

## ***Worth*, Ken Feinberg and Trial Lawyers: The Real Story**

The new Netflix film, *Worth*, attempts to tell the story of the September 11th Victim Compensation Fund and the struggles of its first administrator, Ken Feinberg. While generally well-reviewed, the film is full of typical fictional devices often used by filmmakers to heighten drama and keep audiences interested.<sup>1</sup> Unfortunately, this film's inaccuracies are now part of the September 11 historic record – a record that is important to correct when possible.

One way the film does a terrible disservice to 9/11 history is its portrayal of the trial lawyer community following the attacks, embodied in the fictional character “Lee Quinn.” Quinn is the film's villain. Sitting around a table with U.S. senators and Feinberg (long before Feinberg was actually involved), Quinn is shown having problems with the Fund concept. It also portrays him throughout as constantly threatening to undermine the Fund and the U.S. economy by signing up victims to sue the airlines.

This is not just a slight fudging of facts. What happened 20 years ago was the exact opposite: It was the trial lawyer community who thought up the Fund and insisted it be part of any airline bailout legislation. Without them, there would have been no Fund at all. Here are the facts as described by attorney Leo Boyle, then president of the trial lawyer's national association, the American Association for Justice (AAJ)<sup>2</sup>:

- When the attacks occurred, the last thing on the minds of trial lawyers was finding clients and suing. The trial lawyer community was as “stunned, saddened, and angry” as everyone else and immediately tried to figure out how they could help “in a coordinated, restrained, thoughtful, and patriotic way.”
- Unlike the film's portrayal, there was never a serious focus on suing airlines let alone “collapsing the economy.”<sup>3</sup> Instead, the night after the attacks, AAJ authorized a press statement “calling for a moratorium on the filing of civil lawsuits arising out of the attacks” and “signaled to Congress and the White House that AAJ was willing to consider supporting federal remedies for the victims.”
- Just hours after this statement was released, “airline lobbyists were on Capitol Hill seeking bailout legislation” including “near-total tort immunities.” Their proposals included no way to help victims.
- This was unacceptable to AAJ, so the group's leadership developed a compensation idea that would be acceptable to Congress. They presented the plan to Congress, and after “an all-night negotiating session among House and Senate leaders of both parties, an agreement was drafted” establishing the September 11th Victim Compensation Fund.

- The bill passed overwhelmingly on September 21, after which “AAJ wrote to leaders in both houses of Congress, pledging to represent every victim of 9/11 free of charge.” Hundreds of members immediately signed up, offering their services, and by mid-October, that volunteer initiative became the “largest private, civil, pro bono program in the history of American law.” It was called Trial Lawyers Care (TLC).
- This all occurred well before Ken Feinberg’s November 26 appointment to run the Fund. Clearly, he could not have achieved success without it. Over 1,000 TLC lawyers worked tirelessly for victims, providing extensive legal support and presenting cases to Feinberg to ensure he had the information he needed to award proper compensation. As Feinberg wrote in a letter to attorney Boyle: “What TLC is doing is unprecedented in American history. You . . . should take great pride and personal satisfaction in helping to assure the success of the 9/11 Victim Compensation Fund.”

## Ken Feinberg’s Legacy

The trial lawyer community fully supported Feinberg’s work to compensate September 11 victims. As shown at the end of the film, Feinberg went on to administer many other kinds of victim compensation funds, sometimes to deal with other unique national tragedies. But not every fund has been alike. Some have been run by wealthy negligent corporations for the primary purpose of escaping liability. Feinberg’s work on some of these funds has raised substantial ethical questions. For example:

### Deepwater Horizon Disaster

- Following the 2010 Deepwater Horizon oil disaster, BP, the oil giant primarily responsible, hired Feinberg’s firm (at \$850,000 per month) to run the Gulf Coast Claims Facility to compensate victims who chose to go that route. His firm’s substantial duties and responsibilities toward BP were described in an extensive contract that remained secret for months and was only disclosed during parallel oil spill litigation.<sup>4</sup>
- The contract exposed the fact that while running the fund, Feinberg was essentially representing the company as its attorney while directly engaging victims (often) outside the presence of their own counsel in a judicially-unsupervised claims process. He had duties of confidentiality and loyalty to BP; he was required to turn over all claims information to BP; and BP had a central role in hiring and firing everyone Feinberg brought on to help. Feinberg required that families sign away all legal rights not only for themselves but also for their spouse, their children, their parents and all their heirs – even though no one knew then what losses they might suffer in the future due to the ongoing disaster. This sweeping release, which assigned victims’ claims to BP, benefited only one actor: BP, the company that paid Feinberg’s salary.<sup>5</sup>
- In a strong rebuke to Feinberg’s ethics, a federal judge ruled that it was misleading for Feinberg to call himself “neutral” or “independent” of BP in administering the fund.<sup>6</sup> The late renowned legal ethics expert Monroe Freedman said, “The opinion therefore confirms that Feinberg has been engaging in unethical conduct that has been misleading claimants and posing a serious threat to the administration of justice.”<sup>7</sup>

## General Motors (GM) Ignition Switch Scandal

Similar ethical concerns were raised when Feinberg was hired by GM to compensate people killed or injured by the company's defective ignition switch, which was linked to over 100 car crash deaths and countless injuries.<sup>8</sup>

- After this scandal broke, GM hired Feinberg to administer compensation to victims, who were blocked from suing in court due to a bankruptcy deal with the U.S. government. Feinberg again would not disclose to the public his contract with the company but bias seemed apparent.<sup>9</sup> In addition to establishing impossible claims criteria and failing to conduct adequate victim outreach following GM's deliberate concealment of crashes,<sup>10</sup> Feinberg established an unrealistic deadline for claims.
- Ultimately, the fund reviewed the 4,342 claims. Feinberg rejected 91 percent of them. Clarence Ditlow, executive director of the Center for Auto Safety, said the "burden of proof on the individual consumer was always too high."<sup>11</sup>

## CONCLUSION

*Worth* filmmakers could have done a much better job representing this part of 9/11 history. It was unnecessary to rely on trial lawyer stereotypes in order to turn Feinberg into the character they wanted him to be. The truth is that trial lawyers truly stepped up for 9/11 victims and for the nation as a whole at a time of tremendous loss and tragedy. It is unfortunate that in handling some subsequent compensation funds, Feinberg has crossed ethical lines and not worked as strongly on victims' behalf as he should have.

## NOTES

<sup>1</sup> Matthew Dessem, "What's Fact and What's Fiction in *Worth*," *Slate*, September 3, 2021, <https://slate.com/culture/2021/09/worth-netflix-movie-true-story-september-11.html>

<sup>2</sup> Formerly the Association of Trial Lawyers of America or ATLA. See Leo Boyle, "Ten Days In September," <https://archive.justice.org/who-we-are/mission-history/tlc-trial-lawyers-care>

<sup>3</sup> Also, noted Boyle, "We understood that even if airline negligence had contributed to the hijackers' success, the civil justice system could not possibly render compensation in the traditional way: The airlines would not have enough insurance to cover even a small fraction of the potential damages. (The [AAJ] committee soon learned that the two planes that struck the World Trade Center had a total of \$3.2 billion in insurance coverage, and in New York the property damage alone exceeded \$50 billion.)"

<sup>4</sup> Order and Reasons, *In Re: Oil Spill By The Oil Rig "Deepwater Horizon" in the Gulf Of Mexico* (E.D. La., April 20, 2010), <https://graphics8.nytimes.com/packages/pdf/national/Barbier-Feinberg.pdf>

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> Monroe Freedman, "Kenneth Feinberg Not Neutral, Judge Rules," *Legal Ethics Forum*, February 3, 2011, <https://www.legalethicsforum.com/blog/2011/02/kenneth-feinberg-not-neutral-judge-rules.html>

<sup>8</sup> Center for Justice & Democracy, "Statement on Feinberg/GM compensation plan," June 30, 2014, <https://centerjd.org/content/statement-feinberggm-compensation-plan>

<sup>9</sup> For more, see Center for Auto Safety, <https://www.autosafety.org/general-motors-ignition-switch-recalls-homepage/>

<sup>10</sup> Ana Radelat, "Blumenthal blasts GM for 'concealment' in CT woman's death," *CT Mirror*, November 11, 2014, <https://ctmirror.org/2014/11/11/blumenthal-blasts-gm-for-concealment-of-facts-in-ct-womans-death/>

<sup>11</sup> David Shepardson, "GM ignition fund ends review approving 124 death claims," *Detroit News*, August 3, 2015, <https://www.detroitnews.com/story/business/autos/general-motors/2015/08/03/gm-ignition-fund-ends-review-approving-death-claims/31051683/>