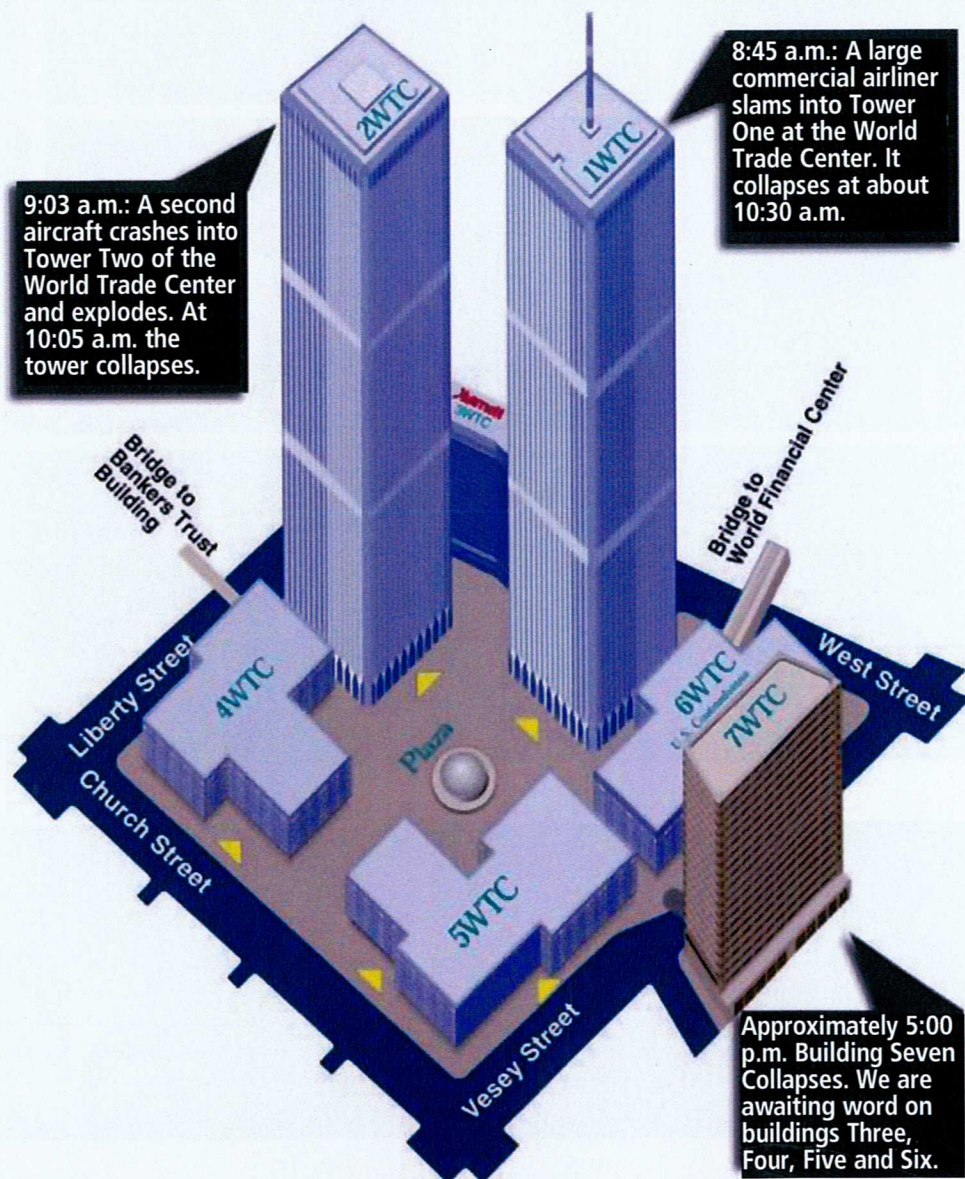


A Decade of 9-11 Litigation

• MARINA SPINNER •

"We have some planes." These words were spoken on September 11, 2001 at 8:24 a.m. by the hijacker of American Airlines Flight 11 which had left Boston's Logan Airport just one half hour before heading to LAX. Just minutes later, Flight 11 would crash into the North Tower of the World Trade Center changing not only the political and social landscape as we knew it but also the landscape of the American judicial system.





The September 11 attacks were a series of four coordinated suicide attacks carried out by Al-Qaeda on the United States. United Airlines Flight 175 crashed into the South Tower at 9:03 a.m. followed by American Airlines Flight 77 which crashed into the Pentagon at 9:37 a.m. At 10:03 a.m. United Airlines Flight 93 was heroically diverted by passengers to a field in Shanksville, Pennsylvania from its target which was thought to be either the Capitol Building or the White House. As a result, nearly 3000 lives were immediately taken of victims in the Twin Towers, the Pentagon and on the four commercial jetliners, and there were many more lives lost thereafter. Almost immediately, the legal system was flooded with lawsuits. The wrongful death and personal injury cases that ensued in the aftermath of 9-11 are well known, but many other lawsuits arose which did not get as much press despite how novel and controversial they were.

April 4, 1973 marked the Ribbon Cutting Ceremony for the World Trade Center ("WTC"), New York's tallest and most controversial skyscraper. Many critics felt that the Towers were unsightly and did not compliment the appeal of the famous New York City skyline. Years later, the Towers would come to be a symbol of that very skyline. The WTC consisted of seven buildings with over 10 million square feet of office space. It was originally owned, constructed and operated by the Port Authority of New York and New Jersey. On July 24, 2001, Silverstein Properties & Westfield America, Inc., entered into a \$3.2 billion deal for the purchase of a 99 year lease on the property.

These companies would take control of the buildings just days before the September 11th attacks. Silverstein Properties, which acquired the lease using only \$14 million of its own funds, was required by its financiers to obtain \$3.55 billion in insurance coverage. The deal also gave Silverstein Properties the right to rebuild if the structures were destroyed.

Almost immediately after the attacks, litigation ensued. Rumors have it that on the eve of September 11th, 2001, Larry Silverstein, the principal of Silverstein Properties, was already considering ways to maximize insurance recovery for the fallen Towers. A lawsuit followed in which Silverstein sought to prove that the crash of each plane into the respective towers constituted a separate occurrence which would have provided for over \$7 billion in policy limits. Thirteen of the insurers of the WTC signed on to a WilProp form binder that defined occurrence as follows:

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

After years of litigation and appeals, the U.S. Court of Appeals for the Second Circuit held that under this definition of occurrence, the September 11th attacks on the WTC constituted one occurrence subjecting those insurers to one policy limit. However, it was also determined that a jury should

determine the number of occurrences for those remaining insurers that did not utilize the WilProp form and where there was no definition of occurrence. On December 4, 2004, a jury held that in this situation there were two occurrences and that Silverstein Properties was entitled to a total of \$4.68 billion in insurance coverage. This ruling was appealed and litigated for over two years with the case ultimately settling for a total of \$4.55 billion.

As information about the attackers, their planning and lack of security at airport security checkpoints surfaced, the potential for a multitude of lawsuits arising for wrongful death, personal injuries and property damage became evident. Congress acted swiftly with the passage of the Air Transportation Safety & System Stabilization Act. The purpose of this Act was to provide financial assistance to the airlines while also providing compensation to the victims' families. A Victim's Compensation Fund presided over by Special Master Kenneth Feinberg was created. The liability of the airlines was capped at the limits of their liability insurance coverage and a two year period of limitations to file claims was set. In the end, 97 percent of the eligible claimants opted to use the Fund in lieu of pursuing retribution through the court system. The Fund would make payouts of over \$7 billion to the families of the victims utilizing a set formula to provide compensation for death, injury and loss of income.

Despite the success of the Victim's Compensation Fund, 95 wrongful death and personal injury actions were filed in court, the first being just three months after the attacks. The wrongful death cases were consolidated in the U.S. District Court for Southern District of New York under Judge Alvin Hellerstein. The plaintiffs focused on the pre-9-11 threats of airplane hijacking, the negligent screening of the hijackers and the failure of the metal detectors which did not identify box cutters that were alleged to have been brought on board the aircrafts by the hijackers. There were also allegations that the cockpit doors were negligently designed and did not provide adequate safety for the pilots.

Discovery in these lawsuits took years to get underway due to the U.S. Government's policy on the release of information about the attacks. The Government took the

position that a great many documents were too sensitive to the security of our country and there was extensive motion practice on what could and could not be released to the plaintiffs. There were also over 180 depositions conducted and millions of pages of documents were exchanged. Eventually the cases were mediated and all but one of the cases settled. The remaining case is brought on behalf of the Estate of Mark Bavis who was an ice hockey coach. At the time of the attacks, Bavis was flying on United Flight 175 on a scouting mission for the L.A. Kings, a professional ice hockey team. This remaining wrongful death case is scheduled for trial in November of this year.

In addition to the wrongful death and personal injury lawsuits there were 21 property damage cases filed by subrogated insurers, reinsurers and uninsured loss plaintiffs seeking recovery for damage to personal property and lost profits which resulted from the inability to conduct their work. In total, the property damage cases sought approximately \$4.4 billion in damages. Unlike the wrongful death cases, the defendants vehemently fought the property plaintiffs claiming that airlines did not owe the same duty to plaintiffs on the ground that they had to the passengers on the planes. In addition to the duty issue many other issues arose such as the measure of recoverable damages and the capacity to bring suit. Interestingly, the property plaintiffs who had been united in their case against the airlines and security companies, found themselves at odds over who had the right to recover if a settlement were to be reached. The direct insurers took the position that reinsurers did not have the right to bring their claims in absence of previously obtaining assignments of those rights from the direct insurers. The reinsurers argued that they had an equitable right to pursue the claims as they ultimately reimbursed the direct insurers for losses that were ceded to them. This issue remains unsettled as the Court never had the opportunity address it prior to settlement.

Beginning in October 2009, the property cases were mediated before retired U.S. District Court Judge John Martin. In December 2009, most of the property cases settled for \$1.2 billion which represented approximately 27 cents on the dollar of the original amount claimed. The settlement was approved by Judge Hellerstein and then became the subject of appeal by Silverstein Properties which also had a case against the airlines and security companies for their alleged uninsured loss. Silverstein Properties claimed that the defendants did not have the right to settle with some but not all of the property plaintiffs and that the

settlement depleted the amount of insurance available for it to recover for their uninsured loss. Silverstein Properties claimed that the settlement was unfair and that there was collusion among the parties. Earlier this year, the U.S. Circuit Court of Appeals for the Second Circuit upheld the settlement. The action of Silverstein Properties as well as the actions of a few other companies remain the subject of litigation.

The September 11th attacks not only affected those individuals in the planes and Towers. The aftermath caused by the disaster resulted in injuries to many rescue workers and first responders. These workers spent months breathing the unhealthy air of

lower Manhattan while combing through the rubble for the remains of those who perished. These workers would later find themselves with respiratory and other injuries caused by exposure to the toxins at the site. Over 10,000 claimants filed suit for injuries sustained during the clean-up of lower Manhattan against the City of New York and the Port Authority of New York and New Jersey. The focus of the litigation in these cases was causation. Did exposure to the environment of lower Manhattan truly cause the injuries alleged by these workers? Ultimately this case settled but not before some controversy. The parties had originally agreed to a settlement of \$657 million; however, and surprisingly, the settlement was rejected by Judge Hellerstein. The Judge felt that the settlement amount was not sufficient to compensate the large number of claimants. The Judge also wanted a reduction of attorney's fees so that more of the settlement would go to benefit the victims. The Ground Zero workers thereafter settled with the City of New York and its contractors for \$712 million which Judge Hellerstein approved and the attorneys for the plaintiffs agreed to take a reduced fee of 25% of the settlement. The settlement was funded by the WTC captive insurance company with \$1 billion from the federal government. In October of 2010 the Port Authority settled its cases with the Ground Zero Workers for \$47.5 million. The settlements were structured into tiers with the less sickened plaintiffs being awarded \$2,000 to \$3,000 and the more seriously injured receiving much greater amounts.

In an effort to compensate the increasing numbers of Ground Zero workers that continued to be diagnosed with illnesses,

President Obama signed the James Zadroga 9/11 Health and Compensation Act of 2010 ("Zadroga Act") on January 2, 2011. Title II of the Zadroga Act reactivated the September 11th Victim Compensation Fund of 2001 to provide compensation to any individual that was injured as a result of the debris removal efforts that took place in the weeks and months following the attacks. Just recently, it was determined that those first responders stricken

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terror network. These judgments were never paid.

The next attempt to hold someone responsible for the 9-11 attack was felt closer to home when Ellen Mariani, the wife of a passenger on board one of the flights, brought suit against President George Bush, Vice President Dick Cheney and others, claiming that the Bush Administration had knowledge of the 9-11 attacks in advance and failed to prevent them. This case was later voluntarily withdrawn and the Estate of Mariani eventually pursued and settled its case against the airlines and security companies.

As the tenth year anniversary of the 9-11 attacks approaches, a new skyscraper at 1 WTC finally emerges from the northwest corner of the WTC site as the multitude of litigation subsides. Hopefully, these litigations had a real purpose. Some would argue that the personal injury and property lawsuits proved to hold the airlines and their security companies accountable for inferior security and paved the way for the Transportation Security Administration. Others will say that these law suits really were not ground breaking in any legal respect. And, while not all is completely resolved, the U.S. Government and the American judicial system arose to the challenge and did an efficient job in handling what has proven to be one of the worst disasters, and one of the most traumatic events in our country's history. «

with cancer do not qualify for federal aid under the Zadroga Act. A review by the National Institute for Occupational Safety and Health concluded that "insufficient evidence exists at this time to propose a rule to add cancer, or a certain type of cancer," to the list of diseases that qualify for aid. Some local politicians have voiced their dissatisfaction which this finding and they claim the large number of cancers diagnosed in these first responders is not likely coincidence as they were proven to be exposed to carcinogens and toxins at the site. The Zadroga Act provides for periodic reviews of those injuries that qualify for aid. The next review will be conducted in late 2012 and this issue is expected to be addressed again.

Some other unique lawsuits arose as a result of the September 11th attacks which are worthy of note. In August 2002, 600 victims' relatives filed suit against the Saudi Government, various Saudi princes, the Osama Bin Laden Family Conglomerate and the Saudi National Bank amongst others. In a 15 count lawsuit seeking \$1 trillion, it was alleged that the Saudi Government knew of and supported the 9-11 attacks. By November 2002, 186 individual defendants had been named. As a result of this lawsuit, the American economy was negatively affected. At the time, estimates have it that the Saudis had between \$400 and \$600 billion invested in the U.S. and they began to pull tens of billions of dollars out of the U.S. By August 2003, many of the defendants had been dismissed from the lawsuit including the Saudi Government which was determined by the lower court to have Sovereign Immunity. After the Second Circuit Court upheld this decision, it was appealed to the U.S. Supreme Court which refused to hear the case.

Following suit with the case against the Saudis, 1400 victims' relatives filed suit against the Iraqi Government seeking \$1 trillion. These plaintiffs claimed that the Iraqi Government conspired with Al Qaeda and knew of the attacks. The named defendants did not appear to answer the complaint and a default judgment was entered against them. U.S. District Court Justice Harold Baer awarded the families of two of the victims nearly \$104 million in damages. Judge Baer found that these plaintiffs had shown that Iraq provided material support to Osama Bin Laden and his al-Qaida



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Marina Spinner is the head of Nicoletti Gonson Spinner & Owen's litigation practice. Ms. Spinner began her legal career handling high-exposure cases involving products liability, toxic torts, and New York labor law. Currently, she handles many of the firm's complex

insurance and reinsurance cases as well as the firm's direct litigation and insurance coverage practices. Ms. Spinner has represented insurers and reinsurers in Japan, London and Continental Europe.

Ms. Spinner has been involved in various facets of the World Trade Center litigation including representing victims' families and insurance companies and reinsurance companies in subrogation actions brought against aviation defendants and security companies in charge of the flights on which the terrorists boarded and hijacked the planes which were flown into the World Trade Center.

Ms. Spinner has lectured before the International Association of Claim Professionals at its New York City and Paris conferences, and has presented seminars for various insurance companies and claims administrators on a host of topics including New York labor law, insurance coverage, and premises and automobile liability.