



Posted April 15, 2014

Sept. 11, BP Oil Spill Fund-Master Kenneth Feinberg: Compensation Fills Need in Wake of Mass Catastrophes



Kenneth Feinberg delivered a speech on "Unconventional Responses to Unique Catastrophes" to mark being named the 2014 Thomas Jefferson Foundation Medal in Law recipient.

As one of the nation's leading experts in alternative dispute resolution and administrator for funds for victims of the Sept. 11 terrorist attacks, the BP oil spill, and the Boston marathon bombings, among others, Kenneth Feinberg has helped decide who gets billions in compensation. But perhaps the most challenging part of his role is handling the fragile emotions of victims and their families, Feinberg said Friday in a talk at the University of Virginia School of Law.

"What I do, as you guys know, is not rocket science," he said. "It doesn't require a special expertise, it really doesn't. You better brace yourself emotionally and you better think about 'rough justice.'"

Feinberg, who was in town to receive the 2014 Thomas Jefferson Foundation Medal in Law, delivered a speech on "Unconventional Responses to Unique Catastrophes" to mark the occasion. Sponsored jointly by UVA and the Thomas Jefferson Foundation, the nonprofit organization that owns and operates Monticello, the Thomas Jefferson Foundation Medals are awarded each year to recognize the achievements of those who embrace endeavors in which Jefferson, author of the Declaration of Independence and the third U.S. president, excelled and held in high regard, including law, architecture and leadership.

As the special master of the federal Sept. 11 Victim Compensation Fund of 2001, Feinberg worked pro bono to evaluate 7,400 claims and paid out \$7 billion in awards. He has also served as fund administrator for the Hokie Spirit Memorial Fund, which gave out \$8 million to victims of the 2007 Virginia Tech shootings, and he advised the Newtown-Sandy Hook Community Foundation, which distributed \$7.7 million to victims of the December 2012 elementary school shooting in Connecticut.

"His role frequently requires assigning a dollar value to human life, but his compassion, fairness and

willingness to listen make that process not actuarial, but humane," said Dean Paul G. Mahoney during his introduction.



In his talk, Feinberg described the two kinds of funds he has managed.

Government-sanctioned funds, like those set up in the wake of Sept. 11 attacks or BP's Deepwater Horizon oil spill in the Gulf of Mexico in 2010, serve as alternatives to the tort system and have two purposes: both to help victims of the disasters and to avert a flood of potential lawsuits that would tie up the courts for years.

Charitable funds created through donations, like the \$60 million One Fund to help victims of the Boston marathon bombing, are concerned only with helping victims, and typically place no restrictions on payment recipients to prevent lawsuits.

Feinberg said how he managed the funds depended on several factors, including the amount of money he has to distribute (with Sept. 11, he had a blank check), determining who is eligible and what proof is required to show a claim for funds is valid. Among the 1.2 million claims in the case of BP, 200 came from Virginia.

"You build it, they will come. I didn't know oil the oil got up this far," he said, adding that only a few such claims were deemed valid in the end. "The integrity of the programs require[s] proof, otherwise \$20 billion in the gulf, it might as well be \$200 billion, [it] wouldn't be enough."

For funds designed in part to forestall lawsuits, Feinberg said he hewed to principles set up by the tort system, such compensating victims based on their economic losses, whereas with charitable funds donated by the public, and not set up by policymakers or a company, "you have much more flexibility."

Feinberg said people who are compensated by charitable funds typically choose not to sue, even though they have not signed a release promising as much.

"Why don't people take that money, hire a lawyer and litigate?" he asked. One reason, he later surmised, was that the process of receiving the funds allowed victims to tell their story to the fund administrator, or talk about loved ones who have died. "And they can't get that in the legal system."

When he was working on the Sept. 11 fund, his office was filled with memorabilia —ribbons, videos and audio of loved ones who died.

"They want to vent, they want to explain, they want to commiserate, they want empathy, they want understanding. They want certainty. And you do, that's part of it.

"My law degree in most of these programs is a wash — doesn't help — a divinity degree would help, or a degree in psychology would help. You're dealing with very vulnerable people. And when you take on

these assignments, brace yourself.... You will never, ever hear a claimant come to me and say thank you, or show appreciation, or gratitude, nor do you expect it."

Feinberg recalled a mother of two young children whose firefighter husband died on Sept. 11. At her first hearing, she demanded payment from the fund within 30 days because she herself only had weeks to live due to a terminal cancer diagnosis.

"The aspect of these programs that's the most problematic, whether it's an alternative to tort or not, is the emotional part of dealing with individual claimants," he said.

Being administrator of such funds also requires answering tough questions about why some – such as victims of the Oklahoma terrorist bombing – were ineligible for compensation. Despite these concerns, Feinberg concluded that the Sept. 11 fund was fair.

"I will defend that fund as sound public policy to my dying day," he said. "But don't ever do it again."

The American people "wanted to demonstrate their empathy and collective community with the victims."

And they did, with an average payout of \$2 million per death claim. "I think it is the right thing to do, but it is a very, very close question.

"The 9/11 fund is better studied in a history class rather than in a law school class," he said. Such funds "are aberrations, they are exceptions to the general way we resolve disputes or tragedies in this country. One should not view what I do as the wave of the future."

Feinberg praised the tort system for being able to handle claims outside of such extraordinary tragedies. He said he suspected funds for catastrophes were set up because the Supreme Court is increasingly frowning upon class-action lawsuits, causing policymakers to think outside of the box.

"I think the tort system works pretty well in this country," he said. "I don't think the tort system works pretty well when it comes to mass catastrophe. I think the system is ill-equipped to deal with aggregative claims."

Feinberg, who has taught as an adjunct professor at UVA Law in the past, also praised the "fabulous students here at UVA" and said he hoped to return to teach in the future.