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PROFESSOR AARON TWERSKI: SPECIAL MASTER IN THE 9/11 RESPONDERS' LITIGATION

*Stephan Landsman**

Although this is a Festschrift honoring Professor Aaron Twerski, I would like to begin with a story about another remarkable individual, Stephen Gerard Siller.¹ The youngest of seven children and an orphan by age ten, Mr. Siller was raised by his siblings and became a New York City fireman. On September 11, 2001, he was assigned to the New York City Fire Department's Brooklyn Squad 1. As he came off his overnight shift and was driving home, he heard that an airplane had just struck the North Tower of the World Trade Center. After calling his wife, he drove to the Brooklyn Battery Tunnel to get to the scene but was turned away because the tunnel had been closed to vehicular traffic as a security precaution. Undeterred, he parked his vehicle, strapped on his sixty pounds of firefighting gear, and literally sprinted through the tunnel to the scene of the attack. He lost his life while attempting to rescue victims at the scene, leaving behind a wife and five children.

Mr. Siller's story exemplifies the heroism displayed by New York City's first responders on that awful day in September 2001. It is a story steeped in bravery, self-sacrifice, and public spiritedness. Mr. Siller was but one of the many responders who, in a terrible moment of trial, rose to the challenge. For those of us who heard Mr. Siller's story—or the stories of dozens of other brave women and men—the question became how to honor and thank them.

Professor Aaron Twerski, Professor James Henderson, Jr., and Federal District Judge Alvin Hellerstein found a way by the wise, just, and humane application of the law of tort in the cases of those responders who claimed injuries manifesting weeks or months after the attack on the Twin Towers. I can think of no more fitting narrative for a Festschrift than to recount a part of their efforts as Special Masters and Presiding Judge, respectively, in the 9/11 Responders' Tort Litigation.

Shocked and energized by the attack, Congress took extraordinary steps to compensate victims. On September 22, 2001, just eleven days after the attack, it passed the Air Transportation Safety and System Stabilization Act (ATSSSA or the Act).² The Act created a no-fault Victim Compensation Fund (VCF) to compensate "any individual (or relatives of a deceased

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1. *Stephen's Story*, TUNNEL TO TOWERS FOUND. (Mar. 19, 2023), <https://t2t.org/stephens-story/>.

2. Air Transportation Safety & System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 (Supp. I 2001)).

individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.”³ Eligibility for compensation was to be determined on the basis of having been: (1) a passenger on one of the hijacked aircraft; (2) a victim present at the time of the crashes at the World Trade Center, the Pentagon, or Shanksville, Pennsylvania; or (3) an individual who suffered injuries in the “immediate aftermath” of the crashes.⁴ Subsequent regulations defined “immediate aftermath” as within twelve hours of the crashes or, for rescue workers, ninety-six hours thereafter.⁵ The ATSSSA paved the way for compensation for the victims or families of those who, like Stephen Siller, died or suffered an immediately manifested injury in the rescue effort. It did not, however, make provision for those responders whose injuries were not immediately apparent and became known only months or years after the events.

Kenneth Feinberg, pursuant to the provisions of the ATSSSA, was designated by the Attorney General to serve as the Special Master to the VCF.⁶ He did an outstanding job, not simply because he distributed more than \$7 billion to deserving survivors of the 2,880 deceased victims and 2,680 injured individuals,⁷ but because he and his staff committed themselves to listening to and personally assisting the bereaved families.⁸ In the end, a remarkable 97 percent of deceased victims’ families opted for compensation through the VCF rather than pursuing litigation.⁹

Feinberg suggested five reasons for the VCF’s success:

1. the uncertainty and delays associated with litigation;
2. his team’s “extraordinary steps” to assure families of the likelihood of recovery;
3. the VCF’s personal outreach to each potential claimant;
4. in-person meetings or hearings with each claimant to provide them the opportunity to express their grief and loss; and
5. an opportunity for swift closure.¹⁰

Feinberg worked with a virtually unlimited budget and personalized the process through the painstaking efforts of an expert staff. He described his

3. *Id.* at § 403.

4. *Id.* at § 405(c)(2).

5. 28 C.F.R. § 104.2 (2002).

6. John Ashcroft, Att’y Gen., Department of Justice Press Conference Announcing Appointment of Special Master to Administer the September 11 Victim Compensation Fund (Nov. 26, 2001) (transcript available at https://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks11_26.htm).

7. KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, VOLUME 1 at 77, 96 (2004)

8. *See, e.g.*, KENNETH R. FEINBERG, WHAT IS A LIFE WORTH? 46–52, 60, 63, 79–80, 83 (2005).

9. FEINBERG ET AL., *supra* note 7, at 1, 80.

10. *Id.* at 1.

work as an expression of America's "national" commitment to respond to the unique and terrible attack. The VCF was, in his words, an "alternative to the tort system" that provided a "credible and effective alternative to conventional litigation."¹¹ Yet, in some quarters, it was said to raise serious questions of fairness because of the variability of its awards and the fact that the awards could not be appealed.¹²

In the aftermath of the work of the VCF, the question remained regarding responders and other victims whose injuries did not become immediately apparent but emerged months or years later because of exposure to toxic substances in the air and on the debris at ground-zero disposal sites. Such exposure, arguably, could result in respiratory illness and a host of other medical problems. Such complaints, in essence, presented a classic toxic tort problem with Stephen Siller's brave colleagues as victims seeking compensation in the aftermath of a tragedy they had selflessly volunteered to address.

The "overwhelming majority" of these individuals were barred from seeking compensation through the VCF.¹³ Their claims were within neither the specified ninety-six-hour time limit nor the VCF's coverage definition. Yet, these were women and men who had answered the call to duty, making significant sacrifices for their community and, indeed, their country. In light of the potentially huge financial risk posed by the toxic contamination to which thousands of responders had been exposed, Congress created a "Captive Insurance Company" (Captive) with up to \$1 billion allocated for claims handling, litigation defense costs, and settlement payments arising out of debris removal.¹⁴ The Mayor of the City of New York, the Governor of New York State, and the President of the United States all declared states of emergency, thereby opening access to additional funds.¹⁵ However, those charged with adjudicating the toxic tort claims did not have the luxury of an unlimited budget or a special compensation process guided by an experienced Master and dedicated staff. The toxic tort claims would have to be adjudicated in a traditional court of law. Congress, in passing the ATSSSA, made certain of that when it specified that the Federal District Court for the Southern District of New York (SDNY) was to hear all 9/11-related claims.¹⁶

11. *Id.* at 80–81.

12. *Id.* at 81.

13. Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 133 (2012).

14. *Id.* at 129.

15. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 527–28 (S.D.N.Y. 2006), *aff'd in part, appeal dismissed in part*, 521 F.3d 169 (2d Cir. 2008).

16. Air Transportation Safety & System Stabilization Act § 408(b)(3) ("The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.").

The key defendants in the toxic tort cases were the City of New York, its contractors for debris removal, the Port Authority of New York and New Jersey (the owner of the Twin Towers), and contractors hired by the Army Corps of Engineers to remove debris to a landfill in Fresh Kills, Staten Island.¹⁷ In 2003, claims began to pour in, mostly filed in New York State court. They alleged City and Port Authority violations of New York labor law regarding conditions at “construction, evacuation, or demolition” sites.¹⁸ Pursuant to the ATSSSA, the defendants removed all the state cases to the SDNY. Initially, Judge Hellerstein ruled that his court did not have jurisdiction over these claims, arguing that the mandate at the disaster site had evolved from searching for survivors from the terrorist attacks to demolition and clean-up of the ruined structures.¹⁹ However, on review, the Second Circuit, in 2005, disagreed and remanded the case back to the SDNY.²⁰ Judge Hellerstein accepted the appellate court’s analysis and retained all the claims.

Proceedings in the Judge’s court were, quite literally, a mess. As Judge Hellerstein observed:

The newly amended master complaints . . . fail to provide . . . any clear picture of the precise nature and extent of the Plaintiffs’ claims. . . . [They] fail to satisfy even the most basic requirement of notice pleading.²¹

But it was at this juncture that the extraordinary began. Instead of simply throwing up his hands, the Judge invoked Federal Rule of Civil Procedure 53(a)(1)(C)²² to appoint a Special Master to grapple with a case that would eventually feature more than 10,000 claimants from among the 60,000 who worked on the Ground Zero rescue, recovery, and debris removal effort.²³

The first person the Judge chose to serve as a Special Master was Aaron Twerski, then Dean of Hofstra Law School. Professor Twerski, in turn, enlisted his frequent co-author, Cornell Professor James Henderson, Jr., to join the case.²⁴

17. Hellerstein et al., *supra* note 13, at 133.

18. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 363 (S.D.N.Y. 2003), *aff’d in part sub nom.*; *In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005); Hellerstein et al., *supra* note 13, at 134.

19. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d at 374.

20. *In re WTC Disaster Site*, 414 F.3d at 371.

21. *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH), 03 Civ. 00007 (AKH), 2006 WL 2948821, at *1 (S.D.N.Y. Oct. 17, 2006).

22. “Unless a statute provides otherwise, a court may appoint a master only to . . . address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” FED. R. CIV. PROC. 53(a)(1)(C).

23. Alvin K. Hellerstein et al., *The 9/11 Litigation Database: A Recipe for Judicial Management*, 90 WASH. U. L. REV. 653, 653 (2013).

24. Hellerstein et al., *supra* note 13, at 141.

The plaintiffs voiced alarm about the two professors.²⁵ They had examined both scholars' academic work and found material that might cause a plaintiff's lawyer sleepless nights. Two pieces were of particular concern. The first was Professor Henderson's then-recent *Hofstra Law Review* piece, "The Lawlessness of Aggregative Torts."²⁶ It argued that suits involving "large, informally defined groups of persons [who] are alleged to be the collective victims of the defendant's wrongdoing . . . exceed the legitimate bounds of judicial authority and competence . . . to a profound degree."²⁷ While Henderson's primary target was lawsuits by government actors against commercial entities that allegedly increased the cost of public services, one could readily envision its application to the 9/11 scenario.

The second piece of concern was one co-authored by Professors Twerski and Henderson, "Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress and Medical Monitoring,"²⁸ which argued that American courts are ill-equipped "to deal with a national tragedy engendered by a product that has caused and will cause serious harm to thousands of Americans."²⁹ The article also contended that judges should reject claims for medical monitoring and anticipatory mental distress.³⁰ Since medical monitoring and anticipatory fear might well be matters considered in the first responder cases, one could appreciate the plaintiffs' concern. In addition to these pieces, Henderson and Twerski had spent more than a decade arguing against particular tort expansions in products liability,³¹ enterprise liability,³² and mass tort proceedings.³³

Not to be outdone, the defendants got into the act, contending that the appointment of Special Masters was premature.³⁴ They also complained that such appointments would allow troubling ex-parte communications between

25. *In re World Trade Ctr. Disaster Site*, No. 21 MC 100, 2006 WL 3627760, at *3 (S.D.N.Y. Dec. 12, 2006).

26. James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329 (2005).

27. *Id.* at 329–30.

28. James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815 (2002).

29. *Id.* at 816–17.

30. *Id.* at 823–47.

31. See generally James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990); Aaron D. Twerski, *Punitive Damages Awards in Product Liability Litigation: Strong Medicine or Poison Pill?*, 39 VILL. L. REV. 353 (1994).

32. See generally James A. Henderson & Aaron D. Twerski, *The Unworkability of Court-Made Enterprise Liability: A Reply to Geistfeld*, 67 N.Y.U. L. REV. 1174 (1992).

33. See generally Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76 (1989).

34. *In re World Trade Ctr. Disaster Site*, No. 21 MC 100 (AKH), 03 Civ. 00007 (AKH), 2006 WL 3627760, at *4 (S.D.N.Y. Dec. 12, 2006).

the Masters and Judge, thereby casting doubt on the integrity and transparency of the process.³⁵

Judge Hellerstein believed he had selected the right Masters for the job and dismissed criticisms from both the plaintiffs and defendants. He explained that the court, not the Masters, would make all essential value judgments.³⁶ He emphasized his intention to adhere to established court “practices [and] responsibilities.”³⁷ He noted that the responder litigation was not “aggregative” or a class action but a set of individual claims.³⁸ He pointed out that he had already rejected both medical monitoring and cancer fear claims, subject to their possible revival as equitable remedies, if necessary.³⁹ Finally, he stated that ex-parte communications would be limited in the interest of transparency and fairness.⁴⁰

The Special Masters’ work had hardly begun when the process came to a grinding halt. Judge Hellerstein had rejected a defense motion asserting immunity as a matter of law, finding that several controverted facts were crucial to any immunity determination.⁴¹ Despite the Judge’s refusal to certify an interlocutory appeal,⁴² the Second Circuit intervened and stayed all proceedings.⁴³ This interruption led Judge Hellerstein to reflect on the Sisyphean nature of the task before him. The Judge noted that there were few, if any, precedents addressing claims like those before him—arising out of exposure to different environments and toxins over a long period of time and producing a plethora of claimed medical problems.⁴⁴ These difficulties were compounded by a “complex interplay of defendants” with varying degrees of authority and responsibility.⁴⁵ Some government defendants had arguable claims to immunity that might substantially “diminish the . . . plaintiff’s potential recovery.”⁴⁶ And, while there might be sufficient funds to cover the potential awards, there would need to be a careful sorting of public funds and private insurance.⁴⁷

Once the Court of Appeals rejected immunity, Judge Hellerstein and the Special Masters plunged in. The challenge was how to manage approximately 10,000 claims concerning 387 diseases, “ranging from the

35. *Id.*

36. *Id.* at *3.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at *4.

41. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 553, 559, 566 (S.D.N.Y. 2006), *aff’d in part, appeal dismissed in part*, 521 F.3d 169 (2d Cir. 2008).

42. *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134, 145 (S.D.N.Y. 2007).

43. *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 201–02 (2d Cir. 2008).

44. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 500 (S.D.N.Y. 2009).

45. *Id.* at 500–01.

46. *Id.* at 501.

47. *See id.* at 501.

most life-threatening to the merely irritating.”⁴⁸ There was a very real concern that hundreds of trials might be required. While one possible approach might have been to certify a class, the wide range of injuries, questions of causation, and varying degrees of defendant involvement made such an approach impractical⁴⁹ and, perhaps, legally untenable.⁵⁰ Beyond the technicalities, Judge Hellerstein saw a public policy issue as central to the proceedings and, because of it, a need to address cases individually and transparently:

[A]ll that I and the parties do must be done with an eye toward public accountability. The September 11th litigation stems from an unprecedented national tragedy that impacted New York City, the State, and the Nation in long-lasting ways. The resolution of these cases must depend on careful and individual evaluations of personal injury and merits in a manner that allows the public to view and understand the results.⁵¹

But how would it be possible to grapple with 10,000 separate cases with so many different injuries in a way that would appease the litigants and win the trust of the public? The Judge and Special Masters concluded that they needed a substantial volume of information, preferably incorporated into an electronically searchable database, drawn from the key facts of each case.⁵² Not only would this provide a means of evaluating the cases but also real public transparency about claims, proof, and, eventually, awards.⁵³ The Judge, Masters, and litigants developed a 368-item discovery questionnaire.⁵⁴ It was here that the Masters embarked on an extended effort to win the cooperation and trust of the litigants. Professors Twerski and Henderson devoted “countless hours” to negotiations with the parties and to the brokering of compromises to develop the questionnaire.⁵⁵ The document addressed work background, tobacco use, duration of employment at the 9/11 sites, respirator use, pre-existing disease, collateral source benefits, and diagnostic test information.⁵⁶

48. *Id.* at 503.

49. *Id.* at 499.

50. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597, 624–28 (1997) (finding that a proposed class of potentially hundreds of thousands (or more) individuals adversely affected by prior exposure to asbestos products manufactured by one or more of twenty companies was too “sprawling” and non-cohesive to be certified as a single class under Federal Rule of Civil Procedure 23); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 851, 854 (1999) (finding that a class seeking certification to settle with an asbestos manufacturer under a limited fund theory failed to show that the defendant had limited funds to pay the aggregated claims and also was underinclusive—in that as many as one-third of potential claimants were not included in the class).

51. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 501.

52. Hellerstein et al., *supra* note 23, at 655–56.

53. *Id.* at 655.

54. *Id.* at 660.

55. *Id.*

56. Hellerstein et al., *supra* note 13, at 147–48.

In tandem with the questionnaire, the Masters—scholars who had previously expressed reservations about mass recoveries—developed a “Severity Chart”⁵⁷ to create as much common ground as possible among the litigants despite the diversity of their circumstances. The Masters and liaison counsel worked together to arrange claimed ailments into one of six “categories of diseases that plaintiffs reported with greatest frequency result[ing] from their exposure to the WTC sites” using a diagnostic system fixed by the American Medical Association and American Thoracic Society.⁵⁸ Within each category was a sliding scale also fashioned by the medical authorities, ranging from “0” (not yet medically supportable) to “4” (most severe).⁵⁹ While far from perfectly precise, the Severity Chart allowed a “neutral observer to identify a set of the most severely ill in each of the six disease categories.”⁶⁰ This approach was not only innovative but also engaging, leading the parties—with the Masters’ guidance and support—to establish common ground upon which to build trust and the basis for a more or less global settlement.

The Severity Chart could not, in the estimate of the Judge and Masters, address every ailment claimed. Causation questions made evaluating cancer and cardiac problems simply too speculative for a reliable evaluation, and determining objective levels of seriousness of such illnesses was viewed as “impossible.”⁶¹ For the adjudicating team, this posed what they called a “gut-wrenching” problem.⁶² They concluded that “the evidence remains problematic regarding whether specific cancers can be tied to the toxic substances ambient in the WTC work site, or even if there were increases in cancers by those exposed to these substances at the work site.”⁶³ That meant such claims could, justifiably, be excluded from compensation—a solution one might have anticipated from scholars deeply concerned with controlling the reach of tort. But that was not what the Judge and Masters concluded was appropriate in the aftermath of the destruction of the towers and the bravery of the responders.

Once the parties had agreed to the 368 core discovery questions that would populate the database,⁶⁴ along with the Severity Chart mechanism, the Court divided the 9,090 plaintiffs into five tranches of approximately 2,000

57. *Id.* at 142, 145–46.

58. *Id.* at 145.

59. *Id.* at 146.

60. *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 503 (S.D.N.Y. 2009).

61. Hellerstein et al., *supra* note 13, at 146 n.121.

62. Hellerstein et al., *supra* note 23, at 659.

63. *Id.*

64. Hellerstein et al., *supra* note 13, at 149. Upon the recommendation of the Special Masters, the database was created and maintained by Technology Concepts and Design, a legal services software developer. *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH), No. 03 CIV.00007 (AKH), 2008 WL 793578, at *1, *3 (S.D.N.Y. Mar. 24, 2008).

each.⁶⁵ Counsel in the tranches were given forty days to complete thirty-five designated fields from the questionnaire.⁶⁶ Using these responses, the Special Masters chose a subset of 200 cases from each group, focusing on relatively severe injuries. But importantly, the Masters also chose twenty-five claims from each tranche that were cancer and cardiac claims and, therefore, did not appear in the Severity Chart.⁶⁷ It is remarkable and humane that this was how the Judge and Masters decided to solve the “gut-wrenching” problem that such claims posed. In each group of 225 cases, the parties were directed to complete the remaining 333 fields of the database.⁶⁸ This opened the way for particularized discovery in individual cases and accelerated trial preparation.

By September 2009, there were over 9,000 sworn responses to the initial thirty-five database queries and answers to the full set of 368 questions in 2,325 cases.⁶⁹ By design, the questionnaire avoided narrative responses in favor of yes/no and multiple-choice answers. Disputes regarding answers were referred directly to Judge Hellerstein, who resolved them on an expedited basis.⁷⁰ The result was a streamlined mechanism that allowed for the evaluation of nearly every claim, both on its merits and in comparison to other claims. This provided the parties in virtually every case with a clear understanding of where they stood in terms of the factual merits and scope of damages. Such information significantly advanced the prospect of settlement by taking most of the guesswork out of almost every case.⁷¹

Searches of the painstakingly assembled database could provide information about the age distribution of plaintiffs, frequency and severity of disease in relation to job and work location, and several other matters. The Special Masters were equipped to assess the relative severity of injuries and disregard insignificant factors.⁷² Hence, the Masters could identify those cases best suited to test the plaintiffs’ and defendants’ theories, thereby providing the parties with well-grounded information about “their relative jeopardy should the cases go forward.”⁷³

Based on the data, it became clear that approximately 27 percent of claimants had suffered serious injury, while about one-third had suffered no compensable harm at all. The scope, clarity, and precision of the Special Masters’ assessments set the table for a global settlement, which, in the end,

65. Hellerstein et al., *supra* note 13, at 146, 148.

66. *Id.* at 149; *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 523–24 (S.D.N.Y. 2009).

67. See Hellerstein et al., *supra* note 13, at 149; *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 523.

68. See Hellerstein et al., *supra* note 13, at 149; see *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d at 504.

69. Hellerstein et al., *supra* note 13, at 152.

70. *Id.* at 174 n.318.

71. Hellerstein et al., *supra* note 23, at 658.

72. *Id.*

73. *Id.* at 660.

was accepted by an extraordinary 99 percent of all claimants.⁷⁴ The skill and care with which the case was managed produced results that provided real and substantial relief to those deserving it. The process also winnowed out the claims of the undeserving. If that were all that was accomplished, the Masters' efforts would have been an administrative triumph. But their work yielded a great deal more. Participation in the process engaged counsel and created a genuine basis for agreement. The Masters' efforts reached even further and provided a basis for awards to the 9 percent of claimants who were cancer sufferers or heart attack victims. In this, the Special Masters and Court went beyond strict legal limits to extend protection to deserving public servants.

The result was that on March 11, 2010, the parties reached a tentative settlement, proposing the payment of \$575 million, contingent upon at least 95 percent of eligible plaintiffs opting in (if more than 95 percent opted in, the value of settlement would rise to \$657.5 million).⁷⁵ At this point, Judge Hellerstein, again, did the unexpected. He rejected the settlement.⁷⁶ His power to do so in this non-class-action proceeding was open to serious debate, but consistent with the court's approach throughout the litigation, the Judge felt that "in the interests of fairness," the settlement was unsatisfactory.⁷⁷ In the Court's view, the Captive had reserved too much money for the settlement of future claims. The initial settlement offer left between \$400 and \$500 million in the Captive's coffers to protect the City and its contractors, which was excessive in the Court's view.⁷⁸ Additionally, the Court felt the attorneys' fees were excessive. Under the proposed settlement, plaintiffs' attorneys could recover one-third of the awards after deducting expenses, potentially totaling as much as \$216 million. Although the Court acknowledged that the lawyers had accepted the first responders' cases when many other lawyers had refused and there was a substantial risk that the lawyers could have walked away with nothing, the fees were excessive nonetheless.⁷⁹

According to Judge Hellerstein, Professor Twerski was particularly instrumental in getting the parties back to the bargaining table.⁸⁰ Professor Twerski served as an informal conduit, facilitating communication and negotiation between the sides. He was the *de facto* choice for this role

74. As of November 2012, Judge Hellerstein and the Special Masters reported that just eighteen cases remained from among the more than 10,000 plaintiffs involved in the litigation, representing a more than 99 percent settlement acceptance rate. Hellerstein et al., *supra* note 13, at 178 n.338.

75. *Id.* at 155.

76. *Id.* at 157–58.

77. *Id.* at 158–59; *see also id.* at 159–77 (for a detailed account of Judge Hellerstein's judicial authority to reject the settlement under these circumstances).

78. *Id.* at 158.

79. *Id.* at 159.

80. Interview with Judge Alvin Hellerstein, Senior Judge of the United States District Court for the Southern District of New York (Nov. 15, 2022).

because of the credibility he had established as Special Master and his own unique wisdom and charisma. All of that would not have won the day without a shared sense among the litigants that he was a fair and trustworthy intermediary. Eventually, a revised settlement was reached, which Judge Hellerstein described as “not perfect” but satisfactory nonetheless. This new deal increased the plaintiffs’ award by more than \$125 million (including a \$50 million increased contribution by the Captive and a roughly \$50 million reduction in plaintiffs’ attorney fees) and included a waiver of between \$25 and \$50 million by workers’ compensation and disability insurance carriers of liens they had held against plaintiffs’ recoveries.⁸¹

Why talk about a case like the 9/11 Responders Tort Litigation in a *Festschrift* for an academic star? I can think of several reasons:

1. The Special Masters did a truly ‘masterful’ job in taking a hugely challenging legal problem, reducing it to its basic factual components, assembling the gathered facts into a coherent tool, and using that tool to achieve a sound legal and practical result.
2. They did so with a clarity and transparency that stilled second-guessing and resulted not only in litigant acceptance but public acceptance as well.
3. Special Masters generally have only the leverage they can generate by brokering consensus between contending parties. Here, 99 percent of litigants agreed to accept the consensus built upon Professor Twerski’s and Professor Henderson’s work. This is a profound vote of confidence in them and their efforts.
4. Consensus was built upon the respect of the parties for the Special Masters. Recall that the Masters were profoundly distrusted by the plaintiffs when the process began. Yet, the process ended with Professor Twerski serving as the ‘glue’ that helped stick an important social and legal arrangement together.
5. The Professors’ work as problem solvers created an infrastructure of ideas that litigants with opposing views could embrace. They created an environment of trust, a remarkable feat in high-stakes litigation in a society easily fractured and prone to mistrust.
6. The Special Masters fostered public policy fixed by Congress and carried forward by the VCF. That policy amounts to a commitment to stand up against terrorist violence and in favor of communal care for countrymen, particularly brave public servants.
7. Another remarkable part of their achievement was to remind America of the value of the courts as problem solvers and doers of

81. Hellerstein et al., *supra* note 13, at 175–76.

what needs to be done in challenging circumstances. Their work helped dignify the judicial system and enhance its reputation.

8. Festschrifts honor innovative scholars. It is impossible to consider the 9/11 Responders' litigation without noting its innovative approach to mass but varied claims and its use of medical tools to address diverse toxic damages and problems of hard-to-analyze causation.
9. The proceedings that the Masters nurtured provided litigants with an opportunity to be heard. Ken Feinberg found that to be key, and the Masters provided the same sort of responsiveness.
10. Lawyers and scholars love precedent. It serves as a roadmap, a proven response to a social challenge. Professors Twerski and Henderson, along with Judge Hellerstein, created an enduring precedent. One hopes it will not be needed often, but it is there, tested and established, ready to serve.
11. Festschrifts may not always sing the praises of scholarly humility, but it was truly on display in the 9/11 litigation. These scholars, with doubts about mass torts, rolled up their sleeves and made a mass tort work. They did not insist on caveats, perhaps applicable in other settings. Doing the best job for the litigants and society was more important than doctrinal purity. The law is a human endeavor, not a hunt for perfection. The good is what we should seek. These fine men sought and achieved that.

I would like to conclude by briefly returning to Stephen Siller. When I first heard his story, I felt tears well up in my eyes. Without hesitation, he gave his all to help save lives and affirm the values of our shared community. As a society, what we all wanted to do in the wake of 9/11 was to honor and respond to what Stephen and those like him did. What Aaron Twerski, Jim Henderson, and Judge Alvin Hellerstein did was exactly that—to pay the highest honor they could under the law. In doing so, they affirmed Mr. Siller's life; they recognized and protected those like Stephen. Let me say that they, along with Siller, are heroes, men I am honored to speak before and praise, deserving of a Festschrift, indeed! Menches of the highest order.