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Victims' fund won't end I-35W bridge litigation

But it gives victims an expedited way to receive compensation from the state.

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The recently passed bill creating an I-35W bridge victims' compensation fund should resolve the question of the state's potential liability to victims of the bridge collapse, but won't end bridge-related litigation against third parties.

Survivors of the collapse — as well as the estates of those killed — qualify for a damage award of up to \$400,000 from a \$24 million state fund. Victims with more severe losses could get more for uncovered medical costs and wage losses from a \$12.6 million supplemental fund. In return for the payouts, victims agree to forgo further claims against the state.

A panel of lawyers to be appointed by Minnesota Supreme Court Justice Russell Anderson will determine the exact amount of each claimant's damages. The statute states that members of the panel must be attorneys who are experienced in the settlement of tort claims and the determination of damages. Supreme Court communications director John Kostouros told Minnesota Lawyer last week that no decision has yet been made as to how the chief will select panel members.

Lawyers familiar with the bridge litigation said there is no real downside to bridge victims submitting their claims to the panel. Unlike the 9/11 victims' fund, the bridge victims' fund



Robins Kaplan Miller & Ciresi attorneys Philip Sieff, Genevieve Zimmerman and Chris Messerly, shown here at the reconstruction site of the I-35W bridge, are part of a consortium of local lawyers representing the collapse victims pro bono. (Photo: Bill Klotz)

does not require those submitting claims to waive any potential claims against third parties, such as companies that designed, manufactured and/or worked on parts of the bridge. Claimants also have the option of rejecting the award and proceeding with a lawsuit against the state. Bridge

Panel to determine amount of bridge claimants' damages for fund

Bridge | From Page 1

claimants must file by Oct. 15 to be eligible for an award from the fund; all offers will be made by Feb. 28, 2009. Once an offer is made, a claimant has 45 days to accept or reject it. A claimant who may be eligible for a payment from the supplemental fund may choose to wait until that payment has been calculated before accepting or rejecting an offer.

Because sovereign immunity laws and statutory damage caps place severe restrictions on claimants' ability to get a substantial award from the state through the litigation process, the fund is likely to represent the best deal for most bridge victims. If a victim compensated by the fund pursues an action against a third-party tortfeasor, the state retains its subrogation rights. (The panel will also apply set-offs for insurance and other collateral source payments to any damage award.)

Birth of fund took nine months

The legislation creating the fund came after months of negotiations starting very soon after the bridge collapsed last Aug. 1.

Within days of the disaster, a consortium of local trial lawyers offered to represent victims pro bono. Some of the victims took the lawyers up on their pro bono offer; others chose to sign up with the Minneapolis firm of Schwebel, Goetz & Sieben under the traditional contingent-fee arrangement. Both groups of lawyers are now well into the legwork for potential lawsuits.

Several lawyers, recognizing the potential hurdles presented to bridge victims from immunity laws and damage caps protecting the state from liability, immediately began pressing for a legislative solution. Minneapolis attorneys Chris Messerly and Philip Sieff led both the consortium of lawyers taking bridge victims' cases pro bono and the legislative push for the fund.

The plan adopted last week by the Legislature reflects a compromise between the lawmakers who wanted to cap victim compensation at \$400,000, and those who wanted no caps at all.

Messerly believes that there are currently about 20 colorable claims for more than \$400,000. However, more may come because medical reports are not yet completed in all cases.

In addition to the initial damage fund and the supplemental fund, the new law creates two more funds:

- a fund of \$750,000 is set for administrative expenses; and
- a fund of \$610,000 for Waite House in Minneapolis to provide services to youth and the families of youth who were on the bridge in a school bus from Waite House when the bridge collapsed.

Opt-outs unlikely

Opt-outs are not likely, said Minneapolis attorney Wil Fluegel, a member of the pro bono consortium. The claimant would have to prove that the state is not immune from suit and that the statutory damage cap that applies in other tort cases is unconstitutional, he said.

"This fund is absolutely essential to get around the damage caps, which are de minimis in a catastrophic case," Fluegel said. (The state's liability to all claimants for injuries arising out of a single incident is capped by statute at \$1 million.)

In return for collecting from the fund, claimants will have to release the state from further claims.

The settlement fund will create "a new kind of release that lawyers haven't seen before," said Minneapolis attorney James Schwebel, whose firm represents a number of the victims. "The release may be a type of modified Pierringer." (A Pierringer release reserves a plaintiff's right to sue certain individuals, while giving a general release from liability to other individuals.)

In a typical Pierringer release, the plaintiff reduces its claim against the non-settling defendants by the amount that the settling defendant pays. In the case of bridge-fund payments, on the other hand, the liability of third parties is not reduced. Instead, the state retains a subrogation right.

An interesting future question will be whether the state's subrogation claim will cover all it has paid out, or will be limited to just the third-party tortfeasors' percentages of fault, Schwebel said.

Potential third-party defendants

The potential third-party defendants most often mentioned are URS Corp., which inspected the bridge for the state between 2004 and 2007, and PSA, the company that was working on the bridge when it collapsed. If either or both of these companies are ultimately determined to be more culpable than the state for the bridge collapse, both the victims and the state will look to them for compensation.

Both those companies have financial resources that would be available, Schwebel noted.

So, despite their success in the Legislature, the victims' lawyers are continuing their preparation for trial.

"We're waiting for the National Transportation Safety Board to graciously allow us to see the evidence," said Messerly, adding that the board refused to hold a public hearing to discuss its conclusions on the bridge. "Obviously they are afraid of something."

The NTSB has issued preliminary findings that point to a design flaw with beam-connecting gusset plates and heavy loads of construction equipment and material on vulnerable parts of the bridge. It has said that a public hearing would slow down the investigation. 

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