

THROUGH THE LOOKING GLASS: THE VICTIMS COMPENSATION FUND VIEWED IN THE CONTEXT OF ADR AND OTHER MASS CLAIMS

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Balancing the tension between individual justice and collective settlement is the central challenge in all efforts to design and implement procedures to handle mass claims. Inevitably, a myriad of difficult issues emerge: Who should participate in the design process? Should claims be considered on an individualized basis or according to predetermined categories as in some kind of grid system that may be faster and promote more consistency? Who should serve as a neutral, and in what kind of process or process steps? And how can concerns about fairness be balanced with concerns about cost and efficiency?

The September 11 Victims Compensation Fund presents these kinds of issues in an unprecedented way. Yet we have certainly grappled with them before in other contexts and cases. The class action gender discrimination cases against Smith Barney and Merrill Lynch are the two most recent examples in the employment area. In the products liability area, the Asbestos, Dalkon Shield and Breast Implant settlements have served as well-known efforts to apply forms of ADR to resolve a multitude of claims. Others efforts have been made in the context of insurance, tort and bankruptcy claims. What kinds of procedures have been designed and implemented in those other kinds of contexts and why? Are there touchstones we can find there for evaluating the design and implementation of the procedures outlined for the Victims Compensation Fund?

Who is the source of funds?

One of the biggest differences between the Victims' Compensation Fund and other kinds of mass claims where ADR procedures have been used is that while the source of funds for the Victims' Compensation Fund is the United States government, the government itself is not a defendant. On the

surface, at least, this means that there is a potential community of interests between claimants and the holder of the purse strings that does not usually exist in other mass claims situations. In a poignant 1999 op-ed piece in the New York Times, for example, contributing New York Magazine editor Meryl Gordon wrote about her arbitration in the Dalkon Shield matter, complaining that the Trust attacked her sexual history when what she really wanted was an apology. Defendant payors in mass claims ordinarily have a clear vested interest in minimizing their exposure, and thus a natural tendency to be adversarial in any claims resolution process.

Who is involved in the process?

In the Victim's Compensation Fund not only are the defendant airlines not the source of the funds paid out to claimants, but also they are not involved at all in the claims resolution process. They are involved only when a claimant opts out of the claims resolution process and goes to court. How does this factor affect process design? Determining whether a claims process should involve the opportunity for each individual claimant to be heard is one of the most basic and critical design questions in mass claims. Giving claimants that opportunity greatly increases costs and time, but may have other more intangible benefits. In employment cases such as the Smith Barney and Merrill Lynch cases, particularly where many of the claimants are current employees, participatory, face-to-face processes have been very important. In other cases such as those involving tort claims they may be less so. The victims of September 11 have a clear need to be heard. The tragedy was horrific and the victims are mourning their losses. However, the fact that neither the real defendants in these cases nor the perpetrators of the attack will be present during the claims resolution process may argue for finding an alternative forum in which the victims can be heard and choosing efficiency over individual participation in the claims process, particularly given the legislatively mandated deadline for resolving claims.

Is the pot limited or unlimited?

Considering another characteristic of the Victims Compensation Fund, however, the fact that the Fund involves an unlimited pot, could lead to a different conclusion. In other mass claims cases such as Agent Orange case, the Astra Pharmaceuticals case, and many bankruptcy matters, where the pot was limited, the process for determining individual claims was more a matter of equitable distribution than a matter of considering individual claims on their merits. Thus grids or presumptive categories for claims in these cases were a more attractive and uncontroversial alternative. The victims of the September 11 atrocities, though, may be less willing than others to be put in some kind of “box” for compensation purposes.

Whether claimants are represented by common counsel

The tension between hearing individual claims and efficiency concerns is typically influenced in mass claims contexts by yet another phenomenon, and that is whether claimants are represented by common counsel. In both the Smith Barney and Merrill Lynch class actions, for example, most of the claimants have been represented by a single law firm. This has allowed development of case evaluations that are understood by both sides and serve as predictive norms, resulting in an enhanced degree of efficiency even without presumptive grids. The well-designed presumptive grids of the Victims Compensation Fund procedure may provide a more reliable guide for predictive purposes than understandings of common counsel. On the other hand, the Victims Compensation Fund claims will involve a variety of counsel in addition to a variety of types of claims. The extent to which these unique factors may skew the kind of uniformity of awards often provided by grids remains to be seen.

Who is involved in process design?

Another difference between the Victim's Compensation Fund claims process and most other mass claims processes is that the claimants have had no real role in the design of the process. The ADR processes with which we are already most familiar in the mass claims area have been a matter of agreement between parties interested in settling existing or threatened litigation. Thus buy-in, while not uniformly assured for all individual claimants, has been at least a matter of discussion and general assurance up front. For practical reasons and considerations of speed, the claims procedure for the Victims Compensation Fund was designed by an uninvolved special master appointed by the Attorney General, and thus the pros and cons of the design continue to be a matter of vigorous debate. The fact that the Fund was established by legislation rather than by settlement has also led to confusion about whether aspects of the process design, such as deductions for collateral offsets, are subject to modification.

Is participation optional?

Relatedly, participation in the Victims Compensation Fund is voluntary, unlike many mass claims processes such as those involving the Drexel-Burnham and Milkin securities claims and other claims arising in the bankruptcy context. This means that the Victims Compensation Fund must divert resources and efforts to "sell" the process to claimants. The pressure to "sell" is heightened by the fact that one of the goals of the Victims Compensation Fund -- to protect the airlines from crippling liabilities that would interfere with our national air transportation system -- can only be achieved if most claimants elect to go through the process. While it could be argued that litigation is not really a viable alternative for claimants given the cap on liability for the airlines, and that in any event the court alternative here is unusually difficult to predict, allowing claimants and the plaintiffs' bar a larger role in process design and implementation might have better assured buy-in. And in yet another interesting twist, the resources allocated to the claims pursued outside the process will be paid by a different entity (the airlines) than the payor of the claims resolved in the process (the government). When, as in the usual case, such resources come out of a common defendant's pocket, there is added incentive to resolve claims through the ADR process.

Who is the neutral?

Finally, there is the issue of the neutral. ADR processes, in whatever context, are generally characterized by the existence of a third-party neutral standing in for a publicly elected or appointed judge to determine or to help the parties, themselves, determine a fair outcome for their dispute. Thus ADR procedures in mass claims typically involve either a single process (such as an expedited hearing before a neutral arbitrator in the Dalkon Shield case) or a multi-step process (such as negotiation, followed by mediation and then arbitration before a different neutral in the Smith Barney and Merrill Lynch cases). Victims Compensation Fund claimants dissatisfied by their award determined according to a presumptive grid are entitled to appeal to the Special Master, whose decision is then binding. However, the Special Master is presumptively the same individual who designed the claims resolution system in the first place and has been advocating for its use. In this aspect, as well, the Victims Compensation Fund claims resolution process will have much to teach future mass claims systems designers.