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Legal Heavyweights to Help Decide Sept. 11 Fund Appeals

By DAVID W. CHEN

For almost a year, the Sept. 11 Victim Compensation Fund has been defined by only one public face: Kenneth R. Feinberg, the special master in charge of administering it.

But now Mr. Feinberg is preparing to decentralize. To help him determine how much each victim's family should receive, he has invited 41 retired judges, lawyers and professors to join a novel appellate system that will mediate objections raised by the families and gauge the validity of arguments for economic relief and suffering worth millions of dollars.

William H. Webster, the former director of the Federal Bureau of Investigation, has been tapped. Nicholas deB. Katzenbach, the former attorney general, has also been asked. So, too, have Arthur R. Miller, the Harvard law professor, and Sheila L. Birnbaum, the head of the products liability department at Skadden, Arps, Slate, Meagher & Flom.

By vesting so much potential power in legal luminaries whose credentials "will not be called in question," Mr. Feinberg said that he was ready to rely on other people to help define the fairness and humanity of a multibillion-dollar fund without precedent.

But already, Mr. Feinberg's list has provoked lively debate and controversy as to whether he has chosen the ideal faces of last resort for grieving families fighting for just compensation.

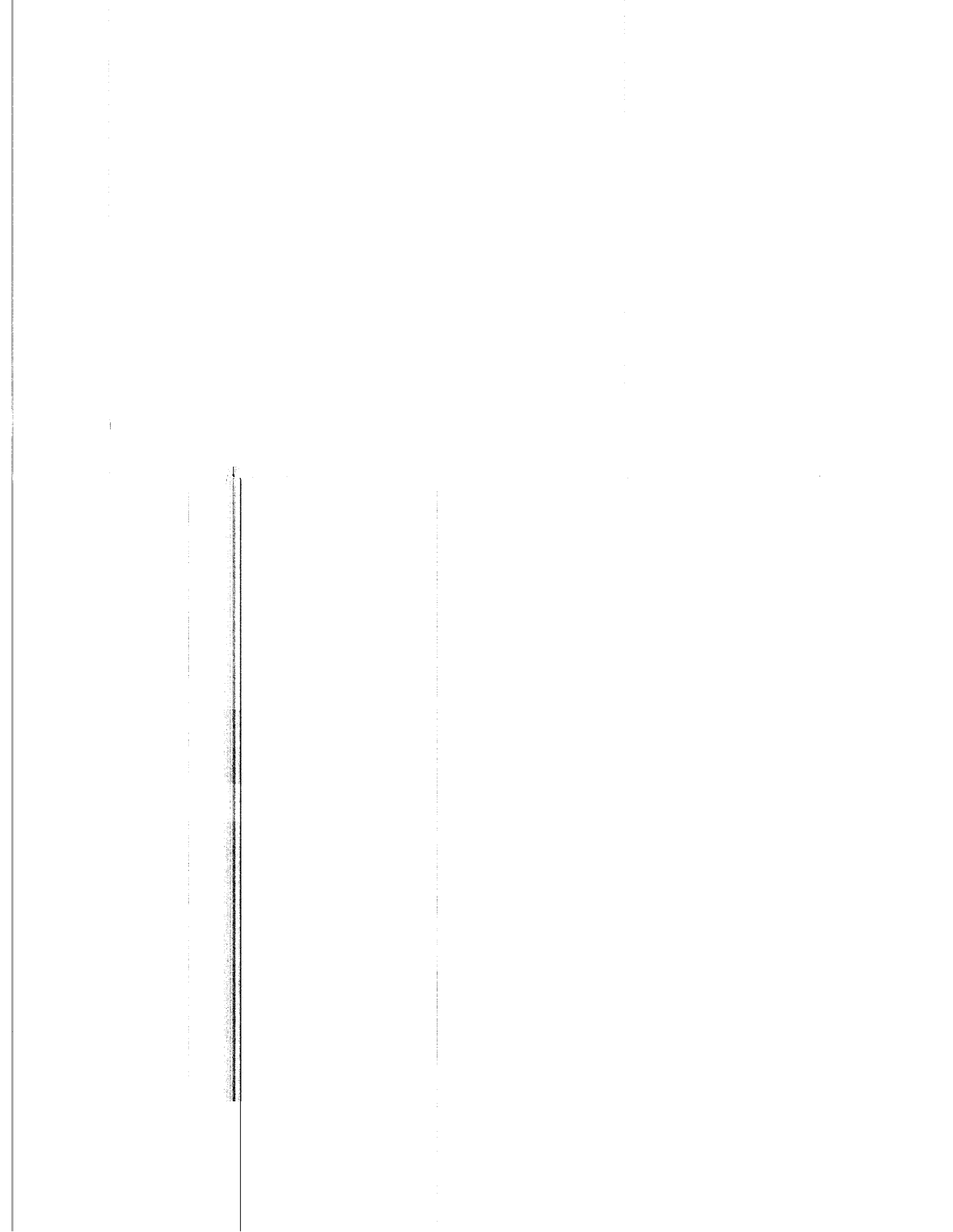
According to several lawyers and scholars who have reviewed the list, there are too many corporate defense lawyers and too many people plucked from Mr. Feinberg's Rolodex of friends, former colleagues and fellow mediators. If anything, Mr. Feinberg's choices may be too qualified, the critics say, to relate to the circumstances and yearnings of the firefighters, bond salesmen and immigrant strivers who died.

"This is not going to be seen as a claimant-friendly list of people," said one lawyer who represents several Sept. 11 families and knows many people on the list.

But according to Mr. Feinberg and his supporters, such complaints are unfounded and driven, perhaps, by a determination to undermine the fund, which has already come under criticism as being a poorly conceived and heavy-handed alternative to litigation.

"The idea that this distinguished group has any agenda other than doing justice to the Sept. 11 victims is just wrong and unfair," said Mr. Feinberg, who provided a copy of the list to The New York Times. "These people have reputations for good judgment, a sense of fairness, credibility."

Under the law that created the fund in late September as part of an airline bailout package, the special master has the authority to "employ and supervise hearing officers" in administering the fund. And



under the rules devised by Mr. Feinberg, the special master retains enormous discretion over all aspects of the fund, including the fact that all decisions are final.

So far, most candidates — officially called "appellate hearing examiners" — have enthusiastically agreed to participate in what is essentially an unusual, parallel justice system. And while they are entitled to a standard per diem allowance, most of the dozen or so candidates who were interviewed for this article said that they would be honored to work free of charge, and for Mr. Feinberg.

"He has a spectacular reputation," said Lawrence J. Zweifach, a securities lawyer in Manhattan whose sister-in-law is a lawyer in Mr. Feinberg's Washington firm. "I think everyone's been touched by the events of Sept. 11 and is looking for a way to help."

About three-quarters of the proposed examiners are from the New York and Washington areas. Roughly half have worked as mediators or arbitrators, or, like Mr. Feinberg, have been affiliated with the CPR Institute for Dispute Resolution in New York. There are prominent Democrats, like Stuart E. Eizenstat, a deputy treasury secretary in the Clinton administration. There are prominent Republicans, like Mr. Webster. Perhaps a quarter of the people have worked alongside Mr. Feinberg, who has mediated compensation disputes involving the Agent Orange defoliant used in Vietnam and the Dalkon Shield birth-control device, and once was chief of staff to Senator Edward M. Kennedy.

And a good number, according to Pamela S. Falk, a law professor at the City University of New York, have sterling résumés with a "bias toward tort reform who believe that corporations are hurt by large payments to victims."

Some proposed examiners, like Barbara Paul Robinson, an expert in estates and trusts at Debevoise & Plimpton, do not know Mr. Feinberg personally. Others, like David O. Bickart, a law school classmate of Mr. Feinberg's at New York University, know him very well.

"I've never dealt with individual people's personal claims for compensation for their injury, so this is something which would be new and different for me," said Mr. Bickart, an environmental lawyer with Kaye Scholer in Washington. "I know that it's very difficult to safeguard the money and be humane and decent and listen at the same time, but I'm glad he thinks I can do it."

Those who do join Mr. Feinberg have been asked to attend an all-day training session in Washington in October. After that, they will be called upon, as needed, to handle hearings in offices in New York, Washington and other locations convenient to the families.

The examiners may be asked to handle either the appeal of an award that has dissatisfied a family, or a hearing in which a family has an initial opportunity to plead its case — proceedings that Mr. Feinberg promised would be nonadversarial. Either way, Mr. Feinberg said he would check their recommendations to guarantee consistency.

"I have to be concerned that these esteemed people, even after a day of training, not go in different directions," he said.

So far, most families have shied away from the fund, unsure of its fairness, overwhelmed by its complexity and unwilling to forgo litigation, for now. As of yesterday, only 52 families had been offered awards, ranging from \$250,000 to \$3.7 million. Thirty-one had accepted, five had requested hearings and the others had not yet responded. The deadline to apply is Dec. 21, 2003.

In the end, Mr. Feinberg says, few families will opt for individual hearings and most will fill out the paperwork for their payments, which are expected to average \$1.5 million. As a result, he expects to

conduct most of the hearings himself.

But Larry S. Stewart, president of Trial Lawyers Care, a national consortium of lawyers offering free legal services, disagrees. His group, in fact, has been encouraging its 1,400 or so claimants to request face-to-face hearings.

Many educators and lawyers said that there should have been more plaintiffs' lawyers, retired judges and perhaps even economists. Not to be ignored, too, is an apparent divide in class and experience between the victims and the examiners, according to some lawyers.

"He hasn't reached out to ordinary citizens; he hasn't reached out to people who have gone through what these people have gone through," said Kenneth P. Nolan, a partner at Speiser, Krause, Nolan & Granito in Manhattan, which represents more than 60 families. "How many of these people have relatives or close friends who are cops or firemen? Not many, I suggest."

Given the emotional baggage, money and history at stake, the examiners do not expect the process to be easy. But they are grateful to Mr. Feinberg for the chance to serve.

"We can do some real good here," said John R. Lacey, a former chairman of the Department of Justice's Foreign Claims Settlement Commission. "But no matter what you say, no matter how sympathetic you try to be, you can never please everybody. You have a lot of people who are angry. You have a lot of people who are grieving. But I'll take the heat as best as I can."

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