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Holding the Victims' Purse Strings, Uneasily

By DIANA B. HENRIQUES

Kenneth R. Feinberg, the Washington mediator in charge of the multibillion-dollar federal fund set up to compensate the families of those killed and injured in the Sept. 11 terrorist attacks, had just taken his first close look at ground zero in New York, the smoking pit where the twin towers once stood.

Mr. Feinberg's brash, can-do optimism about his new task seemed to falter for a moment last Tuesday. "I'm confident, very confident, that the system ultimately will be perceived as fair," he said as he rode uptown from the site. "But I do not really expect to ameliorate anybody's pain. A check won't do that."

But as the special master of the new federal fund, Mr. Feinberg will be the man who writes those checks, the architect of the process that produces them and the final arbiter of their size. If he recognizes that the checks will not erase anyone's pain, he fully realizes that they will provide comfort and most likely provoke controversy.

His awards, based in part on the victims' lost earning power, could well exceed $1 million per family and are apt to be the single most important source of long-term financial support for thousands of victim families. Those who file a claim with the fund waive their right to sue, and the awards cannot be appealed to any court.

> Having to decide $11 billion worth of fairness.

By some Congressional estimates, Mr. Feinberg could ultimately pay out as much as $11 billion in compensation, but official estimates must wait until the fund's rules are written.

Until those formal rules are released, he will discuss only the questions he faces, not the answers he might have reached. But the questions are imposing enough.

"How do you define who is eligible?" he asked, as if leading a law seminar at Georgetown University, where he teaches part time. "The statute covers those killed or injured in the attacks or its 'immediate aftermath,' but how do you define immediate aftermath? Hours? Days?"

That just scratches the surface. There are additional questions of what it means to have been injured, and whether psychological hurt might be compensated, or what should happen if no will exists and there are different family members filing claims.

But perhaps no question hangs over Mr. Feinberg and his every decision more ominously than the matter of fairness. A large part of each award will be calculated by using estimates of a victim's lifetime earnings, and so differing assumptions will have to be made about the earning power of a bond trader and a dishwasher. The former earned more but might have retired or burned out earlier; the latter earned less, but almost certainly would have worked most of his life.

These disparate employment histories will necessarily require awards of vastly different sizes — a fact that may not be palatable to the public, Mr. Feinberg acknowledged. But he must somehow ensure that people in similar circumstances are treated similarly.

Mr. Feinberg has indicated that one possi-

Continued on Page B6

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NYC 9/11 Public Portal Document

Continued From Page B1

ble partial solution to the question of fairness could be to make sure the damages for "pain and suffering" are calculated to ensure that every family gets some minimum amount, regardless of its lost breadwinner's paycheck. Mr. Feinberg agrees that the equity hurdle is daunting, although he will not yet commit to how he will try to overcome it.

As if that were not enough, Mr. Feinberg also has to wrestle with the decision of whether whatever funds a family has received from charity should be deducted from their federal award. "The charities have made it very clear that they do not like the idea, but we're looking at all the options," he said.

Seeking answers to these questions, Mr. Feinberg has been consulting a remarkable cross section of people: a Nobel economist, aviation disaster lawyers, victim families, political leaders, investment bankers, arbitration specialists and labor statisticians.

But economic calculations are not his primary concern, he said. "The Achilles' heel of this program is the emotional force associated with these deaths," he said. "The emotional forces are the key to this whole thing."

With an anonymous process based on paper filings and formulas, "there would be no expiation," he added. "You need to let people explain why they believe they are victims, and why they are different from every other victim."

As that concern suggests, there is nothing uncomplicated about Mr. Feinberg.

Asked about his hobbies, he always gives the same answer: opera and classical music. But if that conjures up an image of studiousness and high-brow tastes, ask him how he first discovered these sedate pastimes.

"Oh, I remember it perfectly," he said with a grin. "When I was 9 years old, I saw Groucho Marx in 'A Night at the Opera.' I was hooked for life."

Part grand opera, part Marx Brothers, he defies easy labels. He built his legal reputation by negotiating settlements, not by winning cases. A former top aide to the liberal Democratic Senator Ted Kennedy of Massachusetts, he has won the confidence of Attorney General John Ashcroft, the conservative Republican who appointed him. And asked about the logistics and rule-making involved in his new job, he talks instead about the storms of the heart, the freshness of the survivors' grief.

Mr. Feinberg, known as much for his resilient optimism as for his blitzkrieg brain, is not daunted by the complexities he faces. Indeed, when he first learned about the fund, Mr. Feinberg said, he thought, "This sounds like something I've been training to do all my life."

At 56, he has been a lawyer for 31 years, having been the court-appointed mediator in a number of disputes, beginning in the mid-1980's with injury claims over the Agent Orange defoliant used in Vietnam and continuing through cases over asbestos, the Dalkon Shield birth control device and the dispute over the shutdown of the Shoreham nuclear plant on Long Island. Logistically and legally, he said, the new compensation fund was much simpler than any of those. "You don't have hundreds of thousands of claims, as you did in the Agent Orange case," he said. "And you don't have the causation disputes; here, there is no question about causation."

But that simplicity is counterbalanced by the speed that Congress demanded, he said. Litigation over injuries or wrongful deaths usually takes years, he explained, "and time has a way of dampening emotions; but we don't have that luxury."

By law, the fund must open for business on Dec. 21 and, after a claim is filed, the special master has 120 days to reach a decision.

"In tort terms, that is virtually overnight — it is so soon after the injury and the loss," he said. "So the hearing process needs to be staffed by people who can deal effectively with individuals — not just number-crunchers, but people with a humanistic side."

The statute's pace has accelerated Mr. Feinberg's naturally frenetic pace. Last Tuesday, in less than 10 hours, he squeezed in four meetings in three locations, his first reluctant look at ground zero, a long interview and, finally, a concert version of Bela Bartok's one-act opera, "Bluebeard's Castle," at Carnegie Hall.

"His natural talent is cutting a deal that everybody can live with," said John C. Coffee Jr., a law professor at Columbia University.

He has not always won unanimous praise for the deals he has cut. Some Vietnam veterans, for example, complained that the settlement in the Agent Orange case was too little and far too late.

Mr. Feinberg says he still thinks of the Agent Orange case as a success, and has argued that the veterans faced an uphill fight and a very uncertain outcome in court. Indeed, he suggests that the families pondering whether to sue over the terrorist attacks face very similar odds.

"I question whether anyone who opts out of this system has a meaningful alternative remedy," he said. "With the liability caps that Congress put in place for the airlines, the delay in getting to trial, the roll of the dice that you would face in court — that is not a meaningful alternative."

NEW YORK TIMES, TUESDAY, DECEMBER 11, 2001

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NYC-WTC_000415733