The September 11, 2001 Terrorist Attack and Litigation Aftermath

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On September 11, 2001, in an unprecedented attack upon the United States, 19 terrorists hijacked four commercial aircraft and purposefully crashed them, causing thousands of deaths and injuries and enormous property damage. Five hijackers seized American Airlines Flight 11, a Boeing 767, which departed from Boston's Logan International Airport bound for Los Angeles, and crashed it into World Trade Center 1 ("WTC 1"), the north tower of the World Trade Center Complex ("WTC Complex") in New York City. Five different hijackers seized United Airlines Flight 175, another Boeing 767, which also departed Logan bound for Los Angeles, and crashed it into World Trade Center 2, the south tower of the WTC Complex. Five more terrorists hijacked American Airlines Flight 77, a Boeing 757, which departed Dulles International Airport bound for Los Angeles, and crashed the aircraft into the Pentagon in Arlington, Virginia. Four terrorists hijacked United Airlines Flight 93, a Boeing 757, which departed Newark International Airport for

San Francisco. After the Flight 93 passengers learned of the other hijackings, they attempted to wrest control of the aircraft from the terrorists, and the aircraft ultimately crashed into a vacant field near Shanksville, Pennsylvania.

No passengers or crew members survived the hijackings. The intentional crashes of the aircraft in New York City caused the collapse of WTC 1 and 2, killing thousands more on the ground. A total of 2,977 people were killed as a result of the attack. The collapse of WTC 1 and 2 also caused billions of dollars in property and business interruption damage. The collapse of WTC 1 also caused the collapse of another nearby building, WTC 7.

In the aftermath of the 9/11 terrorist attack, plaintiffs filed wrongful death, personal injury, and property damage and business interruption lawsuits against American, United, their checkpoint security screening companies,[1] non-carriers that had transported terrorist hijackers on another flight on the morning of 9/11, non-carriers who shared check point security responsibility with American and United, municipal airport operators, and The Boeing Company, the aircrafts' manufacturer (collectively "the Aviation Defendants"). Property damage and business interruption plaintiffs included World Trade Center Properties and other companies affiliated with real estate developer Larry Silverstein (the "WTCP Plaintiffs"), who just months prior to 9/11 won a worldwide auction to lease the buildings comprising the WTC Complex for 99 years. Plaintiffs also included insurance companies suing in subrogation for the billions of dollars in property damage and business interruption losses they paid to businesses located in and around the WTC Complex (the "Subrogated Plaintiffs"). The total amount claimed by all plaintiffs exceeded $30 billion, not including prejudgment interest.

The 9/11 Litigation finally concluded in December of 2017. This article examines some of the critical legal issues and decisions that arose during the course of the 9/11 Litigation, including: (1) Congressional response to the 9/11

[1] Readers will recall that prior to 9/11, airport checkpoint security screening was performed by private security companies contracted by the airlines to perform pre-board passenger screening. The Transportation Security Administration ("TSA") assumed that responsibility in 9/11's aftermath pursuant to the Aviation and Transportation Security Act of 2001. Pub. L. 107-71, 115 Stat. 597.

terrorist attack; (2) the establishment of unique legal principles that governed the 9/11 Litigation; (3) the resolution of WTCP's first-party insurance claims; (4) whether the Aviation Defendants owed a legal duty to ground victims; (5) what evidence would have been admissible if the case had been tried; and (6) the measure of the WTCP plaintiffs' recoverable tort damages. The authors also examine certain 9/11 Litigation defense strategies, and the risks that the named Aviation Defendants and their liability insurers faced in this unprecedented litigation.

I. The Air Transportation Safety and System Stabilization Act

On September 22, 2001, only eleven days after the 9/11 attack, the federal Air Transportation Safety and System Stabilization Act ("ATSSSA") was signed into law.[2] The legislation had two primary purposes: (1) to provide compensation to the individual victims of the 9/11 terrorist attack; and (2) to preserve the financial viability of the U.S. airline industry.[3] The ATSSSA created an exclusive federal cause of action for claims arising from the 9/11 attack and required that all such claims be consolidated in the U.S. District Court for the Southern District of New York. District Judge Alvin K. Hellerstein presided over the entire litigation.

The ATSSSA further provided that each defendant's liability for losses (if liability could be established) "shall not be in an amount greater than the limits of liability insurance coverage maintained by" each defendant.[4] This provision of the ATSSSA was intended to further the goal of "preserv[ing] the continued viability of the United States air transportation system from potentially ruinous tort liability in

[2] Pub. L. 107-42 Section 408(b)(4), 49 U.S.C. § 40101.

[3] The ATSSSA also established procedures for compensating air carriers for losses suffered as a result of the 9/11 attack. The procedures established for this purpose applied to all passenger and cargo air carriers recognized by the Department of Transportation through a grant of certificate or exemption authority. Carriers were eligible to recover funds if they incurred direct losses as a result of the Department of Transportation's ground stop order on September 11, or other direct losses related to the terrorist attack.

[4] ATSSSA § 408(a)(1).

the wake of the attack."[5] The ATSSSA further provided that "the substantive law for decision in any such suit [arising out of the 9/11 terrorist attack] shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law."[6]

A. The Victim Compensation Fund

The ATSSSA established the September 11 Victim Compensation Fund ("VCF"),[7] which allowed individual victims of the 9/11 terrorist attack and their families the option of filing suit in the Southern District of New York, or applying for speedier and risk-free relief from the VCF, which was funded entirely by the U.S. Government. A claimant choosing to be compensated through the VCF was required to waive his or her right to file or be a party to civil litigation seeking monetary damages resulting from the 9/11 attack. The right to file a claim for litigation against the terrorists and their supporters who organized and funded the attack was preserved.

The Attorney General appointed Kenneth R. Feinberg, Esq. as the Special Master of the VCF. Pursuant to the ATSSSA, Feinberg, along with the Department of Justice, promulgated regulations governing the disposition of awards from the VCF. Feinberg developed a matrix for calculating economic losses based on readily identifiable circumstances, such as a victim's age, prior income level, marital status, and the number and age of the victim's dependents.[8] These factors are similar to those used by the laws of most states to determine wrongful death damages. However, the economic loss matrix presumed losses only up to the 98th percentile of individual annual income in the U.S., which at the time was $231,000, thereby implying that awards for decedents with annual incomes exceeding that level still would be limited to compensation based on the assumption that the victim earned only $231,000 per year. The VCF awarded additional amounts for non-economic losses, including care, comfort and companionship, as well as medical expenses, funeral costs, and other losses not considered in the lost income matrix. However, the ATSSSA prescribed that payments to victims and their families from collateral sources such as life

[5] *See In re* Sept. 11 Litig., 650 F.3d 145, 152 (2d Cir. 2011) (quoting Schneider v. Feinberg, 345 F.3d 135, 139 (2d Cir. 2003)).
[6] ATSSSA § 408(b)(2).
[7] *Id.* at Title IV.
[8] Regulations were codified in 28 C.F.R. 104, Subpart D.

insurance must be deducted from VCF awards.[9]

Several plaintiffs filed suit against Special Master Feinberg, claiming that the VCF regulations were arbitrary, capricious, and violated the ATSSSA. Their primary argument was that proposed awards failed to recognize that many of those who died on 9/11 had been earning far more than the Special Master would consider. In *Colaio v. Feinberg*,[10] the District Court rejected these claims. As an initial matter, Judge Hellerstein held that the ATSSSA provided an "intelligible principle" to guide the Department of Justice and the Special Master in promulgating VCF regulations. The court further held that these regulations were entitled to *Chevron*[11] deference (*i.e.*, deference given to a government agency's regulations that interpret a statute) because the regulations did not contradict the ATSSSA, and were persuasive in carrying out Congress' intent. In *Schneider v. Feinberg*,[12] the U.S. Court of Appeals for the Second Circuit affirmed the District Court's *Colaio* holding.

The VCF was closed on June 15, 2004. Approximately 98.5% of all eligible claimants pursued their claims through the VCF.[13] A total of 7,408 claims were submitted and resolved, resulting in 5,560 awards, worth approximately $7.05 billion.

II. Whether the crashes of American Flight 11 and United Flight 175 into WTC 1 and WTC 2 were "one or two occurrences"

In April 2001, WTCP won a worldwide auction to lease the WTC Complex for 99 years from The Port Authority of New York and New Jersey at a total cost of $2.8 billion.[14] In July 2001, WTCP obtained primary and excess insurance coverage for the WTC Complex from approximately a dozen insurers in the amount of $3.5 billion "per occurrence."[15] WTCP and its insurers did not dispute that the losses arising from the destruction of the WTC Complex significantly exceeded $3.5 billion. However, they did dispute whether the crash of American Flight 11 and United Flight 175 into the WTC Complex constituted "one or two occurrences" within the meaning of WTCP's insurance policies.

WTCP's insurance coverage consisted of a primary layer and 11 excess layers. However, as of 9/11,

[9] ATSSSA § 405(b)(6).
[10] 262 F. Supp.2d 273 (S.D.N.Y. 2003).
[11] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-843 (1984).
[12] 345 F.3d 135 (2d Cir. 2003).
[13] http://www.justice.gov/archive/victimcompensation/payments_deceased.html.
[14] World Trade Center Props. LLC v. Hartford Fire Ins. Co, et al., 345 F.3d 154, 158 (2d Cir. 2003).
[15] *Id.*

only one insurer had issued a final policy containing wording that specified the coverage. Accordingly, the court was required to examine the terms of the binders issued by each of the other insurers. Three insurers – Hartford Fire Insurance Company, Royal Indemnity Company, and St. Paul Fire & Marine Insurance Company – issued a form used by the broker Willis. Accordingly, the binder form at issue for those insurers was the Willis "WilProp" form. The District Court analyzed the WilProp form and held that, under its definition of the word "occurrence," the destruction of the WTC Complex was one "occurrence" as a matter of law.[16]

On appeal, WTCP argued that a form issued by Travelers Indemnity Company on September 14 should have controlled because Travelers was WTCP's lead insurer, and the following insurers, including Hartford, Royal Indemnity and St. Paul, would have followed the Travelers form,[17] had the Travelers form been issued prior to 9/11.[18] The Travelers form defined "occurrence" differently from the WilProp form. The Second Circuit rejected that argument, holding that evidence of what the parties "might" have agreed to after 9/11 in the final policy was irrelevant because the WilProp binders were valid and enforceable as of 9/11.[19] After determining that the WilProp form was the operative document, the Second Circuit analyzed the definition of the word "occurrence," defined in the WilProp form as:

> all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the time or area over which such losses occur.

The Second Circuit agreed with the District Court that under this definition the 9/11 attack constituted only one "occurrence" as a matter of law.[20]

The Second Circuit then addressed whether the crashes of American Airlines Flight 11 and United Airlines Flight 175 qualified

[16] SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, 222 F. Supp.2d 385 (S.D.N.Y. 2002).

[17] This practice is known as "following the form" and means that participating primary and excess insurers on layered insurance policies, such as the WTCP policy, customarily agree to accept the terms and conditions agreed to by the lead insurer.

[18] 345 F.3d at 167.

[19] *Id.* at 167-180.

[20] *Id.*

as one or two "occurrences" under the Travelers form, which governed all claims against insurers that had yet to issue any binder form as of 9/11.[21] The Second Circuit held, as a threshold matter, that the Travelers binder in effect on September 11, and not the final policy wording issued on September 14, determined the insurers' obligations under the Travelers policy because, under New York law, binders and policies are two separate agreements, and the binder controls until such time as the final policy is issued.[22] Next, the Second Circuit held that "occurrence" in the Travelers binder was undefined, and therefore ambiguous, which precluded resolution on summary judgment. According to the Second Circuit, a jury, relying on insurance industry custom and usage and other evidence as to the parties' intentions, would have to determine the meaning of the word "occurrence" under the Travelers binder. At the conclusion of a trial on that issue, the jury found that the insurers that did not use the WilProp form must compensate WTCP on a "two occurrence basis."[23] The Second Circuit affirmed.[24] Ultimately, WTCP settled with its insurers and recovered $4.1 billion in first-party insurance proceeds for the destruction of the WTC Complex, substantially more than the $2.8 billion WTCP agreed to pay for the leaseholds in April 2001.

III. Whether the Aviation Defendants owed a legal duty of care to Ground Plaintiffs

In July 2002, Judge Hellerstein ordered that all wrongful death, personal injury, property damage, and business interruption loss cases filed pursuant to the ATSSSA against any Aviation Defendant be consolidated for the purposes of pretrial proceedings. At that time, the scope of the entire 9/11 Litigation was staggering. The 96 wrongful death plaintiffs collectively sought approximately $1 billion million in compensatory damages; the WTCP Plaintiffs sought $13.7 billion in uninsured losses; the Subrogated Plaintiffs sought $5.5 billion; and businesses that did not have enough, or in some instances any, insurance to cover their losses, collectively sought another $6 billion. The total amount of the claims against the Aviation Defendants, not including pre-judgment interest, approached $30 billion.

At that time, claims had been brought against more than thirty different Aviation Defendants in order to increase the total amount

[21] *Id.* at 180-90.
[22] *Id.* at 183 (citing Springer v. Allstate Life Ins. Co., 94 N.Y.2d 645 (2000)).
[23] SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., 467 F.3d 107, 115 (2d. Cir. 2006).
[24] *Id.*

of the liability insurance available to cover the extensive damages claimed, provided liability was established. Certain ground plaintiffs also sought to recover from WTCP for alleged negligence in failing to safely design and construct the WTC Complex to provide safe escape routes, adequate fire control measures, and an emergency management plan.

The defendants brought three motions to dismiss the ground victims' claims based on a lack of duty.[25] First, the Aviation Defendants, although conceding a duty to their passengers, argued that they did not owe a legal duty to ground victims.[26] WTCP argued that it did not owe a duty to protect occupants of the WTC Complex against injury from hijacked aircraft, and that even if it did, the terrorists' actions broke the chain of causation.[27] Boeing separately argued that it did not owe a duty to either ground victims or passengers, whose claims were premised on Boeing's failure to design and install hardened cockpit doors on its aircraft.[28]

The court first addressed the Aviation Defendants' motion.[29] Judge Hellerstein began by tracing basic principles of duty, noting that to prevail, the ground victim plaintiffs must show that the Aviation Defendants owed not just a general duty, but a specific duty to those specific plaintiffs.[30] He further noted that New York courts have been cautious in extending liability to defendants for failure to prevent the conduct of others, but have imposed a duty when a defendant had control over a third-party tortfeasor's action, or was in the best position to protect against the risk of harm.[31]

The court then analyzed the plaintiffs' allegation that the Aviation Defendants negligently failed to carry out their duty to secure the hijacked aircraft. The plaintiffs argued that passenger screening measures were employed to protect against hijackings, and that the Aviation Defendants should have known that hijackings posed a risk not just to passengers, but to people and property on the ground.[32] In this context, the court cited several examples of aircraft that have crashed into residential or otherwise occupied areas and noted that in those instances airlines typically had been held liable for damage to ground

[25] *In re* Sept. 11 Litig., 280 F. Supp.2d 279 (S.D.N.Y. 2003).
[26] *Id.* at 288-289.
[27] *Id.* at 289.
[28] *Id.*
[29] *Id.* at 290; *see also* Section I, *supra* (the law of the state of the crash (New York) applied because it was not inconsistent with, or preempted by, federal law).
[30] *Id.*
[31] *Id.*
[32] *Id.*

victims.[33] However, none of the referenced crashes was the result of third-party criminal activity.

The court then considered the Aviation Defendants' argument that the 9/11 terrorist attack was different from other instances in which aircraft have crashed into the ground because the cause of the 9/11 crashes was the intervening criminal acts of the third-party terrorists.[34] The court explained that under New York law, it is required to analyze five factors to "fix the duty" at issue: (1) the reasonable expectations of the parties and society generally; (2) the potential for the proliferation of claims; (3) the likelihood of unlimited liability; (4) disproportionate risk allocation; and (5) relevant public policies.[35] With respect to the first factor, Judge Hellerstein held that it favored the plaintiffs because they reasonably could have expected that airport checkpoint security screening would be performed for the benefit of ground victims as well as passengers.[36] In making this holding, the court was careful to note that it was not drawing any conclusions as to the reasonableness of the Aviation Defendants' conduct on 9/11, but rather was accepting the plaintiffs' allegations as true at the motion to dismiss stage.[37]

Next, the court held that proliferation should not be mistaken for size of number, and because the universe of 9/11 claims was known, there was no a risk for unlimited liability.[38] Judge Hellerstein then held that the Aviation Defendants were in the best position to prevent the harm at issue because they operated passenger screening.[39] Finally, the court held that public policy considerations favored the plaintiffs because courts previously have recognized that airlines could have a duty to ground victims, and, according to Judge Hellerstein, there was no principled reason to hold that a duty arises out of negligently operating an aircraft, but not for negligently regulating the boarding of aircraft.[40] The court thus denied the Aviation Defendants' motion to dismiss, holding that they owed a legal duty of care to the ground victims.[41]

The District Court then analyzed the issue of foreseeability because the Aviation Defendants argued that even if a legal duty were owed, the events of the 9/11 terrorist attack were not reasonably foreseeable. In rejecting this argument, Judge

[33] *Id*. at 291.
[34] *Id.* at 291-292.
[35] *Id.* at 292.
[36] *Id.*
[37] *Id.* at 293.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 294.
[41] *Id.* at 295.

Hellerstein held that to be considered foreseeable, the precise manner in which the harm was inflicted need not be predicted.[42] Rather, the relevant inquiry was the foreseeability of the class of hazards, and although hijackers may not have flown aircraft into buildings before, it was reasonably foreseeable that a hijacking could pose a risk to those on the ground.[43]

Finally, the court addressed the Aviation Defendants' argument that federal law preempts the imposition of a duty upon the Aviation Defendants because the federal regulations that governed air piracy in 2001 employed a "common strategy," which required airlines to cooperate with hijackers.[44] Because cooperating with hijackers in this instance would not have protected those on the ground, the Aviation Defendants argued that imposition of a duty would be inconsistent with, and preempted by, federal law and therefore would violate the provision of the ATSSSA requiring application of state law only if it was not inconsistent with, or preempted by, federal law.[45] However, the court held that federal preemption is not found within the scope of duty, but instead in connection with relevant standards of care, and therefore did not apply to the matter at issue.[46] In denying the motion to dismiss, the court was careful to note that its holding was only on the pleadings, accepted as true, and that discovery and a complete record could change the nature of its analysis.[47] More than 100 liability depositions and related motion practice followed, spanning a period of several years.

Next, the District Court addressed WTCP's motion to dismiss, which argued that WTCP owed no duty to anticipate events without precedent.[48] Plaintiffs countered that WTCP had a duty not to foresee crimes, but to design and construct buildings so they could withstand fires and avoid collapse, and to provide safe and effective evacuation routes.[49] The court's analysis began with the recitation of the well-known principle that landowners owe a duty to maintain property in a safe condition.[50] In this regard, Judge Hellerstein held that WTCP had a duty to building occupants in designing, constructing, repairing, and maintaining the buildings, and in ensuring appropriate evacuation routes and procedures should an emergency occur. That duty, the court held, arises in the context of emergencies generally, and did not

[42] *Id.*
[43] *Id.* at 296.
[44] *Id.* at 297.
[45] *Id.*
[46] *Id.* at 298.
[47] *Id.* at 296-298.
[48] *Id.* at 299.
[49] *Id.*
[50] *Id.*

have to be particularized to the emergency that occurred on 9/11.[51] Accordingly, the court held that WTCP owed a duty to ground victim plaintiffs. Plaintiffs later withdrew their claims against WTCP, however, and WTCP proceeded in the litigation only as a plaintiff alleging property damage and business interruption claims against the Aviation Defendants.

Finally, the District Court addressed Boeing's motion to dismiss, which argued that Boeing did not owe a duty to prevent the use of the aircraft as weapons, and that the terrorists' acts were superseding causes that severed the chain of causation.[52] In 2003, claims against Boeing had only been filed by victims of American Flight 77 and United Flight 93, which crashed in Virginia and Pennsylvania, respectively.[53] Pursuant to the ATSSSA, Boeing's motion thus was analyzed under Virginia and Pennsylvania law. In denying Boeing's motion, the court came to the same conclusion under both states' laws: (1) the risk that hijackers would take control of an aircraft by breaking into a cockpit unsecured by a hardened door was foreseeable;[54] and (2) plaintiffs could establish proximate cause based on foreseeability.[55] The court also held that plaintiffs' strict liability, breach of warranty, and negligent design allegations stated claims upon which damages ultimately could be awarded if liability were proven.[56] Consequently, plaintiffs pursued claims against Boeing for American Flight 11 and United Flight 175 damages as well as the two other flights.

IV. Whether the ATSSSA permitted the recovery of punitive damages

In 2007, Judge Hellerstein addressed whether wrongful death plaintiffs could recover punitive damages against the Aviation Defendants.[57] The Aviation Defendants had moved to dismiss plaintiffs' punitive damages claims as a matter of law.[58]

In opposition, plaintiffs argued that the phrase "punitive damages" appeared twice in the ATSSSA, and thus it must have been Congress' intent to allow plaintiffs to recover punitive damages.[59] The District Court disagreed, holding that the ATSSSA was enacted for the benefit of the Aviation Defendants, not for the benefit of those who sue the

[51] *Id.* at 300.
[52] *Id.* at 306.
[53] *Id.* at 305.
[54] *Id.* at 307, 312.
[55] *Id.* at 309-310.
[56] *Id.* at 311-314.
[57] *In re* Sept. 11 Litig., 494 F. Supp.2d 232 (S.D.N.Y. 2007).
[58] *Id.* at 236.
[59] *Id.* at 238.

Aviation Defendants.[60] In particular, the ATSSSA was enacted to prevent ruinous liability.[61] Moreover, with respect to lawsuits arising from the crashes in New York, the District Court held that because New York law does not permit the payment of punitive damages from insurance funds, and because the ATSSSA limited the Aviation Defendants' liability to the extent of their available insurance coverage, punitive damages for claims arising from the flights that crashed in New York were not recoverable as a matter of law.[62] The court reached the same conclusion under Pennsylvania law concerning claims arising from Flight 93, which crashed in Shanksville, Pennsylvania.[63]

V. Whether a duty was owed with respect to flights operated by other Aviation Defendants

In 2009, American Airlines and Globe Aviation Services Corporation, the security company that provided checkpoint security screening services for American at Logan on 9/11, moved for summary judgment dismissing property damage claims arising from the destruction of WTC 2 because United Flight 175 had crashed into that building.[64] American and Globe argued that they should not be held liable for damages arising from Flight 175 as a matter of law because they did not operate or provide security to United, and therefore did not owe plaintiffs a duty with respect to that flight.[65] The plaintiffs replied that American, in part, caused the property damage resulting from Flight 175 because American Flight 11 struck WTC 1 before Flight 175 struck WTC 2, and American and Globe failed to provide timely information to the FAA concerning the hijacking of Flight 11.[66] The court rejected plaintiffs' argument and held that: (1) American and Globe did not owe a duty with respect to a flight for which they did not operate or provide checkpoint security screening; and (2) no evidence existed that any reporting to the FAA relating to Flight 11 could have prevented the crash of Flight 175.[67]

In 2012, United moved for a similar ruling concerning damages arising from the destruction of WTC 7 on the ground that the collapse of WTC 7 was caused by the collapse of WTC 1, which was struck by American Flight 11.[68] The analysis of United's motion varied slightly

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[60] *Id.*
[61] *Id.*
[62] *Id.* at 240.
[63] *Id.* at 241.
[64] *In re* Sept. 11 Litig., 594 F. Supp.2d 374 (S.D.N.Y. 2009).
[65] *Id.* at 380-382.
[66] *Id.*
[67] *Id.*
[68] *In re* Sept. 11 Litig., 905 F. Supp.2d 547 (S.D.N.Y. 2012).

from American's, but resulted in the same holding.

On the morning of September 11, 2001 prior to hijacking Flight 11, two terrorists flew on Colgan Air Flight 5930, from Portland International Jetport in Portland, Maine to Boston's Logan International Airport, from which Flight 11 later departed.[69] There was only one security screening checkpoint at the Portland Jetport, and that checkpoint was under the custodial responsibility of Delta Airlines, which contracted the screening services to Globe Aviation Services.[70] However, all carriers operating at the Portland Jetport, including United, participated in a "Shared Responsibility Agreement." The Shared Responsibility Agreement provided that each carrier was solely responsible for that carrier's violation of its Air Carrier Standard Security Program.[71] WTCP's claim against United was based on United's alleged responsibility for security screening at the single checkpoint at the Portland Jetport.

To answer this duty question under New York law, Judge Hellerstein considered the decision of the U.S. Court of Appeals for the Second Circuit in *Stanford v. Kuwait Airways Corp.*[72] In *Stanford*, four terrorists boarded a Middle East Airlines ("MEA") flight in Beirut, Lebanon bound for Dubai, UAE. Upon arriving in Dubai, the terrorists boarded a Kuwait Airways flight bound for Karachi, Pakistan. Three U.S. diplomats were onboard the Kuwait Airways flight and, after takeoff, terrorists hijacked the aircraft and forced the pilot to fly to Tehran, where the diplomats, along with another American passenger, were tortured and two of the diplomats murdered.[73] A wrongful death action was brought against MEA and the trial court granted MEA judgment as a matter of law, finding that MEA had no duty with regard to the security of the Kuwait Airways flight.[74] The Second Circuit reversed and held that although it was a "close call," MEA was not so far removed from the Kuwait Airways flight as to be entitled to judgment as a matter of law.[75]

However, the District Court in the 9/11 Litigation found that the unique facts of *Stanford* distinguished it from WTCP's claims against United. The court held that, apart from sharing "residual authority" for security screening at the Portland Jetport, United had no connection to American Flight 11, which departed from Logan in Boston.[76] This finding was critical because, in

[69] *Id.* at 549.
[70] *Id.* at 550.
[71] *Id.*
[72] 89 F.3d 117 (2d. Cir. 1996).
[73] 905 F. Supp.2d at 553-554.
[74] *Id.*
[75] *Id.*
[76] *Id.*

Stanford, MEA was responsible for selling and examining passengers' tickets in Beirut, and, MEA thus was the first line of defense between the hijackers and passengers on connecting flights.[77] Moreover, MEA was aware of the poor security in Beirut, and that such poor security could allow hijackers to board a flight in Beirut and hijack a flight at a second airport.[78] Accordingly, the court found that if the facts of *Stanford* were a "close call" at the outer limits of imposing a duty on carriers, then the distinguishable facts of this case did not permit the imposition of a duty upon United for the destruction of WTC 7. The court granted United's motion for summary judgment,[79] and the Second Circuit affirmed the decision on appeal.[80]

VI. The admissibility of certain evidence at a 9/11 Liability Trial

In 2009, the Aviation Defendants filed motions *in limine* requesting that the District Court issue discovery and evidentiary rulings relating to: (1) the Aviation Defendants' request to depose certain FBI agents regarding the Government's investigations of the 9/11 terrorist attack; (2) the admissibility of portions of the record from the trial of Zacarias Moussaoui, the so-called 20th hijacker who was unable to participate in the 9/11 terrorist attack; (3) the admissibility of the 9/11 Commission Report (the "9/11 Report"), the official report of the Commission established by the U.S. Government to investigate the 9/11 attack, as well as Commission staff reports; and (4) the admissibility of a reporter's interview with Ramzi Binalshibh, a former al Qaeda leader.[81] The Aviation Defendants contended that each of these evidentiary sources should be admissible at trial; Plaintiffs opposed the admission of each source.[82]

The United States Attorney's Office had denied the Aviation Defendants' request to depose the FBI witnesses,[83] and the Aviation Defendants moved the court to set aside those decisions on the grounds that they were arbitrary and capricious.[84] The Aviation Defendants argued that the FBI testimony would be vital to a jury's understanding of the 9/11 terrorist attack, would establish that the Government's negligence caused Plaintiffs' damages, would

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *In re* Sept. 11 Litig., 802 F.3d 314 (2d Cir. 2015).
[81] *In re* Sept. 11 Litig., 621 F. Supp.2d 131, 140 (S.D.N.Y. 2009).
[82] *Id.*
[83] Requests to depose FBI agents must be made to the U.S. Attorney's Office pursuant to 28 C.F.R. § 16.22(c) and United States ex rel. Touhy v. Ragen, 340 U.S. 462, 467-478 (1951).
[84] 621 F. Supp.2d at 142.

demonstrate that they could not reasonably have foreseen the terrorist attack, and would establish that the terrorists would have accomplished their mission irrespective of any negligence on the part of the Aviation Defendants.[85] Judge Hellerstein rejected those arguments, and held that the FBI depositions would cause undue delay and raise national security concerns, and accordingly denied the Aviation Defendants' motion.[86] Specifically, the court held that a trial against the Aviation Defendants would focus on what they knew and should have known about the terrorist threat to civil aviation, and what they should have done to prevent such threats; therefore, what they learned later from the U.S. Government was irrelevant.[87] The court further held that any alleged negligence on the part of the Government could not be a superseding cause because it preceded the Aviation Defendants' alleged negligence.[88] However, the court held that the Aviation Defendants could argue at trial that the terrorists' mission would have succeeded irrespective of their alleged negligence.[89]

The court next addressed the admissibility of the 9/11 Report and the staff reports.[90] The Aviation Defendants argued that these reports were admissible as reliable government investigations under Federal Rule of Evidence 803(8)(c).[91] Judge Hellerstein held that the staff reports were inadmissible because they did not constitute the Commission's final determination.[92] With respect to the 9/11 Report itself, the Court held that portions may be admissible, but the entire 9/11 Report would not be admitted into evidence.[93] Rather, Judge Hellerstein instructed the parties to use the 9/11 Report and other sources to draft a narrative of the events of 9/11 that could be read to the jury at a liability trial, and stated that the court would make rulings as to the admissibility of individual portions of the 9/11 Report later in the case.[94]

With respect to portions of the transcript from the trial of Zacarias Moussaoui, the court held that testimony attributed to former al Qaeda leader Khalid Sheikh Mohammed was inadmissible, but that the testimony of FBI witnesses during the trial was admissible. Although Khalid Sheikh Mohammed did not testify at the Moussaoui trial, the parties to that trial agreed to admit a written summary of responses Mohammed

[85] *Id.* at 144.
[86] *Id.* at 142.
[87] *Id.* at 146.
[88] *Id.* at 147-148.
[89] *Id.* at 150.
[90] *Id.* at 151.
[91] *Id.*
[92] *Id.* at 155.
[93] *Id.* at 156-157.
[94] *Id.* at 150-151, 156-157.

had given to his interrogators.[95] The court held that this testimony would be inadmissible in the 9/11 Litigation because no exception to the rule against hearsay applied, and the testimony was not sufficiently trustworthy because it may have been given in response to torture.[96] However, the court held that the testimony of FBI agents from the Moussaoui trial was admissible under Federal Rule of Evidence 807, the residual exception to the rule against hearsay, because the testimony was sufficiently trustworthy.[97]

The court next analyzed statements given by Ramzi Binalshibh to a journalist that later were translated into English.[98] The court held that these statements were not sufficiently reliable because, *inter alia*, the source audio recordings were not available, and the identity of the translator was not known or available.[99]

VII. The settlement of certain property damage cases

By 2010, almost all of the wrongful death cases had been settled. At that time, plaintiffs in 18 of the 21 cases asserting property damage, business interruption, and subrogation claims against the Aviation Defendants agreed to settle their claims.[100] The settlement process began in 2008 with a court ordered "protocol," pursuant to which all subrogated Plaintiffs, certain uninsured

[95] *Id.* at 159.
[96] *Id.* at 159-160.
[97] *Id.* at 163.
[98] *Id.* at 164.
[99] *Id.*
[100] *See In re* Sept. 11 Litig., 723 F. Supp.2d 534, 536 (S.D.N.Y. 2010).

property damage plaintiffs,[101] and the Aviation Defendants conducted informal damages discovery with the assistance of a Special Master, retired United States District Judge John S. Martin.[102] Judge Martin then served as the mediator after the protocol provided the parties with a common ground from which to begin mediation.[103] The parties agreed to settle their claims at mediation in December 2009, and apprised Judge Hellerstein of their agreement in January 2010. The settling parties then moved the court for an Order approving the settlement and applying the amounts paid by the Aviation Defendants pursuant to the settlement towards their respective ATSSSA established liability caps.

WTCP objected to the settlement.[104] WTCP argued that the court should not approve the settlement because: (1) each Aviation Defendant's liability cap under the ATSSSA created a limited fund for all plaintiffs, and accordingly, no property damage plaintiff's claim could be settled until each property damage plaintiff's equitable share of the limited fund was determined; (2) the settlement was the product of collusion that prevented the court from analyzing the "substantive reasonableness" of the total settlement amount and its allocation among the settling plaintiffs; and (3) the Aviation Defendants' allocation of the settlement payments was based upon their insureds' available

[101] All uninsured loss property damage plaintiffs who sued the Aviation Defendants were included in the protocol process, the mediation, and the settlement, except for WTCP; Cedar and Washington Associates, LLC ("Cedar & Washington") (*see* Section X, *infra*); and Cantor Fitzgerald & Company and its affiliates (collectively "Cantor Fitzgerald") (*see* Section VIII, *infra*). WTCP did not participate in the protocol process, and also was not included in the mediation because Judge Martin determined that including WTCP would not be fruitful given that the parties' positions were so far apart. *See* 723 F. Supp.2d at 541. Cantor Fitzgerald participated in the protocol process and the mediation, but did not agree to settle its claims. *See id.* at 536. Cedar & Washington did not participate in the protocol process or the mediation.

[102] *Id.* at 539.

[103] *Id.*

[104] *See id.* at 541. The other two non-settling property damage plaintiffs, Cantor Fitzgerald and Cedar & Washington, did not object to the settlement.

insurance rather than their liability, and a portion of the settlement funds would be used to pay plaintiffs' attorneys' contingent fees, both of which were contrary to the ATSSSA's purpose.[105]

Addressing WTCP's arguments, the court first found that the ATSSSA provided only a cap on each Aviation Defendant's liability, and that the liability cap did not create a fund for any plaintiff's benefit.[106] The court further found that under New York law an insurer has no duty to pay claims ratably, and can pay them on a first-come, first-served basis.[107] The court also rejected WTCP's argument that the settlement was collusive and shrouded in secrecy because certain insurers were on both sides of the settlement.[108] The court cited the declaration that Judge Martin had submitted, which attested to the settling parties' hard-fought, good-faith, arms-length negotiations, and the lack of collusion.[109] The court also rejected WTCP's argument that the court could not evaluate the fairness of the settlement because all claims were settled on an aggregate basis. The court again credited the declaration of Judge Martin, who explained that settling all claims on a claim-by-claim basis would have been impossible.[110] Additionally, the court found that the steep discount (approximately 72%) at which the claims settled belied any assertion that the claims settled for something other than a fair value, or that the settlement was collusive.[111] Finally, the court rejected WTCP's arguments with respect to allocation, and rebuffed WTCP's argument that the settlement was unfair because it was funded based upon each Aviation Defendant's remaining insurance rather than each Aviation Defendant's respective liability.[112]

The court therefore approved the settlement agreement over WTCP's objections and revealed the settlement terms.[113] The Aviation

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[105] *Id.* at 541.
[106] *Id.* at 542.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 543-544.
[110] *Id.* at 544.
[111] *Id.*
[112] *Id.* at 545.
[113] The court initially agreed to keep the settlement terms under seal. *In re* Sept. 11 Litig., No. 21 MC 101 (AKH), 2010 WL 637789 (S.D.N.Y. Feb. 19, 2010). However, the New York Times Company then intervened and argued that the terms of the settlement were in a judicial document that was a matter of public interest, and accordingly, that the settlement terms should not be kept under seal. *In re* Sept. 11 Litig., 723 F. Supp.2d 526 (S.D.N.Y. 2010). The court agreed that the amount of the settlement and its allocation among contributing insurers should be made public, but kept the amount to be paid to each settling plaintiff and all communications exchanged between the settling parties under seal. *Id.* at 533. The court then revealed the settlement terms in its Order approving the settlement. 723 F. Supp.2d at 544. Thereafter, no party attempted to file a settlement under seal,

Defendants would pay the settling plaintiffs $1.2 billion to settle a total of $4.4 billion in property damage claims (not including pre-judgment interest at 9% *per annum*), a 72 percent discount reflecting the parties' perceptions of the difficulties Plaintiffs faced in proving liability and damages.[114] The court also noted that the settlement would be funded pursuant to an allocation agreement among insurers as follows: 48% by the insurers of American Flight 11 (which struck WTC 1); 12% by the insurers for Globe Aviation, the security company responsible for screening passengers boarding Flight 11; and 40% split between the insurers of United Flight 175 (which struck WTC 2), and the insurers for Huntleigh, its security company.[115] The allocation agreement among insurers was based loosely on the property damage caused by each flight. Finally, the court revealed that as among the insurers for each airline and its respective security company, the proportions allocated also were based on the amount of available coverage that the airlines and their respective security companies had remaining on their liability insurance policies.[116]

On appeal, WTCP repeated its arguments made to the District Court.[117] WTCP also argued that New York's "first-come, first-served" rule was inconsistent with, and thus preempted by, the ATSSSA.[118] The Second Circuit first concluded that the District Court correctly applied New York state law to its evaluation of the settlement.[119] The court also found that the ATSSSA only created a liability cap for the Aviation Defendants' benefit, not a "limited fund" for any plaintiff's benefit.[120] Accordingly, the ATSSSA did not conflict with New York's "first-come, first-served" policy, and the District Court did not err by applying that rule to the settlement.[121]

Next, the Court of Appeals found that the District Court had made a proper evaluation of the fairness of the settlement agreement.[122] Specifically, the Second Circuit found that the Aviation Defendants had no duty to pay all plaintiffs' claims ratably, and there was no evidence that either the Aviation Defendants or the settling plaintiffs had acted in bad faith.[123] Nor, as WTCP contended, was the lump sum basis on which all claims were settled a reason to reject the settlement.[124] The court

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and all settlement amounts were made public.

[114] *Id*.

[115] *Id.* at 545.

[116] *Id.*

[117] 650 F.3d at 145.

[118] *Id.* at 151.

[119] *Id*.

[120] *Id.* at 152.

[121] *Id.* at 152-153.

[122] *Id.* at 154.

[123] *Id.* at 153.

[124] *Id.* at 154.

also rejected WTCP's argument that the settlement was improper because the insurers of only four Aviation Defendants were responsible for paying the full settlement amount. The court found that the Aviation Defendants were justified in their belief that adding other Aviation Defendants' liability insurers as contributors to the settlement would have served only to increase the settling plaintiffs' demands and further complicate settlement negotiations.[125]

Finally, the Second Circuit concluded that Judge Hellerstein did not err in counting the settlement payments toward each contributing Aviation Defendant's respective liability limitation under the ATSSSA.[126] WTCP argued that the ATSSSA's liability limitations apply only to payments for "liability," and the settlement payments should not count because settlement payments are not a "liability."[127] The Court of Appeals found that a liability can arise from a settlement obligation, and that reading the ATSSSA to allow for crediting the settlement payments towards each Aviation Defendant's respective liability cap was consistent with how the term "liability" is used in the ATSSSA.[128] Accordingly, the Second Circuit affirmed the District Court's approval of the settlement in all respects.[129]

VIII. Wrongful death damages disguised as Business Interruption losses

After the 2010 settlement between the Aviation Defendants and most of the property damage and business interruption plaintiffs, only three plaintiffs remained: (1) WTCP (*see* Section XI, *infra*); (2) Cedar & Washington (*see* Section X, *infra*); and (3) Cantor Fitzgerald, and its affiliated companies.[130]

Prior to 9/11, Cantor Fitzgerald was the nation's largest treasury bond dealer. It occupied the top three floors of WTC 1. 658 Cantor Fitzgerald employees died on 9/11; no Cantor Fitzgerald employee present in its New York office on 9/11 survived. Cantor Fitzgerald's Complaint asserted claims only against American Airlines, whose

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[125] *Id.*

[126] *Id.* at 155.

[127] *Id.* at 154.

[128] *Id.* at 155.

[129] *Id.*

[130] The 2010 $1.2 billion settlement substantially reduced the possibility that the Aviation Defendants would face a liability trial, which would have been fraught with financial and reputational risks given the unique nature of the 9/11 Litigation. As set forth herein, and in Sections X and XI, *infra*, for the remainder of the 9/11 Litigation, the Aviation Defendants' strategy focused on litigating damages issues, and using favorable damages decisions to mediate and settle the remaining claims.

Boeing 767 aircraft crashed into WTC 1 on 9/11.[131]

Cantor Fitzgerald initially valued its claim against American at approximately $100 million.[132] In 2009, however, Cantor Fitzgerald increased its damages claim to nearly $1 billion, exclusive of pre-judgment interest.[133] After settlement discussions with Cantor Fitzgerald broke down, American moved for partial summary judgment to define and limit Cantor Fitzgerald's damages claim, asserting that most of Cantor Fitzgerald's amended damages claim was attributable to the deaths of their employees, and that damages arising from those deaths were unrecoverable as a matter of law.[134] The court agreed.[135]

Judge Hellerstein found that Cantor Fitzgerald's damages expert claimed to have calculated its damages using a "holistic" approach that purportedly covered its destroyed office space, destroyed books of business, and destroyed relationships.[136] However, the expert acknowledged that his method failed to filter out damages arising from the deaths of Cantor Fitzgerald's employees.[137] The court found that under New York law, Cantor Fitzgerald may not recover damages arising from the deaths of its employees regardless of how ingeniously that claim is disguised.[138] Only the decedents' personal representatives may recover wrongful death damages.[139] Indeed, Cantor Fitzgerald was unable to cite a single case in the United States where an employer was permitted to recover wrongful death damages for the death of its employee.[140] Accordingly, Judge Hellerstein directed Cantor Fitzgerald to amend its expert's report to eliminate the impermissible aspect of its damages claim.[141] Pursuant to the 2009 allocation agreement among insurers, Cantor Fitzgerald and American later mediated and settled Cantor's claims prior to a liability trial.[142]

IX. The standard of care to be applied in a liability trial

In 2011, the only wrongful death case remaining was brought by Mary Bavis as the representative of the estate of her son Mark Bavis, a passenger aboard United Flight 175. The Bavis case was scheduled for a liability and damages trial in

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[131] *In re* Sept. 11 Litig., 760 F. Supp. 2d 433 (S.D.N.Y. 2011).
[132] *Id.* at 435.
[133] *Id.*
[134] *Id.*
[135] *See id.*
[136] *Id.* at 439.
[137] *Id.* 439-440.
[138] *Id.* at 441-445.
[139] *Id*.
[140] *Id.* at 442.
[141] *Id.* at 445-446.
[142] *See supra* n. 132.

the fall of that year.[143] Prior to trial, the parties sought a ruling on whether federal law preempted state law on the standard of care applicable to United's conduct on 9/11.[144]

The court first addressed the relevant standard of care under two applicable federal statutes: (1) the Federal Aviation Act of 1958;[145] and (2) the Aviation Security Improvement Act of 1990.[146] The Federal Aviation Act establishes safety standards for the design, construction, and operation of aircraft.[147] The Act requires that the FAA promulgate rules and regulations to promote safety in the design, construction, and operation of aircraft that conform to "minimum safety standards" that the FAA also is to prescribe.[148] The Aviation Security Improvement Act requires that the FAA promulgate a uniform system of regulations to ensure aircraft passenger safety, and to prevent criminal violence and aircraft piracy, by requiring the screening of aircraft passengers and their property.[149]

Plaintiff Bavis argued that the federal statutes and regulations establish only "minimal standards," and the use of that term in the Federal Aviation Act demonstrates that Congress intended to incorporate state law reasonableness standards.[150] Defendants countered that the federal statutes and regulations demonstrate that Congress intended that federal law govern completely questions of aviation safety and security, and therefore these laws preempt state law.[151] Judge Hellerstein found that the federal aviation security regulatory scheme is not a set of minimum federal standards to be interpreted in different ways in different cases, but rather was intended to provide a uniform standard of care that preempts individual states' standards of care.[152]

Relying on the Second Circuit's decision in *Air Transport Ass'n of America, Inc. v. Cuomo*,[153] the court found that the intended purpose of the Federal Aviation Act was to centralize rules for aviation safety in a single body, namely the FAA.[154] That intent to centralize authority over air safety meant that Congress intended to occupy the entire field thereby preempting state laws relating to air safety.[155] According to the court, accepting plaintiff's argument regarding "minimum standards" that also would incorporate state standards of care

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[143] *See* Bavis v. UAL Corp., 811 F. Supp.2d 883, 885 (S.D.N.Y. 2011).
[144] *Id.*
[145] Pub. L. No. 85-726, 72 Stat. 744.
[146] Pub. L. No. 101-604, 104 Stat. 3066.
[147] *Bavis*, 811 F. Supp.2d at 885.
[148] *Id.* at 887.
[149] *Id.*
[150] *Id.* at 891-892.
[151] *Id.* at 892.
[152] *Id.* at 892-893.
[153] 520 F.3d 218 (2d Cir. 2008).
[154] *Bavis,* 811 F. Supp.2d at 890-891.
[155] *Id.*

would contradict the statutory requirement that the FAA create uniform procedures for screening passengers and their property.[156]

Judge Hellerstein next addressed Defendants' argument that under the Aviation Security Improvement Act, there could be no further inquiry into whether Defendants' conduct on 9/11 was "reasonable" provided that their conduct had complied with applicable FAA regulations.[157] The court noted that the Act was passed in response to the 1988 terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland and was intended to enhance federal control over aviation security. [158] Accordingly, the court found that the federal scheme provided a uniform system of standards, not "minimum standards" as Plaintiff had argued. However, because the court had yet to evaluate Defendants' security program as it existed on 9/11, it could not say whether Defendants' conduct comported with the statutory requirements. [159] In light of the court's decision to apply a federal standard of care at trial, Bavis agreed to settle her claims twelve days after the court's decision.[160]

X. The Cedar & Washington Case

Cedar & Washington, which owns a building near the World Trade Center, brought claims under the Comprehensive Environmental Response Compensation Liability Act of 1980 ("CERCLA")[161] seeking to recover the costs to remove from its building toxic dust and debris caused by the collapse of the WTC Complex. The named defendants in Cedar & Washington's lawsuit were: (1) American Airlines and United Airlines; (2) WTCP, the WTC Complex's lessee; and (3) the Port Authority of New York and New Jersey, the WTC Complex's owner.[162] Essentially, Cedar & Washington filed a CERCLA claim because the ATSSSA statute of limitations had expired. In 2010, Judge Hellerstein dismissed all these claims on the grounds that: (1) the claims were time barred even under CERCLA's six-year statute of limitations; (2) the toxic dust and debris emitted from the collapsing towers was not "released" as that word is defined in CERCLA; and (3) Cedar & Washington could not establish liability because it was unable to show that there was a "disposal" of "hazardous material"

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156 *Id.* at 891.
157 *Id.*
158 *Id.* at 892.
159 *Id.* at 893.
160 *See* Stipulation of Voluntarily Dismissal with Prejudice Pursuant to F.R.C.P. 41(a)(1)(A)(ii), *In re* Sept. 11 Litig., No. 21 MC 101, 02 CV 7154 (AKH), Docket No. 242 (Sept. 19, 2011).
161 42 U.S.C. § 9601 *et seq.*
162 *In re* Sept. 11 Litig., No. 21 MC 101, 2010 WL 9474432 (S.D.N.Y. Sept. 22, 2010).

in the WTC Complex, as those words are defined in CERCLA.[163]

Cedar & Washington appealed to the U.S. Court of Appeals for the Second Circuit.[164] The Second Circuit issued a Summary Order remanding the case to the District Court with instructions to decide the limited issue of whether the September 11 terrorist attack was an "act[] of war" as that term is used in CERCLA because the statute provides that a defendant shall not be liable if it can establish by a preponderance of evidence that the release of the hazardous substance was caused "solely" by an "act of war."[165] In 2013, Judge Hellerstein held that the "act of war" exception to CERCLA constituted a defense to Cedar & Washington's claims under that statute and provided another reason to dismiss Cedar & Washington's claims.[166]

In doing so, the court examined traditional and current understandings of the meaning of the term "act of war." Traditionally, the court found, an act of war was committed only by a uniformed military force in the course of armed conflict pitting at least one nation-state against another.[167] Moreover, insurance contracts typically distinguish between acts of war and acts of terrorism, with the former defined as armed conflicts between nation-states, and the latter involving a non-state.[168] However, the court noted that previous cases defining acts of war and acts of terrorism had not defined a catastrophe on the level of the September 11 attack.[169]

Having reviewed definitions of acts of war and acts of terrorism, the court then examined the response of the U.S. Government to the 9/11 attack. The court stated that the September 11 attack was not carried out by armed forces employed by a nation-state, but noted that if it had been, the attack undoubtedly would be considered an act of war.[170] Moreover, both Presidents Bush and Obama called the September 11 attack an "act[] of war."[171] Congress also authorized the use of military force against nations that harbored those responsible for the September 11 attack, and the U.S. Supreme Court held that the authorization to use military force triggered the President's war powers.[172] Thus, the court held that "an act of terror and devastation that provokes a response of war, itself becomes an 'act of war'."[173]

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[163] *See generally id.*
[164] *In re* Sept. 11 Litig., 485 Fed. App'x 443 (2d. Cir. 2012).
[165] *Id.*
[166] Cedar & Washington Assocs., LLC v. Port Authority of N.Y. and N.J., 931 F. Supp.2d 496, 499 (S.D.N.Y. 2013).
[167] *Id.* at 506.
[168] *Id.* at 507-508.
[169] *Id.* at 508.
[170] *Id.* at 509-510.
[171] *Id.* at 510.
[172] *Id.* at 510-511.
[173] *Id.* at 511.

The court included two important caveats in its decision. First, it held that its decision regarding the applicability of the act of war defense was limited to Cedar & Washington's CERCLA case only and should not be a precedent used to interpret insurance policies in future cases.[174] Second, the court held that, realistically, Cedar & Washington's claim against American and United stems not from CERCLA, but from those defendants' alleged negligence in allowing terrorists onboard the planes that crashed into the WTC Complex. However, the court held that its holding in Cedar & Washington's case should have no bearing on the assertion of Defendants' act of war defense in other then-pending 9/11 cases, which also alleged that American and United were negligent in allowing terrorists onboard their aircraft.[175]

In 2014, the Second Circuit affirmed the District Court's decision dismissing Cedar & Washington's CERCLA claim.[176] The Second Circuit held that although CERCLA "casts a wide net" of liability, the "act of war" defense shields those who bore no responsibility for the release of harmful substances, and that the 9/11 terrorist attack was an "act[] of war," as that term is used in CERCLA.[177] The Second Circuit further held the "act[] of war" was the "sole cause" of the release of the dust and debris from the WTC Complex on 9/11, thereby fully satisfying the requirements needed to invoke the "act of war" defense provided in CERCLA.[178]

Cedar & Washington petitioned the U.S. Supreme Court for a writ of certiorari to review the Second Circuit's holding, arguing that the Second Circuit's interpretation of the term "act of war" was at odds with how that term is construed for the purposes of other statutes, and that the Second Circuit's "sole cause" holding was incorrect as a matter of law. The Supreme Court denied the petition without comment.[179]

XI. The WTCP Plaintiffs' case

In 2008, the Aviation Defendants moved for summary judgment dismissing WTCP's claims arising from the destruction of the WTC Complex.[180] The Aviation Defendants argued that under New York law: (1) WTCP is only entitled to recover the diminution in the fair market value

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[174] *Id.* at 514.
[175] *Id.* at 513-514.
[176] Cedar & Washington Assocs., LLC v. The Port Auth. of N.Y. and N.J. 751 F.3d 86, 89 (2d. Cir. 2014).
[177] *Id.*
[178] *Id.*
[179] Cedar & Washington Assocs., LLC v. The Port Auth. of N.Y. and N.J., 135 S. Ct. 742 (2014).
[180] *In re* Sept. 11 Litig., 590 F. Supp.2d 535 (S.D.N.Y. 2008).

of the WTC Complex on 9/11, or the cost to rebuild the destroyed WTC Complex, whichever is less; (2) WTCP's damages should be confined to the diminution of the fair market value of the buildings on 9/11 because that amount indisputably was less than the cost to rebuild; (3) the fair market value of the destroyed WTC Complex on 9/11 was $2.8 billion – the amount WTCP agreed to pay for the leases of the WTC Complex at a worldwide auction held in April 2001; and (4) that pursuant to New York's Civil Practice Law and Rule Section 4545(c) ("N.Y. C.P.L.R. § 4545(c)"), WTCP's damages were offset entirely by the $4.1 billion in insurance payments that WTCP had received. [181] The Aviation Defendants moved for a holding that WTCP had no legally recoverable tort damages for which the Aviation Defendants could be liable.[182]

Relying on the New York Court of Appeals decision in *Fisher v. Qualico Contracting Corporation*,[183] the court held that WTCP only would be entitled to the diminution in the fair market value of the WTC Complex as of 9/11.[184] However, the court allowed WTCP to show by motion that the fair market value of the WTC Complex changed between the date WTCP signed the leases in April 2001 and the date the buildings were destroyed.[185] The court also denied, without prejudice, the Aviation Defendants' motion seeking a ruling that pursuant to N.Y. C.P.L.R. § 4545(c), WTCP's damages corresponded to, and were entirely offset by, its $4.1 billion in insurance recoveries.[186]

Following further briefing by WTCP, the court held that any recovery by WTCP against the Aviation Defendants could not exceed the $2.8 billion net present value that WTCP agreed to pay for the leases of the WTC Complex just prior to 9/11 because WTCP had failed to establish that the fair market value of the leases exceeded that amount. [187] The Aviation Defendants subsequently renewed their motion to apply the $4.1 billion that WTCP received in insurance payments as a collateral offset against the maximum of $2.8 billion in damages that WTCP could recover under New York law. The court again denied the Aviation Defendants' motion without prejudice, finding that whether complete correspondence existed between WTCP's damages claim and its insurance recoveries could not be established without expert testimony.[188]

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[181] *Id*. at 536, 540.
[182] *Id.*
[183] 98 N.Y.2d 534 (N.Y. Ct. App. 2002).
[184] *In re Sept. 11 Litig.*, 590 F. Supp.2d at 541.
[185] *Id.* at 546-547.
[186] *Id.* at 547-548.
[187] *In re* Sept. 11 Litig., No. 21 MC 101, 2009 WL 1181057, at *1 (S.D.N.Y. April 30, 2009).
[188] *Id.*

In 2011, relying on expert testimony, the Aviation Defendants again renewed their motion with respect to the WTC Complex, and in 2012, filed a similar motion with respect to WTC 7, which was leased by 7 World Trade Company, L.P. ("7WTCo."), an affiliate of WTCP. The court separately denied both motions, ruling that the issue of correspondence between each plaintiff's potential tort recovery and its respective insurance recoveries required a trial.[189]

With respect to the WTC Complex, the court held that the Aviation Defendants could not prove by motion that, as a matter of law, correspondence existed between the categories of losses for which WTCP received insurance proceeds and its potentially recoverable tort damages to a degree of reasonable certainty required by N.Y. C.P.L.R. § 4545(c), and that these issues of "complexity and nuance" required a trial.[190]

In his opinion concerning WTC 7, Judge Hellerstein began by tracing that building's history. 7WTCo. executed a 99-year net lease for WTC 7 in 1980.[191] Thus, unlike the case concerning the WTC Complex, there was no contemporaneous sale or lease of WTC 7 that could be used to establish its market value prior to September 11. However, 7WTCo.'s own expert opined that the value of WTC 7 prior to 9/11 was no greater than $737 million.[192] For the purposes of their summary judgment motion, the Aviation Defendants accepted that amount as the fair market value of WTC 7, and all parties agreed that it was lower than the building's replacement cost. Because 7WTCo. received $831 million in insurance proceeds for the destroyed WTC 7, the Aviation Defendants sought a ruling that 7WTCo.'s insurance recoveries corresponded to, and collaterally offset, its legally recoverable damages.

7WTCo. opposed the motion on the ground that, although WTC 7 had a pre-September 11 value of $737 million, because 7WTCo. was contractually obligated to rebuild the destroyed building, the post-9/11 value of its leasehold was negative $222 million. According to 7WTCo., this negative value meant that it suffered a total diminution in value of $959 million, exceeding its insurance recovery.[193] The court rejected this argument, ruling that the Aviation Defendants could not be held liable in tort for the particular features of 7WTCo.'s

[189] *In re* Sept. 11 Litig., 889 F. Supp.2d 616 (S.D.N.Y. 2012); *In re* Sept. 11 Litig., 908 F. Supp.2d 442 (S.D.N.Y. 2012).
[190] *In re* Sept. 11 Litig., 889 F. Supp.2d. 616, 622 (S.D.N.Y. 2012).
[191] *In re* Sept. 11 Litig., 908 F. Supp.2d 442, 444 (S.D.N.Y. 2012).
[192] *Id.* at 445.
[193] *Id.* at 447-448.

contract with its lessor, which allegedly required rebuilding.[194]

The court similarly rejected 7WTCo.'s arguments that it should be permitted to recover the costs to re-tenant the rebuilt WTC 7 because that value is a replacement cost that exceeded the building's fair market value.[195] The court likewise rejected 7WTCo.'s claim for destroyed tenant improvements, finding that such costs also were replacement costs in excess of fair market value.[196] It also rejected 7WTCo.'s claim for its mortgage carrying costs, finding that such costs would have been incurred regardless of whether the building had been destroyed.[197] WTCP had made these same arguments with respect to the WTC Complex, which the court also rejected.[198] On the issue of the correspondence, the court reached the same conclusion that it did concerning the WTC Complex: correspondence could not be found as a matter of law and would require a limited bench trial.[199]

Judge Hellerstein then held a five day non-jury damages-only trial in July of 2013 to determine whether complete correspondence existed between WTCP's and 7WTCo.'s insurance recoveries and potentially recoverable tort damages.[200] The fact that Judge Hellerstein held a non-jury trial confined to damages issues only was itself a significant victory for the Aviation Defendants because it allowed them to litigate the quantum of WTCP's potentially recoverable damages without being exposed to the financial and reputational risks associated with a jury trial on liability.

At the conclusion of the damages-only trial, the court dismissed all of WTCP's and 7WTCo.'s claims with prejudice and entered judgment for the Aviation Defendants.[201] In a written decision, the court examined the insurance programs purchased by WTCP and 7WTCo., how WTCP came to receive $4.1 billion in insurance proceeds after litigation and settlement with its insurers, and how 7WTCo. came to receive $831 million in insurance proceeds after litigation and settlement with its insurer.[202] The court then explained its previous holding that under New York law, Plaintiffs' potential tort recovery for their destroyed property is limited to the lesser of the diminution in the fair market value of the leaseholds[203] or

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194 *Id.*

195 *Id.* at 448.

196 *Id.*

197 *Id.*

198 *In re Sept. 11 Litig.*, 889 F. Supp.2d at 619-623; *In re Sept. 11 Litig.*, 957 F. Supp.2d at 510.

199 *In re Sept. 11 Litig.*, 908 F. Supp.2d at 450.

200 *In re* Sept. 11 Litig., 957 F. Supp.2d 501 (S.D.N.Y. 2013).

201 *Id.* at 502.

202 *Id.* at 503.

203 Previously, both the court and the parties addressed the diminution of value

their replacement cost.[204] The court also noted that under New York law, lessor-plaintiffs are not entitled to recover costs of contractual obligations, such as an obligation to rebuild destroyed leasehold property, because losses arising from contract are not "the natural and probable result of [defendants' alleged] negligence, nor the foreseeable consequence of [defendants' alleged] acts and omissions."[205]

Finally, the court explained the standard by which correspondence between insurance recoveries and alleged tort damages must be proven by a defendant in order to obtain a collateral setoff (*i.e.*, a reduction in damages) pursuant to N.Y. C.P.L.R. § 4545(c). A reduction in damages is warranted only when the collateral source reimbursement for a particular category of loss corresponds to the same category of loss for which damages are sought.[206] N.Y. C.P.L.R. § 4545(c) ensures that a plaintiff does not receive a double recovery, but correspondence must be proven to a "reasonable certainty" to ensure that defendants do not receive underserved windfalls by escaping liability for their actions or omissions.[207]

Having explained the background and relevant law of the case, the court examined the proofs offered at trial. First, the court held that the WTCP and 7WTCo. Plaintiffs purchased two primary categories of insurance: (1) replacement cost insurance to cover the costs of restoring the destroyed property; and (2) business interruption insurance (also known as time element insurance) to cover lost income during a reasonable period of reconstruction.[208] The court further held that these types of insurance were intended to remedy the same economic loss: the destroyed value of the leases, as measured relative to the market value of those leases immediately prior to the terrorist attack.[209] The destroyed value of the leases is precisely the injury for which the WTCP and 7WTCo. Plaintiffs sought to recover damages from the Aviation Defendants. Accordingly,

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issue in terms of the diminution of the value of the *buildings* as opposed to the diminution in value of WTCP's *leaseholds*. Because WTCP leased and did not own the WTC Complex, beginning with its written decision following the July 2013 damages-only trial, the District Court consistently addressed diminution in value in terms of leasehold value, rather than the value of the destroyed buildings themselves. It should be noted, however, that because WTCP entered into 99-year leases, the value of its leaseholds was identical to, or practically identical to, the value of the buildings themselves.

[204] *Id.* at 506-507.

[205] *Id.*

[206] *Id.* at 507-508.

[207] *Id.* at 507-509.

[208] *Id.*

[209] *Id.*

the court held that WTCP's and 7WTCo.'s insurance coverage corresponded completely to their potential tort recovery, precluding any recovery by WTCP.[210] WTCP and 7WTCo. appealed.

On September 17, 2015, the United States Court of Appeals for the Second Circuit, in a two to one decision, affirmed in part, and vacated in part, the District Court's dismissal of WTCP's and 7WTCo.'s claims.[211] First, the court affirmed the District Court's holding that Plaintiffs' damages are limited under the "lesser of two rule" to the diminution in fair market value of its leasehold interests in the WTCP Complex and WTC 7, and rejected Plaintiffs' claim for the costs to rebuild the destroyed properties.[212] Second, the Court of Appeals affirmed the District Court's decision rejecting Plaintiffs' claims for consequential damages.[213] Third, the court held that under New York law, Plaintiffs' insurance recoveries were correctly applied as collateral offsets against their potential tort damages.[214] Fourth, the Court of Appeals rejected WTCP's argument that the District Court was required to conduct a full liability and damages trial before collateral offsets could be applied.[215]

However, the Second Circuit vacated that portion of the District Court's decision relating to leasehold valuation methodology, holding that the District Court incorrectly calculated the diminution in fair market value of Plaintiffs' leasehold interests. The Second Circuit found that the District Court had determined the market value of the fee simple interest in the destroyed properties, not the market value of Plaintiffs' leasehold interests in those properties.[216] On remand, the District Court was instructed to determine the pre-attack value of Plaintiffs' leasehold interests based on what a willing buyer would have paid WTCP prior to 9/11 to assume all of their rights and obligations under the leases.[217] According to the Second Circuit, if, prior to September 11, a willing buyer would not have been willing to pay Plaintiff any more to assume its leasehold obligations than Plaintiff itself paid for those obligations, the value of the leasehold interests prior to 9/11 could be zero.[218]

The Second Circuit also determined that the District Court improperly rejected Plaintiffs'

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[210] *Id.*
[211] *In re* Sept. 11 Litig, 802 F.3d 314 (2d Cir. 2015).
[212] *Id.* at 326-332.
[213] *Id.* at 333-334.
[214] *Id.* at 338-342.
[215] *Id.* at 339-340.
[216] *Id.* at 334-338. *See supra* n. 205. Although the District Court believed it had evaluated the diminution in value of WTCP's leasehold interests, the Second Circuit disagreed.
[217] *Id.* at 337-338.
[218] *Id.* at 335-337.

argument that post-9/11 the value of their leasehold interests could have been negative. On remand, the District Court was instructed to consider this possibility.[219] However, the Second Circuit also instructed the District Court to assume that Plaintiffs did not rebuild the destroyed properties. The Second Circuit remarked that in resolving the leasehold value issues, the District Court "could allow additional discovery or conduct a limited trial on damages, but may find such steps unnecessary, and decide the narrow issue on the current record."[220]

The WTCP Plaintiffs filed a petition seeking both panel rehearing and *en banc* review. The Second Circuit denied both requests in a December 1, 2015 Order.[221] Judge Hellerstein then sought to resolve the outstanding issue identified by the Second Circuit in this last remaining case in the 9/11 Litigation, and ordered briefing from both sides to decide how to resolve the issue. The WTCP Plaintiffs sought to re-open liability fact discovery, and to continue that discovery while simultaneously allowing limited additional expert damages discovery. The Aviation Defendants objected to the resumption of liability discovery given the narrow, damages-focused scope of the Second Circuit's remand, and requested that the District Court order additional summary judgment briefing to resolve the questions the Second Circuit's Order presented, or to permit limited additional expert damages discovery, to be followed by summary judgment briefing.

The District Court decided that in order to determine the value of WTCP's leases, it needed to "construe" the relevant provisions of those leases, and evaluate what, if any, impact the lease terms had on their value. The parties thereafter submitted to the court their competing interpretations of WTCP's leases and their impact on valuation.

On April 6, 2017, Judge Hellerstein issued an Opinion and Order holding that: (1) the pre-attack value of WTCP's leases for the WTC Complex was the $2.805 billion that WTCP agreed to pay for the rights and obligations in those leases in April 2001; (2) the hypothetical post-attack value of the leases must, consistent with the Second Circuit's opinion, exclude potential rebuilding costs, but should include ongoing rental expenses, as well as the amounts WTCP would earn once the WTC Complex was rebuilt; and (3) it is unlikely that the post-9/11 value of the WTC Complex leases, which WTCP entered into through single purpose entities with no assets

[219] *Id.*
[220] *Id.* at 338, n.16.
[221] *In re* Sept. 11 Litig., Nos. 13-3619, 13-3782, Docket No. 263 (2d. Cir. Dec. 1, 2015).

other than the leaseholds, could be negative because if WTCP defaulted on the leases, it would have no liability to the lessor.[222]

On the basis of this Opinion and Order, it was clear that the Aviation Defendants likely would again prevail on a motion for summary judgment that argued that the difference between the pre- and post-attack value of WTCP's leasehold interests was less than the total of its insurance proceeds recovered. However, for the Aviation Defendants to prevail completely, they would have needed to win on every issue on summary judgment, and have all issues affirmed on appeal; whereas WTCP needed only to defeat summary judgment on a single issue to prove the existence of potentially recoverable damages, thereby requiring a jury trial resolving factual issues of both liability and damages. Given the uncertainties and risks to both sides, on December 21, 2017, the parties settled WTCP's $13.7 billion claim for approximately $95 million.[223] The court approved the parties' settlement as consistent with the ATSSSA, applied the settlement amounts toward the paying Aviation Defendants' limitations of liability, and dismissed WTCP's claims with prejudice. The entire 9/11 Litigation thereby concluded without a jury ever having to decide the Aviation Defendants' potential tort liability relating to the terrorist attack of September 11, 2001.

XII. Conclusion

The 9/11 Litigation spanned more than fifteen years. This article addressed some of the major legal issues and court decisions during that litigation, but is not meant to be an exhaustive survey. Readers interested in learning more about other 9/11-related court decisions not addressed in this article should feel free to contact the authors.

[222] *In re* Sept. 11 Litig., No. 21 MC 101, 2017 WL 1287141 (S.D.N.Y. Apr. 6, 2017).

[223] *In re* Sept. 11 Litig., No. 21 MC 101, Dkt. No. 1953 (S.D.N.Y. Dec. 21, 2017).