DISTRIBUTING JUSTICE:
THE SEPTEMBER 11TH VICTIM COMPENSATION FUND AND
THE LEGACY OF THE DALKON SHIELD CLAIMANTS TRUST

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FOREWORD

To speak of the legacy of the Dalkon Shield Claimants Trust is to speak of the legacy of Judge Robert R. Merhige, Jr., who passed away earlier this year. As a distinguished trial lawyer in Richmond, Virginia, he came to the attention of President Lyndon B. Johnson, who appointed him to the U.S. District Court for the Eastern District of Virginia. In over thirty years of service on this court, he presided over many important and controversial cases. Early in his career, he ordered the admission of women as undergraduates to the University of Virginia,† and at considerable risk to himself and to his family, he presided over the desegregation of the Richmond city schools.‡ Later in his career, with the same energy and imagination, he guided the litigation over the Dalkon Shield to a successful resolution, one that remains the best model we have for the fair and efficient resolution of mass tort cases. This article examines what Judge Merhige accomplished in this case and how it reflects the qualities of intellect and character that made him such a forceful and inspiring leader of our profession.

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1. INTRODUCTION

The scale of mass tort claims seems to increase inexorably and exponentially, as does the magnitude of the misfortunes giving rise to these claims. The terrorist attacks of September 11th furnish the latest and most tragic example of events giving rise to claims measured in the billions of dollars. The September 11th Victim Compensation Fund, established by Congress to compensate the victims of these attacks and their next-of-kin, paid out over seven billion dollars in awards, with insurance companies, charities, and other government programs yet to pay over four billion dollars more to these recipients. These payments represent only a fraction of the compensation paid to businesses and others harmed by the terrorist attacks, thereby bringing the estimated total compensation to thirty-five billion dollars.

Figures this large defy comparison with any antecedents. Yet one model for the September 11th Fund stands out among the institutions created to remedy previous mass torts. It is the Dalkon Shield Claimants Trust, in which the Special Master of the September 11th Fund, Kenneth Feinberg, himself served as a trustee. He did, to be sure, bring extensive experience with mass torts to his position as special master, among them serving in the same position in the Agent Orange litigation. But it is the scale, the structure, and the accomplishments of the Dalkon Trust that provide a compelling precedent for the September 11th Fund. This article documents those similarities and the remarkable innovations that both of these funds brought to the resolution of mass torts.

The Dalkon Trust was created to resolve over 400,000 claims arising from the use of the Dalkon Shield, a contraceptive device manufactured by the A.H. Robins Co. in the 1970s. Of these claims, 200,000 were eventually resolved on the merits, resulting in payments of over $2.8

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The two funds discussed in this article will be referred to hereafter as the September 11th Fund and the Dalkon Trust.

2 PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 144-45 (1987). This is not to imply that he agreed with all the decisions made in these prior cases, and indeed, after he left his position as trustee, he expressed several reservations about the operation of the Dalkon Trust. See infra note 67 and accompanying text.
billion from the trust.\textsuperscript{3} By way of comparison, many fewer individuals suffered direct injury from the September 11th attacks. Because so many of the victims died in these attacks, however, the resulting losses were far more severe. Almost three thousand people were killed and almost 2,680 suffered physical injuries. The September 11th Fund handled far fewer claims than the Dalkon Trust, comprising only a few percent of those claims considered by the trust. Yet the September 11th Fund paid out over twice as much in compensation.

If the size of the payments made by each of these funds is roughly comparable, so too, is the centralized control exercised over their administration. The Dalkon Trust resulted largely from the efforts of Judge Merhige to control the many claims arising from the use of the Dalkon Shield. Together with a bankruptcy judge, he presided over the reorganization of the A.H. Robins Co., the corporation that had manufactured the Dalkon Shield and that went bankrupt because of it. The reorganization plan eventually approved in these proceedings resulted in the sale of the company, the creation of the Dalkon Trust, and the funding of the trust from the proceeds of the sale.\textsuperscript{4} Judge Merhige also presided over a related class action involving claims against the company's insurers, which resulted in a settlement and the establishment of related trusts. After all these trusts were established, he presided over their administration. Throughout these proceedings, many of the parties involved, and especially their attorneys, complained bitterly about Judge Merhige's control over the proceedings.\textsuperscript{5} These complaints echoed similar objections to the role assumed by Judge Weinstein earlier in the Agent Orange case.\textsuperscript{6}

These complaints, whatever merit they might have, carried no weight with Congress when it considered the legislation establishing the September 11th Fund. This statute and its implementing regulations gave the Special Master virtually unrestricted discretion to determine the amount of compensation paid to claimants.\textsuperscript{7} By the very different

\textsuperscript{3} See Appendix B infra. Another 200,000 claims were rejected as duplicates or as void for other reasons.


\textsuperscript{6} SCHUCK, supra note 2, at 258-60.

methods of bankruptcy proceedings and congressional legislation, both compensation funds settled on a very similar administrative structure. Judge Merhige closely supervised the administration of the Dalkon Trust, even though it was formally under the control of a board of trustees, and Kenneth Feinberg exercised still more power as the Special Master of the September 11th Fund.

The reason for concentrating control over these funds has less to do with how they were created than with the benefits resulting from foregoing the potentially ruinous cost of litigation on the scale necessary to resolve all the claims arising from a mass disaster. Procedures designed for deciding one claim at a time, or even hundreds of claims consolidated into a single case, cannot be used to decide cases involving a thousand times as many claims. These cases inevitably depart from the model of separate litigation of individual claims controlled by individual plaintiffs and their attorneys. Yet even as the inadequacies of this model of litigation are acknowledged, departures from it are recognized only as a matter of necessity to avoid the cost and delay of adjudicating a seemingly unending series of similar claims. But the goals of mass tort reform must be broader and aim to exploit the gains from avoiding individualized litigation in order to secure more adequate compensation for individual claimants. The proposals for reform must be correspondingly broader, embracing changes in the substantive rules of liability in addition to the procedures by which these rules are applied. Rights to recovery and exposure to liability must be modified in practice, even if they somehow remained unchanged as a matter of legal doctrine, to meet the needs of mass tort claimants.

If approximations are necessary, accurate approximations are essential. This is the single most important lesson from the creation and operation of the Dalkon Trust, and the one that was followed most faithfully in setting up and administering the September 11th Fund. As previous proposals have emphasized,8 a process of approximation achieves gains in efficiency by avoiding the costs, and particularly costs

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caused by strategic behavior, associated with individualized adjudication. Those gains can be achieved, however, only if the resulting approximations approach or exceed the amounts that claimants could realistically have expected to recover through litigation. Otherwise, so many claimants will be dissatisfied with the relief offered to them that they will seek, by one means or another, to retain or revive their right to sue individually. Procedural and substantive rules should be shaped to achieve these two goals: to save the cost of individualized litigation by offering only approximate recoveries, but at the same time, to assure that the approximation leaves claimants no worse off than they would be through litigation.

In seeking to achieve these goals, a compensation fund cannot neglect purely procedural values, such as individual participation in litigation, but it must recognize limits on their scope and force. Parties do not engage in litigation for its own sake, but only to serve some further purpose, such as obtaining compensation or avoiding liability for past injuries. Even the Due Process Clause conditions the existence of procedural rights on substantive interests in liberty or property that are threatened by government action. Procedure should follow substance, and not the other way around, inverting Maine's famous observation that "substantive law has at first the look of being gradually secreted in the interstices of procedures." In mass tort cases, the priority of substantive law requires procedural rights to be defined and allocated so as to encourage the acceptance of approximate remedies as a substitute for individual litigation.

Both the September 11th Fund and the Dalkon Trust sought to achieve this objective by a variety of different means, which nevertheless exhibit a surprising similarity in the overall approach taken by each fund and in the results that each achieved. These similarities are documented in the succeeding parts of this article. Part II examines the similar circumstances confronted by both compensation funds, and particularly the need to achieve a global resolution of many thousands of claims against multiple defendants. Part III analyzes the way in which each fund effectively or formally altered the substantive rules that normally govern recovery of tort claims. Part IV examines the related changes in the procedural rules necessary to resolve these claims. Part V

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10 SIR HENRY S. MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1883).
analyzes the success of each fund in achieving its announced goals and, in particular, in avoiding litigation of individual claims. The Conclusion offers a brief assessment of the strengths and weakness of the approach pioneered by these funds in resolving mass tort litigation.

II. CONDITIONS OF MASS TORT COMPENSATION

The September 11th terrorist attacks and the product defects in the Dalkon Shield could not be more different along many different dimensions of comparison: one was essentially an act of war with profound international implications, the other was a commercial and medical disaster; one resulted in more deaths than injuries, while the other resulted in injuries that rarely proved to be fatal; one concentrated its effects at only a few locations and left few victims who could not be identified, but the other affected users around the world; and one resulted in comprehensive federal legislation designed to compensate victims, while the other required adaptation of existing legal remedies and procedures under the law of tort, bankruptcy, and class actions. No doubt further differences could also be enumerated. Yet the immediate concern that led to the creation of both of these special regimes of compensation was insolvency. It was the bankruptcy of the A.H. Robins Co. that led directly to the establishment of the Dalkon Trust, and the September 11th Fund was created in legislation addressed mainly to solvency of the airline industry.\(^\text{11}\)

The threat of insolvency, in turn, derived from the magnitude and number of the claims asserted against potential defendants and, of crucial importance in both cases, the perceived urgency of providing compensation to those injured or to the families of those killed. The overall exposure of potential defendants depends on all of these considerations, both on how many claims were likely to be brought and whether they would succeed, and if so, for what amounts. The perceived need for compensation made up for uncertainties in recovery under the ordinary principles of tort law and, in the end, justified the alteration in the substantive rules of liability considered in the next part of this article. In creating the September 11th Fund, Congress evidently considered the victims of the terrorist attacks to be, in some sense, casualties of war entitled to compensation for that reason alone. The imperative to

compensate victims of the Dalkon Shield was less dramatic, but ultimately no less influential. The Dalkon Shield was a contraceptive device for women and the injuries attributed to it concerned various aspects of reproduction. The victims’ claims therefore raised sensitive issues of sex discrimination and reproductive rights.

The common theme of insolvency extends far beyond these two instances of mass tort compensation, having been a dominant factor in the asbestos and breast implant litigation, just to name two other mass tort cases. The risk of insolvency figured in the legislation establishing the September 11th Fund for reasons other than the sheer magnitude of the airlines’ exposure to liability. The terrorist attacks deterred and disrupted air travel to such an extent that the simple loss of business to the airlines, which already were in shaky financial condition, threatened to bankrupt them entirely. As subsequent developments have made clear, even this comprehensive legislation could not assure the solvency of the airlines, which face purely economic challenges to their standard methods of doing business. These alone would hardly justify financial assistance from the federal government, let alone the creation of a special compensation fund.

As the fiscal position of the airlines illustrates, the risk of insolvency plays, at best, an ambiguous role in mass tort cases. On the one hand, if too little money is available from which a recovery can be paid, it is hardly worth the extraordinary step of setting up a special facility to determine and distribute mass tort awards. On the other hand, if the defendants plainly have enough money to pay off all the claims against them, there appears to be no urgent need to depart from the ordinary methods of compensation through tort litigation. In the September 11th Fund, it was only when Congress stepped in with the extraordinary commitment to pay off all claims for death or personal injury, no matter how large, that a special compensation fund became feasible. Otherwise, the victims of the terrorist attacks would have been left with the other creditors of the airlines to salvage what they could from the industry’s deprecating assets.

The same paradoxical combination of the threat of insolvency in the presence of assets sufficient for recovery figured prominently in the establishment of the Dalkon Trust. The Trust was funded by proceeds

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from the sale of the A.H. Robins Co., which could command a high market price only if it continued to function profitably as a going concern. The need to create and sustain a fund for the payment of claims placed constraints on the procedures and the results of the reorganization case that led to the establishment of the Dalkon Shield Trust. The September 11th Fund did not face any such constraints, and so, in that respect, presented problems that were more easily resolved because they involved only the distribution of a fund created by Congress. The added layer of complexity involved in funding the Dalkon Trust led to many of the controversial rulings in that case.

The first of these involved the treatment of the managers and shareholders of the A.H. Robins Co. The managers of the company were left in control during the reorganization case, which extended over several years. For an initial period of 120 days after the petition for reorganization was filed, management possessed the exclusive right to propose a plan of reorganization. Judge Merhige repeatedly extended this period, despite numerous instances in which management had expended money, particularly to executives, without the necessary approval of the district court. There was, therefore, ample reason to terminate the exclusivity period and remove management as the debtor in possession of the company. Judge Merhige did not take this step, however, relying instead on the court’s discretion to extend the exclusivity period and not to appoint a trustee.

The fundamental reason to keep management in control was to preserve the value of the A.H. Robins Co. as a going concern. Management is almost always in a better position to preserve the value of the firm than creditors, who both are ignorant of the firm’s operations and are inclined to infighting among themselves over their priority in obtaining repayment in any reorganization plan. During the reorganization proceedings, the company continued to earn profits on products unrelated to the Dalkon Shield, and since these earnings could

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14 The District Court ordered the recovery of these funds, most of which were repaid, and fined the president $10,000 after holding the company in criminal contempt. Disclosure Statement, supra note 4, at 26.
15 This decision was upheld in Comm. of Dalkon Shield Claimants v. A.H. Robins Co., 828 F.2d 239, 242 (4th Cir. 1987). Extensions of the exclusivity period are routinely granted in reorganization cases. See DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 16-17, 234 (1992).
not be distributed to shareholders as dividends while the bankruptcy case was ongoing, they resulted instead in an increase in the value of the company. Some of this increase in value was eventually returned to the officers and directors, in their capacity as shareholders, when they received distributions in the reorganization plan valued at seven hundred million dollars. In absolute terms, this sum represents a large amount of money, but it must be compared to the increasing amounts that were available to the trust under successive proposals for reorganization, increasing from $1.75 billion to $2.475 billion. The terms of the final reorganization plan also benefited claimants in other respects, resulting in an immediate payment to the trust rather than payments spread out over several years, and in making the trust nonreversionary, causing all the funds paid to the trust eventually to be distributed to claimants. Moreover, the company’s managers, although they might have hoped that they could retain their jobs after the company was sold, were discharged as soon as the sale was consummated.

The exigencies of the reorganization process also explain another difference between policies that animated the Dalkon Trust and the September 11th Fund. The former was constructed with a view to achieving “global peace”: the resolution of all claims arising from use of the Dalkon Shield and all other outstanding claims against the A.H. Robins Co. in order to facilitate the sale of the company free and clear of all past liability. This policy extended as well to claims against the company’s liability insurer, whose policies were used to fund a separate trust that was mainly used for the compensation of claims that were filed late with the Dalkon Trust or were disallowed for other reasons. By contrast, insurers who covered losses resulting from the September 11th attacks were not brought into the proceedings for administering the September 11th Fund at all. The fund did not cover property damage and left recovery entirely to claims against property insurers and to other government programs.

17 Disclosure Statement, supra note 4, at 40.
19 Reorganization Plan, supra note 18, § 5.01; Disclosure Statement, supra note 4, at 1, 4. The members of the Robins family, who comprised the principal shareholders and managers of the company, were also required to make a payment of five million dollars to one of the trusts established by the Reorganization Plan. Disclosure Statement, supra note 4, at 48-49.
20 Id. at 41-42.
Companies that issued life, health, or disability insurance policies for the victims of the attacks also were outside the scope of the September 11th Fund. The payments that they made under such policies affected the operation of the fund only in resulting in an offsetting deduction from any award by the fund to the insured victim.21 This abrogation of the "collateral source" rule was controversial, but it clearly deprived the insurers of any basis for a claim against the fund. Under the collateral source rule, an insurer who pays compensation to a tort plaintiff can subrogate to the plaintiff's claim and obtain a share of any resulting judgment. Since the victims of the terrorist attacks did not receive any compensation from the fund for their insured losses, the insurers had no right to subrogate to the victims' claims against the fund and the insurers themselves were given no right to make claims against the fund on their own behalf.

"Global peace," it might be said, was purchased entirely by the willingness of Congress to write a blank check for all the awards and expenses of the September 11th Fund. Yet that explanation does not quite justify the exclusion of claims for property damage or the abrogation of the collateral source rule. The creation of the fund may have preempted the need for the most difficult and contentious litigation arising from the terrorist attacks, but it hardly eliminated it. Claims for billions of dollars were made against the property insurers of the World Trade Center and are still being litigated by the parties involved.22 This massive and complex litigation, however, was not thought to detract from the closure achieved by the awards paid for personal injury and death. Unlike the Dalkon Trust, the insurance payments for property damage and those for personal injury and death did not constitute a competing demand upon the resources available to the September 11th Fund. Congress provided for full compensation of all claimants without further recourse against anyone who might have been at fault. Individuals who filed claims with the fund waived any right to pursue their tort remedies and Congress created no right of subrogation by the Federal Government itself. By closing off the alternative remedies for death or personal injury, Congress created a form of global peace that resolved all such claims arising from the terrorist attacks.

Global peace as to claims for wrongful and personal injury was as much a felt necessity in the September 11th Fund as in the Dalkon Trust.

21 Air Transportation Act, supra note 7, § 405(b)(6).
22 See DIXON & STERN, supra note 1, at 133-35.
The distinctive moral weight attached to such claims justified the creation of a special compensation fund in the first place, leaving the ordinary processes of the law to resolve other claims. These systems could achieve their goal of full and fair compensation, however, only if they turned out to be the dominant, if not exclusive, method of recovery. Only by this means could the high transaction costs of ordinary tort litigation be avoided and the gains from providing an alternative mechanism of compensation be fully realized—hence the importance of the statutory requirement that claimants under the September 11th Fund waive their rights to recover in tort. In the Dalkon Trust, the same objective was achieved by structuring the options available to claimants so that they could pursue litigation only as a last resort. In both cases these strategies succeeded, resulting in litigation of only three percent of the claims covered by the September 11th Fund and far less than one percent of the claims filed with the Dalkon Trust.

Global peace with respect to wrongful death and personal injury claims was therefore critical to the success of both funds. No change in legal doctrine alone could have achieved this result if the funds themselves had not been administered with the single-minded purpose of providing an attractive alternative to ordinary tort litigation. In the September 11th Fund, the crucial step taken by Congress was to vest in the Special Master nearly complete discretion to administer the fund and to make awards. The Special Master was also authorized to promulgate all necessary “procedural and substantive rules.” The same centralizing result was achieved in the Dalkon Trust through application and interpretation of the Bankruptcy Code. This process commenced with the filing of the petition for reorganization of the A.H. Robins Co., which triggered the “automatic stay” against any proceedings by creditors against the company outside of the reorganization case itself. The automatic stay consolidated all claims in the reorganization, a process that was taken a step further by the district court’s decision to make all decisions jointly with a bankruptcy judge. This step avoided jurisdictional disputes over which aspects of the case constituted “core proceedings” in bankruptcy, normally referred to a bankruptcy court,

23 Air Transportation Act, supra note 7, § 405(c)(3)(B)(i).
24 FINAL REPORT, supra note 1, at 1. For the Dalkon Trust, less than .05 percent, or five one-hundredths of a percent, of the claims went to litigation. See Appendix B infra.
25 Air Transportation Act, supra note 7, §§ 404, 405.
26 Id. § 404(a)(2).
and which constituted "noncore proceedings" that had to be decided by the federal district court itself. Continued control over the reorganization of the company and ultimately over the Dalkon Trust required further innovations by the district court.

The first of these, leaving existing management in control of the company, has already been noted. Several further steps were necessary, mainly to counteract the centrifugal tendency of lawyers representing the Dalkon Shield claimants whose natural inclination was to preserve their option to bring individual actions. This alternative maintained both their control over their clients' claims and their own ability to recover contingent fees from any payment in satisfaction of those claims. If pursued too far, it would have caused the reorganization to revert to the form and costs of ordinary litigation, defeating the very purpose of establishing a special compensation fund. Thus, the district court had to step in on several occasions to restrict the role of the claimants' attorneys.

These attorneys participated in the reorganization principally through the Claimants' Committee, which, as its name implies, represented the interests of the Dalkon Shield claimants. It was initially composed of almost forty attorneys who represented the largest number of claimants. Their principal role was in negotiating the reorganization plan and the accompanying sale of the A.H. Robins Co. If the members of the committee could not agree among themselves, however, they could effectively defeat any proposed reorganization plan. They almost did so when dissatisfaction with the committee's counsel, who did most of the actual negotiation over the reorganization plan, led to a disputed vote within the committee about his discharge. After a hearing, the court dismissed the committee and a smaller committee was

28 28 U.S.C. § 157(b), (c) (2000). This rule is of constitutional dimensions, implicating limits on congressional power to assign cases to Article I courts, such as the bankruptcy courts, staffed by judges with limited terms, rather than to Article III courts, staffed by judges with life tenure. See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

29 The district court also appointed a representative of future claimants whose conditions might become apparent only later. Disclosure Statement, supra note 4, at 19. Because of the short latency period for most conditions resulting from the Dalkon Shield and because of special provisions for compensating late claimants, this representative did not play a leading role in the reorganization case. Reorganization Plan, supra note 18, Plan Exhibit C § 15.

30 Sobol, supra note 5, at 73-77.
reappointed, consisting of five members, which voted to retain the committee’s counsel.\textsuperscript{31}

The district court exercised control over the reorganization case through decisions setting an estimated total value on all Dalkon Shield claims. This estimate effectively set a floor on any serious offer for the company, which had to be sufficient to pay off the estimated total liability to the claimants as well as to other creditors of the company. Just as with the September 11th Fund, claimants would forego the option of litigation only if they were likely to receive as much from the trust as from any alternative mechanism of compensation. Only after a reliable estimate was made of the total value of their claims could they make this comparison. Likewise, their attorneys could determine the amount of any contingent fees they would recover only based on such an estimate. This estimate was therefore crucial to obtaining the approval of any proposed reorganization plan by the Claimants’ Committee and by the claimants themselves. In order to be confirmed, the reorganization plan had to obtain a favorable vote among the claimants voting as a class of creditors.\textsuperscript{32} Both forms of approval required an assessment that the claimants would be better off with a reorganization resulting in the sale of the company as a going concern rather than with any alternative form of compensation.

The estimation process itself did not require an accurate determination of the value of each claim, but only of all claims collectively. Overestimates of the value of some claims could be offset

\textsuperscript{31} Id. at 80-85; Disclosure Statement, \textit{supra} note 4, at 19.
\textsuperscript{32} As a technical matter of bankruptcy law, approval by a vote of the claimants as a class of creditors was required by the “absolute priority rule” in the Bankruptcy Code. 11 U.S.C. § 1129(b) (2000). This rule gave a class of creditors with superior claims, like the Dalkon Shield Claimants, a veto over any reorganization plan that did not fully compensate them but that did compensate any class of creditors with inferior claims. The shareholders of the company, including many of its officers and directors, constituted creditors with such inferior claims. If the Dalkon Shield claimants did not approve the plan, then the “absolute priority rule” would have required that all of their claims be fully satisfied before any claims of the shareholders. Since this was likely, but hardly a certainty, the “absolute priority rule” effectively required approval by the class of Dalkon Shield claimants before any reorganization plan could be confirmed by the district court.

The approval process itself required a vote of a majority of claimants and two-thirds of claimants by value of their claims. 11 U.S.C. § 1126(c) (2000). In the absence of individual determination of the value of each claim, the district court set the value of all claims at the same amount, converting the vote into one decided by a two-thirds vote of the claimants. As it turned out, 94.4 percent of claimants voted in favor of the plan. \textit{In re} A.H. Robins Co., 880 F.2d 694, 698 (4th Cir. 1989).
by underestimates of the value of others. The district court exercised control over this process, first, by insisting that all the parties who offered estimates work from a common database, which itself required an evaluation of previously litigated or settled claims and a sampling of additional claims filed in the reorganization case.\textsuperscript{33} Even working from the same database, the parties submitted estimates that varied almost by a factor of ten, from eight hundred million dollars to seven billion dollars.\textsuperscript{34} The variation among these estimates is not at all surprising, especially since they corresponded to the interests of each of the parties. Shareholders and management of the A.H. Robins Co., for instance, had an interest in submitting a low estimate in order to increase the residual value of the company available to them after all the other claimants were paid. The Dalkon Shield claimants, by contrast, submitted a high estimate in order to maximize their claims on the company as against other claimants. After extensive discovery and a hearing that lasted for several days, the district court estimated the value of the claims at $2.475 billion.\textsuperscript{35} This estimate, like the other steps taken by the district court, was not immune from criticism. A more elaborate process would have yielded a more precise estimate, yet it would have come at the cost of reducing the benefits gained from collective resolution over individualized determination of the Dalkon Shield claims. The imperative of reaching agreement on a reorganization plan had to take precedence over achieving greater accuracy.\textsuperscript{36}

Even after the reorganization plan was in place and the Dalkon Trust was established, the district court continued to exercise close supervision over the claims process. The reorganization plan itself provided for continuing jurisdiction of the district court, although in terms that denied the district court any power over "the day-to-day operations" of the trust.\textsuperscript{37} In a dispute that resembled the earlier controversy over the

\textsuperscript{33} See Disclosure Statement, supra note 4, at 19-21.
\textsuperscript{34} Id. at 3.
\textsuperscript{35} Id. at 21.
\textsuperscript{36} This imperative was all the more demanding because the reorganization case had embedded within it a class action against the liability insurer for the A.H. Robins Company. This case within a case had to be resolved in order to determine the total assets available to the company to pay off Dalkon Shield claims. In the end, it was settled and had to be approved by the district court under the procedures specified in Federal Rule of Civil Procedure 23. It resulted in payments to the Dalkon Trust of seventy-five million dollars and the issuance of further insurance policies in the amount of $350 million to cover Dalkon Shield claims under various contingencies. Id. at 41-42.
\textsuperscript{37} The proviso to the section granting continued jurisdiction stated "that nothing contained in this Section 8.05 is intended to confer jurisdiction upon the Court over, or
composition of the Claimants’ Committee, the district court replaced the original group of trustees after they had appointed the counsel for the Claimants’ Committee as counsel for the Dalkon Trust. The reasons for taking this step were twofold: first, the conflict of interest of counsel in representing both the committee and the trust; and second, the resulting perpetuation of disputes that should have been resolved by the reorganization into the administration of the trust. Both issues implicated the fundamental question whether the trust would be effectively controlled by the attorneys on the Claimants’ Committee, who had an interest in maximizing their own role and their own fees, or by trustees who had interest in devising efficient procedures to compensate all claimants, represented and unrepresented alike. Neither the trustees nor trust counsel could owe their primary allegiance to the claimants’ attorneys.  

Similar problems did not arise in the administration of the September 11th Fund, partly because of the plenary power that the Special Master had over the operation of the fund and the determination of claims. In addition, to the great credit of the bar, almost all of the attorneys who represented claimants before the fund did so on a pro bono basis, following the example of the special master himself, who donated his services and those of his firm free of any charge except for out-of-pocket expenses. Generosity on such a large scale cannot be expected in the typical mass tort case, where control over the incentives of attorneys is essential to the success of any compensation fund. As the interests of the attorneys become stronger, so does the need for countervailing sources of power to assure that the compensation fund
does not revert to the strategic behavior and attendant costs of ordinary litigation. The organic law establishing the September 11th Fund explicitly recognized the need for such power, even if the special master did not need to exercise it to control the attorneys who appeared before the fund. In the Dalkon Trust, the district judge had to adapt his existing powers to achieve such control.

III. CHANGES IN THE SUBSTANTIVE LAW: FROM PROVEN FAULT TO PRESUMED CAUSATION

The same contrast between explicit changes in the law and adaptation of existing standards also applies to the substantive rules used to determine eligibility and compensation. Where Congress could make a clear break with the past in creating the September 11th Fund, the district court exercised necessarily more limited powers in presiding over the creation and the operation of the Dalkon Trust. These different sources of authority nevertheless resulted in strikingly similar innovations in the standards for recovery, the exclusion of different categories of damages, and the calculation of awards. The only significant difference is in the collateral source which, as noted earlier, was abrogated in the legislation creating the September 11th Fund. Even this difference should not be exaggerated, however. Collateral sources in the two cases were quite different, consisting mainly of life insurance and disability insurance in the September 11th Fund and medical insurance in the Dalkon Trust.

The similarities begin with the streamlined standards for establishing eligibility for an award, which in both cases dispensed with many of the usual prerequisites for tort liability. The statute creating the September 11th Fund expressly prohibited the special master from considering “negligence or any other theory of liability,” and instead required that eligible victims have “suffered physical harm or death as a result of” one of the air crashes involved in the attacks. This step away from ordinary theories of liability greatly simplified the determination of eligibility, a process which was implemented by several more specific requirements: proof of presence of the victim at the site, injury resulting in death or physical harm, and occurrence during or in the immediate

40 Air Transportation Act, supra note 7, § 405(b)(2).
41 Id. § 405(c)(2)(A)(ii).
Each of these elements, in turn, was subject to more specific definitions and evidentiary requirements. Thus, in order to establish physical harm, it was necessary to submit proof of a hospital admission usually within twenty-four hours, and no later than seventy-two hours, after the air crashes. These more specific requirements to some extent substituted for proof of causation, creating a presumption that injuries of the relevant kind in the specified time period were caused by the terrorist attacks.

The same process of simplification and specification took place in the Dalkon Trust, displacing ordinary standards of recovery in tort with proof of causation. Product defect, a central issue in products liability litigation, was not contested by the trust in the vast majority of cases. Causation, however, remained in issue, but it could be waived by the trust, and it was presumed for a large number of specific injuries itemized in the reorganization plan. The structure for processing claims within the trust itself simplified the proof of causation still further. Under two of the three options for filing claims, no independent proof of causation was necessary at all. Under Option 1, a claimant received a payment of $725 upon timely submission of a claim and an affidavit stating that she had used the Dalkon Shield and "was injured or believes she may have been injured as a result of such use." Option 2 added to these requirements only proof of use and compensable injury through medical records, which resulted in payments according to a schedule of compensation for different injuries on the model of workers compensation. Acceptance of offers under either of these options precluded resort to the more complicated procedures under Option 3, which imposed a heightened burden of proving causation in exchange for a larger potential recovery.

The exclusions from recovery under both compensation systems exhibit surprising similarities, despite apparent differences in the

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42 FINAL REPORT, supra note 1, at 19-23.
43 28 C.F.R. § 104.2(c) (2004).
44 The trust could contest the issue only the tiny fraction of cases that were litigated. Reorganization Plan, supra note 18, Plan Exhibit C ¶ G.12.
46 Id. Plan Exhibit C ¶ G.12; see also id. Exhibit A.
47 Id. Plan Exhibit C ¶ C. Smaller payments were awarded to nonusers of the Dalkon Shield, such as sexual partners, who might have been indirectly harmed through use of the device. Id.
48 Id. Plan Exhibit C ¶ D.
49 Id. Plan Exhibit C ¶ E.
treatment of collateral sources and psychological injuries. The exclusion of punitive damages was explicit in both cases: by statute for the September 11th Fund and by ruling of the district court for the Dalkon Trust. The same basic reason, although with contrasting variations, supported this exclusion in each case. Punitive damages serve a deterrent purpose only if they impose an additional cost upon the wrongdoer. When the source of compensation is the federal government instead of the wrongdoer, an award of punitive damages has no deterrent effect at all, and when the source is sale of the defendant company, no further deterrence is necessary. In the Dalkon Trust, the deterrent purpose of punitive damages was achieved by making the trust nonreversionary, resulting in a pro rata distribution of excess funds to all claimants who had injuries serious enough to support a recovery under Options 2 and 3. This distribution, which eventually amounted to over $1.4 billion, almost doubled the recovery of such claimants and redressed concerns that the compensation paid to shareholders and managers in the reorganization plan rewarded them despite the wrongdoing associated with the Dalkon Shield. Moreover, because it was distributed equally among all claimants with serious injuries, no single claimant (or her attorney) had an incentive to sue just to obtain punitive damages. As was also recognized in the September 11th Fund, preserving a right to recover punitive damages is fundamentally inconsistent with encouraging parties to accept alternatives to litigation.

The exclusion of payments from collateral sources in the September 11th Fund also marks a clear break with current tort doctrine, but one not followed in the Dalkon Trust. This exclusion proved to be immensely significant in monetary terms, saving the federal government over $2.9 billion in payments. Even so, not all collateral sources were subject to the statutory offset. Any sources of compensation that could be attributed to personal savings or investment were not offset, as were various forms of contingent payments or tax benefits. Health insurance coverage, although apparently subject to the collateral offset, was not a

50 Air Transportation Act, supra note 7, § 405(b)(5); In re A.H. Robins Co., 89 B.R. 555, 561-63 (E.D. Va. 1988). The latter ruling also was restated in the Reorganization Plan, supra note 18, § 8.03-8.04.
51 See Appendix B infra.
52 FINAL REPORT, supra note 1, at 12.
53 Air Transportation Act, supra note 7, § 405(b)(6).
principal source of such offsets, which came almost entirely from life insurance and disability insurance plans.55

No corresponding innovation was announced in connection with the Dalkon Trust, which compensated for death and medical expenses without qualification.56 Yet the effect of any collateral offsets on payments made by the trust almost certainly would have been less than under the September 11th Fund. Use of the Dalkon Shield did result in death, but only in a very small percentage of cases.57 Consequently, most payments from collateral sources did not involve life, health, or disability insurance. Although of indeterminate size, these payments undoubtedly were far less than the billions of dollars of collateral offsets paid to claimants of the September 11th Fund. The means by which the Dalkon Trust compensated most plaintiffs further diminished the scope for operation of the collateral source rule. Claimants who selected Options 1 and 2 did not have to submit any independent evidence of loss. Instead, they received compensation either in a fixed amount determined in Option 1 or according to the schedule of benefits in Option 2.

Only under Option 3 were claimants required to submit evidence of financial loss, including lost wages and medical expenses.58 Both were treated with a degree of ambiguity. Wage losses were confined to those "lost by you," without any indication that wages already made up by disability payments could be recovered from the trust. Medical expenses, on the other hand, were divided into those paid by the claimants themselves and those covered by insurance plans or government programs, suggesting that both were compensable. The claim form under Option 3 did not explicitly advise claimants to include

55 See 29 C.F.R. § 104.47 (2004); Final Report, supra note 1, at 51-52.
56 Reorganization Plan, supra note 18, Plan Exhibit C ¶ G.2, Exhibit A.
57 A survey conducted in 1987 of claims resolved by settlement or judgment listed twenty-four claims for wrongful death of women or infants, out of a total of over 8,400 claims, resulting in an incidence of 0.3 percent of the claims surveyed. Even this small percentage is probably an overestimate since the survey examined only claims large enough to be litigated. Jay H. Glasser, Summary Fact Book and Estimation Methods for Pending Dalkon Shield Claims, Table of Resolved (Settled) Case Payments by JG Codes (Nov. 4, 1987). The incidence of wrongful death undoubtedly was reduced by the withdrawal of the device from the market in 1974 and the decision by the A.H. Robins Co. in 1984, after several large verdicts against it, to fund a program for removal of the device by women who continued to use it. See Disclosure Statement, supra note 4, at 16-17.
58 Dalkon Shield Claimants Trust Option 3 Full Review Claim Form 40 [hereinafter Option 3 Form 40].
all losses covered by collateral sources, but neither did it advise them that such losses were excluded. The claim form might have reduced the likelihood that such losses were claimed, but the trust never departed from the collateral source rule as a matter of policy. As the experience of the September 11th Fund revealed, even legislation departing from this accepted principle of tort law could still prove controversial when it was implemented. The Dalkon Trust and the district court, with considerably less authority than Congress, could not take this step.

These funds also exhibited differences in the treatment of pain and suffering, emotional distress, and other psychological injuries, but again, these differences are of uncertain significance. With respect to these forms of noneconomic loss, the September 11th Fund was, at least as a formal matter, more restrictive than the Dalkon Trust. Victims who suffered injuries (but not death) from terrorist attacks were eligible to recover only for "physical harm," but not psychological injury.\(^59\) The latter term, however, was construed far more narrowly than its ordinary meaning might suggest. Victims who suffered physical harm could recover pain and suffering and other noneconomic losses proportional to, but usually less than, those of the victims who died.\(^60\) Since recoveries on behalf of those who died included "pain, emotional suffering, loss of enjoyment of life, and mental anguish," the recoveries for physical injuries necessarily included some of the same elements. This was all the more likely because the special master established a presumption of $250,000 in noneconomic losses for those who died and applied a similar presumption in a reduced amount for those who were injured, depending on the severity of their injuries.\(^61\)

The Dalkon Trust did not exclude any form of injury or loss, specifically including "emotional injury" and "pain and suffering" among compensable injuries.\(^62\) Again, however, the method of compensation blurs many of the differences between this inclusive standard of recovery and the seemingly more restrictive standard applied by the September 11th Fund. The overriding similarity derives from the difference between administrative determination of damages, common to both funds, and determination in litigation with a right to jury trial. Both systems used presumptions and guidelines applied by trained staff.

\(^{59}\) See Air Transportation Act, supra note 7, § 405(c)(2)(A)(ii); 28 C.F.R. § 104.2(c) (2004).
\(^{60}\) 28 C.F.R. §§ 104.44, .46 (2004); see FINAL REPORT, supra note 1, at 40, 43.
\(^{61}\) See FINAL REPORT, supra note 1, at 40, 43.
\(^{62}\) Reorganization Plan, supra note 18, Plan Exhibit C ¶ G.2, Exhibit A.
members rather than legal standards applied by a jury of lay people impaneled only for a single case. In the Dalkon Trust, as noted earlier, recoveries under Options 1 and 2 were wholly determined by legal rules, and recoveries under Option 3 were determined based on evidence of physical injuries and medical treatment. Claimants were not invited to submit additional evidence of noneconomic loss, although the relevant claim form mentioned "emotional injury" and "pain and suffering" in a single list of compensable losses. The most plausible inference is not that these sources of loss went without compensation but that compensation was determined according to presumptions based on the severity of personal injuries, like those used in the September 11th Fund.

The pervasive reliance upon such presumptions represents perhaps the most fundamental departure from the ordinary standards of tort law in both the September 11th Fund and the Dalkon Trust. It follows directly from the basic reason for creating an alternative compensation system: to avoid the costs of litigation by using a standardized method of determining claims and making awards instead of an individualized assessment of legal liability and damages. Both funds sought to achieve this goal subject to the constraint that claimants could preserve their right to sue: victims of the terrorist attacks by not filing claims at all with the September 11th Fund, and those harmed by the Dalkon Shield by exhausting their remedies with the Dalkon Trust. The different timing of these decisions affected the structure and nature of the presumptions that each fund established, but did not alter the ultimate goal of providing an attractive alternative to the tort system, both collectively in saving the overall cost of litigation and individually in distributing those savings among the claimants themselves.

The Dalkon Trust most closely resembled the September 11th Fund in the schedule of recoveries available to claimants under Option 2. This schedule matched particular injuries with specific amounts of money. The presumptions established by the September 11th Fund had much the same effect. The fund applied a "presumed methodology" for determining the economic losses of victims who died in the attacks, taking account of factors such as income, benefits provided by employers, working life, growth rates, consumption, and a variety of adjustments. As noted earlier, a fixed sum of $250,000 was presumed as noneconomic loss, with an additional $100,000 presumed for spouses

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63 Option 3 Form 40, supra note 58, at 27.
64 Final Report, supra note 1, at 30-39.
and dependents.\textsuperscript{65} Under Option 2 of the Dalkon Trust, the amounts awarded were smaller by several orders of magnitude, ranging from $850 to $5,500 for users of the Dalkon Shield,\textsuperscript{66} which was one of the reasons that this option was chosen by relatively few claimants. Those who had weaker evidence could obtain a virtually automatic payment of $725 under Option 1 and those with only somewhat more evidence of larger losses could obtain a greater recovery under Option 3.\textsuperscript{67}

This difference in the scale and attractiveness of scheduled payments no doubt resulted from the exceptional generosity of Congress in fully funding the September 11th Fund. The Dalkon Trust, by contrast, was faced with the uncertainty early in its operations over whether the funding of the trust would be sufficient to compensate all claimants. This concern led to a provision in the reorganization plan authorizing the trust to "holdback" large awards until it was certain that all claimants could be compensated.\textsuperscript{68} Although the trust exercised this authority in only a handful of cases,\textsuperscript{69} the need for such authority reveals how significant the commitment of unlimited funding was to the operation of the September 11th Fund. Not only on this issue, but on a number of others, discussed more fully in the next part of this article, the latter fund could simplify the standards for making awards, erring on the side of generosity in order to forestall litigation.

Thus, the fund's reliance on exceptional factors generally, although not invariably, increased the awards for economic and noneconomic damages.\textsuperscript{70} To a significant extent, of course, this generosity was counterbalanced by the collateral offsets for payments that would not normally be subtracted from a tort award. Moreover, the qualified generosity of the fund proved to be insufficient to persuade 3 percent of the victims or their next-of-kin, apparently those with the most valuable

\textsuperscript{65} Id. at 40-41.
\textsuperscript{66} See DALKON SHIELD CLAIMANTS TRUST OPTION 2 LIMITED REVIEW CLAIM PAYMENT SCHEDULE FOR OPTION 2 CLAIMS.
\textsuperscript{67} Georgene M. Vairo, \textit{The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?}, 61 FORDHAM L. REV. 617, 654 n.135 (1992) [hereinafter Paradigm Lost (or Found)?]. Not surprisingly, given the approach that he later adopted in administering the September 11th Fund, Feinberg took the position that the selection of Option 2 by a large proportion of claimants was crucial to the success of the Dalkon Trust. Kenneth R. Feinberg, \textit{The Dalkon Shield Claimants Trust}, 53 LAW & CONTEMP. PROBS. 79, 111-12 (1990).
\textsuperscript{68} Reorganization Plan, supra note 18, Plan Exhibit C ¶G.3.
\textsuperscript{69} See In re A.H. Robins Co., 42 F.3d 870, 872-74 (4th Cir. 1994).
\textsuperscript{70} FINAL REPORT, supra note 1, at 36-39, 42-43.
tort claims, to waive their right to sue. More significant was the way in which congressional financing influenced the determination of awards. Under the September 11th Fund, these were made according to publicly announced presumptions which enabled claimants to make an informed choice to forego their right to sue. The fund even offered to make a preliminary calculation of the likely award for prospective claimants before they made the decision to file their claims. Individualized determinations were mainly focused on the calculation of economic and noneconomic loss, with departures from the announced presumptions reserved for exceptional cases, such as those involving victims with very high incomes (defined as those above the ninety-eighth percentile in the population).

The focus of individualized determinations in the Dalkon Trust was just the reverse, involving in-depth evaluation of claims under Option 3, rather than departures from the scheduled awards under Option 2. Such departures were simply not allowed under Option 2, leaving Option 3 as the only means for claimants to argue for a larger award based on their individual circumstances. Because claimants under Option 3 reserved the right to sue if they found the award offered by the trust to be inadequate, the evaluation of claims under this option had to approximate the value of claims in litigation. Presumptions no doubt entered into the formulation of the “best and final offers” made by the trust, but the evaluation process was complicated, requiring extensive training of the trust personnel involved in this process. Moreover, the entire method of evaluation remained confidential, unlike the schedule of payments under Option 2 or the presumptions used by the September 11th Fund. Otherwise, claimants and their attorneys could fine tune the evidence that they submitted in order to maximize their individual recovery from the trust, defeating any attempt at making uniform offers based on the predicted average recovery that claimants with similar injuries were likely to obtain in litigation. If the claimants knew how the offers were made, they could continually invoke special circumstances that would cause an upward departure from the average, resulting in a cumulative increase in awards that made the average itself creep upward to ever higher levels.

71 Id. at 80.
73 FINAL REPORT, supra note 1, at 8-9, 37.
The individualized determinations in Option 3 and the confidentiality in making those determinations were both driven by the right that claimants retained to go to court. Since they had not yet waived their right to sue, the offers made by the Dalkon Trust had to be sufficiently generous to prevent them from pursuing this alternative. Yet they could not be so generous that they resulted in a creeping increase in settlement offers that eventually would threaten the solvency of the trust. These competing goals could not be achieved simply by changing the substantive rules for valuing claims, but required procedural innovations as well, which are taken up in the next part of this article.

IV. PROCEDURAL INNOVATIONS: INDIVIDUAL CONSIDERATION WITHOUT INDIVIDUAL LITIGATION

Creating alternatives to the tort system, without entirely abandoning principles of corrective justice, requires a careful compromise between adhering to the values of individual representation in ordinary civil litigation and departing from ordinary procedural rules. The centralization of control in one administrator or judge, discussed in Part II, already represents a significant departure from the adversary system. The risk that this power might be abused requires the preservation of other procedural safeguards for individual claimants. A compensation system that neglects this issue in effect abandons any attempt to offer an alternative to the tort system. At best, it simply substitutes considerations of distributive justice, like those underlying the Social Security or welfare laws, for those of corrective justice. At worst, it results in an arbitrary allocation of payments with no discernible rationale, giving too much to some and not enough to others, with no one assured of getting what they deserve.

Procedural protections are necessary to avoid such a pessimistic outcome for two well-known reasons. First, individual participation is a value in and of itself; and second, it serves the instrumental purpose of assuring accurate application of the relevant substantive rules. Both of these reasons figured in the procedures devised by the September 11th Fund and the Dalkon Trust. The difficulty, of course, was not in finding procedures that would serve these goals. The procedures in ordinary litigation already do so. The challenge in each case was to devise procedures that could serve as credible substitutes for litigation without its attendant costs. Each fund offered a combination of outreach to
claimants, providing legal assistance to them, and offering hearings at varying levels of formality. The September 11th Fund could rely on somewhat less elaborate procedures because of its less complicated methods of determining eligibility and compensation. The Dalkon Trust relied more heavily on standard forms of alternative dispute resolution, such as arbitration.

The efforts to communicate with claimants went far beyond the issue of individual notice, which has proved to be central in most class actions.\(^\text{74}\) Just giving notice to claimants, whether at the outset of a case or as part of a settlement, may not give them enough information to make an informed decision about how to pursue their claims.\(^\text{75}\) Hence, both the September 11th Fund and the Dalkon Trust went to great lengths to assure that the notice and forms given to claimants were comprehensible to them, to hold public meetings with groups of claimants, and to keep them informed of ongoing developments.\(^\text{76}\) The same steps were taken, but at a higher level of sophistication, to advise attorneys representing claimants about how best to pursue their clients' claims. This issue turned out to be sensitive because assistance to some attorneys might have been construed as denial of assistance to others or to claimants who were entirely unrepresented. Both funds took care to assure equal treatment of all claimants, whether or not they were represented or by whom.\(^\text{77}\) The September 11th Fund relied on a network of attorneys who donated their time pro bono and who eventually represented most of the claimants before the fund.\(^\text{78}\) Both the fund and the Dalkon Trust also appointed individual case managers who contacted claimants to assure that their claims were filed in a timely and complete manner.\(^\text{79}\)

\(^{74}\) See Fed. R. Civ. P. 23(c)(2), (e)(1)(B), (e)(3).


\(^{76}\) Final Report, supra note 1, at 11-12, 14-15, 65; Paradigm Lost (or Found)?, supra note 67, at 640-41.

\(^{77}\) Final Report, supra note 1, at 11-12, 70-72; Paradigm Lost (or Found)?, supra note 67, at 637-39, 652-53 n.133.

\(^{78}\) Attorneys represented well over half of all claimants and 90 percent of those with death claims. Final Report, supra note 1, at 71.

\(^{79}\) See id. at 22, 71; Personal Contacts Enjoy Helping Claimants, Claims Resolution Report: A Newsletter of the Dalkon Shield Claimants Trust No. 7 (Dalkon Shield Claimants Trust, Richmond, Va.), August 1990, at 7; Mailings Sent to Inactive Claimants; Lack of Response May Mean Disallowance, Claims Resolution Report: A Newsletter of the Dalkon Shield Claimants Trust No. 14 (Dalkon Shield Claimants Trust, Richmond, Va.), June 1994, at 1-2; Trust Feels Crunch of Deadline;
Relieving claimants of the need to hire an attorney resulted in a significant gain in efficiency. Attorney's fees alone could consume over thirty percent of any award made to represented claimants who had entered into a contingent fee contract. The pro bono representation made available to claimants in the September 11th Fund therefore conferred a substantial benefit upon them in the form of reduced transaction costs. In the Dalkon Trust, many claimants had already retained attorneys and so were to pay attorney's fees out of any recovery from the trust. In a disputed decision, however, the district court unilaterally cut the contingent fees payable on the pro rata distribution to ten percent, on the ground no additional effort was necessary by the attorneys to assure that their claimants received these payments. More generally, the trust procedures were designed so that they could be pursued by claimants without the assistance of counsel.

Designing a compensation system so that claimants can represent themselves requires an unusual degree of communication with and assistance to claimants. It also requires safeguards against conflicts of interest in any advice given to the claimants by the fund itself. The principal such safeguard was the “nonreversionary” funding of both the September 11th Fund and the Dalkon Trust. Neither fund had any residual interest in any money that remained after the claimants were compensated, and so had no financial interest in minimizing the sum of total payouts. This structural feature of each fund did not eliminate conflicts of interests, but it did eliminate the directly opposed interests of the parties in ordinary tort litigation: the zero-sum competition in which the plaintiff wins exactly what the defendant loses. The interest of each fund was aligned with the collective interest of all claimants collectively who were eligible for compensation.

The principal procedural protection extended to claimants was providing them with clearly specified options and giving them the information necessary to make an informed among those options in pursuing their claims. In the September 11th Fund, this step mainly involved the choice, already discussed, between filing a claim with the fund or suing in tort. Within the fund itself, claimants could also choose between “Track A” and “Track B.” The former resulted in a presumed

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80 In re A. H. Robins, Bergstrom v. Dalkon Shield Claimants Trust, 86 F.3d 364, 375-77 (4th Cir. 1996). The author served as an attorney defending this ruling.

81 Final Report, supra note 1, at 15-17.
award within forty-five days, followed by a right to appeal and a hearing to determine whether "extraordinary circumstances" justified a higher award. The latter resulted in a hearing before any award was issued, but did not allow any right to appeal. The more elaborate procedures in Track B were chosen more frequently for death claims than for physical injury claims and more frequently by higher income plaintiffs for all kinds of claims. The crucial decision made by claimants was whether and how to challenge the application of the presumptions used by the fund, with more leeway to do so in the hearings under Track B.

Under the Dalkon Trust, the array of choices was more complex, involving a variety of alternatives to litigation made available to claimants under Option 3. Under Option 1 and 2, as noted earlier, claimants decided whether to accept a fixed sum designated by the trust in satisfaction of all claims arising from use of the Dalkon Shield. Under Option 3, claimants had to submit medical evidence of use, injury, and causation. From this evidence, the trust formulated its "best and final" offer. Claimants were induced to accept this offer for two reasons: first, as its name implies, it was non-negotiable; and second, the trust waived fewer and fewer defenses as the claim went on to arbitration or litigation. If the claimant did not immediately accept this offer, she faced three different choices: ADR (a form of expedited arbitration), full arbitration, or litigation. As the procedures became more elaborate and the potential recoveries greater, the trust waived fewer and fewer defenses, until, in litigation, it waived hardly any defenses at all. These graduated increases in the hurdles that claimants had to clear forced them to give careful consideration to the trust's settlement offer.

Over the history of the Dalkon Trust, ADR took a variety of different forms, but common to each was a limit on recoveries, eventually raised to twenty thousand dollars; limited discovery and informal evidentiary rules; and waiver of any defense based on the statute of limitations. In ADR, the trust was always represented by a non-lawyer and the claimant was essentially given an opportunity to be heard on her objections to the trust's settlement offer. Also, if the claimant had second thoughts, the trust's offer remained open until the day before the hearing.

In contrast to this expedited procedure, full arbitration and litigation were subject to several conditions precedent. The first was an in-depth review and settlement conference, in which the claimant could submit newly discovered evidence and the trust would then re-examine its offer.
In the usual case, in which an offer remained unchanged, a settlement conference was devoted primarily to explaining the strengths and weaknesses of the claimant’s case. A second condition precedent was certification that the claimant had exhausted the trust’s administrative procedures and so was no longer subject to the automatic stay under the Bankruptcy Code.\(^2\) Claimants who initially opted for arbitration or litigation were given several opportunities, before a final decision was reached, to select a less costly means of resolving their claims. If they thought their case was weak, they could simply return to Option 1 and the minimal payment available under it. Alternatively, they could seek reevaluation of their claim based on the additional evidence made available through discovery, but without any guarantee that they would receive a higher rather than a lower offer. When the last form of ADR became available, these claimants could also choose this alternative and receive a quicker and cheaper hearing on their claims. Still later, when it was apparent that a pro rata distribution would be made, they could accept the alternative of settling their claim with a seventy-five percent dividend over the trust’s original offer. In doing so, however, they waived any further rights to a pro rata distribution. All of these alternatives gave claimants incentives to avoid the costs and risks of full arbitration or litigation and, in the end, over eighty percent of claimants who had originally chosen these more elaborate procedures reconsidered and chose one of the simpler alternatives.\(^3\)

Full arbitration differed from litigation in the reduced delay and expense resulting from the uniform rules established for that procedure.\(^4\) Discovery was conducted under simplified procedures, more generous to claimants than most state discovery rules, and claims were subject to a uniform limitations period. By contrast, in litigation, the trust did not waive most of the defenses available to it and generally took a more aggressive position than in its own administrative proceedings in order to foster settlement. At each stage, the Dalkon Trust sought to mimic the results of litigation, by giving each claimant a


\(^4\) Amended Administrative Order No. 1 ¶ 12.
settlement offer based on the average recovery for similar claims, but at the same time, it also sought to avoid the cost of determining whether claimants deviated from the average and to discourage claimants from resorting to litigation of such issues.

This uneasy relationship between the tort system and alternatives to it also was reflected in the September 11th Fund. The fund went to great lengths to assure that claimants were given both an opportunity to be heard, through the hearings available under Track A or B, and that the offers made approximated what they could have recovered in litigation. Both steps assured claimants a degree of individualized treatment that served as a substitute for a "day in court." The legislation creating the fund also took several further steps to discourage litigation, imposing limits on the liability of air carriers, requiring all claims to be brought in a single federal court, and dictating the choice of substantive law. At the outset, claimants then had to face a choice between the compensation offered by the fund and the amounts that they would be likely to recover through litigation. In the Dalkon Trust, claimants who selected Option 3 faced this choice later in the process, when they decided whether to accept the settlement offered by the trust. They, too, received an opportunity to make their case in conferences and hearings with the trust and to contest its assessment of what they were likely to receive in litigation.

The constraints on the operation of the Dalkon Trust were, in some respects, stronger than those on the September 11th Fund. In the early stages of its operation, it was not certain whether it had received sufficient funding to fully compensate all claimants. Nor was there any assurance that the claimants who selected Option 3 would, in large part, accept the trust’s settlement offers or the alternatives that it provided to litigation. The trust faced a degree of uncertainty that required it to approximate the actual value of claims as closely as possible to avoid the risk, on the one hand, of being too generous and running out of money, or on the other, of not being generous enough and discouraging settlement. The need for a greater level of accuracy in settlement offers, designed to influence claimants later in the compensation process, prevented reliance upon presumptions to the same degree as in the

85 On the grounds of equal treatment among claimants, the trust excluded some factors that would have affected the value of claim in litigation, such as whether the claimant was represented by counsel and where the claim was likely to be brought.
86 FINAL REPORT, supra note 1, at 17, 81-82.
87 Air Transportation Act, supra note 7, § 408(a), (b).
September 11th Fund. Partly for that reason, the Dalkon Trust incurred greater expenses of administration, a topic taken up in the next part of this article.

V. RESULTS, TRANSACTION COSTS, AND ACCURACY

Both the September 11th Fund and the Dalkon Trust achieved a reduction in the transaction costs of distributing compensation to claimants that was little short of spectacular. The administrative expenses of the September 11th Fund, while considerable in absolute terms, were close to zero in relative terms, amounting to only 1.2 percent of the total awards to claimants.88 The operating expenses of the Dalkon Trust were also modest in relative terms, amounting to less than 6.9 percent of the amounts paid to claimants.89 Rarely has recovery by so many, in such large amounts, been accomplished with so little expended in administrative costs.

Even taking account of attorney’s fees, these results remain truly extraordinary. Claimants before the September 11th Fund incurred few, if any, attorney’s fees because legal assistance was made available to them pro bono.90 In the Dalkon Trust, the plaintiff’s bar generally followed the standard practice of charging contingent fees. For reasons discussed earlier, these fees were limited to ten percent on the pro rata distributions, which amounted to approximately half of all awards made by the trust. Moreover, a significant proportion of claimants were not represented by counsel, resulting in attorney’s fees of no less than twenty percent of the total amounts awarded. Thus of all the money that passed through the Dalkon Trust, no more than twenty-five percent was consumed in direct transaction costs, leaving claimants with a net recovery of over seventy-five percent of the amounts expended.91 These

88 Final Report, supra note 1, at 77. The total expenses were slightly less than eighty-seven million dollars.
89 As of June, 1991, the Trust’s administrative costs, amortized over all the claims paid, were four hundred dollars per claim. Paradigm Lost (or Found)?, supra note 67, at 656. As the Trust concentrated its efforts on the Option 3 claims requiring more extensive evaluation, its costs rose to $575 per claim by April 1995 and presumably still more thereafter. Transcript of Motion by Movants to Vacate Order Disallowing Unreasonable Attorney’s Fees on Pro Rata Distribution, at 83, In re A.H. Robins Co., (E.D. Va. No. 85-01307-R Apr. 27, 1995), in Joint Appendix at 225, In re A.H. Robins Co., Bergstrom v. Dalkon Shield Claimants Trust, 86 F.3d 364 (4th Cir. 1996).
90 Final Report, supra note 1, at 70-72.
91 This calculation is based on $2.9 billion of distributions by the trust and $210 million of administrative expenses for the trust. It assumes that seventy percent of the
figures necessarily are only approximate and do not count expenditures in the reorganization case (apart from those compensated by contingent fees) and the indirect costs of litigation (such as the operating expenses of the district court). Even so, the net recovery of claimants from the Dalkon Trust was far in excess of the amounts received by plaintiffs under the tort system, which is usually estimated at less than half of total expenditures.92

The performance of each fund, however, cannot be measured solely in terms of outcome. On the positive side, both funds provided a large number of claimants with a recovery as promptly as possible, in many cases after an individual hearing. In this respect, again, the performance of the September 11th Fund was phenomenal. Within three years of the terrorist attacks, the fund distributed over seven billion dollars in compensation to the victims of the attacks or their survivors, a total of nearly 5,600 individuals who were either killed or suffered physical injury.93 While it was in operation, the fund received more than 7,400 claims and held almost four thousand individual hearings.94 The average

distributions went to claimants represented by attorneys, who charged an average contingent fee of forty percent on half of the money their clients received and ten percent on the other half, resulting in total attorney’s fees of $508 million. Administrative expenses and attorney’s fees together therefore amount to twenty-three percent of total expenditures.

92 Before the reorganization proceedings in the A.H. Robins case, approximately thirty-seven percent of the amounts paid by A.H. Robins actually went to Dalkon Shield claimants. The remainder went to attorneys and experts. Sobol, supra note 5, at 142. This figure is consistent with empirical studies that have concluded that the cost of resolving products liability claims through ordinary processes of litigation and settlement consumes more than the compensation eventually received by successful plaintiffs. James S. Kakalik, Patricia A. Ebener, William L.R. Fesltnser, Michael G. Shanley, Costs of Asbestos Litigation 39-40, tbl.6.2 (1983) (finding that plaintiffs received thirty-seven percent of funds expended in early stages of asbestos litigation); James S. Kakalik, Elizabeth M. King, Michael Traynor, Patricia A. Ebener, Larry Picus, Costs and Compensation Paid in Aviation Accident Litigation 94-95, fig. #6.4 (1988) (plaintiffs received half of funds expended in tort litigation generally, but seventy-one percent in aviation torts); Lester Brickman, Michael J. Horowitz & Jeffrey O’Connell, Rethinking Contingent Fees: A Proposal to Align the Contingency Fee System with Its Policy Roots and Ethical Mandates 13 (1994); Sebastian Mallaby, The Trouble With Torts, The Wash. Post, Jan. 10, 2005, at A17 (summarizing study showing that less than half of expenditures in tort system go to plaintiffs).

93 Final Report, supra note 1, at 83. See Appendix A infra.

94 Id. at 111.
award in death claims was just over two million dollars, and in physical injury claims it was almost $400,000.95

The Dalkon Trust operated over a much longer period and considered many more claims, but distributed less than half as much money as the September 11th Fund. The events that led to the creation of the fund unfolded over a much longer time period. Over a decade elapsed between the introduction of this device in 1970, its withdrawal from the market in 1974, and the eventual decision of the A.H. Robins Co. in 1984 to recommend its removal from women who continued to use it. A year later, the company filed the reorganization case and the reorganization plan, creating the Dalkon Trust, became final only in 1989. The trust itself operated from 1988 through 2000, with all but two claims resolved by that time. During this period, the trust received over 400,000 claims and resolved over 200,000 of them on the merits, paying out almost three billion dollars to claimants.96

By far the largest number of these claims were resolved under Option 1, almost 130,000, with minimal payments to users of $725. Another 15,800 claims were resolved under Option 2. All of these claims resulted in offers within ten days after sufficient documentation had been received by the Trust.97 The forty-three thousand claims resolved under Option 3 presented the most complex issues and took far longer to process. Claimants could assure themselves some degree of priority by early submission of their claims and supporting evidence. They could also, of course, receive payment immediately upon acceptance of trust’s “best and final” offer of settlement. The alternative of ADR added an average wait initially of six months (although this period grew longer as more claimants chose this alternative); full-scale arbitration eighteen months; and litigation two years. By the end of 1997, however, well over ninety-nine percent of the claims filed with the Dalkon Trust had been resolved.

The added delay from more elaborate procedures comes as no surprise. What is surprising is that eighty-four percent of Option 3

95 See id. at 110; Appendix A infra.
96 See Appendix B infra; Disclosure Statement, supra note 4, at 16. The Option 5 figures refer to claims withdrawn by claimants for a nominal payment of twenty-five dollars in order to obtain a binding release. Of the original 400,000 claims, 200,000 were rejected as duplicates or as void for other reasons.
claimants accepted the trust’s settlement offer. Within this group, the claimants who decided to represent themselves ultimately did better in the settlement process than those represented by counsel. Option 3 settlement offers to represented claimants averaged $39,047.98. Taking away a contingent fee of at least thirty percent, these claimants recovered significantly less than unrepresented claimants, who received an average of $31,300 not reduced by any fees. Of the remaining claimants, those who chose the more complex procedures, received a larger average award but ran a greater risk of receiving nothing at all. Claimants who chose ADR received an average award of $7,800; those who chose full arbitration received an average award of $24,800; and those who chose litigation received an average award of $63,100. All of these sums were several times larger than the average settlement offered to claimants who selected each of these procedures. This multiple was further enhanced for those claimants who selected full arbitration or litigation and who received any kind of recovery. Claimants who chose full arbitration or litigation essentially accepted the gamble, common in personal injury litigation, of seeking a much larger recovery at the risk of receiving nothing. This choice could fairly be left to individual claimants, usually with the assistance of counsel, but only a tiny percentage of claimants made this choice. The vast majority, over

99 See Appendix B infra. These figures exclude pro rata distributions which effectively doubled the awards in ADR and full arbitration and added about a third to awards in litigation.
100 Those who chose ADR had been offered an average of $1,600. Alternative Dispute Resolution (ADR) Results (as of December 31, 1997) (compilation of trust data on file with the author). Those who chose full arbitration or litigation received an average award of $36,100, while they had been offered an average of $17,600. Litigation and Arbitration Results (as of May 15, 1998) (compilation of trust data on file with the author).

As this last table reveals, less than a third of claimants who selected litigation or full arbitration received any recovery at all. Thus the average award among those who recovered anything was nearly triple the average computed over all claimants, successful and unsuccessful alike. Id. This finding is confirmed by the fact that many of the claims that reached full arbitration or litigation were ultimately resolved by other means. By the end of 1999, when all but two cases had been finally decided, over eighty percent of the cases in full arbitration or litigation had been resolved through alternatives such as ADR or payments under Option 1. DALKON SHIELD CLAIMANTS TRUST, FINANCIAL STATEMENTS FOR THE YEARS ENDED DECEMBER 31, 1999 AND 1998 AND INDEPENDENT AUDITORS’ REPORT at 9 & n.1. The resolution of claims by these means suggests that they were either quite weak or supported only a small recovery.
99.9 percent, found the alternative procedures devised by the trust to be superior to the risks and costs typical of litigation.

The overall figures on resolution of claims by both the September 11th Fund and the Dalkon Trust are truly extraordinary, but they do not reveal very much about another important, but elusive, measure of success: the costs of errors made in compensating the wrong claimants or in the wrong amounts. These error costs are subject to both theoretical and empirical uncertainty. In theory, the question is to what extent departures from the tort system should be taken into account in determining who should recover and in what amount. In practice, the problem is determining what the right awards to the right recipients should be, independently of creating a competing compensation system.

Accepting the presumptive approach of the September 11th Fund, there is little reason to think that it made mistakes in determining eligibility. The number of those killed and physically injured by the terrorist attacks was known independently of the fund’s own procedures. A few instances of fraud were detected and prosecuted, and for death claims, elaborate precautions were taken to assure that the proper representative under state law actually received the award. With respect to physical injury claims, the main risk of error arose from not compensating individuals who suffered harm outside the seventy-two-hour period for receiving treatment. The large number of respiratory claims filed with the fund, over fifty percent of all physical injury claims, suggests that the latent effects of breathing dust and toxic chemicals might have been significant. Just as the presumption of causation used by the fund ruled out these claims, its presumptive approach to calculating awards for eligible claimants ruled out many issues that otherwise would have been raised in ordinary tort litigation. The combination of generous presumptive awards, reduced by payments from collateral sources, reflects a policy of full compensation to those most seriously harmed by the terrorist attacks, taking account of all the sources available to them. Those with less apparent injuries were not eligible for relief and those who were eligible had to rely on all available sources of relief, including payments from collateral sources.

The Dalkon Trust followed the same basic policy, but spread over a longer period of time and a larger number of claimants. Approximately

101 Final Report, supra note 1, at 56-64, 69.
102 Id. at 56.
4.5 million Dalkon Shields were manufactured, with an estimated 2.2 million actually used in this country and 1.4 million used abroad. The 200,000 claims resolved on the merits by the Dalkon Trust represent less than six percent of all users of this device. Extensive efforts, both here and abroad, to publicize the procedures and deadlines for filing claims resulted in only a very low response rate. Moreover, of the claims filed with the trust and resolved on the merits, almost two-thirds were resolved with the small payment under Option 1. Contradictory inferences can be drawn from this low incidence of serious claims. The optimistic inference is that the Dalkon Shield actually caused problems in only a very small percentage of cases and it was the relaxed standards for proving causation that led to the recoveries of many claimants. Some support for this inference comes from the problems that the trust encountered with fraudulent claims, many of which were filed from overseas. The number of such claims, which ultimately reached into the thousands, suggests that the threshold for recovery might have been set too low. The pessimistic inference is that potential claimants could not identify the Dalkon Shield as the cause of their injuries, or if they could, they did not have the resources available to file a claim. The confounding influence of other causes cannot be sorted out in the absence of detailed epidemiological studies. Reproductive disorders associated with use of the Dalkon Shield might have been caused by this device, and even if they occurred independently, might have aggravated by it. The basic judgment, as with the September 11th Fund, was that the most obvious and potentially serious conditions, compensated under Options 2 and 3, were the most deserving. Claimants who recovered under these options also received the equivalent of double compensation through the pro rata distribution in lieu of punitive damages. Nevertheless, the risk that many victims went completely uncompensated must have been greater under the Dalkon Trust than under the September 11th Fund. The harm caused by the terrorist attacks, and the resulting publicity, were far more concentrated and pervasive than anything associated with the Dalkon Shield.

103 Disclosure Statement, supra note 4, at 16.
104 Id. at 19.
105 See Appendix B infra.
Within such constraints, imposed by the situation confronted by each of these funds, any departure from the tort model of individualized determinations of liability would have raised similar issues of undercompensation and overcompensation. This problem can neither be defined away, by assuming that each fund adopted the correct presumptions for making awards, or assumed to be intractable, because neither fund purported to do individual justice. Of course, the tort system, although it holds out the promise of individual justice, does not realize it. The fact that plaintiffs receive less than half the money expended in the system—and frequently nothing at all—demonstrates the need for alternative methods of compensation.

VI. CONCLUSION

Richard Sobol, a leading critic of the Dalkon Trust, framed the standard for its success in these terms: “In the final analysis, what is most important to women injured by the Dalkon Shield about Judge Merhige’s administration of the Robins bankruptcy and of the claimants’ trust is the result: whether they will be compensated, how long it will take, and how much they will be paid.”\textsuperscript{107} The same standard could be applied to the September 11th Fund and the work of Special Master Feinberg. By this measure, both funds succeeded spectacularly in achieving what they were designed to do: to compensate all identifiable claimants as fully, fairly, and expeditiously as possible. While each involved many decisions that were hotly disputed—and remain so to this day—each also achieved results that could scarcely be improved on. Within three years, the September 11th Fund determined ninety-seven percent of all claims for wrongful death and physical injury arising out of the terrorist attacks. And within twelve years, the Dalkon Trust determined more than 99.5 percent of the claims submitted to it without litigation. Under the conditions that made them necessary, and subject to the rules that brought them into existence, these funds achieved the standards for compensation that had been set for them. This represents unprecedented success in the history of mass tort claims.

The continuing criticism of these funds has less to do with the results they achieved than with the procedures used to achieve them. This criticism, too, must go beyond simple dissatisfaction with any deviation from the ordinary rules of adversarial justice. The whole point

\textsuperscript{107} Sobol, \textit{supra} note 5, at 339.
of establishing an alternative system of compensation is to avoid the costs—especially the strategic behavior of parties and their attorneys—involved in individual litigation. Both funds used the same basic device to avoid these costs: to centralize control in the hands of a special master or district judge. The choice of centralized control places great stress on who exercises that control.\textsuperscript{108} In Special Master Feinberg and District Judge Merhige, both funds were fortunate in finding extremely capable administrators with discerning judgment about the issues central to the success of each fund. The former was named “lawyer of the year” for his efforts and the latter had established his reputation in courageous decisions to desegregate the Richmond public schools at a time when such efforts often met with violent resistance.\textsuperscript{109} Future compensation funds might not be so fortunate. Giving plenary power to a single decision-maker, as Congress did in establishing the September 11th Fund, eliminates many of the checks on mistaken use of that power. The model of the Dalkon Trust, in which the district court remained subject to the ordinary procedures for hearings and appellate review under the bankruptcy laws, furnishes a more cautious precedent. It also furnishes a precedent that does not depend upon the unique circumstances of a great national tragedy that led to extraordinary legislation and an outpouring of sympathy, concern, and support. In those circumstances, public sentiment alone worked as a significant check on the decisions of the special master. Compensation for mass torts cannot, in general, depend upon a high degree of continued public scrutiny and interest.\textsuperscript{110} In the Dalkon Trust, if the claimants and their attorneys objected on many more occasions, it was because they had far more opportunities to do so long after the case had ceased to attract headlines.

A more general, and more skeptical, reaction is that both the September 11th Fund and the Dalkon Trust operated in circumstances that virtually assured their success. Both received adequate funding, in the one case through an open-ended commitment by Congress and in the other by the sale of a highly profitable company. Both involved claims in which some form of “global peace” could be attempted, involving

\textsuperscript{109} David Hechler, Lawyer of the Year, Kenneth Feinberg: Conquering the Challenge, 26 Nat’l L.J. 20 (Dec. 20, 2004); Sobol, supra note 5, at 25-29.
\textsuperscript{110} This is not to say that the Dalkon Trust remained free of criticism. Several books expressed deep suspicion of Judge Merhige’s supervision of the reorganization case and the trust. Sobol, supra note 5, at 326-39; Karen M. Hicks, Surviving the Dalkon Shield IUD: Women v. The Pharmaceutical Industry 6-11 (1994).
either discrete events or a product manufactured by a single company. The injuries in both cases were manifest after a definite period of time, almost immediately in the terrorist attacks and over a period of just a few years from the Dalkon Shield. In both cases, the resulting injuries were of limited kinds and became apparent without long latency periods. These compensation funds might both have operated under fortunate conditions, if such terms can be used at all to characterize events that resulted in such tragic misfortune. Nevertheless, these funds also demanded strenuous efforts from the judges, administrators, lawyers, and employees who made them work. At many points, the ultimate goal of compensating claimants could have been lost in the quagmire of individualized adjudication and litigation. The public officials and private individuals responsible for the operation of both funds seized the opportunities that the circumstances presented to them to achieve a truly remarkable success, not for themselves, but for the claimants who came before them. This study has sought to outline the means by which they did so and the magnitude of what they achieved.
Appendix A

Disposition of Claims by the September 11th Fund

<table>
<thead>
<tr>
<th>GENERAL AWARD STATISTICS FOR DECEASED VICTIMS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claim Data for Deceased Victims</td>
</tr>
<tr>
<td>Number of Claims Received</td>
</tr>
<tr>
<td>Number of Claims Denied/Withdrawn/Abandoned</td>
</tr>
<tr>
<td>Total Claims with Awards Issued</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Award Details - Eligible Deceased Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total All Claims with Awards Issued</td>
</tr>
<tr>
<td>Track A</td>
</tr>
<tr>
<td>Track B</td>
</tr>
<tr>
<td>Total Awards Issued</td>
</tr>
<tr>
<td>Total Amount Awarded</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Claim Details</th>
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</thead>
<tbody>
<tr>
<td>Average Award</td>
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<tr>
<td>Median Award</td>
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<tr>
<td>Maximum Award</td>
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<tr>
<td>Minimum Award</td>
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<tr>
<td>Minimum Offset</td>
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<tr>
<td>Maximum Offset</td>
</tr>
<tr>
<td>Average Offset</td>
</tr>
<tr>
<td>Median Offset</td>
</tr>
<tr>
<td>Total Economic &amp; Non-Economic Awards Before Offsets</td>
</tr>
<tr>
<td>Total Offsets (All Claims)</td>
</tr>
<tr>
<td>Claims with Advance Benefits (216 Claims)</td>
</tr>
<tr>
<td>Claimants Receiving Structures (In Whole or In Part) (178 Claims)</td>
</tr>
</tbody>
</table>
### GENERAL AWARD STATISTICS FOR PHYSICAL INJURY VICTIMS

<table>
<thead>
<tr>
<th>Claim Data for Physical Injury Victims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Claims Received</td>
</tr>
<tr>
<td>Number of Claims Denied/Withdrawn/Abandoned</td>
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<tr>
<td>Total Claims with Awards Issued</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Award Details - Eligible Physical Injury Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total All Claims with Awards Issued</td>
</tr>
<tr>
<td>Track A 89%</td>
</tr>
<tr>
<td>Track B 11%</td>
</tr>
<tr>
<td>Total Amount Awarded</td>
</tr>
<tr>
<td>Average Award</td>
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<tr>
<td>Median Award</td>
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<td>Maximum Award</td>
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<td>Minimum Offset</td>
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<tr>
<td>Maximum Offset</td>
</tr>
<tr>
<td>Average Offset</td>
</tr>
<tr>
<td>Median Offset</td>
</tr>
</tbody>
</table>

- Total Economic & Non-Economic Awards Before Offsets: $1,503,401,607.83
- Total Offsets (All Claims): $450,247,073.27
- Claims with Advance Benefits (20 Claims): $500,000.00
- Claimants Receiving Structures (In Whole or In Part) (3 Claims): $8,986,571.00
### Appendix B

**Disposition of Claims by the Dalkon Trust as of April 15, 2000**

<table>
<thead>
<tr>
<th></th>
<th>TOTAL CLAIMS</th>
<th>SETTLEMENTS OR AWARDS PAID</th>
<th>AVERAGE SETTLEMENT OR AWARD</th>
<th>TOTAL PRO RATA PAYMENTS</th>
<th>AVERAGE PRO RATA PAYMENT</th>
<th>TOTAL PAID</th>
<th>AVERAGE PAYMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Option 5 (withdrawn for payment)</strong></td>
<td>2293</td>
<td>$57,325.00</td>
<td>$25.00</td>
<td>$57,325.00</td>
<td>$25.00</td>
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<td></td>
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<tr>
<td><strong>Option 1</strong></td>
<td>129589</td>
<td>$84,981,590.00</td>
<td>$655.78</td>
<td>$84,981,590.00</td>
<td>$655.78</td>
<td></td>
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</tr>
<tr>
<td><strong>Option 2</strong></td>
<td>15793</td>
<td>$49,429,762.50</td>
<td>$3,129.85</td>
<td>$48,508,546.40</td>
<td>$3,071.52</td>
<td>$97,938,308.90</td>
<td>$6,201.37</td>
</tr>
</tbody>
</table>

**Option 3**

(a) settlements 37699 $1,364,675,413.39 $36,199.25 $1,280,876,370.70 $33,976.40 $2,645,551,784.09 $70,175.65

(b) ADR 5207 $40,602,951.45 $7,797.76 $41,096,167.26 $7,892.48 $81,699,118.71 $15,690.24

(c) arbitration 130 $3,226,290.34 $24,833.00 $2,336,957.19 $17,991.98 $5,567,247.53 $42,924.98

(d) litigation 89 $5,619,545.08 $63,140.96 $2,074,326.96 $23,307.07 $7,693,874.04 $86,448.03

Late claims paid by insurance trusts 11110 $62,136.04 $5.60 $45,214,813.31 $4,073.34 $45,316,949.35 $4,078.94

Voided, duplicate, or otherwise not paid by Trust 200801

**Total:** 402411 $1,548,786,407.45 $1,420,249,183.82 $2,968,935,591.27