



Second Circuit Affirms \$1.2 Billion 9/11 Property Damage Settlement

The United States Court of Appeals for the Second Circuit recently approved a settlement resolving the bulk of the 9/11-related property damage and insurance subrogation claims against airlines and security companies for an aggregate settlement amount of \$1.2 billion.

In its opinion, the Second Circuit held that the statute governing the 9/11 litigation—the Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101, note) (ATSSSA)—does not preempt New York state law's "first-come, first-served" settlement rule; that the district court properly evaluated and approved the settlement; and that the full \$1.2 billion settlement amount must be credited against the defendants' liability cap created by ATSSSA.

Background on ATSSSA

Congress passed ATSSSA in the immediate aftermath of 9/11. In addition to establishing the Victim's Compensation Fund for those killed or injured in the tragedy and their family members, ATSSSA contains several key provisions that governed all 9/11-related lawsuits throughout their history. Section 408(a) of ATSSSA statutorily capped the airlines' and security companies' tort exposure at the amount of their available liability insurance limits. Section 408(b) of ATSSSA created a new federal cause of action as the "exclusive remedy" for damages arising out of 9/11; vested original and exclusive jurisdiction over all 9/11 suits in United States District Court for the Southern District of New York; and mandated that the "substantive law" for the 9/11 suits "shall be derived" from state law "unless inconsistent with or preempted by Federal law."

The 9/11 Litigation

Following 9/11, a multitude of plaintiffs brought suit under ATSSSA against United Airlines, American Airlines, their security companies on 9/11, and others in the Southern District of New York. The plaintiffs fell into two general categories: (1) plaintiffs alleging personal injury or wrongful death that opted out of the Victim's Compensation Fund; and (2) property damage and business loss plaintiffs, including insurance companies who paid for 9/11-related damages and brought suit in subrogation. These cases were managed by the district court in two separate but coordinated tracks managed by court-appointed executive committees and liaison counsel.

After a period of extensive discovery, all but one of the personal injury/wrongful death cases had settled. The property damage claims were sent to mediation under the auspices of retired federal district court judge John S. Martin.

The Property Damage Settlement

After several months of mediation, in February 2010, 18 of the 21 plaintiffs in the property



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damage track reached a \$1.2 billion global settlement with the aviation defendants and their insurers.

Following the settlement, a group of entities affiliated with developer Larry Silverstein objected—first, in the district court and then on appeal to the Second Circuit following the district court's approval of the settlement.

The Second Circuit's Approval

WTCP raised three principal grounds for objection. All were rejected by the Second Circuit.

No ATSSSA Preemption

First, the Second Circuit found that ATSSSA did not preempt the ordinary New York state law rule that allows a defendant or its insurer to settle "whenever and with whomever" they choose. The court held that ATSSSA's cap on the aviation defendants' tort exposure to the limits of their liability insurance was designed to protect the nation's air transportation system from "potentially ruinous tort liability in the wake of the attacks." The liability cap was not "intended to create a 'limited fund' from which plaintiffs . . . are entitled to an equitable share." As a consequence, the Second Circuit concluded, approval of a settlement involving some, but not all, of the 9/11 property damage claims was "neither inconsistent with ATSSSA" nor would it "stand as an obstacle to the accomplishment of Congress's objectives in enacting ATSSSA."

District Court's Evaluation Was Proper

Second, the court rejected the argument that the district court failed to properly evaluate the fairness of the settlement, and the objectors presented "no evidence of the bad faith necessary to draw into question the settlement." The Second Circuit endorsed both the process and the "lump sum payment" at issue in the settlement.

ATSSSA Cap Properly Credited

Finally, the Second Circuit held that the settlement amount was properly credited against the defendants' respective ATSSSA liability caps. The court was "not persuaded" that these settlement payments were not payments for "liability" within the meaning of ATSSSA, and held that "it makes better sense to read 'liability' to include the settlement payments made."

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