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ELEVEN DAYS: THE BIRTH OF THE VICTIM COMPENSATION FUND

American Airlines flight 11 slammed into the North Tower of the World Trade Center at 8:45 a.m. At 9:03 a.m., a stunned nation was already watching on live television as the second plane, United Airlines flight 175, crashed into the South Tower. At 9:40 a.m., the Federal Aviation Authority closed American airspace and ordered all planes to land immediately. Three minutes later, at 9:43 a.m., American Airlines flight 77 slammed into the Pentagon across the Potomac River from Washington, D.C.

At 10:05 a.m., the death and destruction mounted to staggering proportions as the South Tower of the World Trade Center collapsed. At 10:10 a.m., a portion of the Pentagon collapsed—and a fourth airplane, United Airlines flight 93, aimed at the nation's capital, crashed instead into farmland near Shanksville, Pennsylvania. And at 10:28 a.m., the North Tower of the World Trade Center collapsed.

The destruction and loss were incomprehensible. Across the nation, airports and other public facilities were evacuated, states of emergency were declared, the national airspace was closed to civilian traffic. Armed forces around the world were put on red alert. National and local networks and other media switched to round-the-clock coverage of the attacks and their aftermath. The leaders and citizens of nations around the world reached out to America.

At 8:30 p.m. that evening, President George W. Bush addressed a world-wide television audience, attesting to the “thousands of lives . . . suddenly ended by evil” and asking the nation for prayers for the victims and their families. Across the country, the reaction to this first foreign-launched attack against America since World War II, some 60 years before, was immediate and overwhelming. In a time of unparalleled shock, there was an overriding national sense that these attacks would not be allowed to undermine this nation or its way of life. Americans opened their hearts, gave their blood, and contributed from their wages in an outpouring of grief and sympathy. Hundreds of millions of dollars were contributed to help the injured victims and surviving families.

In New York City, a massive search and rescue effort was launched. Hundreds of firefighters, ironworkers, and emergency personnel stormed the rubble pile of the World Trade Center seeking survivors; nurses and doctors stood by in hospitals as far away as Philadelphia. At the Pentagon, the devastation was more tightly contained but presented no less a challenge to the hopeful rescuers.

Thousands of family members searched for missing loved ones. Pictures were posted at impromptu memorials, each story more devastating than the one before.

Like all other Americans, trial lawyers wanted to help. On the other hand, the world had suddenly changed, and, for these special circumstances, the legal system might have to change with it. The attacks of September 11 were not a mass tort—a negligent infliction of harm. They were premeditated mass murder. Whatever negligence might be attributed to the airlines or other parties paled in comparison to the terrorists’ cold-blooded criminal acts. Moreover, the civil justice process would be thwarted by inadequate insurance. Immediately following the attack, it was feared that perhaps 6,000 were dead, with property damage certainly in the tens of billions of dollars. Since total liability insurance on all possible defendants was significantly less than the likely losses, it was believed that a plaintiff with the best possible day in court would win only a few cents on the dollar—and, in any event, the recovery would be obtained only after many years of litigation. This outcome would not be just, especially since many of the families would need immediate, substantial financial assistance.

On Wednesday, September 12, ATLA President Leo Boyle convened an emergency conference call of the organization's Executive Committee and senior staff to consider the options. Historically, of course, ATLA has always defended the Seventh Amendment right of Americans to seek redress of their grievances in our civil justice system, and it has always opposed legislative or executive interference with the courts, which are the most open, free, and fair anywhere. At this extraordinary time, however, and given the constraints operating on the civil justice system in this tragic instance, ATLA leaders decided that aiding and comforting the 9/11 victims and families and supporting national unity must take precedence.

Authorized to act on behalf of the entire membership, the leadership realized that it needed to do so *immediately*. By that evening, less than 36 hours after the attacks, a plan of action was in place, adopted without dissent by the Executive Committee and headlined by an unprecedented call for a moratorium on the filing of civil lawsuits. The Association also indicated a willingness to encourage federal remedies for the victims.

“Today,” wrote ATLA President Leo Boyle in a statement released the following morning, “we must enter a period of national unity that should set us on a course of comfort, care, and respect for the privacy and anguish of the families who have experienced this national tragedy in the most personal of ways.

“It should also be a course of renewal and resolve, where American ideals continue as our true guideposts and national security is pursued with vigor and purpose We, as a nation, must speak at this hour with a single voice, a voice of compassion for the victims and a voice of authority to those who would tear down our society.

“For this reason, for the first time in our history, the Association of Trial Lawyers of America, in this time of national crisis, urges a moratorium on civil lawsuits that might arise out of these awful events. There are more urgent needs that must be served at this time. Let us support our government so it can fully gather all the evidence needed quickly to identify and prosecute the terrorists. Let this instead be a time for healing, with our focus on bringing to justice the terrorists who perpetrated this tragedy.”

The reaction was immediate and powerful. Hundreds of members e-mailed ATLA within hours to say how relieved and grateful they were that their organization had taken this step. Although the call for a moratorium could be only inspirational—the Association could not force adherence by its members, much less by other lawyers—the moratorium was widely and positively reported by the media and took on a life of its own.

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Remarkably, it was honored for many months before it was finally broken—and not by a victim, but by an insurance company, which sued one of its insured entities to disclaim coverage for the loss of the World Trade Center buildings.

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One immediate, practical consideration following the attacks was the long-term financial stability of the airline industry. Indeed, it was clear that the industry, already reeling from the impact of a weakening economy caused in large part by the implosion of the technology industry, might be brought to the brink of financial disaster. The closing of the national airspace for two and a half days had cost at least \$1 billion, and losses of an undetermined but large dimension were predicted for months, if not for years, to come. As fighter jets patrolled the skies over major cities from coast to coast, businesses and families would delay or cancel upcoming air travel. Tourists from overseas might simply quit coming to the United States for the foreseeable future. Reagan Washington National Airport, located only five miles from the White House and the United States Capitol, was shuttered indefinitely.

When the stock exchanges reopened on Monday, September 17, airline shares plummeted an average of 40 percent. Drastic cuts in payrolls seemed imminent. Insurance and lines of credit were in jeopardy. Bankruptcies loomed, with likely devastating domino-like impact on other industries.

On Tuesday, September 18, the President proposed a financial package of \$5 billion in cash payments to the airlines, along with protection from liability claims beyond the insurance coverage for all entities involved in the attacks, except the terrorists. However, the airlines sought much more aid: \$24 billion. Fears of widespread economic disaster were reinforced by the warnings of other tourism and airline-related industries that they, too, might require financial assistance.

ATLA watched these developments with concern. The organization had issued its call for a moratorium on lawsuits, but, following its long tradition of fighting for victims' rights, it was concerned about efforts to restrict or eliminate *forever* the rights of injured victims or deceased victims' families. Moreover, it was becoming increasingly clear that litigation might result in bankruptcy not only for the airlines, but for all other potential defendants as well, in which case families could be relegated to fighting over assets that would be woefully inadequate to compensate them for their losses.

In short, the victims of the attacks or their surviving families were in danger of being left behind. Nor was ATLA the only group worried about this prospect. Kevin Gallagher, one of the firefighter heroes at the World Trade Center and president of the Uniformed Firefighters of New York, wrote in a letter to Congress, "Please assure the American people that . . . the number one priority is promptly and completely addressing the needs of the families who have suffered indescribable loss."

Beginning on Wednesday, September 19, ATLA officers and staffers met with Senator Tom Daschle (at the time, Majority Leader in the Senate), Senator Patrick Leahy (at the time, Chairman of the Senate Judiciary Committee), and Representative Richard Gephardt (House Minority Leader) and their staffs to discuss various proposals being considered to assist the airline industry and to explore alternative ways to compensate the victims. Specifically, the concept of a victim compensation fund was introduced and favorably received. ATLA also met with counsel for American Airlines and United Airlines, at their request, and asked the airlines to support such a plan.

On Thursday, September 20, forty senators and representatives traveled to New York City to visit Ground Zero. This trip was an emotionally trying experience for everyone, and there is no doubt that the visceral impact of seeing firsthand the smoking ruins—a tomb for thousands of innocent souls—and the feverish labor of the still hopeful rescuers helped solidify support for a victim assistance program. With the additional leadership of Speaker of the House Dennis Hastert and other House and Senate leaders from both sides of the aisle, a draft proposal was converted into bipartisan legislation that very day.

That night, House and Senate leaders—Republicans and Democrats—met with White House staff, working into the early hours of Friday morning to craft the final legislation.

Normal legislative processes, including committee review, hearings, and “mark-ups,” were simply irrelevant. When Congress convened on Friday morning, companion bills were introduced in both the House and Senate.

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“The Airline Transportation Safety and System Stabilization Act” contained \$5 billion in cash payments for the airlines and \$10 billion in a loan guarantee program. (Nevertheless, US Airways would declare bankruptcy eleven months later, followed four months after that by United Airlines.) The airlines’ and other possible defendants’ financial exposure would be limited to their insurance coverage.

The bill also created the September 11th Victim Compensation Fund, which guaranteed compensation for families of deceased victims and those who were physically injured, for their economic losses and their pain and suffering.

The Fund’s claims process was placed under the authority and control of a Special Master, whose decisions would be final and not subject to judicial review. There would be no limitations or “caps” on the amounts of the awards issued by the Fund, either individually or in the aggregate, and awards would be obligations of the United States government. Thus Congress would have no control or influence over the Fund, whose funding would not be dependent upon or subject to the appropriations process.

The landmark legislation was passed first by the Senate at 6:20 p.m. Friday evening, September 21. The vote was 96-1. At 11:00 p.m., the House passed its identical bill by a vote of 356-54. A unanimous consent agreement allowed the bill to be sent to the White House immediately, without the need for a Conference Committee. President Bush signed the historic measure only eleven days after that horrific Tuesday.

As the nation grieved, our leaders had answered the call to help heal our wounds.