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Kenneth R. Feinberg, *Who Gets What: Fair Compensation After Tragedy and Financial Upheaval* (PublicAffairsBooks, 2012)

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Kenneth Feinberg is a mediator who sleeps well every night after getting countless victims of America's most notorious tragedies to "yes". Feinberg, a lawyer, mediator and author of the new book, "Who Gets What: Fair Compensation after Tragedy and Financial Upheaval" concedes that sometimes he wishes he also held a degree in divinity and psychology.

Feinberg was first called upon in 1984, by his friend and mentor, Federal Judge Jack B. Weinstein, to serve as Special Master over the 250,000 member class action brought by Vietnam Veterans and their families who had become ill due to exposure to the herbicide known as "Agent Orange." Six weeks later, the entire class action was settled for the unprecedented amount of \$180 million.

Over the past thirty years, Feinberg has mediated asbestos claims, the DES birth defect claims, the claims brought by the loved ones killed in the 9/11 World Trade Center attacks and more recently the Penn State sex abuse cases, the Aurora, Colorado shootings and those at Virginia Tech. In 2010, he administered 574,881 claims over about 16 months for damages caused by the BP oil spill in the Gulf of Mexico. That claim resulted in Feinberg and a large staff parsing out \$6.14 billion to businesses and individuals who were harmed by that environmental disaster.

Feinberg reveals that in mediating these mass disputes, there are hard questions which call into play an ambiguity and dichotomy foreign to the conventions of law. For example, these programs essentially did away with the requirement of proof of liability or causation. If a victim is a member of the class, then Feinberg and his team were only involved in the question of, "Who gets what?" He raises rhetorical questions in the book about "how do you parse the ethical, legal and economic issues fairly?" And "how do you manage to maintain your sanity in the face of criticism and challenges to your decisions?"

Though it is hard to comprehend for some, Feinberg stands by his conviction that he is not called upon to wrestle with the larger issues of which disasters get this kind of relief and how huge sums of money get divided justly. Speaking at the annual Conference of the Southern California Mediation Association, Feinberg argued with other local prominent mediators who admitted that occasionally the unfairness or unjust result of a mediation, even after the parties reached an accord, kept them awake at night. Just as he has become perhaps the most celebrated Mediator in America, he also has mastered the zen of mediation: he can live with the ambiguity, knowing that he has accomplished

what the parties hired him (or in the case of the 9/11 Fund he volunteered) to do: reach an agreement that will provide some measure of financial relief—and sooner than it would through a court system.

Still, he tells of compelling stories that might cause a mediator to struggle.

He recounts the jockeying between the fiancée of a victim of 9/11 and his biological family, who contend he was not going to go through with the wedding. On another case, he had to draw distinctions about whether a wealthy family of a stock broker should get more of the fund than a poor, immigrant family of a window washer. He was called upon to decide if a New York City policeman who suffered a fatal heart attack after assisting victims of the World Trade Center tragedy to safety aboard the Staten Island Ferry qualified for death benefits or whether those would be limited to victims who lost their lives in the buildings themselves.

Feinberg concedes that sometimes litigation can be too complex, too time-consuming and too inefficient and uncertain to meet the urgent needs of victims of major disaster. In these cases, business as usual simply will not do. A true mediator, Feinberg sees the greater good in settling claims quickly, getting closure efficiently and remaining neutral in the internal wrestling match that invariably arises out of comparisons, personal passions and the ultimate fairness of the outcome where limited resources need to be matched against limitless loss.

In certain cases, Feinberg finds that the burden of proof is so high that despite the undoubted injuries and suffering of millions of claimants, it would be extremely difficult to obtain redress and relief in the absence of a government-funded, creative program which divides up a set fund amongst all claimants based upon some logical, albeit somewhat arbitrary criteria.

Indeed, in this age of mass torts coupled with mass budget cuts to the Court system, the time honored adversarial system can be cumbersome and inefficient. As anyone who has mediated a tough case knows, it is often the most practical way to eliminate the expense and uncertainty of litigation—even if the outcome does not necessarily mirror the prospective result in trial.

The New York Times review of “Who gets what?” calls Mr. Feinberg’s work, “saintly”. Author, Fred Andrews says Mr. Feinberg is “made for moments of national catastrophe”. Though he portrays himself as impervious to the difficult choices between competing claims, he is equally driven by a sense of magnanimity: generous programs, compassionately delivered.

Still, the notion of finiteness is not lost on Feinberg, who humbly suggests that it is unfair that certain citizens are compensated for certain tragedies, while others are left to their individual claims. It calls into question the bigger philosophical issues of the role of money in society and the role of government in healing traumatic, collective wounds. He asks probing questions about whether money can ever represent justice?

For Feinberg, giving survivors and victims a safe place to air their grievances and to

grieve their losses is an invaluable service to country and individuals. Sparing them and our court system from endless litigation has it's own reward. Many local mediators and lawyers who retain them would certainly agree.