

KEYNOTE ADDRESS, ACTUARIAL LITIGATION: HOW STATISTICS CAN HELP RESOLVE BIG CASES⁺

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Thank you very much. The Dean said I'm a skilled mediator. As long as he didn't say I'm a model mediator. A couple of months ago, somebody introduced me as a model mediator, and a critic stood up and said, "Model in Webster's Dictionary; a small replica of the real thing." I want to thank the Dean for mentioning my book, *What is Life Worth*. Now you may have trouble finding that book today in Barnes & Noble or on Amazon.com. Don't worry, my personal supply of my book is virtually inexhaustible.

It's a real pleasure for me to be here today. There was no way I was turning down an opportunity to be here today and partake in a small part of [this symposium]. It is true, as the Dean pointed out, that for various reasons, which you can read in my book, I got involved in some of these public law challenges over the last twenty-five years starting with Judge Weinstein, Agent Orange, 9/11, Virginia Tech, the Pay Czar (which I think is a very unfortunate characterization of my role, Pay Czar).

[L]et me make a few comments about all of these assignments. First, these special funds that are set up, like the one I'm doing now, with BP, are very, very rare and they should be very rare. I'm asked all the time [whether these funds], like the 9/11 fund, the Agent Orange fund, the Virginia Tech fund, [are] "an alternative to the conventional way of resolving disputes, the wave of the future?" Absolutely not. They are not the wave of the future, they should not be the wave of the future, and even if you wanted them to be replicated, it won't happen. I mean I do these every six years when some tragedy befalls the country. There are variations; you heard . . . others talking about bankruptcy and mass settlements. Those are cousins to what I do. I'm engaged with a design and

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an implementation and an administration that's very, very different from those in terms of its lack of checks and balances, in terms of its delegation, and in terms of its function.

What I do is really out of the box. It is a precedent to nothing and this BP thing is a wonderful idea of why it's a precedent for nothing. Within thirty days after the deep-water explosion, the administration sits down with BP; no statute, no judicial oversight, no regulation, [no] administration, no checks and balances in the form of senate confirmation or me or anybody like me, and they shake hands and BP announces to the world, "We have decided to put up twenty billion dollars." Now how many times can you think of a company, or an admitted wrongdoer, who decides that it's in our interest and it's in the public interest [to] fund twenty billion dollars?

[After] 9/11, Congress passed a law to set up a special fund. Congress didn't appropriate one dollar for that fund. Congress just said, "Whatever it costs, Feinberg, pay it out of petty cash from the US Treasury." No appropriation, pay whatever it takes to get the job done. [With the] Agent Orange [fund], under the auspices of Judge Weinstein, . . . eight chemical companies . . . decided to settle a class action . . . put up one hundred eighty million dollars with interest, which over ten years will grow to about two hundred fifty million dollars. That's when interest mattered . . .

These programs – ask yourself a very practical question when you think about these special programs. Who is funding these programs? Who is going to fund them? If you don't have a deep pocket willing to cut the check; even if you had a deep pocket, as a philosophic matter, these programs are so alien to the conventional way we resolve disputes that even if you come up with some sort of law review article that's going to point out how these programs can be expanded and made more pervasive along the legal spectrum; I don't think you'll get much support for it.

The conventional adversarial litigation system is so engrained in the fabric of this country. It's such a part of our history, our heritage; you may nibble at the edges, but you're not going to change that system. . . . There is a problem with any profession. There's a problem with the adversary system, but when you talk about wholesale changes, here's an alternative way to do it. Unless that alternative way is grounded in history as an alternative – and there are some examples, workers' compensation, the most obvious – unless you're going to have a real historical basis for making radical change, these programs that I've administered over the past twenty-five years should be viewed as aberrations, as one-offs.

Now people . . . may look at the way these programs are administered and designed and you may say, “You know, we can take a little of this and get a little of that.” That’s fine, but any idea that, “Well we did it for BP, we did it for 9/11, let’s do it for asbestos, or let’s do it for pharmaceuticals or let’s do it for chemicals,” it isn’t going to happen. That’s why you really need . . . these people . . . within the design mold of mass aggregation and mass litigation, class actions; a discussion of that, that’s where I think you’re going to likely see some change. That’s where you may see some change, not what I do, which is really an aberration and a sideshow.

Philosophically, you see, there are real problems with what I do. Now take 9/11; the 9/11 Victim Compensation. . . . It was not a mistake. The 9/11 Victim Compensation Fund was absolutely the right thing to do and I’ve been defending it since it was passed by Congress, signed by the President and we implemented it. It was successful and it was the right thing to do, but they’ll never do it again. They will never do it again, not the way it was done in 2001 by Congress where it delegated to one person the authority to design and administer a program that by statute gave everybody a different amount of money in order to buy them out – to attract them out of a tort system. And even though I’ll defend the 9/11 Program, it is a very, very close question. Philosophically, it raises tremendous issues in a free society. There was no 9/11 Fund for the victims of Katrina. You should have read some of the emails that I got when I was administering that fund.

“Dear Mr. Feinberg, my son died in Oklahoma City, where’s my check?” “Dear Mr. Feinberg, I don’t get it. My daughter died in the basement of the World Trade Center in the original 1993 attacks committed by the very same people, how come I’m not eligible by a check?” And it didn’t end with terrorism. “Dear Mr. Feinberg, explain something to me. Last year my wife saved three little girls from drowning in the Mississippi River and then she drowned a heroine. Where’s my check?”

It’s very, very difficult to justify public money, yet tax payer money one hundred percent to some people who are victims of life’s misfortunate. Nobody else is getting a check, and even though I think it could be justified with 9/11 and it was the right thing to do, it’s not by trying to explain away differences among victims – I can’t do that. Maybe you can, but from the perspective of the country, it was the right thing to do, not from the perspective of the victims. The country wanted to do it. The country wanted to show its community and cohesiveness with the victims. Fine, from the country’s perspective, but very, very difficult issues get raised. Then to delegate to one person – I mean I’m getting hammered

now with BP and with the anniversary coming up next week – hammered. One person is making these decisions.

Now there are differences obviously with all of these programs. The problem in BP is the sheer volume paid. I've received, in nine months, eight hundred thousand claims. You know, its human nature. BP announces to the world, "Twenty billion. We're going to make you whole." Well, I'm a dentist, are they going to make me whole? I'm a veterinarian, a chiropractor, why shouldn't I file a claim? Proximate cause, what is that? That's something taught maybe at Connecticut Law School, but what that have to do with me? But for causation is what I'm interested in. But for the skill and human nature being what it is, every financial ill-eye suffers because of that bill. It's in good faith and you're not going to convince people otherwise. So in nine months, we have distributed to two hundred thousand people, four billion dollars. In nine months, and you still get criticized.

So these programs raise important issues, philosophical, political, etcetera. . . . How do you decide what a person ought to get paid, whether it's in tort or [when] Congress passes a law that says, "Pay Czar." How do you decide what a corporate official at CitiGroup should get paid? How do you decide compensation? How do you decide it?

Now the first thing you find out is when you read the statutes or the rules or the compact or the escrow agreement; that gives you some guidance as to how you're going to go about compensating. Notice that in these cases, they largely involve death, physical injury. Pay Czar is financial compensation outside the tort system and BP is largely – not exclusively but largely – old fashioned economic loss: financial wage loss, income loss arising out of the spill. [There's] very, very little actuarial work [involved], very little. First of all, you basically have an unlimited budget in a lot of these, you see, so there's no actuarial requirement in terms of trying to allocate limited resources, thank goodness. One of the biggest problems that I confront in my work is when Peter thinks I'm nickel and diming him in order to pay Paul out of a limited fund, you see. So the more money I have, the more I'm able to deflect arguments like that.

Most of the work in defining compensation depends on the statute and the nature of the cohort of people you're trying to help. In 9/11, the overwhelming compensation went to death. We paid about three thousand people something like six billion dollars. . . . Notwithstanding the title of my book, *What is Life Worth*, I like the title because it sells books, but it is a little bit of a misnomer . . . because we're not placing value in 9/11 on the moral integrity of any person. I'm doing what judges and juries do in Connecticut every day. . . . What is the economic loss suffered by the

victim? How old was he? How long would he have worked? What does the census and the Bureau of Labor Statistics tell us about what a secretary makes in the World Trade Center? Male or female? How many dependents?

Put aside the administrative law problem of having one person do it and delegate to one person, it is basically rather common, if you want to know the truth. What I do in all of these assignments is not rocket science. The people in this room could do exactly what I do, exactly. This is not something where I have a magic bullet here. I do what judges and juries do every day. In BP, but for the difficult problem, shall we say, of people not paying their taxes so that it's hard to prove the claim, it's rather straightforward. What did you earn before the spill? What did you earn after the spill? How do you tie the difference to the spill?

I mean I've got claims from fifty states, from fifty states. "Mr. Feinberg, we served the best shrimp scampi in Hartford. Now we can't get shrimp from the Gulf and we've lost ten percent of our clientele base." "Well proximate cause. . ." "What? What does that mean? Pay me. You've got twenty billion dollars."

One final point . . . One thing that I'm not involved in, in any of these cases, is insurance, contribution, subrogation – not on my watch. Thank goodness. Here's a claimant. Pay the claimant or don't pay the claimant. "Well, there are offsets from insurance." . . . "There's an indemnity agreement that BP has with Transocean and with Halliburton." I don't want to hear about it. That's not what I'm not here for. I'm here to pay the claimant and get a release. Corral the claims and pay the people. Now if BP and Transocean have contributions, indemnity agreements, offsets, insurance, it's not my problem. My problem is to pay the claim. Whatever else is going to happen is going to happen, but not on my watch. Otherwise, I'm already bogged down with eight hundred thousand claims. People want their money, you see. . . . there have been two hundred seventy thousand claims filed since November 23rd, and about seventy percent of them have been processed. Not all paid, but processed.

So that's sort of what I'm doing, and why I thought . . . this [was] the right crowd to [consider] the ramifications of what I do or what our cousins do in the mass tort system and . . . aggregative statistics and aggregative law.

