at sites other than the WTC site following the September 11 attacks.” *Id.* Most of these cases either relate to property or to those suffering injuries that did not qualify for compensation under the Fund. *Id.* These injuries were primarily related to the cleanup undertakings, rescue activities, and airborne diseases that took days, months, or even years to manifest themselves in the aftermath of the attacks. *Id.* at 200-02.


58. FEINBERG, WHAT IS LIFE WORTH?, *supra* note 20, at XVI. Even this portion of the Fund was not without some controversy. Some legislators, including Senator Don Nickels of Oklahoma, were concerned about forming a dangerous precedent of government funding substituting the civil justice system with runaway compensation for potential tort victims at the expense of taxpayers. *Id.* at 35. This seemed like a legitimate concern in the face of an unprecedented Fund whose Special Master was essentially given a blank check and discretion to dole money out as he saw fit—especially with the public sentiment of generous giving, or vengeful philanthropy, pushing the spirit of the Fund. As a result, the statute was amended to offset award amounts with collateral payments. *Id.* at 35-36. Of course the collateral offset portion of the Fund met widespread disdain. This controversial portion of the Fund is discussed *infra* Part III.C.1.

b. Qualifying for the Fund

On the day of the 9/11 terrorist attacks, almost three thousand people died and thousands more were injured. In the days and weeks that followed, the number of injured grew by the thousands as workers carried out dangerous rescue and cleanup efforts. Additionally, billions of dollars in property was destroyed or damaged. Because of the massive range and amount of injuries, the scope of the Fund had to be limited in order to be practical. The legislative requirements for entering the fund were simple: those injured in the attacks qualified, as did family members of those who died. Also, Congress did little to limit potential claimants; the Fund applied broadly, allowing citizens of foreign countries and illegal aliens to apply. Victims of property destruction, however, did not qualify for the Fund, thereby excluding a number of costly claims. While qualifying sounded simple, in reality there were four primary problems in deciding who qualified for the Fund.

60. Conk, supra note 54, at 198–201. The Fund’s limited scope, in relation to injuries outside of the Fund’s seventy-two hour period, continues to remain controversial. In addition to 9/11 being the worst terrorist attack on our country, it was also the worst environmental disaster to ever befall New York City. Id. at 178–79. The collapse of the WTC towers released thousands of toxins, such as asbestos, lead, PCBs, and dioxins, into Manhattan’s air. Id. at 179. After the collapse, thousands of workers labored for months in the toxic air, many without adequate respiratory protection. Id. at 198–200. Additionally, there was little or no training and no formal health plan for the workers until months after the cleanup had begun. Id. at 199–200. Nearly all the workers reported some health problems; many reported serious problems. Id. at 200. Unfortunately, these claims were excluded from the Fund because they arose outside of the seventy-two-hour period that limited the Fund’s scope—leaving the tort system to compensate the thousands of workers suffering from serious illness and disease. Id. at 202–03. Currently, over three thousand workers have filed claims because of illness and disease related to the cleanup of the WTC towers. Id. at 202. These claims come within the jurisdiction of ATSSSA and are currently in federal court in the Southern District of New York. Id. at 202–04. ATSSSA also limited New York City’s liability to $350 million or its insurance coverage limits, whichever is greater. Id. at 204. Congress also established the WTC Captive Insurance Company, Inc., with a coverage limit of $1 billion, to protect contractors against personal injury claims arising out of the cleanup of ground zero. Id. at 204.

61. Ackerman, supra note 1, at 144–46.

62. Id. at 144.

63. See Feinberg, What Is Life Worth?, supra note 20, at XVII–XXI.

First, some questioned even this broad application of the Fund, calling it too narrow, asking why only the victims of the 9/11 attacks were being compensated. These questions were not unsubstantiated. For example, the victims of the Oklahoma City bombings, the first WTC bombings, the U.S.S. Cole attack, and the bombings of the American embassies in Kenya and Tanzania were never compensated by the government through a similar fund. Therefore, there was a push from several fronts to expand the scope of the Fund to include victims of other terrorist attacks. Some even advocated for establishing a permanent fund for victims of terrorist attacks. This highlights one of the toughest questions in creating the Fund or future funds, which is where to draw the line on who to compensate. Highly tragic events tend to spur the emotions and hearts of society because thousands of innocent victims have died or been injured. Yet there are thousands of other victims that suffer similar fates but not in the same highly sensationalized manner. It makes us ask: Why these victims and not others? It is a tough question, and one that those creating future funds reluctantly must face.

Second, it was not clear who qualified to recover under the Fund. The Fund defined eligible claimants as those present at the crash scenes or, in the case of a death claim, "the personal representative of the decedent[",] who had to be appointed as the

65. See FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 21–22.
67. For example, Senator Charles Schumer of New York tried to persuade Feinberg to expand the scope to include the victims of the first WTC bombings in 1993. FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 66.
68. Betsy J. Grey, Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 663 passim (2006). Grey argues that “[t]he rationales supporting the establishment of the September 11th Fund and other permanent domestic and international compensation funds support the idea that the United States should establish a terrorism compensation fund on a permanent basis.” Id. at 669. Grey bases the need for a permanent fund on the assumption that terrorist attacks on the United States will continue. Id. With that assumption in mind, she argues that “[w]ith all the precautions and protocols the United States has instituted in the name of homeland security, establishing a permanent compensation system for victims of terrorism is a logical step in preparing the Nation if it finds itself in the midst of another terror-related crisis.” Id.
personal representative or administrator of the decedent’s estate, usually by a valid will. If no such person had been appointed by will, as was common, the default claimant was determined by the intestacy statutes of the jurisdiction in which the decedent was domiciled. This procedure was arguably the only way to efficiently carry out the program. It was not, however, without faults. For instance, there were situations where the decedent had lived with a partner for years, yet the official claimant would be someone who had little or no contact with the decedent. Some opposing claimants litigated outside of the Fund in state courts to determine the reception of the Fund award, despite the best efforts of Feinberg’s expert mediation endeavors. Again, there likely was no other way to efficiently carry out the program, and in most cases it was a non-issue.

The third problem concerned which people with injuries qualified for the Fund. Coupled with the inherent administrative difficulties in making such a determination, this topic was highly controversial. The Fund limited injury claimants to those who suffered physical injury, rejecting claims for those with solely emotional or mental harm. Moreover, the Fund originally limited eligibility to those who had been at the scene of the attacks and were injured during or immediately afterward. It further limited eligibility to those who were treated at a hospital within twenty-four hours of the attacks. The consequence of this initial limiting provision was the exclusion of many firefighters, policemen, rescue workers, and concerned citizens who were injured in the aftermath of the attacks because they were rescuing or aiding victims. This harsh turn on the heroes of 9/11 created an uproar. In response,
the Fund was amended to allow for injuries that were treated within seventy-two hours of the attacks. This provision was still controversial, however, because numerous injuries either arose or were treated after the seventy-two hour period.

The fourth problem concerned determining the amount of time a claimant had to enter the Fund. All claimants had to enter the Fund within two years of the Fund’s effective date. This did not seem to be a hindrance to many, if any, eligible claimants because the vast majority brought claims within the statutory period.

c. Submitting a Claim

After filing a claim, the Fund’s procedural underbelly kicked into action, and Fund staff carefully evaluated each claimant’s case. Some of these procedures were laid out by statute; most of them were created by Feinberg. The more interesting and relevant of these procedures are outlined below.

i. Individual Evaluators

Upon submission, a claimant’s file was sent to a claims evaluator to determine eligibility. Given the massive scope of the Fund, Feinberg realized from the outset that he would need a large staff that he could trust. Feinberg’s first step was to secure a core staff that could help him build the large network necessary to administer the Fund. To do this, Feinberg relied heavily on both the top lawyers at his prestigious law firm and a few of the Bush administration’s apolitical lawyers. The core staff, through a public bidding process, then chose the accounting firm

82. 28 C.F.R. § 104.2(c)(1) (2008).
83. Ackerman, supra note 1, at 160. These injuries were mainly breathing problems, caused by particles and chemicals in the air that remained for days after the attacks. Id. Additionally, it is possible that many of the rescue and cleanup workers that toiled for days, weeks, and even months afterward may develop health problems in the future. Id.
84. Id. at 161.
85. Id. at 144. This resulted in a filing deadline of December 22, 2003. Id.
86. Id. at 180. Over 97% of the 2976 eligible claims were brought within the statutory period. Id. A large number of those claimants entered the Fund less than one month before the deadline. Id.
87. Alexander, supra note 3, at 669.
88. FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 31.
89. Id.
90. Id. at 31–33.
PriceWaterhouseCoopers to handle all of the Fund’s fiscal responsibilities. 91 The next step, choosing the staff that would implement the Fund’s procedures and evaluate its awards, was the most challenging. Creating this part of the Fund was equivalent to constructing the body’s nervous system. The claims evaluators and staff in the offices that were created throughout the east coast and California were equivalent to the nerves and cells, taking in all of the claimants’ information, answering questions, distributing information, and analyzing the awards. 92 Feinberg was the brain of the operation, taking in all of the relevant information from the evaluators and staff, processing it into one final award, and then sending the award back to the branch offices for distribution to the claimants. 93

Because of the importance Feinberg placed on the decisions of these individual evaluators, choosing them wisely was critically important to the Fund’s integrity. Initially, forty-one of these subordinate officers were chosen, all directly by Feinberg. 94 Hand picking the evaluators proved to be somewhat controversial because it further cemented the Leviathanesque grip that Feinberg had on the Fund. Ultimately, however, it helped ensure that the speed and efficiency of the process would not be jeopardized due to conflicting evaluative philosophies.

ii. Speed

The speed of the Fund was perhaps its greatest feature. Under ATSSSA, all claims were guaranteed, for better or worse, to be decided upon and distributed within 120 days of being filed. 95 This was years faster than the time required to take a claim to its conclusion through the tort system. It assured that any award would be received by the victims quickly, alleviating the time and worry of trying to collect a judgment through the tort system.

Evaluating claims, even with the utilization of presumptive guidelines, was not an easy process. The amount of information and care that went into each claim was impressive. For instance,

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91. Id. at 33.
92. Id.
93. See id. at 87.
94. Alexander, supra note 3, at 669.
the Fund staff had to evaluate tax returns, W-2 wage and tax statements, pension plans, social security records, insurance contracts, workers' compensation awards, bonuses from employers, death benefits, and charitable contributions. Additionally, Feinberg had to decide if the amounts that were calculated corresponded with the goals and spirit driving the Fund; he looked at the calculated awards and decided to increase or decrease the amount in an attempt to "narrow the gap" between award amounts.

Even with the Fund's rapid claims resolution, some 9/11 victim families still experienced financial difficulty. Many of these problems, however, were offset in two ways. First, the charitable outpouring from the American public was tremendous. Billions of dollars poured into dozens of charities. Second, an emergency prong of the Fund was created to quickly get money into the hands of those in need. The idea was to get financially strapped families on their feet while the Fund's particulars were ironed out. The emergency funds were then credited to the award they ultimately received from the Special Master. Oddly, only 236 families took part in the emergency prong of the Fund. This was due, in large part, to the unprecedented flow of money from the American public to various charitable organizations.

96. FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 80.
97. The idea of "narrowing the gap" was a pervasive theme that Feinberg incorporated into award determination. See id. at 51.
100. FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 45.
101. Id.
102. Id.
103. Id. The term "vengeful philanthropy" was coined by Jack Rosenthal, the head of the New York Times Foundation, to describe the phenomenon of Americanism that resulted after 9/11. Id. at 70. Most charities, unfortunately, did not have the capability of distributing the massive amounts of money that poured into their understaffed offices. Katz, supra note 98, at 25254. Most of these problems were purely logistical, with many charitable organizations simply lacking the infrastructure and manpower to effectively administer America's "vengeful philanthropy." Id. As a result, the river of money flowing into charitable organizations experienced difficulty finding its way into the hands of thousands of victims and their families. Id. Fortunately, given the pure amount donated, the
Additionally, further steps were taken to streamline the process by giving claimants the option of entering the Fund via two distinctive tracks, Track A and Track B.\(^{104}\) Entering through Track A, a claims evaluator would determine a claimant’s eligibility and the claimant’s presumed award within forty-five days of filing.\(^{105}\) After receiving the award, the claimant could either accept it or request a hearing before the Special Master or his designee.\(^{106}\) Conversely, under Track B, the claims evaluator would determine eligibility only, again within forty-five days; eligible claimants would then proceed directly to a hearing with the Special Master.\(^{107}\)

Also, under Track B, claimants could arrange evidence and other materials to influence the Special Master; making it similar to a binding arbitration.\(^{108}\) Not surprisingly, the more elaborate procedures under Track B were chosen with higher frequency among those with death (opposed to injury) claims and also with victims that had the potential for large claims.\(^{109}\) Track A allowed simpler claims with the procedural safeguard of an internal appeal to the Special Master for unfavorable determinations.\(^{110}\) Even those appealing their decisions to the Special Master were guaranteed to have a decision within 120 days, a significantly faster resolution than claimants would achieve through the tort system.\(^{111}\)

### iii. Finality

Procedurally, the biggest complaint about the Fund was its finality, or lack of an appeals process.\(^{112}\) Submitting a claim sent the 9/11 victims down an irreversible trail. The language of the

impact of private charities greatly reduced the necessity of an emergency government fund.

104. Ackerman, *supra* note 1, at 155.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 155–56.
109. Rutherglen, *supra* note 16, at 699. The claimants filing under the death provision were able to attain awards based on the salary levels of the decedents. This meant that those earning higher salaries typically received higher awards. As a corollary, these claimants typically would apply directly to the Special Master for a more in-depth hearing under Track B. *Id.* at 698–99.
110. *Id.* at 698–99.
112. *Id.* (stating that all decisions reached by the Special Master are final and not subject to judicial review).
Fund mandated that the Special Master’s final decision was exactly that: final. Once in the system, an unhappy claimant under Track A could appeal to the Special Master for an individual hearing. Claimants choosing Track B, however, were allowed no further redress and were bound to the amount determined by the Special Master. In either case, the buck stopped with the Special Master. Thus, this provision of the Fund proved controversial because victims that were unhappy with an award amount were left with no viable options because of the statutory mandate that all decisions were final.

The absolute nature of the Fund also had the collateral effect of placing claimants, particularly families of high wage earners, in a state of apprehension. Feinberg made it a goal to “narrow the gap” between awards for those earning a janitor’s salary and those earning millions of dollars per year; despite Congress’ mandate that earning potential play a part in the award calculation. Specifically, Feinberg told families of high wage earners that their awards would reach nothing close to the amounts they would receive in a successful tort suit. For instance, Feinberg made it very clear that families of ultra-high wage earners would not receive the $20 or $30 million awards that they might receive in a successful tort suit. These families, of course, would not be able to pursue tort claims if they entered the Fund. This was problematic because they would not know the award they would receive by entering the Fund until already committed to its result.

In contrast, most traditional forms of ADR are either non-binding, or at the very least can be appealed on grounds of fraud,

113. See supra Part III.A.1.c for a more in-depth discussion of the two-track system.
115. See FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 51–52.
116. Id.
117. Stephen Landsman, A Chance to be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund, 53 DePaul L. Rev. 393, 401–02 (2003). Feinberg noted that “multi-million dollar awards out of the public coffers are not necessary to provide [high wage earner families] with a strong economic foundation from which to rebuild their lives.” Id. at 402 (quoting September 11th Victim Compensation Fund of 2001, Interim Final Rule, 66 Fed. Reg. 66,278 (Dec. 21, 2001)).
118. See FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 51–52.
120. See MINN. GEN. R. PRAC. § 114.02(a)(1) (2008).
prejudice, or malice—and participants have the option of not reaching an agreement. The Fund’s finality, of course, has generated a huge amount of criticism. The obvious catch is that if appeals were allowed, the Fund’s goals of speed, efficiency, and cost-effectiveness would be frustrated.

The restrictions on substantive law, jurisdiction, and liability added to the Fund’s potential claimants’ predicament. They faced uncertain and irreversible results by entering the Fund. Yet, the alternative tort environment was hostile, subject to several restrictions, and the possibility of pinning liability on any potential tortfeasors was, at best, dubious. Notably, some of the fear of the Fund’s finality was offset by Feinberg. Knowing that the finality of the Fund was controversial and worrisome to potential claimants, Feinberg sought a proactive solution to the problem. Instead of forcing potential claimants to blindly make a choice between the Fund and the tort system, he offered to give claimants an estimate on their potential award.

iv. Cost-Effectiveness

While fees for any legal matter can be extremely costly, these costs were largely absent for claimants entering the Fund, thereby, making it a much more attractive alternative than the tort system. The Fund was constructed so that claimants would have little trouble representing themselves pro se. But, if claimants wanted assistance, it was provided pro bono or at greatly reduced rates—one of the most championed provisions of the Fund. This direct representation was provided by a pro bono “case manager” for claimants. The Trial Lawyers Care organization (TLC) provided the representation. In addition, lawyers who were handling the

121. See generally id. § 114.08; Minn. Stat. § 572.19 (2006).
122. See, e.g., Feinberg, What Is Life Worth?, supra note 20, at 78–79 (discussing the criticism coming from the victims’ families); Alexander, supra note 3, at 630–36 (highlighting the procedural deficiencies of the Fund caused by its expedited enactment); Landsman, supra note 117, at 399–401 (describing the finality of the Special Master’s decisions and how Feinberg’s approach altered the legislative mandate of the Fund).
124. Id. at 79.
125. Alexander, supra note 3, at 644–45.
126. Id.
127. Id. at 643–44.
128. TLC was created in response to the 9/11 terrorist attacks so that victims and their families would not be subject to large legal fees that would significantly
cases for a fee did so at greatly reduced rates. This accentuated the cost-effective and victim-friendly nature of the Fund. This was especially important given the dramatic nature of the attacks. It would not look benevolent, and indeed it may have eroded the Fund’s magnanimous underpinnings, if lawyers were receiving a third of the awards. This, of course, is in addition to the negative perception the public would have had of a taxpayer-based compensation scheme that padded the wallets of thousands of lawyers instead of directly benefiting the victims of 9/11.

This also fell in line with the goal of making the Fund more attractive than the traditional tort system to potential claimants. Moreover, other than cutting the vast majority of legal fees associated with litigation, the Fund also cut filing, court, and/or ADR fees that accompany the traditional pathways. Most importantly, however, it also presented awards to claimants tax-free; thereby, increasing the amount of awards given by billions of dollars. These aspects of the Fund assured that cost and time would not adversely affect claimants, keeping in-tune with the Fund’s altruistic underpinnings, and would also make the Fund a much more attractive option than the tort system. Specifically, by ensuring the Fund’s speed and cost-effectiveness, along with its no-fault foundation, the claimants were afforded a quick, generous, and risk-free award; an alternative much more attractive than the traditional tort system.

129. This is likely to the credit of Feinberg who, in his final report, cautioned that attorneys taking a contingent fee of larger than 5% would erode the meaning and purpose behind the Fund. In addition, those taking contingent fees were carefully watched by the courts to make sure the fees were within the spirit of the Fund. See Conk, supra note 54, at 187. See, e.g., In re Gomez, 785 N.Y.S.2d 866, 867-68 (2004) (in which the court scrutinized contingent fees less than 10%). Feinberg led by example through the donation of not only his services, but those of his law firm, in excess of 19,000 hours. Conk, supra note 54, at 187.

130. See Conk, supra note 54, at 187.

131. Id. at 183–87.
v. Heightened Notice Requirements

The notice requirements for the Fund went above and beyond standards for typical legal procedures.\textsuperscript{132} One key component of heightened notice was the importance Feinberg placed on transparency, openness, and the need for claimants to be apprised of the Fund's particulars.\textsuperscript{133} For instance, Feinberg and his designees held a great number of public meetings, meetings with groups of claimants, and constructed a website to apprise potential claimants of all the procedures and details of the Fund.\textsuperscript{134} Feinberg went through these elaborate steps to ensure the widest dissemination of information about the Fund as possible.\textsuperscript{135} Additionally, Feinberg offered to meet personally with any potential claimant who had questions or concerns about the Fund.\textsuperscript{136} Feinberg took these steps to ensure that the Fund's public face would be someone who was familiar with the Fund's particulars and who was willing to meet personally with victims and their families.\textsuperscript{137}

Overall, the Fund had several procedural safeguards in place to ensure the speed, efficiency, low cost, and fairness of the process. Besides heightened notice requirements, it had an internal appeals process, expedient turnarounds, an easy to use format, and free legal representation. The process was very similar to binding arbitration. You bring evidence and a claim to an "evaluator," he views that evidence, and then he makes a binding decision. Claimants had knowledge of the process' requirements, how claims were evaluated, and the fact that it was binding was known ahead of time due to Feinberg's dedication to openness and transparency. It differs from arbitration, however, in a few controversial ways. As an absolute, a claimant could not challenge

\textsuperscript{132} See Feinberg, Building Blocks, supra note 66, at 275.
\textsuperscript{133} See id. at 274–75; Feinberg, What Is Life Worth?, supra note 20, at 46–47. Feinberg states that "[i]f you tell 9/11 families, 'You get an award; that's it, you can't go to court,' every intuitive bone in my body says, 'That won't work. It will never work.' There has to be a sense of fairness and openness to the program. Do not underestimate the importance of procedure in the design of these programs. You must give claimants a sense that they are involved in the process. This idea that an award will come on down from on high and you'll take it and like it doesn't sit well with families or with any consumer of a designed program." Feinberg, Building Blocks, supra note 66, at 274–75.
\textsuperscript{134} See Feinberg, What Is Life Worth?, supra note 20, at 47–50.
\textsuperscript{135} Id. at 47.
\textsuperscript{136} Feinberg, Building Blocks, supra note 66, at 275.
\textsuperscript{137} See Feinberg, What Is Life Worth?, supra note 20, at 49.
the decision of the Special Master in court. And rules affecting the alternative, i.e. litigation, made it difficult to avoid entering the Fund. Again, these restraints were likely created out of necessity to ensure that the goals of the Fund remained intact.

B. Compensation

The Fund was also unique in its process for determining the substance or value of claims. The biggest question surrounding the Fund was how claims would be decided. This answer would shape the decision of many claimants pondering whether to enter the Fund or seek traditional tort remedies.

1. Claim Determination

To begin with, the Fund was created on a no-fault basis. This meant that the government created the Fund without admitting wrongdoing on its own behalf or any other party's behalf. More importantly, however, it also meant that claimants would not have to prove any of the traditional elements of negligence (duty, breach, etc.), except damages. Thus, any claimants meeting the threshold eligibility requirements per se were entitled to an award. This is comparable to no-fault workers-compensation systems and no-fault automobile insurance systems.

The question then became how to attach a value to the individual claims. The biggest debate surrounding this question was whether to use a traditional tort approach to deciding damages or a government-benefits-based approach. This question was paramount because the individual award amounts could vary greatly in the two systems. For instance, if the awards were distributed as in a government-benefits system, the awards would likely be identical (or very similar) for most claimants, just as they are for disability, welfare, no-fault insurance, or social security benefits. Under a tort approach, however, the awards would be based on the individual circumstances of each claimant—meaning that income, dependents, age, and special circumstances would

138. Feinberg, Building Blocks, supra note 66, at 274. Though the statute precluded judicial appeals, Feinberg created an administrative appeal process. Id. at 274–75.
139. See Nolan & O'Grady, supra note 98, at 235.
come into play. This approach results in a wide range of award amounts, due mainly to vast differences in income of the claimants.\textsuperscript{141}

The Special Master was required by the Fund to take into account the individual circumstances of the victims.\textsuperscript{142} He did, however, have substantial discretion in deciding how to interpret those circumstances.\textsuperscript{143} The result was a blend of the tort system and a government-benefits system, with a leaning towards tort-based determinations. In this way the Fund was similar to a mass-tort settlement fund, in that it tended to flatten out the differences in award amounts; eliminating the high-end tort awards some claimants may have received, but also giving higher amounts to low-income claimants and those suffering injuries.\textsuperscript{144} This result can be directly attributed to the great pains Feinberg took to “narrow the gap” in awards.\textsuperscript{145} He did so to incorporate the altruistic spirit underlying the Fund.\textsuperscript{146} While awarding everyone the same amount was expressly forbidden by statute, Feinberg used his discretion to successfully narrow the gap between the wealthy, middle-class, and poor claimants.\textsuperscript{147} To best highlight the end result, the substantive

\begin{footnotesize}
\begin{enumerate}
  \item See Feinberg, What Is Life Worth?, supra note 20, at 36. There was great disparity among the income of claimants. \textit{Id.} For instance, the WTC had individual victims, such as top executives for Cantor Fitzgerald, who earned millions per year. \textit{Id.} at 51. The WTC, however, also had janitors and undocumented aliens working on its ground level who made less than $20,000 per year. If a pure tort-award analysis were used, the top end of the spectrum would have seen awards between $10 and $50 million, while the low end would have seen awards with less than $250,000. \textit{Id.} Avoiding this kind of disparity was a pointed goal of Feinberg’s. \textit{Id.} at 47, 91. Developing this goal can be traced, at least in part, to the advice of Feinberg’s former employer, Ted Kennedy, who told him “Ken, just make sure that 15 percent of the families don’t receive 85 percent of the taxpayers’ money.” \textit{Id.} at 47.
  \item \textit{Id.} at 34–35.
  \item Alexander, supra note 3, at 650.
  \item Feinberg, What Is Life Worth?, supra note 20, at 91.
  \item \textit{Id.}
  \item \textit{Id.} While Congress mandated that the Special Master factor income into the awards, it also granted the Special Master great discretion to create the system in which awards would ultimately be determined. Feinberg, wielding his sword of discretion, ultimately decided that Congress had created the compensation with the intention of distributing awards similarly across the board, despite the wide range in incomes of 9/11 victims and the language included in the Fund’s statutory underpinnings. Feinberg made this policy very clear, despite harsh criticism, to the family members of wealthy victims. As Feinberg later reflected:
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\end{footnotesize}
basis for deciding claims is broken into two categories: economic loss and noneconomic loss.

a. Economic Loss

Under the Fund, economic losses included earnings, employment benefits, replacement services, and burial costs, to name a few. These economic losses mirrored the losses that would be comparable under most states' tort systems. For example, to predetermine awards, Feinberg created presumptive tables based on income, which included figures for those who ranked within the ninety-eighth percentile of earned wages in America. Those earning more than the ninety-eighth percentile could either accept an award at that level or apply to the Special Master and present evidence of why they should be entitled to an upward deviation from the scales. Not surprisingly, this proved highly controversial because many of those who died in the WTC were above the ninety-eighth percentile mark.

On the other side, the scales drew criticism because many thought that the victims who were in the most need of financial assistance should be given higher awards. This system would have been more similar to a government-benefits program such as welfare. This presents an important question: Why should the victims be placed in better financial situations than they were

I had to dash expectations that the families of wealthy wage earners would receive tens of millions of dollars. I pulled no punches. I made it very clear—much to the anger of some high-income survivors and their representatives, like Howard Lutnik, chairman of the board and chief executive officer of Cantor Fitzgerald—that payouts in the double-digit millions (or anything close to that) were extremely unlikely. Instead, I would exercise my discretion to reduce the gap between high-income and low-income families. If a calculation based on lost income resulted in a figure of $10, $20, or $50 million after offsets, I would reduce the award to an amount I believed was more reasonable and in line with what Congress intended.

Id. at 51. Feinberg further remarked that “awards exceeding $3 million would be ‘exceedingly rare’ and would require ‘extraordinary circumstances.’” This was, again, despite the Fund’s statutory underpinnings prohibiting a cap on awards based on income. Id. at 50–51.

149. Id.
150. Id. at 240. The ninety-eighth percentile amounted to roughly $231,000 at the time. Id.
151. Id.
152. See id. at 240–41.
before the attacks? For instance, under a benefits-based system, a thirty-five-year-old making $150,000 and a fifty-five-year-old making $20,000 would receive the same award. In other words, investment bankers and janitors could receive the same award regardless of the drastic differences in their incomes. This would run counter to a tort-based system that would at least attempt to calculate actual damages.

The presumptive guidelines were based on tort principles, primarily income and age. The damages awarded varied depending on the career and age of the individual based on actuarial tables, similar to the means with which traditional tort awards and tort settlement awards are fashioned.

While at first glance the economic-loss portion of the awards appeared to be based solely on the tort model, in reality many awards were altered to evenly distribute compensation. This occurred in two ways. First, as mentioned above, Feinberg purposely limited high-end awards. Second, he also inflated awards that were minimal—primarily those that were low-wage earners or mid-wage earners subject to significant collateral offsets. This fit with Feinberg’s goal of narrowing the gap between the wealthy and poor claimants to come in line with Congress’ intent and the spirit of the Fund.

Narrowing the gap also served the purpose of making every award meaningful to the claimants. For instance, hundreds of claims were based on injury or death of primarily mid- to low-wage earners with life insurance, which would have required only a nominal award because of the Fund’s collateral-offset provision. To combat this perceived injustice and to keep awards commensurate with the Fund’s generous spirit, Feinberg made it the Fund’s unofficial policy to make almost every award at least $250,000.

b. Noneconomic Loss

Noneconomic losses were less controversial. The statute defined these losses as “losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and

153. Id. at 240.
154. See id.
155. FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at xx.
companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.\footnote{156}

When establishing these awards, Feinberg again created presumptive guidelines.\footnote{157} For these losses, however, he created presumptive awards for all claimants equally (at least on the death side).\footnote{158} This approach is similar to a government-benefits approach to awarding damages—the same for all, regardless of circumstance.

Claimants could challenge these presumptions based on the unique circumstances of the individual; however, there was not much deviation.\footnote{159} Under Feinberg’s presumptive guidelines, claimants received $250,000 per victim, with an additional $100,000 award for the victim’s surviving spouse and each dependent child.\footnote{160} For claimants with injury (non-death) claims, there were no presumptive guidelines for noneconomic damages because each victim’s injury was deemed unique and therefore decided on a case-by-case basis.\footnote{161}

The parity of these awards satisfied most.\footnote{162} For instance, firefighters were compensated in the same approximation to executives earning millions. At the very least, this approach gave the perception of equality that resonated with 9/11 victims and the nation.\footnote{163}

Many claimants, however, were upset with this approach to calculating awards. Protests to Feinberg’s approach took the form of two basic complaints. First, some victims thought that they or

\footnote{157. See Nolan & O’Grady, supra note 98, at 244.}
\footnote{158. Id.}
\footnote{159. Id.}
\footnote{160. Id. The basis for the $250,000 figure is the death benefit paid to the families of public safety officers and military personnel killed in the line of duty. Id. (citing September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002)) (citing 38 U.S.C. § 1967 (2003) and 42 U.S.C § 3796 (2003)). “With respect to the $100,000 award per spouse and dependent, the Final Rule modifies the definition of ‘dependent’ to include those who fit the Internal Revenue Service definition of dependent, regardless of whether that individual was claimed on the victim’s most recent federal tax return.” Id. at 245.}
\footnote{161. Id. at 244.}
\footnote{162. Ackerman, supra note 1, at 154–55.}
\footnote{163. Id.}
their loved ones had suffered more than others. For example, one victim's wife argued, perhaps rightfully so, that she had suffered great deal more than others on 9/11 because she had received numerous cell phone calls from her husband detailing the horrifying events unfolding while he was trapped in one of the WTC towers.

Based on this, the wife argued, she should be awarded a higher amount than others for pain and suffering.

Second, others thought reducing their loved one's suffering to a formula was an insult to their memory. They were further enraged that this suffering was equated to "a 'mere' $250,000 per decedent plus $100,000 per dependent." Many of these victims blamed "the Special Master for failing to arrive at a figure that could actually represent the monumental loss they had suffered." They argued instead that the standard award should either be increased or that individual suffering should be calculated as it would be in the tort system.

As claims began rolling in, so too did hundreds of the tragic and amazing stories of the suffering, grief, and heroism that were arose out of the 9/11 terrorist attacks. Analyzing and assigning a monetary award to these emotional and heart-rending stories under the limitations imposed by the Fund's mandated quick turnarounds and cost-effective nature would have opened the door to countless criticisms. Furthermore, subjective analysis of claims would have lead to the loved one of a victim asking why the suffering of her mother or husband should be worth $250,000 less than someone else's. In the end, no system can be created perfectly. Ultimately, it appears that Feinberg adequately created a system that created fair presumptive awards, including set formulas for suffering, with at least some room for upward deviation based on compelling circumstances.

164. Id.
165. FEINBERG, WHAT IS LIFE WORTH?, supra note 20, at 75.
166. Id. According to Feinberg, he received dozens of similar stories regarding loved ones at the WTC. Id. at 76. This only reaffirmed his initial reaction to eliminate the highly volatile calculation of individual pain and suffering and instead rely on presumptive guidelines. Id.
167. Ackerman, supra note 1, at 154–55.
168. Id. at 155. This was despite Feinberg's reasoning that "no amount of money can right the horrific wrongs done on September 11, 2001." Id.
169. Id.
170. Id. at 154.
C. Third-Party Matters

1. Collateral Sources

The most controversial aspect of the Fund was the collateral-sources offset provision. Under this statutory provision, awards were offset by any qualifying collateral sources granted to the claimant. As is customary with the statute as a whole, the Fund's statutory underpinnings were rather vague when discussing collateral sources. In fact, the statute does not define collateral sources, but relies instead on a few bare examples: "life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments, related to the terrorist-related aircraft crashes of September 11, 2001."

From the start, the Fund's collateral-sources offset provision was controversial. To begin, the issue of charitable contributions had to be considered. Initially, Fund awards were going to be offset by the charitable contributions available to the victims. This raised the question of whether the government really intended to limit the awards that the victims of the attacks received because of the American public's philanthropy. There are few ways to more inflame the passions of victims, and the public, than by telling them that the generosity of the American people would be offset when it came time to compensate the victims. Reacting to the public outcry, Feinberg eventually eliminated charitable donations, and social security benefits, from the collateral sources pool. This was based mostly on the volatile reaction from the public, and in turn the politicians, to these collateral offsets.

In the end, the two most substantial offsets were life insurance premiums and pensions. This offset, by billions, the amount of awards paid. It also disproportionately affected those with higher incomes because they typically purchased the largest policies and

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171. Nolan & O'Grady, supra note 98, at 245-46.
172. Id. at 245.
174. Nolan & O'Grady, supra note 98, at 245.
175. Id. at 246.
176. Id. at 247. These offsets were reduced by the amount that the claimants paid in premiums or contributions to their respective plans, although these contributions were usually a fraction of the benefit paid. Id.
177. Id.
had pension programs. These offsets were also controversial. Many criticized this portion of the Fund for penalizing those who planned ahead (or whose employers planned ahead) and were diligent in their efforts to provide for their families postmortem by purchasing insurance. Among those whose awards were substantially offset were the police officers and firefighters who died on 9/11, due mostly to their pension plans. On the flip side were those who objected to individuals being overcompensated by the Fund. For example, family members of victims who were wealthy and had large life insurance policies would have received a financial windfall had their awards not been offset by the multimillion dollar insurance awards.

Feinberg made a point of making every award meaningful. In practice, this unofficial rule resulted in adding to claims that were wiped out by collateral offsets.

2. Subrogation

The issue of collateral offsets also relates to the topic of subrogation. In relation to subrogation and collateral offsets, Congress had two unique paths from which to choose. One, they could create a compensation scheme where there were no collateral offsets in Fund awards but which granted subrogation rights against the Fund to third parties. This approach would be similar to that taken in the tort system. Two, they could create a compensation scheme in which insurance awards offset Fund awards and there were no subrogation rights against the Fund. Essentially, the answer would determine who should bear the loss for payments made to 9/11 victims: taxpayers or insurance companies.

In the end, Congress decided to deduct collateral offsets from the Fund awards and against allowing a subrogation right, thereby pushing the monetary burden away from the taxpayers. There

178. Id.
180. Id. These offsets also insulated the Fund from subrogation claims from insurance companies. The government, however, could have insulated the Fund through other legislation. Id. at 624.
181. Id. at 601.
182. Id.
183. Id. at 612–13. This differs fundamentally from the approach taken by the
are several likely reasons for this approach. First, it supports the contractual obligation that the insurance companies or other third parties had with the victims. Second, it avoided using billions of taxpayer dollars to provide windfall awards to victims. For example, even if insurance companies or other third parties had a right of subrogation, they faced very unpromising tort claims against the airlines, government, and other industries that might have shared liability. This, essentially, would have resulted in victims being both fully compensated by the Fund and compensated by life insurance or pension plans; basically, resulting in a double payment made at the taxpayer's expense. Third, although the U.S. government reserved a subrogation right, in a practical sense, this was irrelevant. The Fund was created as a subdivision of ATSSSA, which was promulgated to bailout the airline industry and other businesses that would have toppled if liability were attached to them as a result of the terrorist attacks. It would undermine the main goal behind ATSSSA—protecting American business and government—if subrogation rights were allowed.

D. Summary of the 9/11 Fund

The Fund marked a substantial deviation from traditional mass tort/disaster compensation schemes or settlement funds. Particularly, the manner and amounts in which the victims were compensated, the treatment of collateral sources and third parties, the treatment of the tort alternative, and the near-complete lack of legislative clarity all clearly distinguish the Fund from the traditional tort system. By almost all measures, the Fund was a success. The Fund helped heal a national wound and provided quick, generous, and efficient means of compensating victims at a time when the nation needed to respond with patriotic solidarity. This, of course, makes the Fund a primary source for legislators who will face unforeseen and unprecedented disasters in the future. One such occurrence is Minnesota's I-35W bridge collapse, which has provided the first, and almost certainly not the last,

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184. Abraham & Logue, supra note 179, at 613.
185. Id. at 614.
186. Id. at 615.
testing ground for the Fund’s general concepts. An analysis of the Fund in conjunction with the Minnesota Fund provides a starting point for similarly situated legislators facing the difficult question of whether to create a compensation fund in the event of a national or local tragedy.

IV. THE MINNESOTA FUND

Similar to the 9/11 Fund, Minnesota’s compensation scheme straddles the no-fault and fault worlds. It responds to the urgent needs of the victims of the collapse by providing compensation without regard to fault through a process that utilizes a Special Master Panel to award victims tort damages covering both economic and non-economic loss.\(^\text{187}\) Because of the incentives to settle claims against the State through the procedures established in the compensation scheme, survivors who qualify to recover under the scheme have little incentive to reject the scheme and sue the State directly. The State’s liability is capped at $400,000 per person either way, but under the compensation scheme there is no overall $1 million per occurrence cap on liability for payments under the scheme, as there would have been had the only recourse been tort claims against the State, and the survivor may in fact recover damages in excess of the statutory cap in the form of supplemental payments to cover excess economic loss under the scheme.\(^\text{188}\)

The compensation plan in no way avoids potential claims against third parties, however, who remain subject to suit by the victims or their representatives. Third parties are also not barred from seeking contribution from the State, although the subrogation and reimbursement provisions of the scheme complicate the process.\(^\text{189}\)

A. The Scope and Procedural Highlights of the Minnesota Fund

Minnesota’s response to the bridge collapse did not fit readily into any of the State’s prior compensation scheme models. Those schemes cover an array of situations. Minnesota has schemes in place to handle disaster relief, and it has a department of

\(^{187}\) \text{MINN. STAT. §§ 3.7391–7395 (2008).}

\(^{188}\) \text{Id. § 3.7393 subdiv. 11.}

\(^{189}\) \text{Id. §§ 3.7393–7394.}
DISASTER COMPENSATION FUNDS

homeland security for emergency management. 190 Minnesota,

190. Minnesota's statutory framework for disaster relief establishes multiple layers of responsibility and control mechanisms to ensure effective response efforts. The framework begins with an executive council, consisting of the governor, lieutenant governor, secretary of state, state auditor and attorney general, MINN. STAT. § 9.011 subdiv. 1 (2006), which has general authority to take measures to prevent emergencies and provide relief for stricken communities. Id. § 9.061 at subdiv. 1. The executive council also has the power to command any facilities, offices, or employees of the state to assist in preventing or granting disaster relief. Id. at subdiv. 2. The council's funds for emergency relief derive from a legislative appropriation to the council for disaster relief. Id. at subdiv. 5.

The legislature further delegated this power by creating the Minnesota Division of Homeland Security and Emergency Management (HSEM) (formerly known as the Division of Emergency Management), a statewide agency within the Department of Public Safety. MINN. STAT. § 12.02 subdiv. 1. The HSEM is under the supervision and control of a state director who oversees all the agency's directives. Id. § 12.04 subdiv. 1. The agency's main responsibilities include "coordinat[ing] state agency preparedness for and emergency response to all types of disasters," MINN. STAT. § 12.09 subdiv. 1 (2006), and "develop[ing] and maintain[ing] a comprehensive state emergency operations plan and emergency management program." Id. at subdiv. 2. Responding to this mandate, HSEM created the Minnesota Incident Management System (MIMS), a formal system providing guidelines for agency interaction in times of emergency. MINN. DIV. OF HOMELAND SEC. & EMERGENCY MGMT., MINNESOTA DISASTER MANAGEMENT HANDBOOK 5–6 (2007), available at http://www.dps.state.mn.us/dhsem/uploadedfile/dis_man_hand. pdf. MIMS recognizes five functional areas of response in any pre- or post-emergency situation: (1) command; (2) operations; (3) planning; (4) logistics; and (5) finance/administration. Id. at 6. The MIMS also calls for the creation of an emergency operations center (EOC) and an on-scene commander (OSC). Id. at 11. The EOC is responsible for coordinating and controlling the overall project as well as the administrative and off-site functions, while the OSC is responsible for the coordination and control of the specific activities at the site. Id.

The legislature also requires that every political subdivision in the state establish a "local organization for emergency management in accordance with the state emergency management program." MINN. STAT. § 12.25 subdiv. 1. In practicality, these local organizations handle most emergency situations without state or federal assistance, because before state or federal resources are used, local resources must be "exhausted or unavailable and a local state of emergency declared." MINNESOTA DISASTER MANAGEMENT HANDBOOK, supra, at 31.

However, the governor's power and the possibility of FEMA assistance are layered on top of these specific HSEM functions. The governor still has the power to exercise general discretion and control over emergency management. MINN. STAT. § 12.21 subdiv. 1 (2006), including the ability to oversee rapid emergency aid, MINN. STAT. § 12.36(a)(1) (2006), and declaring a state of emergency, MINN. STAT. § 12.31 subdiv. 2(a) (2006). Therefore, HSEM, as a state agency, is ultimately required to execute and enforce the lawful orders and rules of the governor. Id. § 12.28. Finally, the state, acting through the governor can apply for and accept emergency aid gifts from the federal government. Id. § 12.22 subdiv. 1. If the stricken community has been declared a presidential disaster area, state assistance may only be available for relief that is not covered by FEMA relief or other federal funds. Act of Apr. 28, 2008, ch. 247, 2008 Minn. Laws (codified as
along with other states, has established a system for the compensation of crime victims.\textsuperscript{191} Minnesota adopted workers' amended at MINN. STAT. § 12.03 (2008)).

The Red River Valley floods of 1997, 2000, and 2001 provide an example of this coordinated disaster relief effort. In 1997 the City of Ada suffered devastating floods, causing evacuations, destroying the high school, and damaging the local hospital. MINN. DEP'T OF PUB. SAFETY, DIV. OF EMERGENCY MGMT., MINNESOTA MITIGATION SUCCESS STORIES 9–10 (2001), available at http://www.hsem.state.mn.us/uploadedfile/success_stories.pdf. Following the floods, FEMA and state disaster assistance provided $40 million to help rebuild the school and hospital, while state agencies funded the construction of a levee around Ada to prevent future flood damage. \textit{Id.} at 10. The Minnesota HSEM also provided funds to buy portable generators and upgraded city sewer systems to prevent sewer backup after flooding. \textit{Id.; see also} MINN. DEP'T OF PUB. SAFETY, DIV. OF EMERGENCY MGMT., A DECADE OF MINNESOTA DISASTERS: A HISTORICAL LOOK AT MINNESOTA DISASTERS IN THE 1990s passim (2000) (providing other examples of Minnesota relief efforts).

\textsuperscript{191} The Minnesota Legislature has stated that “a victim of a crime has the right to receive restitution as part of the disposition of a criminal charge or juvenile delinquency proceeding.” MINN. STAT. § 611A.04 subdiv. 1(a). The Crime Reparations Act (CRA) addressed this right by creating a special account in the state treasury, called the crime victim account, which the Department of Public Safety uses to provide reparations to crime victims. \textit{Id.} § 611A.612. CRA further creates a five-member crime reparations board (the “board”) within the Department of Public Safety to disburse the funds. \textit{Id.} § 611A.55 subdiv. 1. To be eligible for reparations under CRA, the claimant must be a victim, a dependent of the victim, the estate of a deceased victim, or another authorized person. \textit{Id.} § 611A.55 subdiv. 1. However, there may be instances where an otherwise eligible claimant is not eligible to receive reparations. \textit{Id.} at subdiv. 1(a)–2

The board has a variety of duties, including providing hearings for eligible claimants, adopting rules to implement and administer CRA, and publicizing the availability of reparations and the method of making claims. MINN. STAT. § 611A.56 subdiv. 1. The board also has a wide variety of judicial powers (e.g., issuing subpoenas, ordering medical examinations, and administering oaths) as well as the power to grant emergency reparations pending a final decision. \textit{Id.} at subdiv. 2. However, the board’s primary duty is to judge the validity of a claim. MINN. STAT. § 611A.57. When a claimant seeks reparations the board may order an investigation, if necessary, to assist in determining the validity and amount of the claim. \textit{Id.} at subdiv. 2. The board’s executive director has the authority to make a decision based on the papers filed in support of the claim and the investigation report. \textit{Id.} at subdiv. 3. If the executive director is unable to make a decision based on these sources, he/she then confers with the other members of the board, who then vote on whether to grant or deny the claim or seek further investigation. \textit{Id.} Within thirty days of the decision, the claimant can appeal for de novo review by the entire board. \textit{Id.} at subdiv. 5. If the claimant is again denied, he is entitled to a hearing, within the meaning of the Minnesota Administrative Procedure Act. \textit{Id.; see also} MINN. STAT. §§ 14.001–.69 (describing the Minnesota Administrative Procedure Act).

The amount of the reparations award should equal the economic losses suffered by the claimant, but cannot exceed $50,000 for the injury or death of one person. \textit{Id.} § 611A.54. The reparations must also be reduced by contributory fault and the amount of economic losses that have been recouped from other collateral
compensation in 1913\textsuperscript{192} and no-fault automobile insurance in 1975.\textsuperscript{193}

\textit{sources.} \textit{Id.; see also id. § 611A.52 subdiv. 5 (defining “collateral sources”). The state reserves a subrogation right, to the extent that reparations are awarded, to the claimant’s right to recover economic losses from a collateral source. \textit{Id.} § 611A.61 subdiv. 1. However, this does not limit the claimant’s right to bring a cause of action to recover for other damages. \textit{Id.}}

\textsuperscript{192} The current version is at \textit{MINN. STAT. §§ 176.011-862. Paul J. Barringer et al., Administrative Compensation of Medical Injuries: A Hardy Perennial Blooms Again, 33 J. HEALTH POL. POL’Y & L. 725, 742-43 (2008), characterized the reasons for the adoption of workers’ compensation schemes as follows:

[I]n the case of workers’ compensation, the main factors were (1) mutual recognition of dissatisfaction with the existing liability system by both of the major stakeholder groups in workplace injury policy—business and labor; (2) the perception on the part of both groups that shifting to a no-fault system would be advantageous to them in some important respects; and (3) general agreement over the basic parameters of the new system, especially the standard for determining eligibility for damages. In the case of automobile insurance, the primary enabling factor was, similarly, widespread recognition that a problem existed along with public demand for change. The predominant factor inhibiting the adoption and continued utilization of these programs was and has remained the political compromises necessary to gain passage of no-fault legislation, which has been a factor in limiting the programs’ ability to deliver promised cost savings. Finally, in the case of vaccine injury compensation, a wholesale shift to administrative compensation was spurred by (1) a perceived crisis with important potential health implications; (2) demands for specific reforms by the two major stakeholder groups that, although not identical, did not conflict irreconcilably with one another; (3) the federal government’s willingness to act decisively and accept financial responsibility for the compensation program; and (4) the program’s unusual, cost-spreading financing scheme, which did not represent an offensive “tax” on any one of the major players.

In \textit{Gluba v. Bitzan & Ohren Masonry}, 735 N.W.2d 713, 725 (Minn. 2007), the Minnesota Supreme Court stated that “[t]he purpose of the Workers’ Compensation Act as a whole is to ‘assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to [the Act].’ MINN. STAT. § 176.001 (2006).”

\textsuperscript{193} The Minnesota No-Fault Automobile Insurance Act is at Minnesota Section sections 65B.41-.71. The stated purposes of the Act are as follows:

[T]he detrimental impact of automobile accidents on uncompensated injured persons, upon the orderly and efficient administration of justice in this state, and in various other ways requires that sections 65B.41 to 65B.71 be adopted to effect the following purposes:

(1) to relieve the severe economic distress of uncompensated victims of automobile accidents within this state by requiring automobile insurers to offer and automobile owners to maintain automobile insurance policies or other pledges of indemnity which will provide prompt payment of specified basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident;
(2) to prevent the overcompensation of those automobile accident
There are obvious differences between the workers’ compensation or no-fault acts and the Minnesota Fund. The bridge-collapse compensation scheme was a response to a specific disaster, rather than a concern about the general efficacy of the tort system’s ability to deal with a broad class of cases. The bridge-collapse scheme is financed by the State, rather than privately. The bridge-collapse compensation scheme provides a tort measure of damages for victims and subjects the damages to the same $400,000 per person cap that would apply in any litigation against the State. The available damages include not only special damages but also general damages, unlike the workers’ compensation and no-fault acts, which provide benefits primarily for economic loss, subject to various caps and ceilings.

In cases where the State or its political subdivisions bear potential responsibility for accidents, the primary framework for compensation is the tort system, with its statutory limitations. The legislature also boosted the caps on liability under the State Tort Claims Act when it enacted the compensation scheme. The amendment increased the caps from $300,000 per person to $400,000 per person, effective August 2007, although the per occurrence cap on liability remained at $1 million.  

Minnesota’s statutory immunity for policy-making decisions at the planning level and official immunity for decisions involving judgment or discretion at the line level provide additional insulation from liability. Under Minnesota law, the State has statutory (discretionary) immunity for policymaking activities at the planning level, and State officials have common-law (official) immunity for decisions at the line level. Victims suffering minor injuries by restricting the right to recover general damages to cases of serious injury; to encourage appropriate medical and rehabilitation treatment of the automobile accident victim by assuring prompt payment for such treatment; to speed the administration of justice, to ease the burden of litigation on the courts of this state, and to create a system of small claims arbitration to decrease the expense of and to simplify litigation, and to create a system of mandatory intercompany arbitration to assure a prompt and proper allocation of the costs of insurance benefits between motor vehicle insurers; to correct imbalances and abuses in the operation of the automobile accident tort liability system, to provide offsets to avoid duplicate recovery, to require medical examination and disclosure, and to govern the effect of advance payments prior to final settlement of liability.

195. Id. at subdiv. 3(b) (the state and its employees are not liable for "a loss..."
immunity in cases where they are charged by law with the exercise of duties involving judgment or discretion. In general, if a state official has official immunity, the State will have vicarious official immunity. In the event the State is held liable, damages are capped.

Two bills were introduced in the Minnesota Legislature to deal with the issue of compensation of bridge-collapse victims as an alternative to the tort system. The House bill, House File 2553, passed the House on February 28, 2008 by a vote of 120 to 10. The primary Senate bill, Senate File 2824, was substituted for House File 2553, and as amended, passed the Senate unanimously on March 17, 2008. A conference committee was appointed and the bill passed the House and Senate on May 5, 2008. The Governor signed the bill on May 8, 2008.

The House and Senate bills were roughly similar in their approaches to providing a mechanism for the compensation of the victims of the bridge collapse, but they differed in the structure for dealing with catastrophes. The House bill created a shell intended to deal with extraordinary events that cause widespread damage, injury, or death, in response to which the legislature determines that compensation is desirable to serve the object of government stated in article 1, section 1 of the Minnesota Constitution, to provide for the security, benefit, and protection of the people.

The law would have been triggered only "when the legislature enacts a law appropriating money for purposes of this chapter."
The bill specifically stated that "[t]he legislature finds and declares that the collapse of the I-35W bridge on August 1, 2007, constitutes a catastrophe under Minnesota Statutes, chapter 8A, and that the state should provide compensation to the survivors of the catastrophe."\(^{202}\)

The Senate bill was confined to the I-35W bridge collapse, without embracing a general framework for dealing with future disasters. A motion to amend the findings section in the Senate bill would have added language stating that "[t]he legislature has every expectation that this catastrophe will prove unique, and that this compensation process will not be used for any future event."\(^{203}\) A second proposed amendment stated that the establishment of a compensation scheme was "in response to a catastrophe that was wholly unforeseen."\(^{204}\) Both amendments failed, but neither would have been of significance. A legislative finding that the bridge collapse was unforeseen would be the subject of disagreement and in any event would have to await the outcome of the investigation into the bridge collapse and any subsequent litigation. The finding that the catastrophe would prove unique and that the compensation process would not be used for future events would have no binding effect on any future legislature.

1. Statement of Purpose

Section 3.7391, subdivision 1, sets out the legislative findings supporting the act:

[T]he legislature finds that the collapse of the Interstate Highway 35W bridge over the Mississippi River in Minneapolis on August 1, 2007, was a catastrophe of historic proportions. The bridge was the third busiest in the state, carrying over 140,000 cars per day. Its collapse killed 13 people and injured more than 100. No other structure owned by this state had ever fallen with such devastating physical and psychological impact on so many.\(^{205}\)

Subdivision 2 states that establishing a compensation process "for survivors of the catastrophe furthers the public interest by

\(^{202}\) Id. at art. 2, § 1.


\(^{205}\) MINN. STAT. § 3.7391 subdiv. 1 (2008).
providing a remedy for survivors while avoiding the uncertainty and expense of potentially complex and protracted litigation to resolve the issue of the liability of the state, a municipality, or their employees for damages incurred by survivors.”

The term “catastrophe” is defined to mean “the collapse of the I-35W bridge over the Mississippi River in Minneapolis on August 1, 2007.”

The conference committee adopted the Senate version, with minor changes. While the compensation bill as enacted does not provide a specific structure for handling future catastrophes, as did the House bill, nothing would prevent the basic structure of the bill, as finally adopted, from being the blueprint for any future disasters deemed worthy of compensation.

2. Qualifying for the Minnesota Fund

Claims for compensation may be made by “survivors.” The term “survivor” is defined to mean a natural person who was on the bridge at the time of the collapse, as well as the parent or legal guardian of a survivor under the age of 18, a survivor’s legally appointed representative, and the surviving spouse or next of kin of a deceased who would be entitled to bring an action under the Wrongful Death Act.

The General Information Form, which survivors making claims to the Special Master Panel are required to complete, tracks the statute in asking applicants to indicate whether they were “present on the 1-35 bridge when it collapsed on August 1, 2007,” or are “making a claim on behalf of another person who was present on the I-35W bridge when it collapsed . . . .” A later section in the form entitled “Standing and Damages,” states that “[b]y law, only certain people are allowed to make a claim for certain kinds of injuries or damages,” and then asks the person to choose one of

206. Id. at subdiv. 2.
207. Minn. Stat. § 3.7392 subdiv. 2.
208. The bill as enacted stated that the findings are not an admission of liability not only as to the state, but also as to municipalities and their employees for damages caused by the catastrophe. Id. § 3.7391 subdiv. 3.
209. Id. § 3.7392 subdiv. 8. Minn. Stat. § 573.02 subdiv. 1 (2006) defines the persons for whose benefit the wrongful death action may be brought, and limits damages to pecuniary loss.
four options: (1) the person was “a natural person” who “was present on the 1-35W Bridge at the time of the collapse”; (2) the person was “the parent, legal guardian, or guardian ad litem of a natural person who was present on the 1-35W bridge at the time of the collapse, and that person is under age 18 as of October 15, 2008”; (3) the person was “the trustee for the next of kin of a natural person who is now dead, but was living and present on the 1-35W bridge at the time of the collapse”; or (4) the person is “making a claim, but none of the options above apply . . . .” \textsuperscript{211} The person is then asked to explain the reasons justifying the claim. \textsuperscript{212} It is not clear what the other basis for a claim might be if the claim does not flow from injury or death to someone on the bridge at the time of the collapse. Bystanders who witnessed the collapse and suffered emotional trauma would seem to fall outside the scope of coverage, \textsuperscript{213} as would anyone not on the bridge who might have sustained economic loss because of the collapse.

The definition of “survivor” in Minnesota’s compensation scheme excludes persons in close family relationships that are not covered, same-sex or otherwise, in contrast, for example, to the class of persons who are covered under the Minnesota Civil Damages Act. This Act permits recovery by “[a] spouse, child, parent, guardian, employer, or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person” against a commercial vendor of alcohol who made an illegal sale of alcohol that caused the loss. \textsuperscript{214} These sorts of limitations on the right to recovery raise justice concerns, as noted by Feinberg in confronting similar problems in administering the 9/11 Fund. \textsuperscript{215}

\textsuperscript{211} Id.  
\textsuperscript{212} Id.  
\textsuperscript{213} The limitation is consistent with the Minnesota Supreme Court’s adoption of the zone of danger rule in cases involving claims for the negligent infliction of emotional distress. See Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764, 767 (Minn. 2005).  
\textsuperscript{214} Minn. Stat. § 340A.801 subdiv. 1 (2006) (emphasis added). See Lefto v. Hoggbreath Enters., Inc., 581 N.W.2d 855, 857–58 (Minn. 1998) (permitting recovery by victim’s fiancee and her daughter against a bar that illegally sold alcohol to a person who injured the victim). In negligent infliction of emotional distress cases involving a claim by a person who was in the zone of danger but feared for the safety of another, the supreme court limited recovery to persons in a close relationship but left future cases to determine what close relationships will justify recovery.  
3. Submitting a Claim

The bill requires the Chief Justice of the Minnesota Supreme Court to establish a “special master panel” of three attorneys “to consider claims, make offers of settlement, and enter into settlement agreements with survivors on behalf of the state.” The panel has the authority to establish procedures for making the claims. Section 3.7393, subdivision 4 of the Act is the only section specifically labeled as governing procedure. It reads as follows:

[C]onsistent with sections 3.7391 to 3.7395, the panel may adopt and modify procedures, rules, and forms for considering claims, making offers of settlement, entering into settlement agreements, and considering requests for and making supplemental payments. The panel must allow each survivor to appear in person before the panel or one of its members.

The Special Master Panel consulted with several people in developing the claims process, including “several lawyers representing survivors, representatives of the Minnesota Attorney General’s office, State Court Administration, and Minnesota Department of Finance, and authors of the legislation, Senator Ron Latz (DFL-St. Louis Park) and Representative Ryan Winkler (DFL-Golden Valley).”

The “Overview of the Special Compensation Process for Survivors of the I-35W Bridge Collapse” (Overview) posted on the web site for the compensation process states the following:

[A]fter an Application is submitted, each survivor will be

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217. MINN. STAT. § 3.7393 subdiv. 4.


[W]ithin the limits of available appropriations, the state court administrator, in consultation with the panel, shall hire employees or retain consultants necessary to assist the panel in performing its duties under this section. Employees are in the unclassified state civil service. The panel may also use consultants who are under a contract with the state or current state employees to assist the panel in processing claims under this section.
scheduled to meet with a member of the Special Master Panel. Survivors are encouraged to exercise their right in this process to meet personally with a member of the Special Master Panel or the Panel. Any survivor who does not wish to meet with a Special Master may waive the in-person meeting by indicating in the survivor’s Application their desire to submit their claim in written form only. Any survivor who wishes to meet with the full Panel of three Special Masters may also indicate that desire in the survivor’s Application.\textsuperscript{219}

The “General Information Form” permits claimants to have their claims presented “in a hearing with one Special Master” or “in a hearing with all three Special Masters.”\textsuperscript{220} Claimants may also choose to submit their claims based solely on the written application.\textsuperscript{221} Hearings will be scheduled for thirty minutes, unless claimants request a time of forty-five or sixty minutes, or a longer time, although that requires a written explanation.\textsuperscript{222}

A panel determination concerning an offer of settlement or a supplemental payment “is final and not subject to judicial review.”\textsuperscript{223} In that respect, the compensation scheme is similar to the 9/11 Fund, although to establish fairness and openness in the administration of the 9/11 Fund administrative regulations provided for an administrative appeal from the determinations of the special master.\textsuperscript{224}

The Overview qualifies the statutory statement with respect to wrongful death claims:

\begin{quote}
[T]he settlement and disbursement of certain claims involving injury to minors or claims for wrongful death must be court approved in accordance with the General Rules of Practice for the District Courts (Rule 144 for a death claim and Rule 145 for a claim on behalf of a minor). The court approval must be completed within the 45 day time period prescribed for acceptance of claims. A copy of the signed court order approving the settlement disbursement must be returned to the Special
\end{quote}


\textsuperscript{220} General Information Form, supra note 210, at 5.

\textsuperscript{221} Id.

\textsuperscript{222} Id.

\textsuperscript{223} MINN. STAT. § 3.7393 subdiv. 8(b) (2008).

\textsuperscript{224} Feinberg, Building Blocks, supra note 66, at 275.
Master Panel along with the survivor’s signed Release form.

In order to speed the administration of these claims during the limited 45 day acceptance period, petitions for settlement approval filed in Ramsey or Hennepin Counties will not require payment of a filing fee. In addition, all of the settlement matters filed in Hennepin and Ramsey Counties will be promptly scheduled for hearing before a judge within the limited 45 day acceptance period. Each claimant to whom this applies will receive specific court filing instructions with their offer of settlement.225

The Overview also encourages survivors to consult with attorneys:

[S]urvivors are encouraged to consult an attorney who will represent the survivor throughout the special compensation process, although having a lawyer is not required. Survivors are encouraged to consult with an attorney about the nature of their damages which may be claimed in this process and the best means of effectively

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225. Overview, supra note 219. Minnesota General Rules of Practice 144.01, covering wrongful death claims, provides as follows:

[E]very application for the appointment of a trustee of a claim for death by wrongful act under Minnesota Statutes, section 573.02, shall be made by the verified petition of the surviving spouse or one of the next of kin of the decedent. The petition shall show the dates and places of the decedent's birth and death; the decedent's address at the time of death; the name, age and address of the decedent's surviving spouse, children, parents, grandparents, and siblings; and the name, age, occupation and address of the proposed trustee. The petition shall also show whether or not any previous application has been made, the facts with reference thereto and its disposition shall also be stated. The written consent of the proposed trustee to act as such shall be endorsed on or filed with such petition. The application for appointment shall not be considered filing of a paper in the case for the purpose of any requirement for filing a certificate of representation or informational statement.

Rule 145.01, which covers claims on behalf of minors, provides that:

No part of the proceeds of any action or claim for personal injuries on behalf of any minor or incompetent person shall be paid to any person except under written petition to the court and written order of the court as hereinafter provided. This rule governs a claim or action brought by a parent of a minor, by a guardian ad litem or general guardian of a minor or incompetent person, or by the guardian of a dependent, neglected or delinquent child, and applies whether the proceeds of the claim or action have become fixed in amount by a settlement agreement, jury verdict or court findings, and even though the proceeds have been reduced to judgment.
documenting those damages. In addition, certain aspects of settlements involving minors or claims related to death must be court approved and, thus, having legal representation is encouraged. There are attorneys available to represent survivors at no fee for their services in this special compensation process.  

The Overview provides a list of the law firms known to be representing survivors or claimants in connection with the bridge collapse.  

Survivors were required to file claims with the panel by October 15, 2008. The panel must make an offer of settlement by February 28, 2009. Survivors then have forty-five days to accept or reject the offer.

4. Causation

The legislation requires a computation of damages, but in defining the damages that are recoverable through settlements under the plan there is no requirement that the damages arise out of the collapse, which is the compensable event the plan intends to address. Only survivors are eligible to recover under the plan, however, and survivors are defined as those who were on the 1-35W bridge at the time of the collapse, so it is logical to assume a requirement that the damages must have arisen out of the collapse.

The General Information Form that the Special Master Panel drafted fills in that blank by asking applicants to indicate whether they “sustained damages due to a DEATH caused by the 1-35W bridge collapse,” “sustained PERSONAL INJURIES as a result of being on the 1-35W bridge at the time of the collapse,” or “sustained damage to PROPERTY as a result of being on the 1-35W bridge at the time of the collapse.”

5. Financing the Minnesota Fund

The House bill provided for the appropriation of $39.32 million from the general fund for deposit in the catastrophe

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227. Id.
228. MINN. STAT. § 3.7393 subdiv. 9 (2008).
229. Id.
230. Id.
231. General Information Form, supra note 210, at 2.
survivor compensation fund. It limited appropriations for purposes other than payment to survivors to 1% of the appropriation. The bill also appropriated $680,000 for a grant to Pillsbury United Communities in Minneapolis, to allow Waite House in Minneapolis to provide comprehensive services to youth and families of youth who were on a school bus on the I-35W bridge when it collapsed.

The Senate bill, Senate File 2824, took a somewhat different approach to the compensation issue. It provided for increasing the caps in the Minnesota State Tort Claims Act to $400,000 for injury to any claimant in any case arising on or after August 1, 2007, and before July 1, 2009, and $1 million for any number of claims arising out of a single occurrence.

Article 1 of the Senate bill would have retroactively increased the $300,000 cap on individual tort claims against the State to $400,000, effective August 1, 2007. Rather, this increase took effect on January 1, 2008. The change would apply to claims brought by bridge-collapse victims as well as any other person who has a claim against the State.

The Senate bill provided for the appropriation of $26.43 million, including $25 million for settlement agreements, but with the caveat that the intent is "to fully fund the settlement agreements," and that if the amount appropriated is insufficient to do so, the Commissioner of Finance is directed to notify the legislature of the projected insufficiency. The bill specifically appropriated $750,000 from the general fund to cover the salaries and expenses associated with the settlement fund process, and $680,000 from the general fund for a grant to Pillsbury United Communities in Minneapolis to permit Waite House "to provide comprehensive services to youth and families of youth who were on..."
a school bus on the I-35W bridge" when it collapsed.240

As enacted, the compensation scheme is an amalgam of both approaches. It is financed by a $40 million appropriation from the general fund to the Commissioner of Finance. The appropriation is broken into four parts. The bill appropriates $24 million for payments under settlement agreements pursuant to section 3.3793, subdivision 11; $12.64 million for supplemental payments under subdivision 12; $750,000 for salaries, expenses, and administrative costs associated with making settlement offers and entering into settlement agreements; and $610,000 “for a grant to Pillsbury United Communities in Minneapolis, to allow Waite House in Minneapolis to provide services to youth and families of youth who were on a school bus on the I-35W bridge when the bridge collapsed.”241 The bill does not contain the Senate provision for additional appropriations if necessary, although that would not be an impediment to any bill providing for additional funding. The bill also included a specific appropriation for supplemental payments, something that neither the House nor Senate bills included.

B. Compensation

1. Claim Determination

Both the House and Senate bills defined the compensation survivors would be entitled to recover in terms of tort damages, reduced by certain collateral sources and payments made by third-party tortfeasors.

The House bill provided that the special master would “determine the loss suffered by the survivor filing a claim.”242 “Loss” was defined to mean “economic loss” and “noneconomic loss” resulting from a catastrophe.243 Economic loss was defined as “pecuniary harm resulting from a catastrophe, and includes loss of earnings, medical expenses, burial costs, property loss, and loss of business or employment opportunity.”244 Noneconomic loss was

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240. See id. § 3(c).
241. See generally Minn. Stat. § 3.7394 subdiv. 6.
243. Id. § 2 subdiv. 5.
244. Id. at subdiv. 3.
defined as "nonpecuniary harm resulting from a catastrophe, and includes loss for physical and emotional pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, and loss of society and companionship." The House bill did not limit the amount of damages to be awarded to a survivor.

The House bill provided that in determining loss the special master would be required to "offset payments made or to be made in the future from sources as defined in section 548.36, subdivision 1, that compensate a survivor for loss or losses as a result of the catastrophe." The bill also provided that the special master was required to offset "any payments made or to be made by a third-party tortfeasor pursuant to a settlement or other agreement with the survivor, or a judgment in favor of the survivor, concerning any claim or claims of the survivor which relate to, involve, or arise out of the catastrophe."

The Senate bill defined "damages" to mean "damages that are compensable under state tort law and damages that are included for wrongful death that are compensable under Minnesota Statutes, section 573.02." The definition excluded "punitive damages or attorney fees or other fees incurred by a victim in making a claim under this section or other law." The bill provided for the total damages incurred by the victim to be offset by the collateral source reductions mandated by section 548.36, "any payment to the victim from the emergency relief fund," and "any payments made or required to be made to the victim by a third-party tortfeasor under the terms of an existing settlement or other agreement with the victim or a final judgment in favor of the victim concerning claims of the victim that relate to, involve, or arise out of the bridge collapse." Thus, the Senate bill was broader in also providing for reductions by payments received from victims from the emergency relief fund.

The primary difference between the House and Senate bills is that the House bill provided for the reduction of payments under the fund by amounts paid or to be paid in the future, both under

245. Id. at subdiv. 6.
246. Id. § 5 subdiv. 5(a).
247. Id.
249. Id. at subdivs. 4 (a)–(c).
the collateral source statute and pursuant to a settlement agreement or judgment against a third-party tortfeasor. Making the determination of future losses, coming as they likely would a substantial period of time after the settlement of any claims under the compensation scheme, would present significant administrative difficulties. The Senate bill addressed the problem by providing for subrogation or reimbursement in cases involving claims by victims against third-party tortfeasors. As enacted, the bill adopted the Senate position on compensation.

The statute as enacted follows the Senate version in requiring the Special Master Panel to determine the total damages incurred by survivors. It defines "damages" as "damages that are compensable under state tort law and damages for wrongful death that are compensable under section 573.02," the Wrongful Death Act. Punitive damages and attorney fees or other fees incurred in making a claim are not included in the definition.

Tort damages include past and future damages for bodily and mental harm, health care expenses, and income loss, including loss of earning capacity. A non-injured spouse may make a claim for loss of consortium caused by injury to his or her spouse. The claim for consortium is for loss of the injured spouse's services and companionship the non-injured spouse would have received in the usual course of married life. Minnesota law does not permit children to recover for loss of parental consortium nor does it permit parents to recover for loss of the consortium of their children.

The compensation scheme defines "survivor" as "a natural person who was present on the I-35W bridge at the time of the collapse," as well as parents or legal guardians of survivors under the age of eighteen, the legally appointed representative of a survivor, or the surviving spouse or next of kin who would be

250. See id. § 2 subdiv. 5(b).
251. MINN. STAT. § 3.7394 subdiv. 3 (2008).
252. Id. § 3.7392 subdiv. 3.
254. See MINN. STAT. § 3.7392 subdiv. 3 (2008).
255. For a convenient summary, see 4A Minnesota Practice: Jury Instruction Guides—Civil, CIVJIG 91.10–35 (5th ed. 2006).
257. Id. at 510–11; Thill v. Modern Erecting Co., 170 N.W.2d at 867–68.
258. Salin v. Kloempken, 922 N.W.2d 736, 740 (Minn.1982).
entitled to bring a wrongful death action.\textsuperscript{260} It says nothing about consortium claims, although those claims are derivative in nature and flow from personal injury of a spouse. The Personal Injury Form adopted by the Special Master Panel asks whether the person making the claim was married as of the date of the bridge collapse and, if the answer is yes, asks the claimant whether “you [are] including in your individual claim your spouse’s loss of consortium.”\textsuperscript{261} A “checklist of documents for personal injury claims” at the end of the form specifically states “If you are making a claim for spouse’s loss of consortium, please attach all supporting documentation and a notarized statement signed by your spouse describing that loss.”\textsuperscript{262}

An interesting question arises under the compensation scheme concerning the right of survivors to recover for emotional harm. Emotional harm flowing from personal injury is compensable, of course.\textsuperscript{263} One who does not suffer emotional harm as a direct result of physical injury but is nonetheless in the zone of danger is also permitted to recover damages for emotional harm in Minnesota under limited circumstances.\textsuperscript{264} Survivors making claims under the compensation scheme may or may not be in that position, although many of the people on the bridge at the time of the collapse undoubtedly would have suffered emotional trauma in

\textsuperscript{260} MINN. STAT. § 3.7392 subdiv. 8 (2008).


\textsuperscript{262} Id. at 12.

\textsuperscript{263} See e.g., Krueger v. Henschke, 210 Minn. 307, 309, 298 N.W. 44, 45 (1941).

\textsuperscript{264} See Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764, 767 (Minn. 2005). A plaintiff making a claim for the negligent infliction of emotional distress must, in addition to establishing the elements of negligence, prove that “she: (1) was within the zone of danger of physical impact [created by the defendant’s negligence]; (2) reasonably feared for her own safety; and (3) [consequently] suffered severe emotional distress with attendant physical manifestations.” Id. (quoting K.A.C. v. Benson, 527 N.W.2d 553, 557 (Minn. 1995)).  ! Engler held that a plaintiff could recover for emotional distress resulting from injuries to a third party when she:

(1) was in the zone of danger of physical impact; (2) had an objectively reasonable fear for her own safety; (3) had severe emotional distress with attendant physical manifestations; and (4) stands in a close relationship to the third-party victim. In addition, to succeed with such a claim, the plaintiff also must establish that the defendant’s negligent conduct—the conduct that created an unreasonable risk of physical injury to the plaintiff—caused serious bodily injury to the third-party victim. 706 N.W.2d at 770–71.
part because of their concern for other victims. Section 3.7393, subdivision 7 of the compensation scheme states that “[t]he panel must not consider negligence or any other theory of liability” in considering claims and making offers of settlement. The problem is that the right to recover for emotional distress in cases involving recovery by persons in the zone of danger, whether or not they fear for the safety of others, is tied to the negligence claim. Putting aside the issue of fault, a claimant would still presumably have to meet the zone of danger standards in order to claim damages for emotional distress.

2. Supplemental Payments

Survivors may also be eligible for supplemental payments to cover medical expenses, income loss, loss of future earning capacity, or other financial support for which compensation was not received under an offer of settlement pursuant to subdivision 11 of section 3.3793. Supplemental payments may be made only to a survivor who has accepted a settlement offer, entered into a settlement agreement, and executed the required release.

The bill provides a priority of payments scheme for supplemental benefits. It provides coverage first for uncompensated medical expenses in excess of those expenses paid from the first $400,000, and second, for income loss, loss of future earning capacity, or other financial support not included in the first $400,000. The bill defines “uncompensated medical expenses” to mean “medical expenses less payments made to a survivor from collateral sources” referred to in the collateral source statute that provide payment for medical expenses and “the present value of premiums, deductibles, and coinsurance payments for high-risk health plan coverage offered by the Minnesota Comprehensive Health Association.”

If the legislative appropriation is insufficient to provide full awards to all survivors who are eligible for supplemental payments,

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266. Id. at subdiv. 12(b).
267. Id.
268. Id. at subdiv. 12(a). The Minnesota Legislature provided for the establishment of the Minnesota Comprehensive Health Association (MCHA) in 1976 to offer individual health insurance policies to Minnesota residents who were denied health insurance in the private market because of pre-existing health conditions. See MCHA’s Home Page, http://www.mchamn.com/ (last visited Jan. 4, 2009).
the panel may make payment awards based on a uniform amount that is less than the full amount available for supplemental payments, or take other steps to ensure that there is an equitable distribution of the available funds.\textsuperscript{269}

C. Third-Party Matters

1. Impact of Acceptance of Settlement Offer

The scheme provides that any survivor accepting a settlement offer must execute a release. There are three parts to the release subdivision. The first part requires the survivor “to release the state and every municipality of this state and their employees from liability, including claims for damages, arising from the catastrophe and to cooperate with the state in pursuing claims the state may have against any other party.”\textsuperscript{270}

The second part covers the right of the State and its municipalities and their employees to indemnification from liability for contribution or indemnity:

[T]he release must . . . provide that the survivor will indemnify the state, a municipality, and their employees from any claim of contribution or indemnity, or both, made by other persons against the state, a municipality, and their employees and that the survivor will satisfy any judgment obtained by the survivor in an action against other persons to the extent of the release, if the claim or judgment relates in any way to a claim of the survivor arising from the catastrophe. The release must provide for the subrogation interest of the state under section 3.7394, subdivision 5.\textsuperscript{271}

The third part provides that a survivor who has previously commenced an administrative, court, or other action against the State or a municipality or their employees seeking to recover for loss that resulted from the catastrophe “must agree to dismiss or otherwise withdraw the action” before the survivor will be entitled to receive compensation.\textsuperscript{272}

\begin{footnotes}
\item[269] \textsc{Minn. Stat.} \textsection\textsc{3.7393} subdiv. 12(c).
\item[270] \textit{Id.} at subdiv. 13.
\item[271] \textit{Id.}
\item[272] \textit{Id.}
\end{footnotes}
2. **Settlement Offers and the Interests of the State and Third Parties**

The statute protects the State’s interest in being reimbursed for payments under the fund in three ways. First, the release the survivor is required to sign in accepting the settlement offer not only releases the State, its municipalities, and their employees from liability, but it also provides for a right of indemnity against the survivor for any contribution or indemnity claims against the State by third parties who assert contribution or indemnity claims against the State. Second, the State reserves a right to be reimbursed for any payments pursuant to the plan or the emergency relief fund from “any third party, including an agent, contractor, or vendor... to the extent the third party caused or contributed to the catastrophe.”

Third, the State is subrogated to claims the survivor has against third parties, but only to the extent that the payments under the fund are greater than the total damages sustained by the survivor. This part discusses the State’s rights under the statute and then uses a hypothetical to examine how the rights relate to each other and how they affect the rights of the survivor and a defendant subject to liability for the bridge collapse.

### a. The State’s Right to Indemnification from the Survivor

Paragraphs 5 and 6 of the release form drafted by the Special Panel Master spells out how the statutory requirement will be implemented:

5. [C]laimant hereby agrees to indemnify, defend and save the State Releasees harmless from liability for any claims, demands, causes of action or judgments for contribution or indemnity on or under any theory of liability, whether sounding in tort, contract, federal or state statute, if the claim, demand, cause of action or judgment relates in any way to a claim of the Claimant arising out of or relating to the Collapse.

6. It is also agreed and understood that Claimant releases and further agrees to indemnify, defend and save the State Releasees harmless from liability for any and all claims, demands, causes of action or judgments based on any subsequent judgment of Claimant in any way arising out of or relating to the Collapse being determined to be

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273. Minn. Stat. § 3.7394 subdiv. 5(a).
274. *Id.* at subdiv. 5(c).
uncollectible in accordance with Minn. Stat. § 604.02 as may be reallocated to any of the State Releasees.²⁷⁵

The release requires the settling survivor to indemnify the State releasees from any liability sustained by the State via contribution or indemnity claims, no matter what the theory of liability is, as well as from any liability pursuant to the loss reallocation provisions of section 604.02.²⁷⁶

The release effectively operates as would an indemnity clause in a Pierringer release,²⁷⁷ but with one significant difference. A Pierringer release severs joint and several liability between the settling and nonsettling parties, so that the nonsettling parties are subject to liability only for the percentage of fault assigned to them in subsequent litigation.²⁷⁸ The nonsettling party, held liable only for its percentage of the total damages, has no basis for asserting a contribution claim against the settling defendant.²⁷⁹

More significantly, the 2003 amendment of the comparative fault act abolished joint and several liability in favor of several liability, except when a defendant is determined to be more than 50% at fault or where two or more actors engaged in a common scheme or plan that resulted in injury to the plaintiff.²⁸⁰ The only way the reallocation provision in section 604.02, subdivision 2 of the comparative fault act could apply to make the State subject to liability on a contribution claim by a third party is if the party is held liable for more than its fair share of the judgment. That could happen only if the third party were jointly and severally liable for


²⁷⁶. Id.

²⁷⁷. Id.


²⁷⁸. See Simonett, supra note 277, at 11.

²⁷⁹. See id. at 19–22.

²⁸⁰. MINN. STAT. § 604.02 subdivs. 1(1)–(2) (2006). Joint and several liability also applies where a defendant has committed an intentional tort or where certain environmental liability statutes apply. Id. at subdivs. 1(3)–(4). Neither would be applicable in the bridge collapse case.
the survivor’s damages. A defendant responsible for the bridge collapse would therefore have a contribution claim against the State only where that defendant is more than 50% at fault or if that defendant and the State acted in a common scheme or plan.

Conversely, the State should not have a common law contribution claim against the defendant because the State is not subject to tort liability against a settling survivor because in accepting the settlement the survivor waives any claims against the State.

b. Reimbursement from Agent, Contractor, or Vendor

Section 3.7394, subdivision 5(a) covers the State’s right of reimbursement for payments made under the fund. The right of reimbursement exists against various third parties, including agents, contractors, or vendors retained by the State, for any payments paid by the State pursuant to the compensation scheme or the emergency relief fund. The reimbursement right exists “to the extent the third party caused or contributed to the catastrophe.” The statute also provides that the State “is entitled to be reimbursed regardless of whether the survivor is fully compensated” and that the right of reimbursement exists “[n]otwithstanding any statutory or common law to the contrary.”

Paragraph 11 of the release form drafted by the Special Master Panel covers the State’s right to be reimbursed by the third party. It reads as follows:

[T]he parties understand and agree that, in accordance with Minn. Stat. § 3.7394, subd. 5, this Agreement is not intended to, and does not, negate or diminish any right the State may have to recover reimbursement of the Payment, and/or any payment made to Claimant from the I-35W bridge emergency relief fund created by the State on or about November 30, 2007, from any third party, including but not limited to an agent, contractor or vendor retained by the State. The State is entitled to reimbursement by a third party regardless of whether Claimant is fully compensated. Claimant agrees to

282. See id. at 862–64.
283. MINN. STAT. § 3.7394 subdiv. 5(a) (2008).
284. Id.
cooperate with the State in the State’s pursuit of any claims the State may have against any third party for reimbursement or otherwise, including subrogation as provided in Paragraph 12.285.

The right of reimbursement exists irrespective of whether the survivor brings suit against a third party, although agents, vendors, and contractors are of course the entities against whom suit has been and will be brought by survivors. The subdivision 5(a) right of reimbursement appears to be independent of the right of reimbursement noted in the subrogation in subdivision 5(c), which is connected to the State’s right of subrogation. The right of reimbursement exists “to the extent the third party caused or contributed to the catastrophe.” This language seems to hint at a right of reimbursement conditioned on the apportionment of responsibility.

c. State’s Right to Subrogation

Section 3.7394, subdivisions 5(b) and (c) cover the State’s subrogation rights:

(b) [N]otwithstanding any statutory or common law to the contrary, the state is subrogated to all potential claims against third-party tortfeasors of a survivor receiving payment from the emergency relief fund or under section 3.7393 to the extent the claims relate to, involve, or arise out of the catastrophe. The subrogation right of the state under this subdivision is limited to the amount paid to the survivor from the emergency relief fund and under section 3.7393. The rights of the state under this subdivision are in addition to other remedies, claims, and rights relating to the catastrophe that the state may have against other persons for the recovery of monetary or other relief.

(c) A survivor must notify the state if the survivor has been fully compensated by third parties for damages caused by the catastrophe. A survivor is fully compensated if payments made or required to be made to the survivor by a third-party tortfeasor under the terms of a settlement agreement or other agreement with the survivor or a final judgment in favor of the survivor concerning claims that

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285. Release Form, supra note 275, at 5.
286. MINN. STAT. § 3.7394 subdiv. 5(a).
relate to, involve, or arise out of the catastrophe are equal to or greater than the total damages incurred by the survivor as determined by the panel under section 3.7393, subdivision 10. The state is entitled to be reimbursed by a survivor only to the extent that these payments are greater than the total damages incurred by the survivor.\textsuperscript{287}

The right of subrogation is specifically stated to be in addition to other rights that "the state may have against other persons for the recovery of monetary or other relief."\textsuperscript{288} It subrogates the State "to all potential claims against third-party tortfeasors of a survivor receiving payment from the emergency relief fund or under section 3.7393 to the extent the claims relate to, involve, or arise out of the catastrophe."\textsuperscript{289} The subrogation right is limited to the amounts paid by the State pursuant to the compensation scheme and from the emergency relief fund.

Paragraph 12 of the release form interprets the statute as follows:

[C]laimant understands and agrees that, in accordance with Minn. Stat. §§ 3.7393, subd. 13 and 3.7394, subd. 5, the State is subrogated to all potential claims that Claimant has or may have against any other person or entity that in any way arise out of or relate to the Collapse. Claimant and the State agree that the State's right to subrogation herein is limited to the total amount of the Payment and any payment made to Claimant from the I-35W bridge emergency relief fund created by the State on or about November 30, 2007. Claimant shall not take any action, including settlement with any other person or entity, that adversely affects the State's subrogation or reimbursement rights. Claimant further agrees, in accordance with Minn. Stat. § 3.7394, subd. 5(c), to notify the State in the event Claimant becomes fully compensated for Claimant's losses arising out of or related to the Collapse. The rights of the State under this Agreement are in addition to other remedies, claims, and rights relating to the Collapse that the State may have against other persons for the recovery of monetary or other relief.\textsuperscript{290}

Subdivision 5(c) requires a survivor to notify the State if the

\textsuperscript{287}Id. at subdivs. 5(b)–(c).
\textsuperscript{288}Id. at subdiv. 5(b).
\textsuperscript{289}Id.
\textsuperscript{290}Release Form, supra note 275, at 5–6.
survivor receives full compensation from a third-party tortfeasor for “claims that relate to, involve, or arise out of the catastrophe.” 291 Full compensation is achieved if the terms of a settlement or other agreement between a survivor by a third-party tortfeasor or the terms of a final judgment in favor of the survivor against a third-party tortfeasor, “are equal to or greater than the total damages incurred by the survivor” as determined by the Special Master Panel. 292 The State has a right to be reimbursed only to the extent that the payments from a third-party tortfeasor “are greater than the total damages incurred by the survivor.” 293

The last sentence of subsection (c) refers to the State’s right to be reimbursed, permitting reimbursement only where the payments from a third-party tortfeasor are greater than the survivor’s total damages as determined by the Special Master Panel. The relationship of subsection (c) to subsection (a) is not entirely clear. Subsection (a) states that the State has a right to reimbursement from “any third party, including an agent, contractor, or vendor retained by the state... regardless of whether the survivor is fully compensated.” 294 It seems to be in opposition to the right of reimbursement noted in subsection (c), which is limited to cases where the survivor is fully compensated. The limitation of the subrogation right is consistent with the way subrogation rights have generally been read by the Minnesota Supreme Court. 295

The right of reimbursement noted in subsection (a) is granted to the State against the “agent, contractor or vendor retained by the state,” and is not the sort of reimbursement noted in subsection (c), which would be a right of reimbursement that is consistent with the right of subrogation and would exist only to the extent

291. MINN. STAT. § 3.7394 subdiv. 5(c).
292. Id.
293. Id.
294. Id. at subdiv. 5(a).
295. In the insurance context, subrogation involves the substitution of an insurer to the insured’s rights against a third party. “The insurer stands in the insured's shoes and acquires the insured’s rights against the third party.” Medica, Inc. v. Atl. Mut. Ins. Co., 566 N.W.2d 74, 77 (Minn. 1997). The general rule is that subrogation, whether equitable or based on contract, will be denied prior to full recovery by the claimant. Westendorf v. Stasson, 330 N.W.2d 699, 703 (Minn. 1983). Put another way, subrogation is not allowed where the insured’s total recovery is less than the insured’s actual loss, absent express contract terms to the contrary. Id.
that a subrogation claim would exist against the third party.\footnote{MINN. STAT. § 3.7394 subdiv. 5(a).} If so, it makes sense to consider the right of reimbursement in subsection (a) as distinct from that in subsection (c). The right of reimbursement in subsection (a) exists no matter what amounts the survivor has been paid from the compensation fund or the emergency relief fund. The survivor need not be fully compensated in order for the State to be entitled to obtain reimbursement from the third party.\footnote{Id.} In effect, to use the insurance analogy, the right of reimbursement is contractual and may be exercised against the third party irrespective of whether or not the survivor makes a claim against that party.

The rights of subrogation and reimbursement noted in subsections (b) and (c) are more like the classical subrogation claims exercised by an insurer standing in the shoes of the insured. Equitable principles limit that subrogation right to the amounts paid by the insured and permit the right to be exercised only to the extent necessary to prevent a double recovery. One problem in interpretation concerns the fact that the categories of third parties referred to in subsections (a) and (c) may overlap.

d. The Rights in Combination

To better understand how the State's interests play out, this section uses a hypothetical to illustrate some of the potential complications of the statutory provisions governing reimbursement and subrogation. For purposes of illustration, assume that a Survivor receives a settlement from the Panel in the amount of $400,000 and then brings suit for negligence against a third-party contractor, and that the judgment against the contractor is for $1 million. For simplicity, assume that the Panel also determined that the Survivor's total damages were $1 million. Also assume that the contractor is found to be 60% at fault and the State 40% at fault. The Survivor is entitled to collect $1 million from the contractor. The statute precludes the contractor from reducing its obligation by the settlement received from the Panel. The contractor, 60% at fault, has a contribution against the State in the amount of the overpayment. The contractor's fair share of the judgment is $600,000, so the contractor has a contribution claim against the State for $400,000.
The State, however, has a subrogation claim against the contractor to the extent of the amount of the payment received by the Survivor from the Panel. The State would be entitled to recover $400,000 by way of reimbursement from the Survivor, who is nonetheless made whole because she has received total compensation of $1 million, which is the exact amount of the damages she sustained. The contractor, however, still has a contribution claim against the State. If the State satisfies the contribution claim, the statute gives the State a right of indemnification from the Survivor to the extent of the contribution claim.

That would mean that the Survivor would have to pay the State $400,000 out of the remaining $600,000 the Survivor received after the State exercised its subrogation right. If so, the net effect is that the Survivor’s total payment for her injuries would be $600,000. She would be undercompensated. The State, found to be 40% at fault, effectively pays nothing. Because the State has recovered the payment made by the Panel by exercising its right of subrogation, it presumably would not in addition be entitled to a statutory right of reimbursement for the same amount.

It is questionable whether the Legislature would have intended to undercompensate the Survivor. A more logical reading would be to permit the contribution claim by the contractor, require indemnification of the State by the Survivor, and then deny the State its subrogation right because exercising that right would result in undercompensation of the Survivor.

Or, in the reverse, the State could assert its right of reimbursement first and recover from the contractor “to the extent” the contractor “caused or contributed to the catastrophe.” But what if the Survivor later brings suit? If the State recouped the $400,000 from the contractor and the Survivor subsequently recovers in the same amount, i.e., $1 million, the State would still be subject to liability on the contribution claim. If the State paid $400,000 on the contribution claim, the State would have a right to be indemnified in that amount by the Survivor. The State would presumably not be subrogated to the Survivor’s claim, however, because it would already have recouped its payment pursuant to the settlement when it exercised its right of reimbursement against the contractor. If the State is held liable on the contribution claim by the contractor, the State would recoup its payment from the Survivor pursuant to the indemnification agreement that was part
of the release form signed by the Survivor. If so, the Survivor would pay the State $400,000. That means that the Survivor's net damages would be a total of $1 million, consisting of $400,000 from the fund and $600,000 net from the tort recovery.

The Contractor would have paid the Survivor $1 million and the State an additional $400,000, but the Contractor would have received $400,000 on the contribution claim, limiting its net exposure to $600,000, which is still more than its fair share (if it is held liable for any percentage of fault less than 60%).

As a practical matter, however, the State's liability on the contribution claim will be severely limited. The State’s liability on all contribution claims would be limited by the statutory caps on damages, including the $400,000 cap on individual liability and the $1 million per occurrence cap. The State’s liability is limited, no matter how many contribution claims are asserted and no matter what the amount is of those contribution claims.

3. **Subrogation by Other Persons**

Subrogation by other parties against either the benefits provided for in the statute or from the emergency relief fund are prohibited. Subdivision 4(a) provides:

[N]otwithstanding any statutory or common law or agreement to the contrary, a person who has paid benefits or compensation to or on behalf of a survivor does not have a subrogation or other right to recover those benefits or compensation by making a claim, or recovering from payments made, under section 3.7393 or from the emergency relief fund. 298

The statute also provides:

[A] person who believes that the state cannot constitutionally prohibit assertion of a subrogation claim and who is claiming a subrogation interest against the amount to be paid by the state has 40 days after the settlement agreement was entered into to provide notice to the state and the survivor of the person’s intent to assert that interest . . . . 299

The person asserting the interest waives the subrogation claim if notice is not provided by the deadline. 300 If the commissioner does

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298. *Id.* at subdiv. 4(a).
299. *Id.* at subdiv. 4(b).
300. *Id.*
receive notice of the claim, the bill provides that "the commissioner shall withhold the payment until the subrogee abandons or waives the subrogation claim."301

The statutory limitation could be challenged by the assertion of a subrogation claim, which would place the constitutionality of the bar on subrogation at issue when asserted by the State. The claim that subrogation cannot be constitutionally barred would presumably be based on a violation of the remedies clause in the Minnesota Constitution, providing that every person is entitled to a "certain remedy . . . for all injuries or wrongs . . . ."302

4. Collateral Sources

The statute requires settlement offers to be calculated based on total damages minus three categories of payments to the survivor:

(1) payments made to the survivor up to the date the settlement offer is made from the collateral sources referred to in section 548.36, subdivision 1;
(2) any payment made to the survivor from the emergency relief fund; and
(3) any payments made or required to be made to the survivor by a third-party tortfeasor under the terms of a settlement or other agreement with the survivor that exists at the time the offer is made or a final judgment in favor of the survivor concerning claims of the survivor that relate to, involve, or arise out of the catastrophe.303

The collateral source statute, which provides the guidelines for one of the reductions required by the compensation scheme, reads in relevant part as follows:

[F]or purposes of this section, "collateral sources" means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff’s behalf up to the date of the verdict, by or pursuant to:

(1) a federal, state, or local income disability or Workers’ Compensation Act; or other public program providing medical expenses, disability payments, or similar benefits;

301. Id.
303. Minn. Stat. § 3.7393 subdiv. 10.
(2) health, accident and sickness, or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments;

(3) a contract or agreement of a group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services; or

(4) a contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability, except benefits received from a private disability insurance policy where the premiums were wholly paid for by the plaintiff.\textsuperscript{304}

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304. \textit{Id.} § 548.36. Subdivisions 2 and 3 provide the method for the deduction of collateral sources:

[1]n a civil action, whether based on contract or tort, when liability is admitted or is determined by the trier of fact, and when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion within ten days of the date of entry of the verdict requesting determination of collateral sources. If the motion is filed, the parties shall submit written evidence of, and the court shall determine:

(1) amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted; and

(2) amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff or members of the plaintiff's immediate family for the two-year period immediately before the accrual of the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses.

\textit{Id.} at subdiv. 2. Subdivision 3 states the court’s duties under the collateral source statute:

(a) [T]he court shall reduce the award by the amounts determined under subdivision 2, clause (1), and offset any reduction in the award by the amounts determined under subdivision 2, clause (2).

(b) If the court cannot determine the amounts specified in paragraph (a) from the written evidence submitted, the court may within ten days request additional written evidence or schedule a conference with the parties to obtain further evidence.

(c) In any case where the claimant is found to be at fault under section 604.01, the reduction required under paragraph (a) must be made before the claimant’s damages are reduced under section 604.01, subdivision 1.

\textit{Id.} at subdiv. 3. The Special Master Panel would follow those calculations in
The second reduction from total damages is for payments from the emergency relief fund, which was announced in November 2007 by Governor Pawlenty and legislative leaders to provide short-term relief up to $20,000 to cover wage loss due to the death of or injury to bridge-collapse victims.\footnote{An important limitation on deductions is that they must be from total damages, rather than from the $400,000 that is available to each survivor under the compensation scheme.}

The third reduction is for payments a third-party tortfeasor has to make to the survivor pursuant to the terms of a settlement or other agreement with the survivor if the settlement or agreement is in existence at the time the Special Master Panel makes an offer of settlement to the survivor or if there is a final judgment in favor of the survivor, provided the payments or judgment "relate to, involve, or arise out of the catastrophe."\footnote{An important limitation on deductions is that they must be from total damages, rather than from the $400,000 that is available to each survivor under the compensation scheme.}

An important limitation on deductions is that they must be from total damages, rather than from the $400,000 that is available to each survivor under the compensation scheme.

\begin{itemize}
  \item D. Summary of the Minnesota Fund
  \end{itemize}

Minnesota's compensation scheme is limited in scope. It provides compensation for survivors of the bridge collapse but limits the compensation in two ways. While the damages for which compensation is payable include tort and wrongful death damages, compensation is capped at $400,000, which would be the amount of the State's tort liability.\footnote{Supplemental payments may also be available for uncompensated economic loss incurred by survivors. The legislative appropriation of $36.64 million also establishes an overall limit for the payment of damages, including supplemental payments.} Supplemental payments may also be available for uncompensated economic loss incurred by survivors. The legislative appropriation of $36.64 million also establishes an overall limit for the payment of damages, including supplemental payments.\footnote{The interaction between the provisions of the compensation scheme and the rights and liabilities of both the State and third parties will be complex as the panel makes its applying the statute. Section 548.56, subdivision 3(c), covering cases where a plaintiff is at fault, would be irrelevant, since fault is irrelevant in the compensation scheme. See Minn. Stat. § 3.7393 subdiv. 7.}

\begin{itemize}
  \item 305. See Minn. Stat. § 3.7393 subdiv. 10(2).
  \item 306. Id. § 3.7394 subdiv. 5(b).
  \item 307. Id. § 3.7393 subdiv. 10.
  \item 308. Id. at subdiv. 11.
  \item 309. The scheme differs in significant respect from the 9/11 scheme. Most of the claimants from 9/11 made claims under the Fund, where the average award was $1.8 million, tax free. Feinberg, supra note 66, at 276. Feinberg notes that all but about seventy potential claimants came into the fund. Sixty filed suits against the airlines. Id.
  \end{itemize}
settlement awards and litigation against third parties, who will likely have their own claims against the State, unfolds.

V. A CONCISE COMPARISON

1. The justification for a legislative response

There is no template for this. Whether any future compensation scheme will be adopted depends on the political climate following a catastrophe. That states the obvious, of course, but there is simply no way, short of a general accident compensation scheme, that will provide a method of defining meritorious cases.

The magnitude of the catastrophes and the reasons for the legislative responses in the 9/11 and I-35W bridge-collapse cases differed dramatically in their origin, the number of people injured, and the motivation for the adoption of a compensation scheme. In both situations an unanticipated and unprecedented tragedy absorbed the public’s collective conscience. Both tragedies left various levels of government and private industry scrambling for answers and the public demanding accountability.

In both tragedies, the tort system provided victims with dismal prospects of recovery, at least against some of the potential defendants. This meant that, without the establishment of a government-backed compensation fund, every victim of these massive tragedies likely would have obtained little, if any, compensation. The unique nature of the tragedies, combined with the limited chances of tort recovery, made the decision to use taxpayer monies to create a no-fault compensation fund politically tenable, but nonetheless subject to criticism.

For instance, in Minnesota alone, hundreds of people are killed each year in motor-vehicle accidents and thousands more perish in noncompensable accidents, and others are killed or injured in claims involving the State where the victims face claims of immunities and statutory caps on recovery. It is difficult to justify why these victims’ lives are less important than those who died or were injured in the I-35W bridge collapse, or why the victims of the 9/11 attacks are more deserving of compensation than the victims of terrorist attacks in Oklahoma City, the Kenyan and Tanzanian embassies, the U.S.S. Cole, or even the first WTC bombings.
2. Defining the compensable event

In no-fault schemes the compensable event is readily defined. In workers’ compensation it is workplace injury and in no-fault automobile insurance it is an accident resulting in loss arising out of the maintenance or use of a motor vehicle. The 9/11 Fund encountered some difficulty with this problem, initially limiting compensation to those physically injured or killed within hours of the attacks. This obviously created several problems because of the subsequent rescue and cleanup efforts occurring days and months after the attacks, in which many were injured and killed. In cases involving catastrophes, the catastrophic occurrence itself is the defining event and the starting point for creating a compensation scheme, but defining the compensable event is only part of the problem.

3. Deciding who is entitled to recover

A third problem is in determining who is entitled to recover under the compensation scheme. Beyond the immediate victims of the catastrophe are numerous individuals and entities who may sustain loss, including family members, people in close relationships with victims, or even persons who are in business relationships with the victims. Choosing a model for compensation presents the potential for creating inherent inequities in the compensation scheme, depending on how the individuals or entities deserving of compensation are defined in the enabling legislation and implementing regulations. The Fund regulations permitted recovery by victims and their loved ones. Minnesota limited recovery to survivors, defined as persons who were on the bridge at the time of the collapse, or if the person perished in the collapse, the surviving spouse or next of kin as defined in Minnesota’s wrongful death act.310 The limitations in death cases, and the regulations permitting recovery of loss of consortium, work to the significant disadvantage of those in relationships not legally sanctioned. Expanding the list of persons entitled to recover would place additional strains on any compensation scheme, but as a matter of fundamental fairness, it is important to recognize that the suffering and loss of those individuals is no less than those who are in legally sanctioned relationships.

310. MINN. STAT. § 3.7392 subdiv. 8(3) (2008).
4. Defining the compensation to be allowed

Establishing the type and amount of compensation is also critical. Schemes might cover personal injury, loss of consortium, wrongful death, economic loss, and property damage. Or, damages might include only economic loss, or also include compensation for noneconomic loss as well. Minnesota opted to provide compensation on the basis of a tort model rather than a government-benefits model, defining the damages survivors were entitled to recover according to tort law, including wrongful death damages. The 9/11 Fund took the same basic approach. Both schemes excluded property damage. Inclusion of property damage would have created significant definitional problems and would have significantly increased the cost of the already expensive compensation schemes.

The approach taken in the Fund was to provide compensation for economic loss and a set sum for noneconomic loss. The bridge-collapse scheme provided for undifferentiated compensation for economic and noneconomic loss. The 9/11 Fund gave the Special Master substantially greater discretion in formulating guidelines for awards, including using his discretion to narrow the gap in economic loss awards. The Minnesota scheme provided that the Panel should make awards of damages, defined as tort damages. The maximum amount that can be awarded under the Minnesota plan is $400,000, with additional potential supplemental awards solely for economic loss. The Special Master Panel under the Minnesota plan is limited in making awards to the specific damages outlined in the plan.

The two plans also differed drastically in the total amounts that were appropriated to finance the funds. The only cap on the Fund was Feinberg's discretion. Accordingly, the Fund's average award was $1.8 million for all claims, and $2.1 million for death claims. The Minnesota Fund, however, placed a limited amount of money into the fund and, as mentioned above, maintains the individual statutory cap for claims against the State, limiting awards to $400,000.

311. *Id.* § 3.7393 subdiv. 11.
5. Determining the impact of collateral sources

An important function of deciding compensation is whether collateral sources should reduce compensation and, if so, from what sources. Anyone injured in a catastrophic occurrence will have other sources of available compensation. One of the problems in defining the amount of compensation a victim is entitled to recover will be the treatment of collateral sources. Deductions could be required from a variety of sources, including health and life insurance, workers’ compensation benefits, social security benefits, or even funds received by victims through charitable contributions.

The controversial offsets in the 9/11 Fund for pensions and life insurance payments were not included in the definition of collateral sources to be deducted under the Minnesota plan. The rationale for that reduction was simple. Minnesota’s collateral source statute provided for the reduction of damages in a tort claim by the specified sources. The plan provided for tort damages, so it was natural to require the same reductions without broadening the category of deductible sources. Of course, Minnesota could have included life insurance and pension payments, but it would have further reduced damages already subject to a $400,000 cap.

6. Procedures for processing claims

The procedure to be utilized in determining who actually receives compensation and in what amount is critical. A variety of processes might be implemented, ranging from trial forms to arbitration. The decision of the entity processing claims may be final, or there may be administrative or judicial appeal from the decision.

The 9/11 Fund process relied on a Special Master to handle the administration of compensation under the ATSSSA. Minnesota relied on a Special Master Panel composed of three experienced lawyers appointed by the Chief Justice of the Minnesota Supreme Court. Submission of claims could be to a single panel member or to the whole panel. Survivors were also permitted to ask for a personal appearance before the panel. The process was streamlined, but, particularly in cases involving claims for noneconomic loss, the process offered a limited ability to make a case for that loss.
7. Limitations on tort claims

The impact on tort claims is an important factor. A no-fault compensation scheme could result in a complete bar of actions against the government that created the compensation scheme or the bar could be broader to include other entities as well. Legislation providing for compensation would likely include a waiver of liability against the government if compensation was accepted. It could condition acceptance on the waiver of other tort liability as well, or depending on the goals, allow third-party tort actions without limitation.

Both the Fund and the Minnesota Fund provided incentives for victims to enter the compensation scheme instead of the tort system, albeit through slightly different avenues. The Fund was more focused on creating a compensation scheme that funneled people into the Fund and away from the tort system. The Fund did this by restricting the substantive law and jurisdiction for potential tort claims and by capping the amount by which entities could be held liable.

The principal purpose of the Fund’s underlying statute, ATSSSA, was to bail out the airline industry and local government entities. Accordingly, the Fund had to be more attractive than the tort system to lure claimants away from the potentially astronomical awards that the tort system might produce. The statutory and immunity scheme in Minnesota was already so beneficial to the State that there was no need to create incentives to not enter the tort system. For example, in the unlikely event that a victim was able to prove liability and get past the State’s ample immunities, there were still the highly restrictive statutory caps on the amounts that could be recovered, especially the $1 million per incident cap. Accordingly, Minnesota did not have to create incentives the way the framers of the Fund did because the existing statutory and common-law scheme was already in place.

8. Subrogation and reimbursement rights

A remaining issue is whether subrogation and reimbursement should be allowed by the entity providing compensation or by other entities that have provided insurance coverage for victims of the catastrophe. Subrogation and reimbursement are key factors in designing a compensation scheme. There is a question as to whether the government providing the compensation should be
subrogated to tort claims the victim has against other potential defendants and if so, in what amount. That decision will turn in part on the type of compensation the compensation scheme pays, and in part on whether the legislation scheme permits subrogation even if the result is that the victim receives less than full compensation. Legislation may also provide for reimbursement of the compensation paid under a plan, even if no third-party claim is asserted.

VI. CONCLUSION

The 9/11 and bridge-collapse compensation schemes were prompted by dramatically different events, but both raised similar questions. It is by no means obvious that a government-funded compensation scheme is an appropriate response to these or any other mass disasters. That issue is the most problematic, of course. Thousands of others have suffered immeasurable loss because of similar occurrences, but with no compensation. The difficulty of determining when there should be compensation militates against the adoption of a framework for compensation in other similar mass disaster cases.

No-fault compensation schemes in general are difficult enough to implement and a general accident compensation scheme would simply not be feasible. Carving out certain types of accidents defies definition. Minnesota’s scheme characterized the I-35W bridge collapse as “a catastrophe of historic proportions” because the bridge was the third-busiest in Minnesota, 13 people died and more than 100 were injured, and because “[n]o other structure owned by this state has ever fallen with such devastating physical and psychological impact on so many.” That defines the event that justified the compensation scheme, but there are most certainly other cases that would justify recovery, cases where there is fault on the part of a governmental entity and where the injuries are significant enough that the tort system will not provide a realistic means of compensating multiple victims.

Governing entities, both national and local, will undoubtedly face unforeseen and catastrophic tragedies in the future. Any entity seeking to adopt a compensation scheme for a catastrophic occurrence will have to consider the primary points that governed the structure of the 9/11 and bridge-collapse compensation

312. *Id.* § 3.7391 subdiv. 1.
schemes. Whether to compensate, who to compensate, what the compensation should cover, and the procedure to achieve those goals are the major issues. Each involves significant policy judgments that will shape the structure. The legacy of the 9/11 Fund and the pending legacy of the Minnesota Fund have likely altered the response to future unforeseen catastrophes. At the very least, many more governing entities will discuss the merits of creating a similar scheme. A joint analysis of the 9/11 and Minnesota Funds provides a starting point for debate and discussion that any future legislators must address should they choose to create a compensation scheme.