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### *ESSAY*

#### COMPENSATING THE VICTIMS OF CATASTROPHE: THE VIRGINIA TECH VICTIMS ASSISTANCE PROGRAM

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**I**N the wake of the April 16, 2007 shootings at Virginia Tech, which claimed the lives of thirty-two victims and injured scores of faculty and students, the Virginia Tech School Administration announced the creation of “The Hokie Spirit Memorial Fund.”<sup>1</sup> This Fund of approximately \$7.5 million—the result of unsolicited private donations from some 20,000 individuals around the globe—will be distributed to the victims and their families pursuant to a proposed Victims Assistance Program Protocol, which delineates the terms and conditions of victim eligibility and levels of compensation.<sup>2</sup> The program stands in sharp contrast to its well publicized predecessor, The Federal September 11th Victim Compensation Fund of 2001, enacted into law by Congress eleven days after the 9/11 terrorist attacks on the World Trade Center and the Penta-

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<sup>1</sup> See Maria Glod, Administrator of 9/11 Fund to Direct Va. Tech Donations, Wash. Post, July 6, 2007, at B1; Ian Urbina, Sept. 11 Compensation Chief to Oversee Virginia Tech Payouts, N.Y. Times, July 6, 2007, at A10.

<sup>2</sup> Virginia Tech Victim Assistance Program Final Protocol, August 15, 2007, available at <http://www.virginialawreview.org/inbrief/2007/08/27/protocol.pdf>.

gon.<sup>3</sup> Although the differences in the two Funds vastly outweigh any similarities, there are important lessons to be drawn in contrasting the two compensation regimes. And in two critically important respects—the need for transparency in publicizing the programs, and providing eligible claimants procedural due process and the opportunity to be heard—the contrasting programs actually track one another.

At first glance, there are few similarities in comparing the two programs. True, the April 16 and September 11 attacks both resulted in traumatic deaths, physical injuries, and mental trauma. And both fueled public expressions of grief, anger, and frustration by the families of the dead as well as the wounded; the emotions surrounding the two incidents fostered a climate in which any discussion of reasonable compensation was guaranteed to receive a hostile reception. The drafters of “The Hokie Spirit Memorial Fund” quickly learned a pivotal lesson from those who designed and administered the 9/11 Fund: emotion often trumps efforts at providing prompt compensation to eligible claimants.

But it is the differences, rather than the similarities, which highlight any attempt to compare the two Funds.

First is the difference in the *source* of the two Funds. The Hokie Fund is a purely privately funded program, the result of private donor contributions ranging from a few dollars to approximately \$1 million.<sup>4</sup> No additional contributions were received from the University (which is part of the Commonwealth of Virginia’s university system). In contrast, the 9/11 Fund was a publicly funded program established by Congress without any private contributions from the airlines, the World Trade Center, or other potential defendant tortfeasors.<sup>5</sup> The Hokie Fund currently consists of approximately \$7.5 million, amounts received by the University from private donors up to and including August 15, 2007; the 9/11 Fund had no liquidated fixed amount of any type, nor were there any funds appropriated by Congress for distribution to eligible claimants. Instead, the Special Master of the 9/11 Fund was simply authorized to spend whatever he deemed necessary in order to implement the statutory

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<sup>3</sup> Air Transportation Safety and System Stabilization Act, tit. IV, Pub. L. No. 107-42, 115 Stat. 230, 237 (Sept. 22, 2001) (codified as amended at 28 C.F.R. § 104 (2002)).

<sup>4</sup> See Glod, *supra* note 1, at B1.

<sup>5</sup> See Air Transportation Safety and System Stabilization Act, *supra* note 3.

mandate. Ultimately, the 9/11 Fund distributed over \$7 billion to some 5,300 eligible claimants;<sup>6</sup> it is expected that the Hokie Fund will authorize payment of the \$7.5 million to fewer than 150 families and individuals who suffered death and injuries on April 16. (The Fund will remain open until December 31, 2007, to receive any additional contributions, which will then be distributed to eligible claimants on the same basis as the existing funds.)

There is also a second critical distinction involved in the establishment of the two programs. The 9/11 Fund required all eligible claimants, as a condition of participating in the Fund, to waive their right to litigate against any and all potential domestic tortfeasors (for example, the airlines, World Trade Center, Port Authority of New York and New Jersey, Mass Port, the airline security guard companies, the manufacturers of the airplanes involved in the attacks, etc.).<sup>7</sup> An express purpose of Congress in establishing the 9/11 Fund was to divert claimants out of the civil justice system and into a legislatively created, no-fault administrative compensation scheme. The Hokie Fund has no such requirement; because the fund is the result of purely private donations, no terms and conditions pertaining to access to the courts accompany claimant eligibility. Eligible families and victims can participate without waiving their right to sue Virginia Tech or any other potential defendant.<sup>8</sup>

There are also critical differences between the two Funds when it comes to the rules governing *distribution* of Fund proceeds. The 9/11 Fund was a unique hybrid of both tort and workers compensation no-fault principles.<sup>9</sup> The Fund's Special Master was required by statute to calculate economic loss, pain and suffering, and emotional distress in processing each individual application, a clear reference to basic tort law. At the same time, however, the law required him to deduct collateral sources of income from his final calculations (clearly not a tort concept). In sum, one size did not fit

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<sup>6</sup> See Kenneth R. Feinberg et al., Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, at 109 tbl. 11 (2004), available at [http://www.usdoj.gov/final\\_report.pdf](http://www.usdoj.gov/final_report.pdf) [hereinafter Final Report].

<sup>7</sup> Air Transportation Safety and System Stabilization Act, supra note 3, at § 405.

<sup>8</sup> See Virginia Tech Victim Assistance Program Final Protocol, supra note 2.

<sup>9</sup> See Robert L. Rabin, September 11 Through The Prism of Victim Compensation, 106 Colum. L. Rev. 464 (2006); Kenneth R. Feinberg, Response To Robert L. Rabin, September 11 Through The Prism Of Victim Compensation, 106 Colum. L. Rev. 483 (2006).

all; each eligible claimant received a different amount of 9/11 Fund compensation. And the Special Master had wide-ranging discretion to adjust final awards as he deemed appropriate.

This is not the case with the Hokie Spirit Memorial Fund. Distancing itself far from the tort principles that guide access to our civil justice system, the Fund avoids the practical and philosophical problems associated with individual calculations. Instead, it calls for flat payments of \$180,000 to each of the thirty-two families who lost a loved one on April 16.<sup>10</sup> There is no attempt to make value distinctions among the dead. And, although there are varying payments when it comes to the approximately thirty individuals who were physically injured on April 16, these payments are tied directly to the number of days of hospitalization required by the injured. Hospitalization becomes an objective measure of payment—students and faculty hospitalized for more than three days but fewer than ten days receive a flat payment of \$40,000, plus free tuition; the two students hospitalized for more than ten days receive \$90,000 each and free tuition. The Fund Administrator has no discretion to vary this payment schedule.<sup>11</sup>

The two Funds also differ when it comes to eligibility for psychological trauma without accompanying traumatic physical injury. The 9/11 Fund made all such claimants ineligible; the Special Master did not compensate for mental trauma without accompanying physical injury. The Hokie Fund takes a different tack when it comes to the approximately thirty-five faculty and students who were in Norris Hall, the scene of the shootings, on April 16 but managed through luck or good fortune to escape death or physical injury. These claimants are eligible to receive free tuition at Virginia Tech until they successfully complete their planned study or (at the claimant's sole discretion) \$10,000, the cash equivalent of a year's in-state tuition.<sup>12</sup> All other campus observers of the tragedy who now claim psychological trauma, but who were not physically in Norris Hall on April 16, will receive free psychological counseling at the Virginia Tech Counseling Center.

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<sup>10</sup> See Virginia Tech Victim Assistance Program Final Protocol, *supra* note 2, at § 1(A)(1).

<sup>11</sup> *Id.* at §§ 1(C)(1), 1(B)(1).

<sup>12</sup> *Id.* at § 1(E).

Both the 9/11 Fund and the Hokie Fund are, however, similar in two critically important respects—the need to promote transparency in the promulgation and dissemination of the two Funds’ terms and conditions, and the right of any claimant to seek a confidential hearing with Fund Administrators before submitting a claim. These two principles of transparency and due process lie at the heart of the two Funds and reflect a recognition that accountability and the opportunity to be heard are essential features of any successful effort to compensate blameless victims and families.

As for the issue of transparency, the Hokie Spirit Memorial Fund, like the September 11th Victim Compensation Fund, was first governed by a proposed interim set of terms and conditions, which were not final but sought family and victim input before the final eligibility and compensation rules were fixed. The Fund Administrator invited comment concerning proposed Fund regulations and met with all interested parties to discuss eligibility criteria, the level of funding for different types of claims, and due process procedures. Following these series of meetings in Blacksburg, Northern Virginia, Richmond, Washington, and Trenton, New Jersey, a Final Protocol was issued on August 15, 2007.

In addition, the Hokie Fund (like the 9/11 Fund) calls for a private, confidential hearing for any eligible family or victim who makes such a request.<sup>13</sup> This hearing will be conducted under oath and will be transcribed. The claimant can be accompanied by a lawyer, a tax advisor, an accountant, or anybody else the claimant deems appropriate. The hearing will permit any claimant to memorialize on the record thoughts and memories concerning a loved one or one’s attempt to cope with loss or current injuries. It is obvious, however, with fixed amounts being predetermined and no discretion being afforded the Fund Administrator in the calculation of individual awards, that requested hearings will not include any discussion of adjusting compensation (a major purpose of the 9/11 Fund hearings). Nevertheless, the opportunity to be heard—to vent about life’s unfairness and comment about loss, memory, the future, and any other topic—should not be underestimated in providing claimants an outlet to express their thoughts (and, perhaps,

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<sup>13</sup> *Id.* at § 2(B).

discourage lawsuits against the University and other potential defendants).

What lessons are learned from an analysis of these two Funds? First, the Hokie Fund—unlike the 9/11 Fund—can correctly be viewed as a rather conventional attempt to provide prompt and fixed private compensation to eligible victims. Unlike the 9/11 Fund's hybrid tort/workers compensation approach, with its requirement that all claimants waive their right to litigate against potential tortfeasors, the Hokie Fund is more mainstream, offering families and victims an opportunity to participate without any preconditions. Nor are Fund Administrators of the Hokie Fund permitted to exercise discretion in the calculation of individual payments; unlike the 9/11 Fund, tort concepts of economic and noneconomic loss are absent. A published compensation matrix, grounded in objective variables of loss, hospitalization and location, offer each individual claimant an advance preview of what compensation can be anticipated. In this sense, it can be argued that the Hokie Fund is superior to the 9/11 Fund in providing each individual claimant a clear indication of each award.<sup>14</sup> It is clearly more efficient; it is anticipated that the Hokie Fund will distribute all available proceeds to eligible claimants no later than the end of the October 2007 (the 9/11 Fund took 33 months to complete all distributions). Any additional funds which may be contributed by years' end will result in a second distribution on the same basis as the first.

But the most important aspect of the Hokie Fund is, again, the recognition of the wisdom of transparency and due process in distributing compensation to victims of catastrophe. The Hokie Fund is the latest compensation scheme to build upon the value of due process in encouraging grieving families and victims to participate in a purely voluntary program.<sup>15</sup> It remains to be seen how many eligible claimants will take advantage of this opportunity to be heard, especially since the hearings will have no impact in the calculation of compensation. Even if compensation were an issue at the hearings, it is by no means apparent that all claimants would

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<sup>14</sup> See Kenneth R. Feinberg, *What is Life Worth?: The Unprecedented Effort to Compensate Victims of 9/11*, at 182–83 (2005).

<sup>15</sup> See generally Carrie Menkel-Meadow et al., *Dispute Resolution: Beyond the Adversarial Model* 270 (2005).

take advantage of the opportunity to be heard. After all, approximately half of all 9/11 Fund applicants decided not to request a hearing, even though the calculation of individual awards could be adjusted based upon testimony at such hearings.<sup>16</sup> Many claimants, whether the victims of 9/11 or April 16, grieve in private.

It would also be of interest to analyze whether the establishment and fair administration of The Hokie Spirit Memorial Fund will short-circuit what might otherwise be a volume of protracted lawsuits directed at the University and other potential defendants. Voluntary participation in the 9/11 Fund was virtually complete; some ninety-seven percent of all eligible claimants decided to enter the Fund, thereby waiving their right to litigate.<sup>17</sup> Today, there are fewer than one hundred 9/11 death claims being litigated in federal court in New York City. Although the Hokie Fund does not raise the same civil justice policy issues as the 9/11 Fund, it will be viewed with great interest concerning its impact on likely future tort litigation.

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<sup>16</sup> See Final Report, *supra* note 6, at 17–18 (providing a general overview of the hearing process and emphasizing the hearing process’s vital role in the success of the Fund).

<sup>17</sup> See Feinberg, *supra* note 15, at 164.