PAYING WITH THEIR LIVES: THE STATUS OF COMPENSATION FOR 9/11 HEALTH EFFECTS

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

AND THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

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PAYING WITH THEIR LIVES: THE STATUS OF COMPENSATION FOR 9/11 HEALTH EFFECTS

TUESDAY, APRIL 1, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION,
CITIZENSHIP, REFUGEES
BORDER SECURITY, AND
INTERNATIONAL LAW
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:08 a.m., in Room 2141, Rayburn House Office Building, the Honorable Zoe Lofgren (Chairwoman of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law) and the Honorable Jerrold Nadler (Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties) presiding.

Present: Representatives Conyers, Nadler, Lofgren, Scott, Watt, Jackson Lee, Waters, Cohen, Weiner, Davis, Wasserman Schultz, Ellison, Franks, Goodlatte, Issa, Pence, King, Gohmert, and Jordan.

Also present: Representative Maloney.

Staff present: Blake Chisam, Majority Counsel; Lou Debaca, Majority Counsel; David Lachmann, Subcommittee Chief of Staff; Andres Jimenez, Majority Professional Staff Member; Caroline Mays, Majority Professional Staff Member; Paul Taylor, Minority Counsel; and Jennifer Burba, Minority Staff.

Mr. NADLER. I call to order this joint hearing of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties.

Welcome, everyone.

Without objection, the Chair is authorized to declare a recess, just in case there are any votes on the floor.

Let me note that Congresswoman Lofgren, who is the Chairperson of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, will be co-chairing this hearing with me, as I am the Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. This is a joint hearing in which we will both be chairing, both to serve as co-Chairs.

I will now recognize the co-Chair of this hearing, Ms. Lofgren, for an opening statement.

Ms. LOFGREN. Thank you, Mr. Chairman.

And, although it is not in the title, the very long title, of our Subcommittee, the Immigration Subcommittee also has jurisdiction over claims made against the Federal Government, which is one of the reasons why I am pleased to be co-chairing this hearing with you.

I will ask unanimous consent to put my full statement into the record, but I would just summarize by saying that when we created the 9/11 Victims Compensation Fund, we created a very successful program, very ably administered as far as it went. It was a bipartisan effort, and it provided the means to compensate in a very short period of time the survivors of the 2,880 people killed in the attacks and the 2,680 people injured in the attacks or in the rescue efforts immediately following.

The Special Master Fienberg, one of our witnesses today, noted in his final report that 97 percent of the families of deceased victims who might otherwise have pursued lawsuits for years received compensation through the fund. So this was a stunning success, and we thank the administrator for his, really, very able effort.

Unfortunately, however, the specter of tort litigation is with us. Over 10,000 lawsuits have been filed in the City of New York by first responders, building and trades workers, volunteers—who rallied to the World Trade Center to help, who were not compensated by the victims' fund. They didn't know they were sick in time to file, and they are suffering tremendously.

I think there is broad agreement that these individuals are sick and will continue to get sick because of their exposure to the World Trade Center's noxious dust. And from the city's testimony today, it seems clear the city agrees.

So the question at the hearing, the beginning, is our quest to answer the question: What do we do?

I want to thank Chairman Nadler for his leadership on these issues. The Bill 3543, the James Zadroga 9/11 Health and Compensation Act of 2007, authored by Chairman Nadler along with Representative Maloney and Representative Fossella, represents a good first attempt at addressing these issues.

I believe this hearing is going to help us to begin to answer the question: What do we do? And I believe we will leave here today with a better sense of the problems that people are facing.

From there I am hopeful that we can begin to structure a fair and just program to compensate those who continue to bear the deep scars from that terrible day in September almost 7 years ago.

And I thank Chairman Nadler for yielding to me and yield back.

Mr. NADLER. Thank you.

And before I recognize the next opening statement, let me simply note the presence here of a non-member of the Committee, Representative Maloney of New York, who has been instrumental in this whole area and who along with Congressman Fossella and myself is the co-author of the legislation, the Zadroga Act, which includes reopening the VCF, the Victims Compensation Fund, which is the subject of this hearing.

And let me thank her for all the wonderful work she has done and note her presence here.

I now recognize the gentleman from Iowa, who is the Ranking Minority Member on the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, for an opening statement.

Mr. KING. Thank you, Mr. Chairman, I appreciate you holding this hearing.

Almost 7 years ago, terrorists carried out mass murder of innocent Americans on our own soil. The attacks were carried out by radical Islamists who hate America and the freedoms we represent. They ripped away our security and devastated thousands of families.

My heartfelt sympathies go out to those who suffered in the wake of the 9/11 attacks. All of America identified with New York, with Washington, D.C., and the Pentagon and Pennsylvania as never before. An attack on any one is an attack on us all.

One of the groups that suffered in the aftermath is the Ground Zero workers who worked heroically day and night for months in rescue, recovery and cleanup efforts at the World Trade Center site. For the most part, these workers went in without contracts, insurance policies or knowledge that there were toxins in the air. Today, many of these of these workers are having health problems as a result of their work at Ground Zero.

In addition to the Ground Zero workers, people who lived and worked in the proximity of Ground Zero have also now developed respiratory problems that appear to be related to toxins in the air. Understandably, the Ground Zero workers have looked to the construction companies that hired them for compensation for their health problems. These companies along with the City of New York are now being sued by some 10,000 plaintiffs who allege they were injured from the contaminants in the debris. These victims are being forced to sue because they do not qualify for relief under the 9/11 Victims Compensation Fund.

The companies and the city are being forced to vigorously defend against these lawsuits because they were unable to obtain insurance to cover injuries arising out of the Ground Zero cleanup efforts.

We are here today to examine what we in Congress can do to help compensate those that are now experiencing respiratory ailments due to the air quality in or around Ground Zero.

We are also here to ensure that whatever is done to compensate the victims does not financially cripple the construction companies—that is some of the largest in the world and best in New York City. They stepped up as corporate and good Samaritans and cleaned up the terrorist disaster at a moment's notice at Mayor Giuliani's plea without having protected themselves by obtaining contracts or insurance.

Because they had the right equipment and construction experts, these companies were asked to mobilize within hours of the Towers falling, and they did so as volunteers. The companies cleared the debris for emergency personnel. They dug for survivors in the huge pile of rubble. They worked for 9 months until the site was clear. They did it 24/7, and they did so without a profit motive.

These companies and those executives who made the decisions to help on 9/11 are heroes, too. Just as the firefighters, the emergency responders and the workers who toiled for weeks and weeks at the World Trade Center site, these corporate heroes should not be forgotten by our government when they face the liability nightmare that they now do.

If we in Congress do not address their liability exposure, we cannot expect to call on these and other companies in the future if tragedy strikes. In order to address the compensation owed to those facing health problems from the toxins in the air around Ground Zero and the liability exposure of the companies that came to the aid of our Nation after the Towers fell, the 9/11 Victims Compensation Fund has been suggested as a blueprint. That suggestion makes a lot of sense.

However, if we are to follow the 9/11 Fund as a blueprint, we must make sure that we follow it studiously. We must make sure that we provide adequate compensation to the victims without handing the keys of the U.S. Treasury to the trial lawyers. And we must make sure that we provide liability protections to New York City and the companies that came to the rescue of the victims.

The bipartisan legislation establishing the original 9/11 Fund had these types of protections. The liability of airlines was capped at the levels of their insurance coverage. The liability of other third parties such as New York City and the Port Authority of New York and New Jersey were also capped. Moreover, the legislation required 9/11 Fund claimants to waive their right to file a civil action or be the party to an action in any Federal court or State court that damages sustained as a result of the Federal-related aircraft crashes of September 11, 2001.

With these liability protections in place, the 9/11 Fund was successful in providing compensation to the victims or their families. In fact, 97 percent of the victims or their families chose to file under the 9/11 Fund instead of seeking redress in the courts.

The 9/11 Fund model is one we should consider for victims that are able to come forward with proof that they were in general proximity of Ground Zero during the cleanup period and are able to medically document that they have an illness as a result of exposure to the air around the site. We should provide these victims with a better path than the inefficient and expensive litigation they are currently pursuing.

But if we pursue this path, we must do so in a manner that limits the liability of construction companies that were instrumental in the efforts at Ground Zero and places a reasonable cap on recovery through litigation outside the fund. Thus, while we owe it to the victims to provide a reasonable means to seek compensation, we must make sure that any expansion of the 9/11 Fund is proportionate to the original terms of the legislation creating the fund.

So I would ask the unanimous consent to enter into the record a statement by the five major contractors that is submitted on behalf of these five major contractors that participated in New York.

Unanimous consent requested, Mr. Chairman.

Mr. NADLER. Without objection, so ordered.

[The information referred to follows:]

Committee on Judiciary
Subcommittee on Immigration Citizenship, Refugees, and Border Security and International Law
And
Subcommittee on the Constitution, Civil Rights and Civil Liberties
10:00 a.m. Tuesday, April 1, 2008
2141 Rayburn House Office Building

This testimony is submitted on behalf of the five major contractors located in New York City that responded immediately after the September 11, 2001, terrorist attack to conduct rescue and recovery work at the World Trade Center site—Bovis Lend Lease, LMB, Turner Construction, Tully Construction, Plaza Construction and AMEC Construction Management.

These contractor companies never sought the spotlight in the September 11 aftermath. The senior executives of each company: Peter Marchetto, Peter Tully, Peter Davoren, Richard Wood and Patrick Muldoon were asked to help amid the chaos and calamity that spilled from the 12 square blocks of ground zero to an entire city, to our nation and then worldwide.

When they got to the site what they saw was a 14-story pile of rubble, twisted steel where two of this country's tallest buildings once stood. They did not hesitate to commit the skills and resources of their companies to assist New York City and the federal government in response to this national emergency.

The contractors immediately mobilized their experienced networks of employees and subcontractors. There was no time to negotiate contracts or to secure insurance. The buildings were down, fires were burning, and rescue operations needed to get underway. They engaged because it was the right thing to do.

The contractors moved in cranes, heavy machinery and tools through the clogged streets of the city. They began clearing tons of rubble and digging for survivors in the 14-stories of debris that later became known as "the pile." The work continued around the clock for over nine months, until the last bit of debris was removed from the site.

The contractors and other emergency responders faced burning fires, the constant threat of additional collapse of remaining structures and the pile itself – upon which heavy equipment had to be operated. They encountered countless additional perils from working at this unprecedented disaster site. The pile contained munitions and Freon tanks. And there was the constant risk that the "bath tub" slurry wall would collapse, causing the waters of the Hudson River to inundate lower Manhattan and Jersey City. Under these most treacherous conditions, the contractors took every possible measure to ensure the safety and welfare of their workers.[1]

The contractors' actions were in every sense heroic. Yet now, over six years later, they face thousands of lawsuits[2] and potentially open-ended liability. Crippling litigation is an unfair result for the contractors and the other responders impacted by the terrorist attacks.

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[1] The entire rescue, debris removal and recovery operation was completed with no fatalities.
[2] Of the over 9,000 individual lawsuits filed thus far, only about 2% involve employees of the contractors. In contrast, over 60% of these lawsuits appear to be brought by City employees, the vast majority of whom are Firemen

Terrorists at Fault—Heroes Forced To Be At Odds

Terrorists are to blame for this national tragedy. Yet, the contractors and their workers (along with thousands of the City's police, fire department and other uniformed personnel, as well as many public utilities workers) now find themselves locked in litigation.

Unfortunately, litigation is the reality under the well intentioned "captive" insurance system enacted by Congress for the World Trade Center situation. The City of New York had advised the contractors that after the attacks the City was able to purchase only limited insurance on behalf of itself and the contractors for the World Trade Center rescue, recovery and debris removal work. As a result, Congress subsequently appropriated $1 billion to the State of New York to create the "captive" insurance company to cover any potential liability of the City and the contractors.

The captive then issued a liability policy to cover the cleanup risk. As a consequence of this legislative enactment, those who believe they are entitled to compensation must sue the City and the contractors, the captive must provide the defense of those lawsuits (because it is obligated to do so) and the parties must fight in court. If responsibility is determined for a claim, the captive funds would be used to pay it.

The current system, characterized by massive litigation, is adversarial by nature. It will consume tremendous resources, cost untold amounts of money in expenses and it will take many years to resolve claims, if they can be resolved at all. This approach is different from the Victims Compensation Fund ("VCF") enacted by Congress to respond to claims arising from the attacks themselves and their *immediate* aftermath.[3] The VCF was successful in resolving more than 95% of all first responder and citizen injury/death claims within its scope. The contractors are glad to see the Congress considering how it might open up the VCF again to deal with the current situation.

Whatever legislation or mechanism is ultimately utilized to address the problems created by the current unavoidably adversarial system, it should also protect the contractors from potential liability for their work related to the World Trade Center rescue, recovery and debris removal operations. The City advised that it was able to purchase only limited insurance coverage specifically for the work undertaken at Ground Zero and the contractors' standard private insurance policies are subject to numerous limitations and exclusions. These private insurance carriers have either disclaimed coverage, reserved their rights or have not acknowledged coverage for the cases involving the cleanup work for the World Trade Center site. In addition, the carriers with whom the City obtained limited insurance coverage have also denied coverage leading to coverage litigation. The Captive insurance program is the

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and Police Officers and nearly 40% appear to be Utility Workers, Transit, Port Authority or other workers unrelated to or outside the direction and control of the contractors.

[3] The VCF was implemented to address the claims of those injured or killed within 96 hours of the attacks on the World Trade Center, as well as the other terrorist attack sites, and did not require a showing of legal liability. It was widely heralded as being highly successful.

contractors' primary protection in this massive litigation. Thus, without Federal indemnity, the contractors may be wholly unprotected from onerous liability and face extended coverage litigation upon exhaustion of the Captive's funds.

Contractors Seek Fairness

The contractors, like all responders, acted extraordinarily under an extraordinary set of circumstances. They deserve to be counted among the heroes in the wake of September 11th. They put the needs of the city, the nation and the injured first. They now seek simple and basic fairness in the form of protection from the significant potential liability they now face.

Protecting the contractors from such liability is imperative from a public policy standpoint. In the event of another national tragedy like September 11, the nation will again need an immediate response from private contractors. The nation needs to feel comfortable and know that those who can help—including contractors—will respond. Protecting the contractors for their World Trade Center efforts will send the message that Good Samaritans can help without fear of potential liability and that our government has done the right thing.

It would be a privilege to work with these subcommittees to produce and pass legislation that addresses the needs of the contractors and the needs of those who were truly injured in the service of our country cleaning up the aftermath of the terrorist attack on the World Trade Center.

Mr. KING. I thank you, Mr. Chairman.

And I would conclude my statement. Thank you for holding this hearing.

I thank the witnesses in advance, and I look forward to your testimony.

And I yield back.

Mr. NADLER. Thank you.

I will now recognize myself for an opening statement.

This joint hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties and the Subcommittee on Immigration etcetera, will investigate the status of compensation for the tens of thousands of people who are suffering because of the collapse of the World Trade Center on 9/11.

I want to thank the distinguished Chairwoman of the Subcommittee on Immigration for her agreeing to hold this joint hearing with the Subcommittee on the Constitution. It is both timely and important.

Other hearings have focused on the ongoing health crisis, and this Committee has previously investigated the disastrous response to the environmental catastrophe.

This is the first hearing in the Congress that will examine the issue of providing compensation to the many first responders, construction workers, volunteers and other affected individuals. They are the true heroes of September 11, and they need our help, not more salutes.

I want to welcome our witnesses and thank them for participating. We are fortunate to have an expert panel with us today to discuss the past successes, current challenges and proposed solutions to the ongoing struggle to provide proper compensation to the victims of 9/11.

I would also like to recognize those individuals who have traveled to Washington today to attend this hearing and thank them for coming. Many are the very people who have been denied proper compensation thus far. And I hope that we can learn today about why the system has failed so many.

Last June, Senator Clinton and I held companion hearings on the actions of the EPA and other Federal agencies that allowed workers to work in a toxic environment without proper protection and gave them false assurances as to their safety.

Obviously, none of the injuries we are talking about would have occurred were it not for the terrorists, who are ultimately to blame. But many or most would have been avoided if the Federal Government had acted in a responsible manner. The Federal Government, therefore, has a moral and legal obligation to compensate the victims of 9/11 and to provide for their healthcare.

Many hearings have examined the health issues, and we have heard from many who are too sick to work, and we must assume that many more will become sick in the future. Which brings us to today's hearing.

We have with us the former special master of the Federal Victim Compensation Program, who was responsible for providing approximately $7 billion in compensation to the families of those who lost their lives and to those injured in the immediate aftermath of the attacks. He paid claims to about 2,900 families of the deceased and

to 2,500 people with physical injuries, including respiratory illnesses. The funds he distributed were tax free, and every award took into account the recoveries from collateral sources such as private insurance, pensions and workers' compensation. Claims payments were halted because of a statutory expiration date.

We will also hear from Mike Valentin, a police officer and 9/11 first responder who can no longer work and who long ago exhausted his prescription drug coverage and is now fighting to keep his family financially afloat. Unfortunately, his case is all too typical.

New York City Corporation Counsel Michael Cardozo will discuss the World Trade Center Captive Insurance Company, which established with a $1 billion congressional appropriation has spent millions of dollars in administrative and legal costs to contest rather than to pay claims filed by first responders and other individuals whom Congress intended to assist.

Only a handful of claims have been paid, and none of those have been related to the respiratory problems that so many suffer. I look forward to hearing from him how many claims have been paid out, what he sees as the challenges to compensating 9/11 victims.

I assume he may discuss last week's Second Circuit Court of Appeals decision denying New York City and its contractors immunity from World Trade Center-related lawsuits. Close to 10,000 victims have filed suit claiming that they "suffered respiratory injuries due to the failure of the city and the Port Authority to monitor those conditions and to provide them with adequate safety equipment and/or warn them of the hazards."

Finally, I look forward to the testimony of Dr. Jim Melius, who is an expert on the proposed legislative solutions to reopen the Victims Compensation Program and to provide for the long-term health needs of those affected by the attacks of 9/11.

I would like to note that my colleagues Congresswoman Carolyn Maloney and Congressman Vito Fossella and I have introduced the 9/11 Health and Compensation Act, which would provide comprehensive medical treatment to any person whose health was affected and would reopen the Victim Compensation Fund so that people can be compensated for their economic losses.

The pain and suffering of the living victims of 9/11 is real and cannot be ignored. I think it is clear that we as a Nation must do more than we have.

During the final months of the Civil War, President Lincoln in his Second Inaugural Address noted that the Nation had to go beyond mourning the dead and needed to look toward what could be done to help the Nation recover and reconstruct. Nearly 7 years after 9/11, we are in the same position. We must, as Lincoln remarked, "bind up the Nation's wounds and care for him who shall have borne the battle, and for his widow and his orphan."

I hope that as we continue to bring the truth to light through these hearings we can do a better job of repaying a debt that can never fully be repaid to the victims and heroes of 9/11.

I yield back. And I now recognize the gentleman from Arizona, the Ranking Minority Member of the Subcommittee on the Constitution, Civil Rights and Civil Liberties, for an opening statement.

Mr. FRANKS. Well, thank you Mr. Chairman.

First, let me just say, like so many others here today, that my heart does go out to everyone who toiled and suffered in the tragedy of 9/11. Those attacks were met with the very noblest of responses. I still remember the reports of firemen running up the stairs to try to help people from the burning Towers.

Today I hope we all rededicate ourselves to doing what is right and just for all Americans harmed by the terrible act of terrorism on 9/11.

Among those heeding the call to respond to the 9/11 attacks were private contracting firms that were asked by the City of New York to immediately begin cleanup efforts after 9/11. They did so even though they and the City of New York were unable to secure liability insurance that they normally would have before starting a recovery project.

Other major entities affected by the 9/11 attacks including the airlines, the World Trade Center and port authorities were protected by bipartisan Federal legislation from excessive and unwarranted liability exposure following the attacks. The cleanup firms, however, whose liability issues did not arise until many months after the attacks were not so protected.

In the administrative compensation program created to help the immediate victims of 9/11, called the September 11th Compensation Fund, does not cover those exposed to subsequent site contaminants. That fund, administered by Mr. Kenneth Feinberg here, was administered within set parameters.

As the non-partisan RAND Institute for Civil Justice pointed out in its 2004 report, "pre-commitments by government programs reduced the ability of government and society more generally to allocate resources to meet those pressing needs after an attack."

And the Government Accountability Office in 2005 also cautioned that "because these compensation programs may expand significantly beyond the initial cost estimates, policymakers must be careful in considering the cost and precedent-setting implications of establishing any new Federal compensation programs, particularly in light of the current Federal deficit."

And I would like to submit both of those reports,[1] Mr. Chairman, for insertion into the hearing record today.

Mr. NADLER. Without objection, so ordered.

Mr. FRANKS. Private contracting firms should not be driven out of business by these lawsuits or deterred from responding to future crises for fear of unlimited and potentially bankrupting liability. The model Congress created on bipartisan basis after 9/11 worked well as it was intended to do. Under that model, if a person chose not to obtain relief through the compensation fund but decided, rather, to sue the court, the liability the airlines, the World Trade Center and the airports, who were also victims of the 9/11 attacks, would be limited to the extent of their insurance coverage at the time of the attacks.

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[1] The reports submitted by Mr. Franks are not reprinted in this hearing but can be accessed at the following links:

http://www.rand.org/pubs/monographs/2004/RAND__MG264.pdf

http://www.oig.dol.gov/public/feca/reports/GAO%20PERSPECTIVES%20ON%20FOUR%20PROGRAMS%202005.pdf

The Aviation Security Act conference report put reasonable limits on the otherwise potentially infinite liability innocent Americans would have faced as a result of litigation surrounding the attacks. Consequently, the vast majority of victims opted to seek compensation through the September 11th Victim Compensation Fund, and Americans were spared decades of costly and wasteful litigation regarding damages that the terrorists themselves would be responsible for.

As the non-partisan RAND Corporation concluded, it is difficult to imagine that the Victims Compensation Fund did not resolve claims much faster and more efficiently than the tort system would have given the size of the losses, the parties primarily responsible for the attacks, and the complicated liability issues surrounding the events of 9/11.

As we move forward today, I want to make sure that whatever compensation fund might be created to cover new claims treats current victims in the same responsible manner as those who were injured in the immediate aftermath of the 9/11 attacks.

That is something that justice demands, Mr. Chairman, and I will do all that I can to see that the victims of 9/11, whoever they are, receive a fair and just result. And I look forward to hearing from all of our witnesses today. Thank you, sir.

Mr. NADLER. Thank you.

And I will now recognize the distinguished Chairman of the full Committee, the gentleman from Michigan, for an opening statement.

Mr. CONYERS. Thank you, Chairman Nadler and Co-Chairwoman Zoe Lofgren, the two distinguished Ranking Members of the Subcommittees that are holding a joint hearing, Steve King and Trent Franks.

Please note how democratically this Committee operates. We finally get down to the Chairman of the Committee after a half a dozen people have already articulated their opening statements.

I am going to just make a couple comments that will let all of these distinguished witnesses know, all six of you, we are proud that you are here. We think this is an important element of understanding how we react to attacks of terror in our country.

Now, in the wake of the World Trade Center attacks, then-Governor Pataki and then-Mayor Giuliani, let us face it, took a do-it-yourself attitude toward the victims of this unprecedented disaster. Instead of respirators and professional cleanup, first responders, construction workers, volunteers, were sent into this disaster without protection. And the public got instructions, believe it or not, to just wipe their apartments and offices down with a wet rag. And now cancer and lung disease are ravaging these survivors.

Now, the current mayor has worked hard to fix this mess and has taken—but the city is really in an adversarial stance. And I leave it to all of our New York people here—Mrs. Maloney, Mr. Weiner, Jerry Nadler and others here. But they have taken an adversarial stance against the victims of the environmental tragedy.

Now, in my opening statement, let me give you the bottom line here. We need to sit down and start settlement negotiations that will get these victims the help they deserve. And the way we do it is get beyond—you know how many people have received relief

under this World Trade Center Captive Insurance Company? Five. Five victims—8,600 claims pending. And we have got something like a billion dollars to account for what is going on. What has really turned out to be the case is that the lawyers are suing the victims against allowing them to get recovery. That is where the money is going.

So this unique hearing with two Subcommittees—and we have got another Ranking Member of Crime, Bobby Scott, here. We have got the former Chairman of the Congressional Black Caucus, Mel Watt, here. We need to, after we hear from the witnesses, let us do something here. And we have got all the players here, and this is the right time to do it.

And I will put the rest of my statement in the record, Mr. Chairman. And thank you both.

Mr. NADLER. I thank the gentleman.

We have a distinguished panel of witnesses today. Ken Feinberg served as the special master of the Federal September 11th Victim Compensation Fund of 2001. He is currently the managing partner and founder of the Feinberg Group, LLP, and has had a distinguished teaching career at the Georgetown University Law Center, University of Pennsylvania Law School, NYU School of Law, University of Virginia Law School and Columbia. Why did you ever leave Columbia and NYU? He has been listed by the National Journal as one of the 100 most influential lawyers in America, and was named lawyer of the year by the National Law Journal in 2004. Mr. Feinberg received his J.D. from New York University School of Law.

Michael Cardozo has served as the corporation counsel and chief legal officer of New York City since January 2002. He serves as legal counsel for the mayor of New York, elected officials, the city and its agencies, and also heads the Election Modernization Task Force. Prior to becoming corporation counsel, Mr. Cardozo was a partner at Proskauer Rose where he served as co-chair of the firm's 150-person litigation department. He is a graduate of Columbia Law School and served as a law clerk to the late Judge Edward McLean in the United States District Court for the Southern District of New York.

Ann-Marie Lasowski joined the U.S. Government Accountability Office in 1988. She currently serves as acting director in GAO's Education Workforce and Income Security Issues Team where she leads work and worker protection issues. In recent years, she led a body of work on defense trade issues covering topics such as the U.S. export control system, foreign military sales and militarily critical technologies. Ms. Lasowski began her career as an analyst in GAO's Philadelphia field office, performing evaluations and orders on topics including transportation safety, housing programs, environmental contracts, and defense contract management and financing issues.

Detective Michael Valentin was a detective with the New York City Police Department and is now retired on medical disability as a result of his exposure to toxic dust and particulate matter while working at the World Trade Center site for 3 months.

Ted Frank is the resident fellow and director of the American Enterprise Institute Legal Center for the Public Interest where he

manages the institute's research and studies liability reform. His research areas include product liability, class actions and civil procedure, corporate regulation, antitrust and patent litigation, lifestyle litigation, medical malpractice, and judicial selection—a rather wide field. Previously, Mr. Frank was a litigator in private practice. His litigation experience includes defending the 2003 California gubernatorial recall election against an ACLU constitutional challenge; Vioxx and automobile products liability cases; class action defense; and antitrust and patent cases.

Dr. James Melius is an occupational physician and epidemiologist. For the past 10 years, he has worked with the Laborers International Union of North America and currently is administrator of the New York State Laborer's Health and Safety Trust Fund and director of research for the Laborers Health and Safety Fund of North America. He currently Chairs the steering committee for the World Trade Center Medical Monitoring and Steering Committee which oversees this program for World Trade Center responders. He received his M.D. from the University of Illinois in 1974 and his Dr.P.H. in Epidemiology from the University of Illinois School of Public Health in 1984.

Before we begin, I want to formally acknowledge all of the people who have come down from New York in buses who are now here. They have come down to show their support for all those who are still suffering after 9/11.

I want to acknowledge those in the overflow room as well. Thank you for your service. We welcome you all.

Without objection, the written statements of the witnesses will be made part of the record in their entirety. We would ask each of the witnesses to summarize his or her testimony in 5 minutes or less. To help you keep time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow and then to red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses. If you could please stand and raise your right hand to take the oath.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information and belief?

Thank you.

Let the record reflect that the witnesses answered in the affirmative.

We will now recognize our witnesses in order. First, I recognize for 5 minutes for statement, Mr. Feinberg.

TESTIMONY OF KENNETH R. FEINBERG, FORMER SPECIAL MASTER, VICTIM COMPENSATION FUND

Mr. FEINBERG. Thank you very much, Mr. Chairman.

This is the first time since the 9/11 Fund expired almost 5 years ago that I have had a chance to come here and personally thank this Committee, the House of Representatives, the Congress, the Administration, for their absolute, unstinting support for the 9/11 Fund. It was truly bipartisan. I had the complete support of the Administration, Attorney General Ashcroft, and the Congress,

Members from both parties. And it would have never worked without that bipartisan support, and I am very grateful.

I also particularly thank the Chairman of the full Committee, Chairman Conyers, who I first worked with in 1975 when I was a Member of the Senate Judiciary Committee staff. And it is good to see him.

The statistics concerning the 9/11 Fund speak for themselves if statistics are any indication of success. Over $7 billion in taxpayer funds was paid to 5,560 eligible claimants. Families of 2,880 victims received almost $6 billion in compensation. In addition, 2,680 physical injury victims were paid over $1 billion by the 9/11 Fund. As the Chairman pointed out, and others, some 97 percent of all eligible families who lost a loved one on September 11 voluntarily agreed to enter the 9/11 Fund rather than litigate.

The real irony here that brings me here today to testify is that there are almost 11,000 current litigants who, had they manifested an injury, a physical injury, before the fund expired by statute on December 22, 2003, they would have been paid. The only reason they weren't paid under the 9/11 Fund is that they didn't manifest any injury from their exposure at the World Trade Center site until after the fund was dissolved.

So we are asked here today to consider: What do we do? Not only about the 11,000 individuals who have already brought suit, but it is estimated that there may be over the next 5, 10 years an additional 25,000 or 30,000 people who now have latent in-residence illness that may manifest a physical injury in the next decade. And again, the only reason they weren't paid by the fund is they weren't "sick" at the time the fund expired by statute.

Now, in my testimony I have proposed for your consideration two alternate ways to move forward in this matter.

Option one is to simply reenact the September 11 Victim Compensation Fund. But there are two major challenges if you decide to reenact that fund.

First, if it is reenacted, I would recommend that it be reenacted with a one-line extension. There are some well-intentioned amendments to that fund that have been circulating. I have been asked to comment upon them. I suggest for your consideration it would be a mistake in reenacting the fund to change the rules and regulations of that fund.

If you want to reopen the fund to cover 11,000 people or more, that is an option. But I suggest that amendments designed to change the way the fund worked would be a mistake and would probably be the political death knell of any attempt to simply reauthorize the fund to deal with these current claims.

The second challenge with reauthorizing the fund is a philosophic dilemma which I raised in my testimony: Why reauthorize the 9/11 Fund? There was no 9/11 Fund for Oklahoma City. There was no 9/11 Fund for the victims of Katrina. There was no 9/11 Fund for the African Embassy bombings. There was not even a 9/11 Fund for the first World Trade Center attack in 1993. Those people aren't eligible under the fund.

So if you reopen the fund—and there is a strong, basic fairness argument for reopening the fund to deal with people who are legitimately ill but who weren't around legitimately ill at the time that

the fund expired—understand that there are real philosophic questions as to the wisdom of the Congress again singling out for special public compensation certain victims of life's misfortune while failing to do so for others.

I leave that philosophic conundrum to the Committee. But I just want everybody to understand that that is a problem that I heard repeatedly in administering this fund. "Mr. Feinberg, my son died in Oklahoma City. Where is my check?" "My son died in the basement of the World Trade Center in 1993. Why aren't I eligible?" That is a serious dilemma.

I also say, finally, in my testimony that if this Congress decides not to extend the 9/11 Fund, I urge all parties currently involved, directly and indirectly, in the litigation currently pending in Manhattan to come together and settle and resolve all of the litigation. There is a captive insurer with substantial resources, there are other defendant companies with extended insurance that might or might not be available to add to that captive amount. But it is certainly an option that I lay out in my testimony is vastly preferable than continuing this ongoing litigation with all of its uncertainty, with all of the roll of the dice that goes with litigation, the time and money it will take, without anybody knowing in advance what the result will be.

So if the 9/11 Fund is not to be extended, I urge this Committee to do what it can to encourage the private parties to sit down and resolve that litigation. It should not be that difficult.

Finally, I want to just thank not only this Committee for inviting me to testify. Michael Cardozo is here from the City of New York. The City of New York, when I administered the 9/11 Fund, the City of New York and the Department of Defense discussed with me practically every day—Michael Cardozo was on the phone with me at least three, four times a week—how can we best administer the program to help eligible claimants?

So I just want to publicly thank the city and the mayor, and the Defense Department and the secretary, for all they did as well in helping make this 9/11 Fund work.

And, finally, I just point out, Mr. Chairman, Deputy Special Master Camille Biros is here today, who worked so closely with me and others in helping to administer the 9/11 Fund, and I thank her for her service as well.

Thank you very much.

[The prepared statement of Mr. Feinberg follows:]

PREPARED STATEMENT OF KENNETH R. FEINBERG

Mr. Chairman,

My name is Kenneth R. Feinberg, and I served as the Special Master of the Federal September 11th Victim Compensation Fund of 2001. Appointed by the Attorney General of the United States, I was responsible for the design, implementation and administration of the 9/11 Fund. I served in that capacity for 33 months, until the Fund expired by statute on December 22, 2003.

If statistics are any barometer of success, the 9/11 Fund served its purposes in providing an efficient and effective administrative no-fault alternative to tort litigation against alleged domestic tortfeasors. Over $7 billion in public taxpayer funds was paid to 5,560 eligible claimants. Families of 2,880 victims received $5,996,261,002.08 in compensation; in addition, 2,680 physical injury victims were paid $1,053,154,534.56 by the 9/11 Fund. Some 97% of all eligible families who lost a loved one on September 11 voluntarily agreed to enter the 9/11 Fund rather than litigate. The average award for a death claim was $1,267,880.49; the average award

for a physical injury claim was $392,968.11. And all of this was accomplished with 9/11 Fund administrative and overhead costs of less than 3%. I point with pride to the fact that this was one of the most efficient, streamlined and cost effective government programs in American history.

It was also totally bipartisan. During the thirty-three months that I served as Special Master, I had the complete cooperation of the Department of Justice, Office of Management and Budget, the Administration, and the Congress. I also received unqualified support from various state and local governments, including, particularly, the City of New York and the Department of Defense. All government entities worked at my side to make sure that the 9/11 Fund was a success and that prompt payments were made to all eligible claimants.

I also worked closely with Federal Judge Alvin Hellerstein, who continues to preside over all the federal 9/11 related cases in Manhattan. Judge Hellerstein worked tirelessly with me in coordinating the litigation and the 9/11 Fund claims in an effort to maximize the number of individuals who elected to enter the Fund rather than litigate. I am in his debt for his extraordinary work, then and now, in coming to the aid of families and victims in distress.

When the Program expired, in December of 2003, only 94 lawsuits were filed by families of deceased victims who decided to litigate rather than enter the 9/11 Fund. It is my understanding that almost all of these wrongful death lawsuits have since been settled and that there are currently only a handful of cases still being litigated in federal court in Manhattan.

The same cannot be said for the 9/11 physical injury victims, particularly the responders working after September 11 during rescue and clean-up operations at the World Trade Center. As already indicated, the 9/11 Fund paid over $1 billion to 2,680 eligible physical injury claimants. The vast majority of these physical injury victims were responders suffering various respiratory ailments at the World Trade Center site in the days, weeks and months following the September 11 attacks. Almost all of these responders were compensated by the Fund for respiratory ailments rather than traumatic physical injuries. The 9/11 Fund eligibility criteria recognized that these respiratory ailments were often latent, that physical manifestations of injury often did not occur until months or years after first exposure to hazardous substances at the World Trade Center. That is why the 9/11 Fund modified its eligibility criteria to permit the valid filing of claims years after the terrorists attacks, when these physical manifestations first appeared and became apparent.

However, as already indicated, the 9/11 Fund expired by statute on December 22, 2003, before thousands of responders, and possibly other individuals exposed to the toxic air at the World Trade Center site, manifested any physical injury. This large group of individuals could not be paid from the 9/11 Fund since there was no longer any Fund to process and pay their claims. Accordingly, they have exercised the alternative option of litigating before Judge Hellerstein. It is estimated that 11,000 responders will file suit by the end of this year, and that as many as an additional 29,000 individuals may yet manifest physical injuries in the next few years. It is anticipated that these affected individuals might file suit as well.

I take no position on the merit of these lawsuits, which involve complex issues of liability, legal immunity of governmental entities, medical causation, and valuation of individual damage claims. But I do believe that these lawsuits should be resolved, that protracted and uncertain litigation is in nobody's interest. That is why the 9/11 Victim Compensation Fund was established by Congress in the first place, a recognition that a prompt and efficient alternative to tort litigation constituted a better way.

It is ironic that these very individuals who have filed lawsuits seeking compensation are the same type of individuals who received payments from the 9/11 Fund; had these thousands of individuals manifested a physical injury before the 9/11 Fund expired, they, too, would have received compensation without litigating. It is perfectly understandable, therefore, why they seek to be treated the same way and in the same manner as their brethren. It is my understanding that their decision to litigate is directly related to the fact that there is no longer a 9/11 Fund to process their physical injury claims.

What should be done to resolve this problem, and the costly and uncertain litigation, and provide prompt compensation to eligible claimants physically injured in the aftermath of the September 11 attacks? I offer two proposals for your consideration, both of them controversial and challenging and neither easy to achieve. But I believe that either of my proposals are preferable to the existing uncertainty and expense associated with the ongoing litigation.

I. RENEW AND EXTEND THE FEDERAL SEPTEMBER 11TH VICTIM COMPENSATION FUND

One option would be simply to reenact the law establishing the Federal September 11th Victim Compensation Fund for an additional period of years in order to provide the same public compensation to eligible physical injury claimants. This could be justified on grounds of basic fairness; Congress would simply declare that the same eligibility criteria and compensation should be made available to those currently suffering respiratory injuries who were not paid by the earlier 9/11 Fund solely because they did not manifest a physical injury until after the earlier Fund had expired. Congress could simply reopen the 9/11 Fund to encompass all such claims during a "window" of five years during which time all September 11 related respiratory physical injuries could be evaluated and processed. (medical evidence would need to be considered by Congress in deciding how long this "window" would be open, permitting the filing of such physical injury claims).

But one should not underestimate the philosophical, political, and practical problems associated with reenactment and extension of the 9/11 Fund.

First, any attempt to reenact and extend the 9/11 Fund should be initiated with the understanding that there would be no changes in the rules and regulations governing the original Fund, that the new law would simply be a "one line" reaffirmation of the law which established the original 9/11 Fund. This will not be easy. Various interested parties, while championing the reenactment of the 9/11 Fund, have called for statutory modifications and additions, e.g., indemnity protection for contractors at the World Trade Center site; compensation for claimants suffering mental trauma without accompanying physical injury; elimination of the collateral offsets rule which was an integral part of the original Fund; and subsequent Fund payments for eligible claimants who received compensation from the earlier Fund, but whose physical condition has subsequently worsened resulting in a demand for additional compensation. These and other well intentioned requests have all been asserted in connection with any attempt to reenact and extend the original 9/11 Fund. But I suggest that any attempt to modify the statutory provisions and accompanying regulations of the original Fund will lead to the type of controversy and disagreement that will undercut political consensus and prevent reenactment of the Fund.

Second, even a "one line" extension of the original 9/11 Fund poses fundamental philosophical and political questions of fairness. Why should Congress be reenacting the 9/11 Fund, providing millions in additional public compensation to the physical injury victims of the September 11 attacks, while no such Fund exists at all for the victims of the Oklahoma City bombing, the victims of the African Embassy bombing, the victims of the first World Trade Center attack in 1993 or, for that matter, the victims of the unprecedented disaster associated with Hurricane Katrina? Why should Congress, which has already enacted legislation authorizing over $7 billion in public compensation to the families of those who died on September 11, or who were physically injured as a result of the attacks, now authorize additional millions or even billions in compensation for the remaining September 11 victims, while failing to do anything similar to the other victims of life's misfortunes? It is a fundamental question posed to our elected officials in a free democratic society. Why some victims but not others? On what basis should such distinctions be made? Are some victims more "worthy" than others?

I have maintained that the original 9/11 Fund was the correct response by the American people to the unprecedented terrorist attacks on September 11, 2001. It was sound public policy, reflecting national solidarity towards the victims and expressing a national sense of compassion not only to the victims, but to the rest of the world. The September 11 statute was an expression of the best in the American character. It could be justified, not from the perspective of the victims, but, rather, from the perspective of the Nation. But whether or not it should be reenacted instead of being considered a unique singular response to an unprecedented national tragedy is a fundamental question better left to the consideration of Congress.

II. SETTLEMENT OF THE CURRENT AND FUTURE PHYSICAL INJURY LITIGATION

Even if Congress decides not to extend and reenact the 9/11 Fund, this does not mean that the current litigation should continue. Fortunately, there is a path open for the comprehensive resolution of the litigation, while protecting all defendants against the likelihood of similar future litigation.

As I understand it, Congress created a September 11 related captive insurance company for the City of New York and its contractors in an amount approximating $1 billion. This money is readily available at the present time to resolve the physical injury claims currently pending in federal court against the City of New York, the contractors, and other defendant entities. Two problems have been raised, however,

about the availability of these funds and the challenges posed in securing a comprehensive settlement of the litigation.

First, is the obvious question as to whether or not the $1 billion is sufficient to resolve all of the pending claims? After all, it is noted, the 9/11 Fund paid over $1 billion in resolving just 2,680 physical injury claims; how can $1 billion be sufficient to resolve some 11,000 current similar claims? A fair question. But there are answers. Nobody knows how many of the 11,000 pending claims are eligible for compensation, what the eligibility criteria might be, or what the compensation levels should be for valid physical injuries. In addition, how many of the existing plaintiffs are already receiving health related reimbursement? What role will collateral offsets play in any settlement negotiation? Most importantly, it is not clear to me that the $1 billion is the sole source of compensation in the event that a comprehensive settlement is sought. What about financial contributions over and above the $1 billion from other defendants and their insurers? If settlement negotiations do commence, to what extent is it possible and likely that all defendants, not just the City of New York and the captive insurer, will contribute settlement proceeds in an effort to secure "total peace" through a comprehensive resolution of the dispute? These are important questions that can only be answered in the context of meaningful settlement negotiations.

Second, creative settlement terms and conditions can be negotiated which might provide additional financial security to eligible claimants over and above immediate compensation. For example, plaintiff attorneys involved in the litigation have been meeting with officials of the insurance industry to determine whether some type of individual insurance policy might be made available to each eligible plaintiff. Premiums would be paid from the captive insurance fund; in return, each eligible plaintiff would receive an insurance policy to be paid by the insurer if and when the individual plaintiff develops a future cancer or some other related illness. This approach, and other similar creative ideas, might be advanced during settlement negotiations to maximize financial protection for plaintiffs while taking advantage of relatively limited settlement dollars.

Third, is the perplexing and legitimate problem of future physical manifestations resulting in additional litigation. I agree with the City of New York and other defendants that it makes little sense to settle all 11,000 current cases only to find that additional lawsuits are filed by future plaintiffs who do not manifest a physical injury until years after a current settlement. But, again, there are answers to this vexing problem which should help ameliorate defendant concerns. For example, it might be possible to set aside a portion of all available settlement proceeds, to be used if and when additional individual physical injury claims are presented for payment. Alternatively, it might be possible for all current eligible plaintiffs to be paid in installments, with additional funds due and owing depending upon the filing rate of future claims; this is exactly what Federal Judge Jack B. Weinstein did in reorganizing the Manville Trust involving individual asbestos claims. A down payment was made, with future payments depending upon the filing rate of subsequent individual asbestos claims. Another idea is to provide some type of claims registry; an eligible individual exposed to toxic fumes at the World Trade Center, but not yet manifesting any physical injury on the date of the settlement, might receive a modest payment immediately and "register" for participation in the settlement. This potential future plaintiff would immediately receive the available insurance policy in addition to the modest down payment; in return, the individual would surrender all future rights to litigate.

These are just some personal concepts which may be supplemented by other similar creative settlement terms and conditions. Some may work, others may not. What is important is that all interested parties come to the negotiation table with the flexibility, creativity, and determination to secure a comprehensive settlement. This approach is vastly preferable to the ongoing costly and uncertain litigation lottery.

Mr. Chairman, I believe that either of the approaches which are the focus of my testimony today, are better alternatives than the existing litigation currently proceeding in federal court in New York City. Whether Congress decides to reenact the Federal September 11th Victim Compensation Fund, or whether it encourages all interested parties to commence intense negotiations designed to resolve all current and future September 11 related physical injury litigation, I am convinced that the courtroom is not the best place to resolve these disputes. I am prepared to assist the Congress and the parties in any manner requested, and to do so pro bono. What is important is that the litigation be brought to an end and that eligible claimants receive the compensation necessary to move on with their lives as best they can. We do not have the power to change history and prevent the September 11 terrorist

attacks. But it is the responsibility of the Congress and the American people to try and bring some degree of financial security to the victims of September 11. I hope I have offered a blueprint and some food for thought to all interested parties.

I thank you for the opportunity to testify here today.

Mr. NADLER. Thank you, Mr. Feinberg. And we join with you in thanking the deputy special master and the corporation counsel.

We will now recognize the corporation counsel for a statement. Mr. Cardozo?

TESTIMONY OF MICHAEL A. CARDOZO, CORPORATION COUNSEL, CITY OF NEW YORK

Mr. CARDOZO. Thank you, Mr. Chairman, Members of the Committee.

I particularly want to thank the members of the New York delegation and their staffs who have long made the question of health of the workers and the other people at Ground Zero and area residents a prime area of concern.

Needless to say, the City of New York strongly supports the bill that we are discussing today, introduced by Chairman Nadler and Representatives Maloney and Fossella, and particularly supports what we are talking about today, a reopening of the Victims Compensation Fund.

Six and one-half years ago, 90,000 people from every State in this country responded to the attack on this Nation and participated in the Ground Zero rescue and recovery effort. Today, over 10,000 of those people report that they suffer from a wide range of ailments. And, unfortunately, it is anticipated that many, many more may claim and report accurately that they are also sick as a result of 9/11.

Now, medical care for these people is being provided by the city, the Mount Sinai Consortium and others, and enactment of this bill would provide the stable funding required to ensure that, as Mayor Bloomberg has committed, everyone who was hurt as a result of the 9/11 attacks has access to medical care at no cost.

But in addition to these health problems, many of the people are unable to work, and some have other losses. Those individuals who rushed to the scene of the devastation without a thought for their personal safety, New York City and the contractors who provided aid to the city without a written contract and without adequate insurance, are now battling against one another. Some of those people are sick, and others may become sick.

But New York City and the contractors do not believe that they committed a wrong that makes them liable for these illnesses. And in any event, the amount of money available in the captive insurance company, $1 billion—a congressionally authorized insurance company, not a victims' compensation fund—that money is not sufficient to resolve the claims of those who claim to have become ill let alone future claimants.

And as a result, we are locked in a litigation. And regardless of the result of that litigation, no one is going to win. If the city and the contractors prevail, people who became sick as a result of 9/11 will receive nothing. And if the plaintiffs win, many of the contractors will face very, very substantial financial jeopardy, since as I

have noted the available insurance may not be adequate to cover them.

Reopening the VCF, therefore, offers the means of resolving this terrible dilemma. As you have just heard from my very good friend Ken Feinberg, who so ably administered the 9/11 Fund, that fund allowed for compensation to injured people without any need to establish fault. And it worked just as Congress intended.

But the critical limitations on the VCF that Mr. Feinberg just noted have made it unavailable to the more than 10,000 people who are now suing the city and the contractors. If someone became ill as a result of 9/11 exposure even days after September 15, 5 days after the attack rather than 4, that person was not eligible for a VCF payment. If someone manifested an illness weeks after December 2003 when the fund statutorily expired, she was not eligible to recover. And if someone was cleaning buildings three blocks from Ground Zero, that person, too, was ineligible to recover.

There is no just reason for these people to receive nothing while many others who were in essentially the same position, but who met the strict eligibility requirements, were compensated. Reopening the VCF would deal with these problems.

Now, I do want to note that if this Committee and the Congress reopens the VCF as we urge, there will undoubtedly be some, hopefully few, who will nevertheless decide to pursue a claim through the courts. If the Congress would provide an indemnity to the city and the contractors in the event of such claims, it would mean that the $1 billion presently in the captive insurance company could be used to help fund the VCF. Without it, the captive would have to continue.

In conclusion, let me just note as I have explained in detail in my written statement, the VCF would provide fair, fast and certain relief. And providing compensation through the VCF will help ensure that if, God forbid, we have another attack the response from the contractors, the relevant city and the area workers will be as generous and robust as it was after 9/11.

Thank you very much.

[The prepared statement of Mr. Cardozo follows:]

PREPARED STATEMENT OF MICHAEL A. CARDOZO

Good morning, Chairman Nadler, Chairwoman Lofgren, ranking members Franks and King, and committee members. My name is Michael A. Cardozo and I am the Corporation Counsel of the City of New York. I want to start off by thanking the members of the New York delegation and their staffs who have long made the issue of the health of the responders and the area residents to the attack on the World Trade Center a top priority. I also want to thank you for holding this hearing on compensation for the responders and community members affected by the September 11 attack.

The federal government contributed substantially to New York City's economic and physical recovery from the 9/11 attacks. Mayor Bloomberg and the people of New York City are grateful for the federal government's strong support.

The federal government has also provided some funding through annual appropriations for screening, monitoring and treatment of responders and community members and for that we are also grateful. But what is needed is long-term, stable funding and a method to address compensation for non-health-related concerns. The City of New York strongly supports H.R. 3543, the James Zadroga 9/11 Health and Compensation Act of 2007 introduced by Chairman Nadler and Representatives Carolyn Maloney and Vito Fossella. That bill would provide the stable funding required for health issues.

But I am here today to testify in support of the provision of that bill that would re-open the Victim Compensation Fund, thereby providing a fast, fair, and efficient way to compensate the Ground Zero workers and area residents who report that they were injured as a result of the terrorist attack. I am also going to recommend a very important addition to the bill: that the City and its contractors be indemnified for the claims of any person who does not accept an award from a reopened Victim Compensation Fund.

Approximately six-and-a-half years ago, over ninety thousand people took part in the rescue and recovery effort—including workers and volunteers who came from all 50 states and are constituents of *every* member of these subcommittees, and indeed of virtually every member of the House. In addition, some residents, students and area workers were exposed to the dust and fumes.

While many who were at or near the site and who reportedly fell ill have recovered, others continue to report a range of ailments. The most commonly reported are respiratory illnesses, such as asthma, and mental health conditions, such as Post-Traumatic Stress Disorder (PTSD) and depression. We do not yet know the extent to which these conditions will remain or will be successfully resolved with treatment.

We also do not yet know whether late-emerging conditions, like cancer and pulmonary fibrosis, will arise in the future; but concern about these illnesses developing was raised time and again in discussions with responders and residents alike. We know that we must build the capacity to detect and respond to any conditions that may reveal themselves in the future.

In addition to the health effects reported by these individuals, many report other losses. Some report they are unable to work, some have out of pocket medical expenses or other losses. Simply providing medical care, as important as that is, would not compensate them for these types of losses.

Some of these people are City employees, particularly members of the FDNY and NYPD. Others worked for the contractors the City retained in the rescue, recovery and clean-up efforts in this attack upon our country. Many of these contractors began work on September 11 itself. They came forward out of patriotism and a sense of civic duty without having a contract in hand or insurance to cover their liabilities.

As you are aware, almost 10,000 of those who worked on the rescue, recovery and clean-up efforts have sued the City and the contractors seeking compensation. Resolving these issues through the courts is not in anyone's interest. It is especially not in the nation's interest, if we want to assure that the next time—if God forbid there is a next time—that people and companies will once again step forward.

We have a model of how we can proceed in a way that will quickly, efficiently and fairly resolve these issues—the Victim Compensation Fund of 2001, which was enacted shortly after September 11.

THE VCF WORKED WELL

In the aftermath of the terrorist attack on the World Trade Center, Congress established a Victim Compensation Fund (VCF). When Congress created the VCF in 2001, it chose a no-fault compensation program—those injured were compensated without any need to establish negligence or fault. As ably administered by Kenneth Feinberg, the VCF worked exactly as Congress had intended. Determinations were made promptly and without the delays, litigation risks or rancor that lawsuits inevitably engender. Approximately 5,500 claimants opted to accept awards rather than to pursue a lawsuit.

LIMITATIONS OF THE VCF

Unfortunately, the VCF had some limitations on it that made it unavailable to most of the workers at Ground Zero. For example, to be eligible for the fund, a claimant had to have been present at Ground Zero within four days of the attack. And claims had to be filed by December 2003.

Because of these limitations, there are now many rescue and recovery workers, not to mention those in the community, who report injuries, but have no option for compensation other than litigation. More than 10,000 of those people have sued New York City and/or its contractors. Most of them say they did not develop symptoms of their injury until long after the filing period for the original VCF passed. Also, many of them were not present at Ground Zero within four days of the attack and were therefore not eligible for compensation from the fund. These individuals, however, if they were hurt as a result of their work helping their country recover from a terrorist attack, or exposure to dust and fumes from the attack, deserve to be compensated by their country for their losses. There is no just reason for them to get

nothing while many others, who were in essentially the same position, but who met the strict eligibility requirements for compensation, were compensated.

THE DOWNSIDES OF LITIGATION

Regrettably, these individuals have been relegated to the tort system to obtain compensation for their injuries. The many downsides of litigation are well known.

First, the outcome is uncertain for all concerned. Each plaintiff, in order to prevail, must prove:

1. that the City or its contractors are not entitled to the civil defense immunities provided by law, and
2. that the City or its contractors were negligent, a difficult standard for them to meet.

Needless to say, we believe we are entitled to civil defense immunities and we do not believe that we or our contractors were negligent.

Second, even today, some six-and-a-half years after the attacks and since the first suits were filed, we may still be years away from an end to the litigation. To be prepared for trial on plaintiffs' claims, which they say total billions of dollars, both sides must engage in extensive discovery, which has barely begun. Finally, as with any litigation, if the plaintiffs are successful, much of the compensation awarded will not go to them, but to their lawyers.

Even more regrettably, because the plaintiffs must prove that the City or its contractors were at fault, the lawsuit necessarily pits the City and the patriotic companies, which rushed to the City's aid without a written contract or adequate insurance, against the heroic workers, who rushed to the scene of the devastation without a thought for their personal safety. Holding the City or its contractors liable because of their response to an attack on our nation runs the risk that the next time there is a similar disaster, cities and contractors will hesitate to provide the needed help.

In the wake of September 11, because of these lawsuits and the inability to obtain insurance, a number of the contractors experienced business difficulties and continue to do so. The defendants all face very substantial potential monetary exposure. To try and alleviate this burden, Congress used a portion of the assistance provided to New York City after the attacks to create an insurance company for the City and the contractors to protect them from the very large potential exposure they face in the lawsuits. The $1 billion provided was used, as the legislation required, to set up a captive insurance company. This is an insurance company set up under New York State law and regulated by the insurance commissioner of New York to provide insurance to the City and its contractors for liabilities relating to the rescue, recovery, and debris-removal efforts following the September 11 attacks. It is *not* a victim compensation fund.

Some have suggested that all that needs to be done is for this one billion dollars of insurance be used to settle the claims brought by the 10,000 plaintiffs. But this approach overlooks two critical factors.

First, the plaintiffs' attorneys have said in open court that the $1 billion, which would amount to about $60,000 per plaintiff when standard plaintiff's legal fees and costs are factored in, will not be nearly enough to settle all of the current claims. So, according to the plaintiffs' attorneys, the $1 billion held by the captive insurance company would be nothing more than a down payment on their claims. The contractors would remain exposed to billions of dollars of additional liability without the benefit of the insurance that Congress explicitly provided for them and the City.

Second, even if the Captive were able to settle all of the current claims for $1 billion that would leave the contractors vulnerable to any claim that might be filed in the future. New cases are literally being filed every week. And there is concern that there are some potential diseases, like cancer, that could arise, but would not develop for years. Without the protection of indemnity, which I will speak about shortly, settling all of the cases currently pending will not solve the problems faced by the City and its contractors.

REOPENING THE VICTIM COMPENSATION FUND

Fortunately, there is a better way: re-opening the Victim Compensation Fund. Compensation from the fund will be prompt and certain and there will be no need to assign blame to anyone. In addition, there will be no need to marshal the services of hundreds of lawyers and experts in a pitched battle between the plaintiffs and the City and its contractors. And there will be no need to use the valuable resources of the federal judiciary.

INDEMNITY

But simply re-opening the Victim Compensation Fund will not be enough. Under the original VCF, individuals could opt not to accept the award from the fund and instead pursue a claim through the court system. Some did so. Under the Zadroga Act, there would be a similar option and some will undoubtedly avail themselves of it. That means that the need for the captive insurance company, although diminished, will continue. The plaintiffs' lawyers have estimated that their claims are worth billions of dollars. And they have asserted that there are many claims that have yet to manifest themselves, like cancer, and that may not develop until years in the future. Thus, the contractors remain exposed to potential liability for their patriotic actions.

The way to eliminate this highly undesirable outcome is to provide for an indemnity for any remaining claims for those who decide not to pursue a VCF award. I emphasize that this indemnity would only cover the claims of those who do not opt for the VCF. Past experience leads us to believe that most will take the award from the reopened VCF. And medical costs would be covered under another part of the bill. Moreover, once an indemnity is in place, the captive insurance company would no longer be needed and the funds it holds would be available to fund the reopened VCF.

We all hope and pray that 9/11 will remain a unique event in this nation's history. But if it is not, and if we do not resolve these difficult issues fairly, the next time there is a major disaster, we are concerned that the response will not be as robust as it was after 9/11. Workers will be reluctant to pitch in because they won't know if they will be taken care of if they are injured on the job. Companies will be slow to bring their resources to bear until they are satisfied that they are not sacrificing their very existence by helping out. I have been told that, because of the lessons the contractors learned from 9/11, many engineering firms were reluctant to participate in the recovery following Hurricane Katrina.

The solution I have outlined ought to take care of every party's concerns. Re-opening the Victim Compensation Fund will provide fast, fair, and certain relief to the workers and area residents. And providing indemnity for the companies involved in the response to 9/11 will give them the peace of mind, and the protection against possible financial ruin, they deserve.

I will be happy to answer any questions you may have.

Mr. NADLER. Thank you.

I will now recognize for her statement Ms. Lasowski.

TESTIMONY OF ANNE-MARIE LASOWSKI, ACTING DIRECTOR, EDUCATION, WORKFORCE, AND INCOME SECURITY ISSUES, GOVERNMENT ACCOUNTABILITY OFFICE

Ms. LASOWSKI. Mr. Chairman, Madam Chairwoman, Ranking Members and Members of the Subcommittees, I appreciate the invitation to talk to you today about our prior work on Federal compensation programs.

Compensating victims is one of the key issues Congress continues to face in light of those injured from the terrorist attacks at the World Trade Center. As you well know, the Federal Government has played an increasing role in providing benefits to individuals injured from exposure to harmful materials ever since 1969 when the Black Lung Program was established. Since then, Congress has established other such programs. Most recently, legislative proposals have been introduced regarding the September 11th Victim Compensation Fund.

My remarks are based on work GAO reported in 2005 on four Federal compensation programs including Black Lung, the Vaccine Injury Compensation Program, the Radiation Exposure Compensation Program and the Energy Employees Occupational Illness Compensation Program.

Today I will focus on three key areas: first, the structure of these programs; second, the initial cost estimates and the actual cost of

benefits paid; and, third, claims filed and paid. We did not review the September 11th Victim Compensation Fund as part of this report.

First, all four Federal programs we reviewed are structured very differently, including who administers the program, how they are funded, the benefits provided and who is eligible for benefits. Now, to address each of these points.

In terms of administration, several Federal agencies are responsible for administering these four programs including the Departments of Labor and Justice along with other agencies.

In terms of funding, funding of the four programs varies. For example, the Black Lung Program is funded by a trust fund that is financed by an excise tax on coal and supplemented with additional funds. In contrast, the Energy Employees Compensation Program and the Radiation Exposure Program are fully federally funded.

In terms of benefits, benefits vary among the four programs. Some of the benefits they provide include lump sum compensation payments and payments for lost wages, medical and rehabilitation costs, and attorney fees.

In terms of eligibility, the groups who are eligible for benefits under the four programs and the proof of eligibility required for each program vary widely. It is also worth noting that in terms of structure, the Federal Government role has increased since the inception of these programs, and all four have been expanded eligibility to additional categories of claimants, cover more medical conditions, or provide additional benefits.

Second, as the Federal role of these four programs has grown and eligibility has expanded, so has cost. In addition to the costs associated with expanded eligibility, rising medical costs have increased the cost of the programs.

Actual costs for benefits paid through fiscal year 2004 significantly exceeded the initial estimates for the Black Lung and Radiation Exposure Programs. For example, for the radiation program, the cost of benefits paid through fiscal year 2004 exceeded the initial estimate by about $247 million because the original program was expanded to include additional categories of claimants.

Third, regarding claims: the number of claims filed generally exceeded initial estimates. For example, at the end of fiscal year 2004, actual claims filed for the energy employees program exceeded the estimates by over 46,000. Furthermore, factors that affect the amount of time it takes agencies to finalize claims includes statutory and regulatory requirements for determining eligibility, changes in eligibility criteria, the agency's level of experience in handling claims, and the availability of funding. In addition, the approval process and the extent to which programs allow appeals can affect the time it takes to process claims.

In conclusion, the Federal Government has played a growing role in providing benefits to individuals injured by exposure to harmful materials. As the four programs we reviewed changed and grew, so did their actual costs. In addition, the programs varied in their ability to handle claims, and in some cases took years to compensate claimants.

In designing a Federal compensation program, it is important to consider how the program is to be structured. Decisions about how

to structure compensation programs are critical because they ultimately affect the cost of the program, an important issue in light of the Federal deficit, and they affect how quickly those injured are compensated.

This concludes my prepared statement. I would be pleased to respond to any questions. Thank you.

[The prepared statement of Ms. Lasowski follows:]

PREPARED STATEMENT OF ANNE-MARIE LASOWSKI

United States Government Accountability Office

GAO

Testimony

Before Congressional Subcommittees, Committee on Judiciary, U.S. House of Representatives

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FEDERAL COMPENSATION PROGRAMS

Perspectives on Four Programs for Individuals Injured by Exposure to Harmful Substances

Statement of Anne-Marie Lasowski, Acting Director, Education, Workforce, and Income Security Issues

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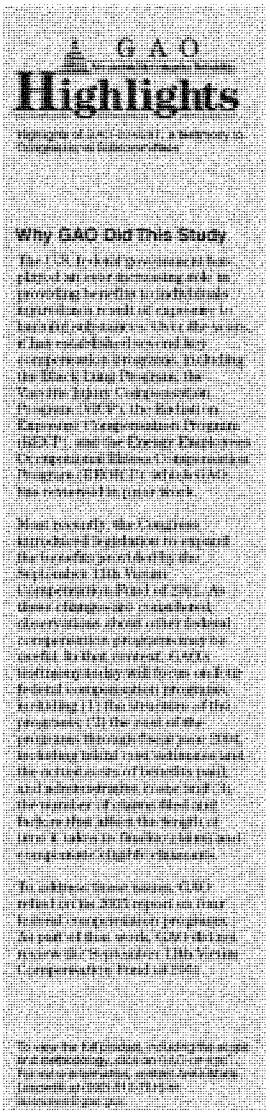

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Highlights

Highlights of GAO-05-942, a testimony to Congressional Subcommittees

Why GAO Did This Study

[illegible]

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Chairs, Ranking Members, and Members of the Subcommittees:

I am pleased to be here as you discuss important issues related to compensation for individuals injured as a result of the terrorist attack on the World Trade Center in 2001. After the collapse of the WTC buildings, nearly 3,000 people died, and an estimated 250,000 to 400,000 people who lived, worked, or attended school in the vicinity were affected.[1] An estimated 40,000 people responded to the attack, including New York City Fire Department personnel and other government and private-sector workers and volunteers from New York and other locations across the nation. These responders, as they took part in various rescue, recovery, and cleanup activities in the days, weeks, and months following the attack, were exposed to numerous physical hazards and environmental toxins.

The federal government has played an increasing role in providing benefits to individuals injured as result of exposure to harmful substances since 1969 when the Congress established the Black Lung Program as a temporary federal program to provide benefits for coal miners disabled by pneumoconiosis (black lung disease). Although the Black Lung Program was initially designed to end in 1976 when state workers' compensation programs were to provide these benefits, it was amended to make it an ongoing federal program. Since that time, the Congress has established several compensation programs to provide benefits to individuals injured by exposure to hazardous substances such as radiation, and the role of the federal government in many of these programs has expanded over time. Most recently, legislative proposals have been introduced in the House that would expand the benefits provided by the September 11th Victim Compensation Fund of 2001.

My testimony is based on work GAO reported in November 2005 on four federal compensation programs: the Black Lung Program, the Vaccine Injury Compensation Program (VICP), the Radiation Exposure Compensation Program (RECP), and the Energy Employees Occupational Illness Compensation Program (EEOICP).[2] My remarks will focus on (1) the structure of these programs; (2) the cost of the programs through

[1]See GAO, *September 11: Monitoring of World Trade Center Health Effects Has Progressed, but Not for Federal Responders*, GAO-05-1020T (Washington, D.C. Sept. 10, 2005).

[2]See GAO, *Federal Compensation Programs: Perspectives on Four Programs*, GAO-06-230, (Washington, D.C.: Nov. 18, 2005).

fiscal year 2004, including initial cost estimates and the actual costs of benefits paid, and administration costs; and (3) claims, including the number of claims filed and factors that affect the length of time it takes the agencies to finalize claims and compensate eligible claimants. We did not review the September 11th Victim Compensation Fund of 2001 as part of this testimony.

We examined information on the four programs from their inception through the end of fiscal year 2004. We obtained initial estimates of the anticipated costs of benefits, as available, and the actual costs of benefits paid from the date the programs were established through the end of fiscal year 2004. In addition, we obtained information on the total number of claims completed as of the end of fiscal year 2004 and reviewed information on the time it took the agencies to finalize claims and compensate eligible claimants. That work was completed in accordance with generally accepted government auditing standards.

In summary, in 2005 we reported that

- All four federal programs we reviewed were designed to compensate individuals injured by exposure to harmful substances. However, the structure of these programs differs significantly in key areas such as the agencies that administer them, their funding, benefits paid, and eligibility criteria. Since their inception, the federal role has increased and all four programs have expanded to provide eligibility to additional categories of claimants, cover more medical conditions, or provide additional benefits.

- As the federal role for these four programs has grown and eligibility has expanded, so have the costs. Actual costs for benefits paid through fiscal year 2004 significantly exceeded the initial estimates for two of the programs: the Black Lung Program and RECP. In addition, the annual administrative costs for the four programs for fiscal year 2004 ranged from approximately $3.0 million for RECP to about $89.5 million for EEOICP.

- Finally, the number of claims filed through 2004 for the three programs for which initial estimates were available significantly exceeded the initial estimates. In addition, the structure of the programs, including the approval process and the extent to which the programs allow claimants and payers to appeal claims decisions in the courts, affected how long it took to finalize claims and compensate eligible claimants. In some cases, it took years for some of the agencies responsible for processing them to finalize the claims.

Background

The four federal programs we examined were established from 1969 through 2000 for various purposes.

- The Black Lung Program was established in 1969 as a temporary federal program to provide benefits to coal miners disabled because of pneumoconiosis (black lung disease), and their dependents, until adequate state programs could be established. It has been amended several times, effectively restructuring all major aspects of the program and making it an ongoing federal program.
- VICP was authorized in 1986 to provide compensation to individuals for vaccine-related injury or death. According to the Department of Health and Human Services (HHS), the agency that administers the program, it was established to help stabilize manufacturers' costs and ensure an adequate supply of vaccines. Concerns expressed by various groups contributed to the program's establishment, including concerns from parents about harmful side effects of certain vaccines, from vaccine producers and health care providers about liability, and from the public about shortages of vaccines.
- RECP was established in 1990 to make partial restitution to on-site participants, uranium miners, and nearby populations who (1) were exposed to radiation from atmospheric nuclear testing or as a result of their employment in the uranium mining industry and (2) developed certain related illnesses.
- EEOICP was established in 2000 to provide payments to nuclear weapons plant workers injured from exposure to radiation or toxic substances, or their survivors. Initially, some qualifying workers were paid federal benefits and others were provided assistance in obtaining benefits from state workers' compensation programs. In 2004, the federal government assumed total responsibility for benefits paid under the program.

The Structure of the Programs Varies Significantly

The purpose of the four federal compensation programs we examined is similar in that they all were designed to compensate individuals injured by exposure to harmful substances. However, how the programs are structured varies significantly, including who administers the program, how they are funded, the benefits provided, and who is eligible for benefits. For example:

Administration

Several federal agencies are responsible for the administration of the programs: the Department of Labor (DOL) administers the Black Lung Program and EEOICP; the Department of Justice (DOJ) administers RECP and shares administration of VICP with HHS and the Court of Federal Claims. In addition, the National Institute for Occupational Safety and Health and DOJ provide support to DOL in administering EEOICP.

Responsibility for administering two of the programs has changed since their inception. Specifically, claims for the Black Lung Program were initially processed and paid by the Social Security Administration but, as designed, DOL began processing claims in 1973 and took over all Black Lung Program claims processing in 1997. In 2002, the Congress officially transferred all legal responsibility and funding for the program to DOL. In addition, administration of EEOICP was initially shared between the Departments of Energy and DOL but, in 2004, DOL was given full responsibility for administering the program and paying benefits.

Funding

Funding of the four programs varies. Although initially funded through annual appropriations, the Black Lung Program is now funded by a trust fund established in 1978 that is financed by an excise tax on coal and supplemented with additional funds. The tax, however, has not been adequate to fund the program; at the time of our review, the fund had borrowed over $8.7 billion from the federal treasury. For the VICP, claims involving vaccines administered before October 1, 1988, were paid with funds appropriated annually through fiscal year 1999. Claims involving vaccines administered on or after October 1, 1988, are paid from a trust fund financed by a per dose excise tax on each vaccine. For example, the excise tax on the measles, mumps, and rubella vaccine at the time of our review was $2.25.[8] EEOICP and RECP are completely federally funded. Although RECP was initially funded through an annual appropriation, in 2002 the Congress made funding for RECP mandatory and provided $655 million for fiscal years 2002 through 2011. EEOICP is funded through annual appropriations.

[8]Three doses were required and the excise tax on each dose was $0.75.

Benefits

Benefits also vary among the four programs. Some of the benefits they provide include lump sum compensation payments and payments for lost wages, medical and rehabilitation costs, and attorney's fees. For example, at the time of our review, when claims were approved, VICP paid medical and related costs, lost earnings, legal expenses, and up to $250,000 for pain and suffering for claims involving injuries, and up to $250,000 for the deceased's estate, plus legal expenses, for claims involving death. The Black Lung Program, in contrast, provided diagnostic testing for miners; monthly payments based on the federal salary scale for eligible miners or their survivors; medical treatment for eligible miners; and, in some cases, payment of claimants' attorney fees.

Eligibility

The groups who are eligible for benefits under the four federal programs and the proof of eligibility required for each program vary widely. The Black Lung Program covers coal miners who show that they developed black lung disease and are totally disabled as a resnlt of their employment in coal mines, and their survivors. Claimants must show that the miner has or had black lung disease, the disease arose out of coal mine employment, and the disease is totally disabling or caused the miuer's death. VICP covers individuals who show that they were injured by certain vaccines and claimants must show, among other things, that they received a qnalifying vaccine. RECP covers some workers in the nranium mining industry and others exposed to radiation during the government's atmospheric nuclear testing who developed certain diseases. Claimants must show that they were physically present iu certaiu geographic locations during specified time periods or that they participated on-site during an atmospheric nuclear detonation and developed certain medical conditions. Finally, EEOICP covers workers in nuclear weapons facilities during specified time periods who developed specific diseases.

Actual Costs of Benefits Paid Exceeded Initial Cost Estimates for Two Programs and Annual Administrative Costs Varied

At the time of our review, total benefits paid for two of the programs—the Black Lung Program and RECP—significantly exceeded their initial estimates. An initial cost estimate was not available for VICP. The initial estimate of benefits for the Black Lung Program developed in 1969 was about $3 billion. Actual benefits paid through 1976—the date when the program was initially to have ended—totaled over $4.5 billion and benefits paid through fiscal year 2004 totaled over $41 billion. For RECP, the costs of benefits paid through fiscal year 2004 exceeded the initial estimate by about $247 million.

Table 1 shows the initial program estimates and actual costs of benefits paid through fiscal year 2004 for the four programs.

Table 1: Initial Estimates and Actual Benefits Paid as of September 30, 2004

Program	Initial Estimate (billion)	Actual Benefits Paid as of September 30, 2004 (billion)
Black Lung	$2.980	$41.039
VICP[a]	Not available	$1.440
RECP	$0.540	$0.787
EEOICP (Part B only)	$0.951	$0.952

Source: Initial estimates: DOL (Black Lung) and Congressional Budget Office (RECP and EEOICP). Actual benefits paid: DOL (Black Lung and EEOICP), HHS (VICP), and DOJ (RECP).

[a]An initial estimate for VICP was not available.

Actual costs for the Black Lung Program have significantly exceeded the initial estimate for several reasons, including (1) the program was initially set up to end in 1976 when state workers' compensation programs were to have provided these benefits to coal miners and their dependents, and (2) the program has been expanded several times to increase benefits and add categories of claimants. The reasons the actual costs of RECP have exceeded the initial estimate include the fact that the original program was expanded to provide benefits to additional categories of claimants, including uranium miners who worked above ground, ore transporters, and mill workers.

Although the costs of EEOICP benefits paid through fiscal year 2004 were close to the initial estimate, these costs were expected to rise substantially because of changes that were not anticipated at the time the estimate was developed. For example, payments that were originally supposed to have been made by state workers' compensation programs are now paid by the

federal government. In addition, at the time of our review, a large proportion of the claims filed (45 percent) had not been finalized.[4]

At the time of our review, the annual administrative costs of the four programs varied. For fiscal year 2004, they ranged from approximately $3.0 million for RECP to about $89.5 million for EEOICP (see table 2).

Table 2: Annual Administrative Costs for Fiscal Year 2004

Program	Annual Costs (million)
Black Lung	$55.8
VICP	$10.5
RECP	$3.0
EEOICP (Part B only)	$89.5

Source: DOL (Black Lung Program and EEOICP), HHS (VICP) and DOJ (RECP).

The Number of Claims Filed Generally Exceeded Initial Estimates and Program Structure Affected the Time It Took to Finalize Claims

The number of claims filed for the three programs for which initial estimates were available significantly exceeded the initial estimates and the structure of the programs, including the approval process and the extent to which the programs allow claimants and payers to appeal claims decisions in the courts, affected the amount of time it took to finalize claims and compensate eligible claimants. The number of claims filed through fiscal year 2004 ranged from about 10,900 for VICP to about 960,800 for the Black Lung Program. The agencies responsible for processing claims have, at various times, taken years to finalize some claims, resulting in some claimants waiting a long time to obtain compensation.

Table 3 shows the initial estimates of the number of claims anticipated and the actual number of claims filed for each program through fiscal year 2004.

[4]This figure includes only claims filed under Part B of EEOICP.

Table 3: Initial Estimates and Actual Number of Claims Filed as of September 30, 2004

Program	Initial Estimate of Number of Claims Anticipated (thousand)	Actual Number of Claims Filed as of September 30, 2004 (thousand)
Black Lung	520.0	960.8
VICP[a]	Not available	10.9
RECP	13.0	20.6
EEOICP (Part B only)	13.4	59.5

Source: The initial estimate for the Black Lung Program is from DOL, the estimate for RECP is from DOJ and includes claims expected through 2012, and the estimate for EEOICP is from the Congressional Budget Office and included claims expected through 2010. The actual numbers of claims filed are from DOL (Black Lung Program and EEOICP), HHS (VICP), and DOJ (RECP).

[a]An initial estimate for VICP was not available.

Factors that affected the amount of time it took the agencies to finalize claims include statutory and regulatory requirements for determining eligibility, changes in eligibility criteria that increase the volume of claims, the agency's level of experience in handling compensation claims, and the availability of funding. For example, in fiscal year 2000, when funds appropriated for RECP were not sufficient to pay all approved claims, DOJ ceased making payments until the following fiscal year when funds became available.

The approval process and the extent to which programs allow claimants and payers to appeal claims decisions also affected the time it took to process claims. For example, it can take years to approve some EEOICP claims because of the lengthy process required for one of the agencies involved in the approval process to determine the levels of radiation to which claimants were exposed. In addition, claims for benefits provided by programs in which the claims can be appealed can take a long time to finalize. For example, claimants whose Black Lung Program claims are denied may appeal their claims in the courts. At the time of our review, a Department of Labor official told us that it took about 9 months to make an initial decision on a claim and at least 3 years to finalize claims that were appealed.

Conclusions

The federal government has played an important and growing role in providing benefits to individuals injured by exposure to harmful substances. All four programs we reviewed have been expanded to provide eligibility to additional categories of claimants, cover more medical conditions, or provide additional benefits. As the programs

changed and grew, so did their costs. Initial estimates for these programs were difficult to make for various reasons, including the difficulty of anticipating how they would change over time and likely increases in costs such as medical expenses. Decisions about how to structure compensation programs are critical because they ultimately affect the costs of the programs and how quickly and fairly claims are processed and paid.

This concludes my prepared statement. I would be pleased to respond to any questions that you or the Members of the Subcommittees may have.

GAO Contact and Staff Acknowledgments

For further information, please contact Anne-Marie Lasowski at (202) 512-7215. Individuals making key contributions to this testimony include Revae Moran, Cady Panetta, Lise Levie, and Roger Thomas.

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Mr. NADLER. Thank you.

Detective Valentin is recognized.

TESTIMONY OF MICHAEL A. VALENTIN, FORMER NYPD DETECTIVE

Mr. VALENTIN. I would like to thank everyone here for inviting me to speak, and I apologize for my informality.

My name is Michael Valentin. I was born in the Bronx. I am 43 years old, and I am the son of a New York City police officer. My father retired with 24 years of service. I am married for 23 years to a wonderful and understanding wife. I have three beautiful kids.

I joined the police department in 1995 and retired with a line of duty disability on January 2007—11 years of service to the City of New York. I remember the academy like it was yesterday. It was the longest academy in NYPD history—11½ months. I remember being able to run five to eight miles per day. Now I lose my breath walking up a flight of stairs or walking a short distance.

On September 11, like so many others, I responded to the attacks on the World Trade Center. For the next few months I worked on or around Ground Zero. I assisted in bucket brigades, searching for human remains, transporting supplies, and perimeter security. I don't like talking about these things. I saw too many bad things, and it brings bad memories to me, and I would really like to try to forget them.

There are so many people like me, sick or dying with terminal illnesses, that first responders need the help of this Congress. I suffered health problems after 9/11, and on my 40th birthday I was told that I possibly had lymphoma. The doctors found a four-centimeter mass in my chest. Subsequently, my partner also, approximately 2 or 3 months later, was diagnosed with B-cell lymphoma; so was my lieutenant, a year before, B-cell lymphoma, blood cancer. I just find that a little strange that that would happen to one unit.

This was the beginning of something that I did not expect. I went through four operations. They had to biopsy the tumor twice because it got larger. Then they removed my gall bladder and found a lymphatic tumor under it. I have been lucky that none of my tumors were cancerous.

The doctors at Long Island Occupational and Environmental Health in Hauppauge, Long Island, along with my family doctor diagnosed me with the following: RADS, restricted airways disease syndrome; GERD; sinusitis; pleural thickening, which is indicative of asbestos exposure; pleurisy, very painful to breathe. They attribute my illnesses to the exposure of toxins and particulates from Ground Zero. I need to use my nebulizer every 4 to 6 hours and to take over 10 medications a day, including oral steroids.

I get all my pulmonary medicine through Long Island Occupational, which is part of Mount Sinai, which saves me a lot of money. And I, please, hope that you guys keep that funded. There are over 1,000 police officers that attend that one unit in Long Island, and at least 3,000 first responders from all the building trades.

I am presently more than $160,000 in debt. Due to my illnesses, I have recently depleted my 401K plan to catch up with my bills. I feel embarrassed talking about these, but I know that I am not

the only one like this. There are hundreds of us like me, in the same situation, and many cases much worse than me. I consider myself fortunate to have the help and support of my family.

I would like to talk about the captive insurance fund. It is my understanding that Congress gave the City of New York $1 billion. It is a disgrace that the city is using the money for a legal defense fund. I am sure that it was not what the Congress intended this money to be used for. I still can't understand why Christine LaSala, the CEO of Captive, is paid $350,000 a year and $20,000 a year in benefits. That is sad when I pay my own insurance, which costs me $250 a month.

What has she done for the money? So many families are struggling with illnesses and deaths of loved ones? When men and women who stand in my shoes and cannot pay their bills or purchase medication, we need to take care, take control of that money. I am tired of hearing about the city law firms making hundreds of millions of dollars just to defend against us.

It is my understanding that the city exhausted their appeals, and yet they claim that victory will be theirs on the backs of police, firemen, and all the building trades and volunteers.

Does this make any sense? Just like September 11, none of it makes sense.

I am proud to have served the City of New York as a police officer. I love my city. I love my country. I love my work. If I had a chance to go back, I would go back in a New York minute. Thank you. [Applause.]

[The prepared statement of Mr. Valentin follows:]

PREPARED STATEMENT OF MICHAEL A. VALENTIN

Chairwoman Lofgren, Chairman Nadler, Ranking Member King, Ranking Member Franks and Members of the Committee, good morning. Thank you for giving me the opportunity to speak with you today about my experiences, and those of so many others of my colleagues, following the World Trade Center attacks on September 11, 2001.

My name is Michael Valentin. I was born in the Bronx, and I am the second generation of my family to serve as a New York City Police Officer; my father retired in 1988 as an NYPD Detective after 24 years of service. Today, at the age of 43, I am retired on medical disability from my work as a New York City Police Detective. Although I loved my work for the NYPD, I have been forced to retire as a result of my exposure to toxic dust and particulate matter while working at the World Trade Center site beginning on September 11, 2001 after the towers fell, through mid-December of 2001. Although it is difficult for me to relive those terrible memories, I am here to speak to you today because it is important that this committee fully understands why its work here is so important to so many brave and hard-working men and women who—without thought for their own safety—ran to their City's aid in its darkest days.

In September of 2001, I was a New York City Police Officer working undercover for the Manhattan South Vice Unit. I was subsequently promoted to Detective in April of 2002. On the morning of September 11th I was awakened by my wife, who told me that a plane had hit the World Trade Center. I turned on the television in time to see the second jet hit the South tower, and, like millions of other Americans, I realized immediately that we were under attack. I contacted colleagues who lived close by and we drove together to "Highway 3," a police unit located by the Grand Central Parkway. There, we met my Lieutenant, who kept his department issued vehicle at that location, and we all proceeded to the 7th Precinct, located in Manhattan's lower east side. As we drove, I remember seeing a convoy of police officers and firefighters who were all desperate to get to lower Manhattan, and we were no different.

When we arrived at the 7th Precinct, a young woman was walking past the Precinct, covered with what looked like powdered cement. Her face was covered with

powder except for circles around her eyes—but you could see the look of horror in her face. I asked if she needed help, and told her to come in so we could help her get cleaned up and check her for injuries, but she said no, she just wanted to go home, and that she was going to walk over the Williamsburg Bridge. As I entered the Precinct, I saw a sobbing firefighter who was being consoled by one of his colleagues. Realizing that the world we had known until that morning was suddenly in chaos, I was overwhelmed by a feeling of helplessness.

When we arrived at the Trade Center site on the West Side Highway, one of my team members was visibly upset and crying uncontrollably because he could not get in touch with his father, an NYPD Police Chief. Although his father was later found alive and unhurt, he had every reason to believe at that point that his father had been caught in the collapse and there was no consoling him. We all had tears in our eyes as we stood there watching his heartbreaking attempts to contact his father. As we know now, many, many families of police officers and firefighters—and those of the thousands of innocent civilians who worked in the towers—had no happy relief at the end of that day, because their husbands, wives, fathers, mothers and children did not miraculously turn up safe and sound.

Later that afternoon when 7 World Trade Center collapsed, I was standing only a block away. The scene was surreal—I remember feeling like I was watching a disaster movie. Quite simply, I could not believe what I was seeing with my own eyes. But if that scene was surreal, it did not begin to let me know what waited for me in the days and weeks to come. During the next few months, working in and around the World Trade Center site, I saw things that were unimaginable—the sights, sounds and smells of those months were burned into my memory for the rest of my life. Looking back now, my memory of 9/11 seems like one long nightmarish blur from beginning to end.

Throughout the initial attempts at rescue and continuing through the recovery and clean up efforts in the months to come, my team and I were assigned to many posts in and around the site. We performed perimeter security, worked on the bucket brigade, did door-to-door searches, recovered human body parts from the surrounding roof tops, and transported equipment and supplies.

In October or November of 2001, I had a physical examination that included a chest x-ray—my lungs were clear, and I was healthy, as I had always been up until 9/11. Initially, during the time I was still working on the World Trade Center site, I began to suffer from chronic sinus problems and inflammation, and developed a hacking cough. I coughed so hard that I actually developed back spasms. In 2003 and 2004 I began having intractable lung and sinus infections, and burning inside my ears. Throughout 2004, I suffered from night sweats, and in September 2004, on my 40th birthday, my doctors told me that they had found a four-centimeter mass in my chest between my aorta and trachea, and that it was most likely lymphoma. I underwent a surgery called a mediastinoscopy, to biopsy the tumor. The mass turned out to be benign, but when the surgeon and pathologist examined my lymph nodes, they found black particulates in the lymph node. Not long thereafter, I was diagnosed with gall bladder problems, and when I underwent surgery to remove the gallbladder, my doctors found another lymphatic tumor. I underwent a PET scan because of the continuing night sweats, and that scan revealed that the lymphatic tumor had grown. A broncoscopy failed to drain the tumor, so I underwent another mediastinoscopy. This was the fourth operation I had since 9/11. While I was in the hospital, they found that my lung function was diminished, and the doctors told me to have that checked. Since then, I have been diagnosed with reactive airway disease syndrome, gastro-esophogeal reflux disease, esophagitis, sinusitis, thickening of the pleural lining of my lungs, which is indicative of asbestos exposure, and pleurisy, which is a very painful inflammation of the lining of the lungs. I also have severe ankle swelling, and severe throat pain 24 hrs a day from the excessive stomach acid production. I need to use a nebulizer to inhale medication every 4 hours, and oral steroids so that I can breath. I take ten medications daily.

I was lucky to find the Long Island Occupational and Environmental Health of Stony brook University Hospital located in Hauppauge, Long Island. They treated me for my pulmonary problems and tested me for other illnesses. I am fortunate to receive all of my pulmonary prescriptions through them. This is vital to my family and me because the average cost for these medications over the course of a year is about 8 thousand dollars that would have otherwise come out of my pocket. This Long Island Office has treated over one thousand New York City police officers and over three thousand first responders from firefighters to the building trades. It is my understanding that their funding is in danger. I hope that you can do something about funding for them.

Because I am unable to work, I had to sell my house in 2005 and today, my wife and our children and I live with my parents. I've had to stop all of my physical activities, like going salsa dancing with my wife, bike rides with my kids, and my wife has taken over coaching my girls' basketball team. I often feel as if I am married to my nebulizer, and today, as a result of my illnesses, I am more than $160,000.00 in debt. I worry about my children's future, and whether I will be around to see them grow up. I have no life insurance, and no long-term health care insurance. I am horrified at the thought of burdening my family with my illnesses.

Two of my co-workers, Lt. William Serpe and my partner, Detective Ernie Vallebouna were diagnosed with B-cell lymphoma, a cancer that is usually extremely rare. The odds of two co-workers being diagnosed with this disease is infinitesimal. Another colleague, Sergeant Dave Moloney, suffers from reactive airway disease and had part of his palette removed so he could breath. Like me, they have bleak life expectancies and because of our grim prospects, insurance companies have labeled us uninsurable

And we are not the only ones who have suffered. Literally thousands of my fellow police officers, firefighters, construction workers and laborers are all desperately ill and many have already died, including Detective James Zadroga, a HERO who died of 9/11 illnesses with his baby daughter by his side—only to have Mayor Bloomberg sully his memory with public statements implying that Zadroga had caused his own death by abusing his pain medications—pain medications that were kept under lock and key by his father to prevent even an accidental overdose. Detective Bobby Williamson died of pancreatic cancer leaving behind a wife and three beautiful children. Sergeant Mike Ryan, who lived only two miles from my home, died of lymphoma also leaving behind a wife and children. These men and many more died because they put their City and their duty ahead of their own safety. They died waiting for their government to do the right thing and provide for their health care and for the support of their families.

Even now, many police officers are being denied the three-quarter salary line-of-duty pensions they should have received, and instead are only given ordinary disability. Even to get that much, we have to face a maze of bureaucracy that is frustrating, demoralizing and needless. These brave men and women are not asking for a free lunch—all they want is to be taken care of in their time of need. I was fortunate in that I received a line of duty pension. Thanks to the intervention of Congressman Israel I am also receiving social security disability benefits. But here's the point—I should not have needed the help of a United States Congressman to get the social security benefits I am entitled to as a disabled police officer. Many of my colleagues have been denied Social Security disability benefits—and today I am here to ask for your assistance on their behalf.

In 2003, you and your colleagues allocated a billion dollars through FEMA to provide the City of New York and its debris removal contractors with coverage for claims arising from debris removal performed after collapse of World Trade Center (WTC) buildings on September 11, 2001. You left it to the City to determine the best mechanism to administer those funds, and the City created the World Trade Center Captive Insurance Company. Today, we know that the Captive, and the city's control of that mechanism, is a national disgrace akin to our nation's treatment of Iraq war veterans under deplorable conditions at Walter Reed Hospital and its abandonment of our Viet Nam veterans. I don't need to remind this committee that America has a poor record in assisting our national heroes, leaving them to fend for themselves after they've given unselfishly of themselves in the service of their country.

I can't believe that my Congress would have set aside a billion dollars to have that money go to pay insurance executives and law firms hundreds of millions of dollars to fight the very heroes that money should have been helping for these last five years. Surely you did not intend that money to be used as a legal defense fund or to pay for expensive dinners for the City's lawyers. I find it incredible and offensive that my Mayor has the audacity to pay Christine LaSala, CEO of the Captive Insurance Company, a salary of 350,000 dollars a year and 20,000 dollars in benefits, while the men and women who stand in my shoes cannot pay their bills or purchase their medications.

In the past week, the Court of Appeals for the Second Circuit affirmed a decision of the District Court holding that the City of New York and its Contractors are not immune from litigation for their failure to provide adequate safety protections such as respirators and hazmat suits to those of us who worked in hazardous conditions at the World Trade Center Site. What is the City's reaction to that decision? In the New York Times on Thursday, March 27, one of the City's Senior attorneys was quoted as saying that this decision only means that "victory is going to take longer to achieve, and we're going to have to get into the underlying facts of the case." Vic-

tory? Let's think about that for a minute. The victory that attorney was talking about is a victory over the men and women who put their lives in mortal danger to protect and serve this Country in its darkest time. Men and women who are mortally sick and dying and forsaken by their country.

We had hoped that the Second Circuit's decision would spur the City and the Captive to sit down and resolve our claims for medical care and lost income. Instead, the City's lead defense attorney Jim Tyrrell told the New York Law Journal that "the 'net result' of [the courts decision] . . . will be the extension of 'this litigation for years.'" Congressmen, with all do respect, I don't have years to wait. My colleagues and the other men and women who are sick and out of work because of their time at Ground Zero don't have years to wait. What they do have is mounting frustration, worsening illness and disability, bills and mortgages they can't pay and medications they can't afford. They have children who may grow up without a parent, and spouses who will be left young and widowed. We don't have the luxury of time to wait while our Mayor and his Captive Insurance Company pay their lawyers to fight us in court, and their claims administrators to do nothing but generate bills. We need you to take control of that money and see that it reaches the people you intended to help back in 2003.

I am proud to have been a New York City police officer. Notwithstanding my comments here about the City's control of the Captive Insurance Company, I love my city and I loved my work, and if my health would permit me, I would go back to that work in a New York minute. I still believe that New York is the greatest city in the world and I love it dearly. Don't let the City and its lawyers discount my testimony here today by telling you that my colleagues and I are just disgruntled employees, because the NYPD treated me with decency and respect through my illnesses. It was, and it is, an honor to be a New York City police officer. We are only asking that our City and our country help us now in our own hour of need.

Thank you for letting me speak with you today. On behalf of all of my colleagues—not just the police officers and the firefighters, but also the construction and building trades people and the volunteers, we appreciate all of your dedicated work and your continuing efforts on our behalf.

Mr. NADLER. Thank you very much.

Mr. Frank is recognized.

TESTIMONY OF THEODORE H. FRANK, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE, DIRECTOR AEI LEGAL CENTER FOR THE PUBLIC INTEREST

Mr. FRANK. Thank you, Mr. Chairman and Ms. Chairwoman and Members of the Subcommittee for your kind invitation to testify today.

The September 11 Victim Compensation Fund was a short-term administrative program to compensate victims of the terrorist attacks while limiting litigation against innocent third parties who had also been victimized. Unfortunately, H.R. 3543 fails to protect innocent third parties from unfair litigation, does not have the advantages that made the fund successful, and magnifies the disadvantages and fairness problems of the original fund.

The original fund used a non-adversarial structure to compensate a limited set of claimants in time and place with relatively uncontroversial claims. This structure will not work for a longer-term compensation scheme involving a substantially larger set of potential claimants with injuries with much more ambiguous causation. For example, as the New York Times notes, there is no scientific evidence that exposure to World Trade Center dust leads to lymphomas or cancer.

I discuss problems in much more detail in my written testimony, but let me touch on a few of them briefly. First, the largest problem is that reopening the fund creates a compensation program that is especially susceptible to error and fraud because the fund was not designed to resolve causation issues. A passenger on the

September 11 planes or someone killed or injured in the Towers or Pentagon was plainly entitled to compensation from the fund. Thus, determining eligibility for compensation was largely a ministerial function.

The fund structure was not designed to vet recipients' claims. But it is not the case that anyone with a pulmonary or cancerous or psychological ailment in the greater New York area is an appropriate claimant. The fund is required by law to adjudicate claims within 120 days but has no provisions for independent medical review or testing of claims. This creates what is known as a Field of Dreams problem: "If you build it, they will come."

If Congress reopens a system where geographic proximity and a diagnosis are the only prerequisites for a large government check and an attorney's contingent fee, attorneys will have every incentive to manufacture a fake diagnosis. The law firm behind many of the thousands of pending 9/11 lawsuits have plaintiffs eligible for reopened fund compensation has previously used questionable medical diagnoses to obtain huge sums in the fen-phen litigation.

If the bill is passed in the current form, trial lawyers will steal billions from taxpayers.

Second, expanding the program to include psychological injury will result in double recovery for thousands of claimants. Claimants who have already recovered millions, including hundreds of thousands in non-economic damages, will be permitted to double-dip and resubmit new claims for psychological injury. And the legislation is so broad that taxpayers could end up paying for psychotherapy for Woody Allen and half of Manhattan.

Third, 3543 fails to protect innocent contractors who are faced with tremendous liabilities simply for volunteering to help New York City in its hour of need, often without pay. Calls for government indemnification are not a solution because they do nothing to stop the chilling effects on future volunteers.

Prospective immunity is needed. And indemnification is fraught with peril for abuse of the government fisc if statutory language is not finely crafted to permit the government to protect its interest in the underlying litigation and if damages caps are not included.

Fourth, 3543 fails to provide adequate protection to taxpayers that taxpayer money will be spent on compensation of victims rather than on attorneys' fees.

Fifth, 3543 compounds problems of unfairness in the original fund, as Special Master Feinberg noted, where victims of one terrorist attack received millions and those of another received nothing. The bill calls for a government bureaucrat to define the "New York City disaster area," and those who lived or worked south of that cross street will be entitled to potentially millions of dollars in compensation and benefits, while those living and working to the north will do without. And if you think school boards get lobbied hard over the boundary lines between high schools, imagine what pressure the WTC program administration will face when she decides which Manhattan cross street is the dividing line for millions of dollars of government largesse.

There are many, many more issues that outstrip the time I have, and I welcome your questions.

[The prepared statement of Mr. Frank follows:]

PREPARED STATEMENT OF THEODORE H. FRANK

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Thank you, Mr. Chairman, and members of this Subcommittee, for your kind invitation to testify today about proposals to expand the September 11 Victim Compensation Fund of 2001 and about H.R. 3543, the proposed James Zadroga 9/11 Health and Compensation Act of 2007.

I serve as Director of the AEI Legal Center for the Public Interest, and as a Resident Fellow at the American Enterprise Institute for Public Policy Research, but I am not testifying here on their behalf and the views that I am sharing today are my own.

The September 11 Victim Compensation Fund of 2001 ("VCF") was a uniquely successful short-term administrative program to compensate victims of the September 11 terrorist attacks while limiting litigation against innocent third parties who had also been victimized by the attacks. Unfortunately, H.R. 3543 in its current form fails to protect innocent third parties from unfair litigation, does not have the advantages that made the VCF successful, and magnifies the disadvantages and fairness problems of the VCF.

I conclude:

1. The original VCF structure, intended for compensating a limited set of claimants in time and place with relatively uncontroversial claims in a non-adversarial structure, will not work for a longer-term compensation scheme involving a substantially larger set of potential claimants with injuries with more ambiguous causation.

2. While I do not oppose compensation for rescue workers injured in the course of work on Ground Zero, H.R. 3543's definitions are vague and overinclusive and will expand the VCF far beyond that intended set of beneficiaries.

3. In particular, expanding the program to include psychological injury will result in double-recovery for many claimants and, if not circumscribed, billions of wasted taxpayer dollars.

4. H.R. 3543 creates a compensation program that is especially susceptible to error and fraud.

5. At the same time H.R. 3543 is overinclusive, it is also underinclusive, because it fails to protect innocent subcontractors who are faced with tremendous liability simply for volunteering to help New York City in its hour of need, often without pay.

6. If H.R. 3543 is amended to protect the federal government against fraud, the intended beneficiaries will be unlikely to participate in the VCF unless H.R. 3543 is also amended to make the VCF the exclusive remedy for September 11-related injuries.

7. Indemnification provisions are fraught with peril for abuse of the government fisc if they are not finely crafted to permit the government to protect its interests in the underlying litigation, and if damages caps are not included.

8. Indemnification provisions fail to solve the problem of future subcontractors being deterred from volunteering to help the government.

9. H.R. 3543 fails to provide adequate protection to taxpayers that taxpayer money will be spent on compensation of victims, rather than on attorneys' fees.

10. H.R. 3543 compounds problems of unfairness in the original VCF.

I. The September 11 Victim Compensation Fund of 2001

The September 11 Victim Compensation Fund of 2001 ("VCF" or "Fund") was created in September of 2001 by the Air Transportation Safety and Stabilization Act ("Stabilization Act") in response to the fear that plaintiffs' attorneys seeking to hold the victimized airlines responsible for damages stemming from the September 11 attacks would bankrupt the industry.[1]

The VCF is a great success story. Conceived, implemented, and concluded in under three years, the Fund distributed about $6 billion to survivors of 2,880 persons killed in the September 11th attacks and over $1 billion to 2,680 individuals who were injured in the attacks or in the rescue efforts conducted thereafter.[2] As the Special Master of the Fund, Kenneth Feinberg, documents, however, there were unique circumstances that made the Fund so successful: the Fund "took extraordinary steps to assure that families could obtain detailed information about their likely recovery"; the Fund personally contacted each claimant and assisted them in non-adversarial formal and informal proceedings to maximize recovery; the Fund's cooperative approach permitted rapid resolution of claims.[3]

This was possible because the scope of the Fund was limited to a discrete time, place, event, and set of injuries, giving it additional advantages. *First*, there was no ambiguity over causation: someone on the September 11 planes or killed or injured in the Towers or Pentagon was plainly entitled to compensation over the Fund.[4] Thus, determining eligibility for compensation was, aside from the

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[1] Under New York law, a defendant who is found even 1% negligent is jointly and severally liable for economic damages. Some academics have dismissed the possibility that innocent third parties would be held liable for terrorist actions. Anthony J. Sebok, *What's Law Got to Do With It? Designing Compensation Schemes in the Shadow of the Tort System*, 53 DEPAUL L. REV. 901, 917 (2003); RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 104 (2007); Peter Schuck, *Special Dispensation*, AM. LAWYER (June 2004); *see also* LLOYD DIXON AND RACHEL KAGANOFF STERN, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS (RAND Institute for Civil Justice 2004). But Congress's concern was more than hypothetical. In a trial over the 1993 World Trade Center bombing, a New York jury found the terrorists only 32% responsible for the injuries, and the Port Authority of New York and New Jersey 68% responsible—thus holding the deep pocket entirely liable for $1.8 billion in damages. Ted Frank, *Follow the Money*, WALL ST. J. (Oct. 28, 2006). A survey of family members of September 11 decedents found that the median respondent held the terrorists only 30% responsible for losses. Gillian Hadfield, *Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC. R. __ (forthcoming 2008). Attorneys for September 11 victims have sued everyone from thirteen airlines to three airport authorities to Boeing to Motorola to the Port Authority to New York City to Riggs Bank. *Id.*; Sebok at 904; DIXON AND STERN at 19.

[2] KENNETH R. FEINBERG, 1 FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND 1 (2004).

[3] *Id.* at 1, 10.

[4] James R. Copland, *Tragic Solutions: The 9/11 Victim Compensation Fund, Historical Antecedents, and Lessons for Tort Reform* 20, 24-25 (Manhattan Institute 2005).

occasional intra-family squabble,[5] largely a ministerial function, with little adjudication necessary. The Fund's structure was not designed to vet recipients' claims, and any such structure to do so would necessarily be more cumbersome and less satisfactory to victims.[6]

Second, because the set of potential claimants was limited to a few thousand, the Fund could operate efficiently and effectively with an administrative structure relatively thin for a government bureaucracy. Kenneth Feinberg, the Fund's Special Master, did an excellent job in part because he could react nimbly and flexibly, and with considerable discretion. A longer-term and larger compensation fund could not possibly vest that much discretionary authority in a single individual, and would need to craft "rigidly standardized rules" that the current statutory structure of the Fund would not permit.[7]

Third, though the Act did not make the Fund the exclusive remedy for September 11 victims, it did make it a competitive and largely preferable remedy, by moving litigation against airlines and other defendants out of state court and into federal court, and limiting airline liability to the limits of insurance.[8] As a result, 97% of survivors of September 11 decedents chose to use the VCF, rather than the tort system, for recovery.[9]

These advantages are missing in H.R. 3543's expansion of the Fund, while the disadvantages of the Fund are amplified.

II. H.R. 3543's definitions are vague and overinclusive

H.R. 3543, like the September 11th Victim Compensation Fund of 2001 before it, vests tremendous unchecked and unreviewable discretionary power to the Special Master of the Fund. This was a procedural flaw in the original creation of the Fund, and Americans were very fortunate that Special Master Feinberg exercised that discretion wisely. The scope of H.R. 3543 is, however, orders of magnitude greater than the original VCF, will reopen the VCF for five years,[10] and it is potentially problematic that H.R. 3543 does not meaningfully constrain the ability of the Special Master to disburse money to hundreds of thousands of claimants.

Section 3012(a)(2) of the World Trade Center Health Program created by Section 101 of H.R. 3543 includes as "presumed WTC-related health conditions" such common ailments as anxiety disorder, depression, substance abuse, lower back pain, and "marital problems, parenting problems, etc." Under Section 3012(a)(1)(C), a WTC responder with a "presumed WTC-related health condition" has a "WTC-related health condition" without the need to show any causation. With such generous criteria, about forty percent of Americans would be classified as having a presumed WTC-related

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5 Jeff Jacoby, *Why the 9/11 Fund Was a Mistake*, BOSTON GLOBE (Sep. 26, 2004).

6 *Cf. also* Michelle Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 293 (2003).

7 *Id.*; Copland, *supra* note 4 at 24; Schuck, *supra* note 1.

8 NAGAREDA, *supra* note 1 at 102, 105.

9 FEINBERG, *supra* note 2 at 1.

10 H.R. 3543, § 201.

health condition.[11] Under § 3012(c)(1), the government would be required to pay for medically necessary treatment for a WTC responder who had these common conditions, even if that responder had them on September 10, 2001.

For causation for conditions that are not "presumed," all an eligible claimant must demonstrate under Section 3012(a)(1)(B) is that the September 11 "attacks are at least as likely as not to be a significant factor in ***aggravating, contributing to***, or causing the condition" (emphasis added). The attacks need not have caused a mental condition; they only need to have "aggravated" or "contributed to" it. Over twenty percent of Americans have taken anti-depressant medications;[12] one strongly suspects that ratio is higher for a cosmopolitan area such as New York City where the stigma of psychiatric care is smaller than in the American population at large. If the vague definition of "psychological injury" is interpreted by the Special Master to include emotional distress from bad memories, then nearly every New Yorker (like nearly every American) would be an eligible claimant. The Administrator also has great discretion under Section 3022 to create a list of presumed WTC-related health conditions for which New York residents need not demonstrate causation.

Section 3021 creates eligibility for benefits for people who lived, worked, or attended school in the "New York City disaster area," the precise parameters of which are left up to the WTC program administrator, but must, under Section 3009(5), include all of Manhattan south of 14th Street, *i.e.*, within two miles of the World Trade Center. Under Section 3009(5), "In determining the boundaries of the New York City disaster area, the administrator shall take into consideration peer-reviewed research that has demonstrated potential exposure to such toxins at a distance of within 5 miles from the former World Trade Center," and nothing bars the Administrator from using a larger radius. If you think school boards get lobbied hard over the boundary lines between high schools, imagine what pressure the WTC program administrator will face when she decides which Manhattan cross-street is the dividing line for eligibility for millions of dollars of government largess.

The definition of "New York City disaster area" is critical, as Section 205 of H.R. 3543 expands eligibility for VCF compensation to anyone living or working in the New York City disaster area—as well as to, under § 3022(a)(2)(G), "any other person whom the WTC program administrator determines to be appropriate."

Though the "New York City disaster area" is determined with reference to airborne toxins, it creates rights under § 3012(a)(1)(B) and § 3022(a) to mental health benefits unrelated to exposure to such toxins.[13] In short, it is well within the authority of the Administrator to create an entitlement to mental health benefits for someone who lives in New Canaan, Connecticut and commutes to a job on West 72nd Street in Manhattan—or even further north, since nothing restricts the Administrator to a five-mile radius in determining the New York City disaster area.

With such minimal requirements for recovery, and such potentially broad definitions of eligibility, taxpayers may find themselves paying for psychotherapy for Woody Allen and hundreds of thousands of other New Yorkers, many of whom are amongst the wealthiest people in the nation.

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[11] Christopher Lane, *Are We Really That Ill?*, N.Y. SUN (Mar. 26, 2008).

[12] *Id.*

[13] Separately, the bill has a drafting error in Section 3022(b)(1), which references "section 3102(a)(2)" instead of Section 3012(a)(2).

And even beyond that broad giveaway, Section 3052 gives the WTC program administrator blank-check authority to "make grants to the New York City Department of Health and Mental Hygiene to provide mental health services to address mental health needs relating to the 9/11 NYC terrorist attacks."

If the purpose of the bill is to compensate Ground Zero responders who suffered from lung problems caused by toxins in the smoldering pit, as the Findings of Section 2 of H.R. 3543 suggest, then it is hard to see why there is the need to include such broad swaths of common mental health conditions for treatment. Well over $100 million in taxpayer and private dollars were spent on mental health treatment in the New York City area immediately after September 11 in response to never-realized predictions of epidemic levels of long-term post-traumatic stress disorder, and those programs appear to have been largely irrelevant to the mental well-being of New Yorkers.[14]

Section 203 of H.R. 3543 opens a can of worms for the VCF by creating eligibility for recovery for "psychological injuries." To the extent Section 3012(a)(2)(B) is intended to compensate families of September 11 victims who were not permitted to directly recover damages for psychological injury from the original VCF,[15] such claimants for decedents already received a presumed $350,000 (plus $100,000 per dependent) in non-economic losses,[16] which, under the Stabilization Act, included "losses for physical and emotional pain, suffering, inconvenience, … mental anguish, … loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, … and all other non-pecuniary losses of any kind or nature."[17] Permitting additional compensation for psychological injury, including additional non-economic damages, would result in double-recovery for families that already averaged $2 million in compensation from taxpayers and hundreds of thousands of additional dollars in charity.

It is worth noting that the non-economic losses limitations in the original VCF were entirely the discretionary doing of Special Master Feinberg. A different Special Master could undo those regulatory limitations, and open the Treasury to arbitrary non-economic damages awards to hundreds of thousands of claimants for psychological injury. Even if the Special Master awards as little as $25,000 for the non-economic damages of experiencing the September 11 attacks for residents of and workers in the "New York City disaster area," the cost to taxpayers could be in the tens of billions of dollars before a single dollar is spent on medical care for pulmonary injuries, several times the expenditure of the original VCF. If the discretionary limits of 28 CFR § 104.44 are eliminated entirely, that number could skyrocket.

Even within the category of pulmonary injuries, H.R. 3543 is overbroad. Under § 3012(a)(2)(A)(iii), anyone in the New York City disaster area with asthma, even if they had the asthma on September 10, 2001, is considered to have a "WTC-related health condition" entitled to compensation.

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[14] Sally L. Satel, *Book Review: 9/11: Mental Health in the Wake of Terrorist Attacks*, 58 PSYCHIATRIC SERV. 276 (Feb. 2007).

[15] *See* H.R. 3543 § 202 (amending Stabilization Act § 405(c)(3)(A) to permit original VCF claimants to file new claims for psychological injury).

[16] 28 CFR § 104.44.

[17] Stabilization Act § 402. The RAND Institute report's claim that the VCF did not permit recovery for emotional injury (DIXON AND STERN, *supra* note 1 at 66) is thus incorrect.

The fires in the Ground Zero pit responsible for the spread of toxic fumes were extinguished on December 20, 2001, but § 3011(a)(2)(B)(i) makes any responder who worked eighty hours south of Canal Street before July 31, 2002, an "Eligible WTC Responder" eligible for expansive government benefits and thus a VCF claimant for economic and non-economic damages under § 405(c)(2)(C).[18]

In addition, Section 204 of H.R. 3543 defines "immediate aftermath" as the nearly-ten-month period between September 11, 2001 and July 31, 2002; someone who moves to Greenwich Village in January 2002 would be eligible to claim compensation from the VCF for psychological injury from watching the September 11 attacks on television in Atlanta.

Congress should give guidance to the Special Master on the scope of non-economic damages, or set aside a specific sum for total non-economic damages to all claimants that cannot be exceeded. The original VCF, under Special Master Feinberg, paid hundreds of millions of dollars to approximately 2,425 rescue workers claiming pulmonary and other environmental injuries;[19] Public Law 108-7 has already allocated an additional $1 billion to create a captive insurance company to pay claims arising from Ground Zero debris removal. Congress should limit the future exposure of the U.S. Treasury (and the exposure of the federal taxpayer) at either that $1 billion, or some other figure Congress might choose at some future date based on the interests of justice as the facts and circumstances play out. Anything else puts taxpayers entirely at the mercy of the Special Master's discretion.

The history of expanding compensation programs demonstrates the danger of costs outstripping original estimates. Time after time—the Black Lung Program, the Vaccine Injury Compensation Program, the Radiation Exposure Compensation Program, and the Energy Employees Occupational Illness Compensation Program—the federal role and expense expanded significantly over time well beyond initial cost estimates.[20] Even a program as well run as the original VCF failed to stay within its original estimates for expense: Special Master Feinberg estimated taxpayer expense of $4.8 billion in 2001,[21] but the fund paid out $7 billion when it closed.

III. H.R. 3543 creates a compensation program that is especially susceptible to error and fraud

The original VCF was aimed at a select group of claimants who, for the most part, were unquestionably the intended recipients and eligible for benefits. There were strict time limits on the evaluation of claims; Section 405(b)(3) required a decision be made within 120 days. The emphasis was on ensuring rapid payment to families of September 11 victims. "Claimants did not need to

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[18] Separately, H.R. 3543 suffers from a drafting problem. Section 407 of the Stabilization Act requires regulations to be promulgated within 90 days of the enactment date of September 22, 2001. There are currently no provisions in the bill providing for the timing of promulgation of new regulations to create rules for the greatly expanded scope of the September 11th Victim Compensation Fund.

[19] DIXON AND STERN, *supra* note 1 at 56.

[20] GOVERNMENT ACCOUNTABILITY OFFICE, FEDERAL COMPENSATION PROGRAMS: PERSPECTIVES ON FOUR PROGRAMS 4-5 (2005).

[21] Diana B. Henriques and David Barstow, *Victims' Fund Likely to Pay Average of $1.6 Million Each*, N.Y. TIMES (Dec. 21, 2001).

present detailed computations or analyses. Instead, they needed only to supply the fund with easily obtained data."[22]

This cooperative non-adversarial process had advantages when there was no dispute of causation and a limited number of claims. But the structure, left unchanged in H.R. 3543, is inappropriate for either the broader scope of the new Fund or the larger volume of claims the Fund can anticipate.

Anyone who died in the plane crashes or tower collapses of September 11 clearly was a victim of the September 11 attacks. But it is not the case that anyone with a pulmonary or psychological ailment in the greater New York area is an appropriate claimant. Lung disease is common without exposure to Ground Zero; psychological ailments even more so. Some patients with pulmonary disease contracted it from working at Ground Zero, but that is not true of all such claimants. Yet nothing in the current version of Section 405(a)(2) requires claimants to submit information on other possible causes of pulmonary disease or psychological ailments, and it is entirely permissible for the Special Master to decline to conduct discovery on or independent medical reviews of claimants.

If the Fund is to be aimed at a specific set of victims of terrorist attack, rather than simply a giveaway of taxpayer money to a geographic area and to trial lawyers, Section 405 will need to be amended to both require the Fund to establish neutral medical criteria for demonstrating causation, and to have a more realistic timeframe for adjudication of potentially controversial claims for compensation. Congress should require the Fund to establish appropriate burdens of proof and permit for independent medical review to ensure that, if taxpayers are to be responsible for compensation for injuries caused in the aftermath of the September 11 attacks, they are responsible for that amount and no more.

This problem of causation or false positives can be seen in the most prominent cases of post-September 11 illness. The *New York Post* promoted the story of Cesar Borja, who died at the age of 52 of lung disease in 2007 after working what his family called "fourteen-hour days in the smoldering pit" of Ground Zero. But as the *New York Times* revealed, "very few of the most dramatic aspects of Officer Borja's powerful story appear to be fully accurate."[23]

- On September 11, Borja reported for duty at a tow pound in Queens.
- Borja did not work near Ground Zero until December 24, 2001 "after substantial parts of the site had been cleared and the fire in the remaining pile had been declared out." Borja thus never worked in the "smoldering pit."
- Borja never worked a 14-hour shift; rather, he worked a few shifts for a total of 17 days directing traffic to add to his overtime pay, most of which were in March and April 2002, and all blocks away from Ground Zero.

Borja's pulmonary fibrosis—a disease diagnosed in 30,000 Americans a year that has a latency period of twenty years—was almost certainly related to his pack-a-day smoking habit rather than his

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[22] FEINBERG, *supra* note 2 at 7.

[23] Sewell Chan and Al Baker, *Weeks After a Death, Twists in Some 9/11 Details*, NEW YORK TIMES (Feb. 13, 2007).

peripheral involvement directing traffic for a few days in 2002.[24] Yet under Section 3011(a)(2)(B)(i), Borja's family would be presumptively eligible for economic and non-economic death benefits from the VCF.

Indeed, the problem is made very clear by the namesake of H.R. 3543, James Zadroga. Zadroga, 34, died January 5, 2006, from pulmonary disease and respiratory failure; one medical examiner suggested the cause of death was exposure to Ground Zero dust. Zadroga's death prompted New York state lawmakers to pass a bill awarding accidental-death benefits to Ground Zero responders. But the cause of Zadroga's death is disputed. The chief New York City medical examiner, Charles Hirsch, concluded: "It is our unequivocal opinion, with certainty beyond doubt, that the foreign material in your son's lungs did not get there as the result of inhaling dust at the World Trade Center or elsewhere."[25] Rather, Hirsch argues, Zadroga died from injecting ground-up prescription drugs into his bloodstream; the binders, or nonsoluble fillers, accumulated in his lungs, scarring them and causing his death.[26] Zadroga's family disputes this finding, but the fact of the controversy suggests that the non-adversarial character of the VCF cannot be retained if the VCF is expanded to include pulmonary problems without subjecting the Fund to rewarding potentially meritless claims.

The danger here is not simply the occasional false positive of unmerited compensation, but the creation of a compensation structure that will be subject to pervasive fraud. History has shown in the asbestos and silicosis mass tort litigations that claims of lung ailments are especially susceptible to fraud.[27] An investigation matching plaintiffs in a multidistrict litigation against silica defendants against claimants from the Manville Trust found that thousands of the plaintiffs claiming silicosis injuries had previously claimed asbestosis and that the asbestosis claims made no mention of the alleged silicosis and vice versa, even though the two competing diagnoses were sometimes made by the same doctor.[28]

Even legitimate medical facilities have a danger of suffering from confirmation bias and exaggerating the scope of pulmonary injuries, given the millions of dollars of federal money at stake. Many of the most sensational reports, including congressional testimony, have come from the Irving J. Selikoff Center for Occupational and Environmental Medicine, based at Mount Sinai Medical Center, with six full time doctors. But critics have complained that "doctors at the clinic, which has strong historical ties to labor unions, have allowed their advocacy for workers to trump their science by

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[24] Mark P. Steele *et al.*, *The clinical and pathologic features of familial interstitial pneumonia (FIP)*, 172 AM. J. RESPIR. AND CRIT. CARE MED. 1146 (2005) (smoking has a relative risk of 3.6 for pulmonary fibrosis).

[25] Bill Hutchinson, *Coroner says hero James Zadroga didn't die from WTC dust*, NEW YORK DAILY NEWS (Oct. 19, 2007).

[26] Anthony DePalma, *City Says Prescription Misuse Caused Death of Detective Who Worked at 9/11 Site*, NEW YORK TIMES (Oct. 26, 2007).

[27] In re Silica Products Liab. Litig., 398 F.Supp. 2d 563 (S.D. Tex. 2005); Ted Frank, *Making the FAIR Act Fair*, 1 LIABILITY OUTLOOK No. 1 (2006); Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?* (2008) (unpublished manuscript available at bepress.com); Lester Brickman, *Disparities between Asbestosis and Silicosis Claims Generated By Litigation Screenings and Clinical Studies*, 29 Cardozo L. Rev. 513 (2007); Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L. J. 35 (2006); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPPERDINE L. REV. 33 (2004); Lester Brickman, *False Witness*, WALL. ST. J. (Dec. 2, 2006).

[28] *Id.*

making statements that go beyond what their studies have confirmed";[29] and they have presented findings in "scientifically questionable ways."[30]

A compensation fund like the one created by H.R. 3543 will suffer from what Professor Richard Nagareda calls the *Field of Dreams* problem: "If you build it, they will come."[31] If Congress creates a compensation system where geographic proximity and a diagnosis are the only prerequisites for a large government check and an attorney's contingent fee, attorneys will have every incentive to manufacture such diagnoses, and have done so in the past. "Plaintiffs are recruited at mass screenings sponsored by lawyers; mobile X-ray vans churn out hundreds of thousands of X-rays on an assembly line basis which are read by a handful of doctors selected by lawyers solely for litigation purposes."[32] Ninety percent of such diagnoses erroneously favor the claimant.[33] Despite the widespread fraud in asbestos and silicosis litigation, no attorneys have faced any sanction harsher than a fine of a few thousand dollars.

This is more than hypothetical in the case of the September 11 litigation. Thousands of lawsuits in the September 11 litigation in Judge Hellerstein's court alleging pulmonary injury have been filed by Napoli, Kaiser & Bern LLP ("Napoli"),[34] which was responsible for massive fraud in the fen-phen litigation. That firm set up "echo mills" with three or four echocardiogram machines and several sonographers and cardiologists; lawyers would generate the medical histories and doctors would rubber-stamp thousands of diagnoses; Napoli paid millions of dollars to doctors to generate for litigation fraudulent diagnoses of valvular regurgitation to submit to the trust fund for fen-phen settlement, including contingent bonuses for successful recovery.[35] In the words of federal district court Judge Harvey Bartle about one such doctor:

> The circumstances under which the Dr. Crouse echocardiograms were performed and interpreted undermine her credibility. Despite her extensive experience with echocardiography, she relied on a law firm employee to instruct her staff on how to measure regurgitant jets. On days when Hariton and Napoli clients were scheduled, her office would conduct echocardiograms for twelve hours at half hour intervals, all with the same sonographer! Dr. Crouse spent little time actually reviewing and approving the results of these echocardiograms. She never met with the claimants, never reviewed their medical records, and largely relied on the law firms to provide

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29 Anthony dePalma and Serge F. Kovaleski, *Accuracy of 9/11 Health Reports Is Questioned*, N.Y. TIMES (Sep. 7, 2007).

30 *Id. See also* MANHATTAN INSTITUTE CENTER FOR LEGAL POLICY, TRIAL LAWYERS, INC.—9/11 (forthcoming 2008).

31 NAGAREDA, *supra* note 1 at 143.

32 Lester Brickman, *False Witness*, WALL. ST. J. (Dec. 2, 2006).

33 *Id. See also* note 27, *supra*.

34 Anthony dePalma, *9/11 Lawyer Made Name in Lawsuit on Diet Pills*, N.Y. TIMES (Mar. 30, 2008).

35 Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?* 52-55 (2008) (unpublished manuscript available at bepress.com); Berkeley Rice, *Do these doctors give medicine a black eye?*, 80 MEDICAL ECON. 58 (Dec. 19, 2003); *see also* In re: Diet Drug Litigation, Master Docket No. BER-L-13379-04MT, 2005 WL 1253991 (N.J. Super. L.) (May 9, 2005) ("the techniques used in performing the echocardiograms fell so far below appropriate practice so as to make the data reported in the echocardiograms virtually worthless in either diagnosis or treatment").

> the medical history required by the Green Form. Nonetheless, Dr. Crouse received $725,000 from the Hariton and Napoli firms to say nothing of the $2,000,000 or more that she earned from other law firms for interpreting fen-phen echocardiograms. When considering the thousands of echocardiograms that Dr. Crouse interpreted during the period that she worked for the Hariton and Napoli firms, her practice resembled a mass production operation that would have been the envy of Henry Ford.[36]

Napoli has suffered no disciplinary or criminal consequences.[37] As a result of such frauds, a settlement expected to cost $3.75 billion ended up costing American Home Products and its successor tens of billions dollars more.[38] We can be quite confident that this firm will continue its business model of litigation fraud and do the same thing to the U.S. Treasury if Congress permits it.

If it is surprisingly easy to manufacture fake claims of lung ailment through mass screenings, it is easier still to manufacture claims of "psychological injury," where self-reporting is the only possible verification, diagnostic criteria are malleable, and falsification is all but impossible for many common psychological injuries within the scope of the definition of "presumed WTC-related injuries." Awarding compensation for minor psychological injuries while avoiding fraud will be impossible unless Congress or the Special Master caps damages at trivial amounts and insists on independent medical evaluations.

Without firm medical criteria and the opportunity of scrutiny of claims on the front end and the promise of criminal penalties for fraud on the back end, H.R. 3543's Fund and the government fisc will be subject to substantial fraud and abuse.[39]

IV. H.R. 3543 fails to provide protection for volunteer subcontractors, and will not be effective without tort reform

The pulmonary injuries to Ground Zero rescue workers are reminiscent of an earlier government program where safety was sacrificed in favor of exigency.[40] Though the Navy recognized the dangers of asbestos as early as 1939, its World War II Liberty Ship and Victory Ship shipbuilding program, in the name of wartime urgency, knowingly exposed thousands of shipyard workers to

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[36] In re Diet Drugs Products Liability Litig., 236 F.Supp. 2d 445, 457 (E.D. Pa. 2002); *see also id.* at 462 (Napoli has "submitted numerous claims that are medically unreasonable").

[37] Napoli, Kaiser & Bern LLP is also named in multiple lawsuits alleging that it violated ethical rules in how it handled settlements for its clients in the fen-phen litigation. dePalma, *supra* note 34; In the Matter of New York Diet Drug Litig., 15 Misc.3d 1114(A) at *11 (2007) ("this Court finds that a sufficient showing has been made that the Napoli Firm may have violated the Disciplinary Rules and may have made material misrepresentations"), *affirmed*, In re New York Diet Drug Litig., 47 A.D.3d 586, 850 N.Y.S.2d 408 (2008) (permitting litigation to go forward); *see also* Buckwalter v. Napoli, Kaiser & Bern LLP, Case No. 1:01cv10868 (S.D.N.Y.) (dismissed without prejudice because of arbitration clause in clients' retainer agreements).

[38] Alison Frankel, *Fen-Phen Follies*, AM. LAWYER (March 2005); *see also* NAGAREDA, *supra* note 1 at 143-51.

[39] *Cf. also* Dauber, *supra* note 1 (documenting fraud in compensation fund for victims of War of 1812).

[40] Professor Sebok has made a similar point. Anthony J. Sebok, *More on the Issues Raised by the Recent Proposal to Reopen the 9/11 Victims Compensation Fund*, Findlaw.com (Apr. 10, 2007).

dangerous levels of asbestos.[41] The government then failed to compensate those workers, and stood by as trial lawyers sued into bankruptcy asbestos suppliers and other third parties[42] who had nothing to do with Navy working conditions, thus victimizing not only government workers but government contractors. H.R. 3543 is an improvement over the government's inaction with Victory Ship workers in that it addresses the compensation problem for workers, but it repeats the error of failing to protect government contractors.

As the *New York Times* has documented, trial lawyers have indiscriminately sued dozens of subcontractors who voluntarily worked without pay at Ground Zero over injuries blamed on work there; nine thousand such lawsuits are pending.[43] Structural engineers who had no say over air quality or safety are named in thousands of wasteful and expensive lawsuits, and cannot hope to extract themselves for years. Clare Boothe Luce once said "No good deed goes unpunished," but this witty aphorism should not be the policy of the United States government. Private contracting companies should not be driven out of business by these lawsuits, and such companies in the future should not be deterred from responding to a crisis because they fear unlimited and potentially bankrupting liability. Such contractors are also victims, and H.R. 3543 provides no recourse for them. Congress should bar litigation against contractors assisting the United States in emergency situations like the Ground Zero clean-up for all but intentional torts. At a minimum, liability in such situations should be limited.

The original VCF did not create an exclusive remedy for claimants; claimants had no obligation to opt in. Nevertheless, the VCF was successful because it provided a generous and certain remedy to September 11 victims and because the Stabilization Act limited liability for innocent third parties and moved litigation of September 11-related claims into federal court. Moreover, the Stabilization Act was passed September 22, 2001, before families of September 11 victims had committed to retainer agreements with attorneys, and thus permitting the vast majority of representation to be done on a *pro bono* basis because of the certainty of a streamlined process. Special Master Feinberg also credits the personalized attention given to claimants.[44] Thus, the Stabilization Act incentivized claimants to opt in to the Fund rather than participate in the tort system.

The personalized attention that made the original VCF successful will not be possible in a system where there are tens or hundreds of thousands of claimants. Special Master Feinberg was able to provide assurances as to the likely recovery of original VCF claimants, such that claimants were willing to waive their rights to a civil tort action to participate in the VCF. Such assurances and certainty will not be possible if the VCF is to adjudicate causation issues.

Meanwhile, H.R. 3543 does not provide any such limitations on the tort system: lawsuits may proceed apace in state courts with potentially unlimited liability.

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[41] WALTER OLSON, THE RULE OF LAWYERS 189-92 (2004).

[42] Frank, *supra* note 27; STEPHEN J. CARROLL *et al.*, ASBESTOS LITIGATION COSTS AND COMPENSATION (RAND Institute for Civil Justice 2005); Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* (2002).

[43] Jim Dwyer, *For Engineer, a Cloud of Litigation After 9/11*, N.Y. TIMES (Feb. 23, 2008).

[44] FEINBERG, *supra* note 1 at 1.

In short, claimants will not opt in to a voluntary administrative compensation system unless they are confident that the administrative system will provide a superior alternative. Congress can do that only by (1) increasing the attractiveness of the administrative system by making it more generous or lenient; (2) decreasing the attractiveness of the tort system by limiting liability; or (3) eliminating the voluntary aspect of the administrative system by making it the sole exclusive remedy for certain types of injury.

As discussed in Sections II and III, above, H.R. 3543 already risks being too permissive to claims and thus open to substantial abuse. Congress needs to limit or eliminate tort liability over Ground Zero-related injuries to provide the proper incentives for claimants to participate in the VCF rather than resort to the tort system. If the VCF is to be expanded, it is best that it be the exclusive remedy for potential claimants.

V. Indemnification, by itself, will create opportunities for abuse without resolving the prospective dangers of tort liability

I understand that contractors are asking that a provision be added to the bill that would allow them to be indemnified by the federal government for their liability in September 11 cleanup-related lawsuits. Under such a provision, the lawsuits against the companies would be allowed to proceed, but taxpayers would pay for the legal fees of and any damages assessed against (or settlements made by) the companies. To require the American taxpayer to pay for damages caused by terrorists, much of which will go to trial lawyers, is terrible public policy. It is one thing for America to create a program to reasonably compensate victims. It is quite another to require taxpayers to pay for unlimited damages on the basis of moral culpability in the form of legal liability, when much of that money will go to trial lawyers seeking to blame Americans for the damages caused by terrorists.

Government indemnification would be the ultimate deep pocket, and may encourage suits that might not otherwise been brought. It creates the danger of collusion between trial lawyers and indemnitees to extract and split rents from the indemnitor, in this case the federal taxpayer. A contractor will have no incentive to contest liability if it faces no costs or consequences with a government backstop, and it would be possible for a plaintiff to offer a secret collusive so-called *Mary Carter* settlement[45] to such a defendant to share in the recovery from the government.

Most importantly, indemnification would only act retroactively. It would provide no legal certainty in the case of the next emergency that those who assist the government would not face bankrupting liability. Only prospective immunity can do that.

If Congress does go the indemnification route, it is important that any indemnification provision be finely crafted to permit government attorneys to stand in the shoes of defendants and litigate to protect the public fisc. If Congress refuses to make the VCF the exclusive remedy for potential claimants, but taxpayers are also going to pay for the damages awarded by the tort system, then it is all the more important that Congress take steps to limit liability through reasonable damages caps.

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[45] In a *Mary Carter* settlement, a defendant settles litigation with a plaintiff in exchange for a share of the plaintiff's recovery against other parties. *E.g.*, Bristol-Myers Co. v. Gonzales, 561 S.W.2d 801, 805 (Tex. 1978).

VI. H.R. 3543 fails to provide adequate protection to taxpayers that taxpayer money will be spent on compensation of victims, rather than on attorneys' fees

The original VCF was established before trial lawyers had a large inventory of clients, and made clear that the process was designed to generously compensate September 11 victims in a non-adversarial fashion, often with the assistance of Fund officials in maximizing recovery. As a result, the vast majority of claimants were able to receive free legal assistance *pro bono*;[46] taxpayer money allocated to compensation went to victims, rather than to trial lawyers. (On the rare occasion when it became known that an attorney charged a contingent fee, publicity was harsh.)[47]

In contrast, many of the intended beneficiaries of H.R. 3543 are already engaged in litigation, with contingent-fee agreements with attorneys likely providing as much as 40% to 50% of recovery. If the VCF is to be continued as a non-adversarial program without need to prove causation, then it would be unconscionable to victims and to taxpayers to permit attorneys to charge substantial contingent fees for the ministerial task of submitting claim forms. Even if the VCF is restructured to permit appropriate independent scrutiny of claims, the streamlined administrative procedure combined with legal ethical requirements suggest that contingent fees may need to be limited by Congress where representation contracts were designed in contemplation of a lengthy litigation process.[48] Fees should be limited to a reasonable hourly fee for necessary work; there should be provisions to maximize victim recovery and ensure that money is paid to victims, rather than attorneys. Otherwise, billions of dollars would be diverted to trial lawyers at taxpayer expense.

But if trial lawyers fear they would personally realize less recovery in the VCF than in litigation, because their fees are limited in one instance, but not the other, it may deter them from having their clients utilize the VCF. This "leakage" problem provides yet another reason why it would be fruitless for Congress to establish an administrative compensation scheme without simultaneously regulating or eliminating the parallel litigation structure over the same issues: any measures taken to protect taxpayers from abuse of the VCF would deter participation in the VCF unless similar restrictions are placed on the tort system.

VII. H.R. 3543 compounds problems of unfairness in the original VCF

The original VCF was criticized for the unfairness of windfalls arbitrarily awarded to victims of one American tragedy, while others go uncompensated; as Yale Law professor Peter Schuck wrote:

> It is not simply that the fund compensates the victims of one set of terrorist attacks (9/11) but not victims of other terrorist attacks on American and foreign soil (Oklahoma City, Khobar Towers, and others). It is also that the fund compensates the 9/11 victims while most other innocent victims of crime, intentional wrongdoing, or negligence must suffer without remedy unless they are "lucky" enough to have been injured by someone who can be held liable under the tort

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[46] NAGAREDA, *supra* note 1 at 103; FEINBERG, *supra* note 2 at 71.

[47] Anthony Lin, *Attorney's $2 Million 9/11 Fee Called "Shocking, Unconscionable"*, N.Y.L.J. (Aug. 29, 2006).

[48] *Cf.* Lester Brickman, *The Market For Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65 (2003).

> system's peculiar, often arbitrary rules and who is also sufficiently insured or secure financially to pay the judgment.[49]

H.R. 3543 compounds this problem in many ways. The September 11 decedents, who have already averaged $2 million in compensation, will be permitted to reopen their cases and receive double-compensation for psychological injury. The WTC program administrator will be required to create an arbitrary geographical dividing line where residents on one side will receive substantial government assistance, and residents on the other will receive nothing without successfully navigating an uncertain bureaucratic appeals process. Ground Zero rescue workers (and responders working well away from Ground Zero) will receive benefits and medical monitoring, while Ground Zero contractors get no protection from unfair litigation.

There are two additional areas of unfairness. The original VCF required compensation to be offset by collateral sources of insurance.[50] The effect was to punish victims for having the foresight to purchase insurance: those who faithfully paid premiums for years in the event of catastrophe found that their recovery was reduced dollar for dollar. H.R. 3543 fails to undo this unjust and economically irrational public policy choice. When the government regularly puts the uninsured and the insured on the same financial footing, as it does in the collateral source rules of the VCF and in bailouts of flood victims,[51] it creates a disincentive to purchase insurance in the first place, and increases the moral hazard that citizens will rationally choose to go uninsured and instead wait for a government handout in the event of misfortune.

Conclusion

Compensation for those injured by the Ground Zero clean-up effort is appropriate, as is legal protection for contractors who assisted in that effort and now find themselves embroiled in litigation. I take no position whether existing local, state and federal programs—which include $380 million of outlays in the original VCF for environmental injuries;[52] the $108 million appropriated in the Fiscal Year 2008 Omnibus Appropriations Bill; outlays for medical monitoring and insurance in the Consolidated Appropriations Resolution, PL 108-7; workers' compensation; New York City Department of Health and Mental Hygiene outreach efforts; and New York State's World Trade Center Disability Law—adequately compensate rescue workers. If Congress decides more compensation is appropriate, any such compensation scheme should be narrowly targeted to include only its intended beneficiaries, and protect taxpayer money from fraud, abuse, and double-recovery; H.R. 3543 fails to meet any of these criteria, in part because the September 11 Victim Compensation Fund of 2001 was not designed to carry the weight that H.R. 3543 places on it.

I welcome your questions.

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[49] Schuck, *supra* note 1; *see also* Copland, *supra* note 4 at 22-23.

[50] Stabilization Act § 405(b)(6).

[51] Ted Frank, *Mississippi Fails to Learn From History*, AMERICAN.COM (Feb. 16, 2007).

[52] DIXON AND STERN 56.

Mr. NADLER. Thank you for your statement.

Dr. Melius?

TESTIMONY OF JAMES MELIUS, ADMINISTRATOR, NEW YORK STATE LABORER'S HEALTH AND SAFETY TRUST FUND

Dr. MELIUS. Thank you.

Honorable Chairmen Conyers, Nadler and Lofgren, other Members of the Committee, I greatly appreciate the opportunity to appear before you this morning.

I think, as we know, in the period after September 11, over 50,000 emergency responders and recovery workers were exposed during the initial rescue work at the site and in the subsequent cleanup and recovery activities. Tens of thousands of people living, working and going to school in the areas around the World Trade Center area were also exposed either in the immediate collapse of the buildings or in the subsequent weeks and months in their apartments, workplaces or schools.

These people were exposed to a myriad of toxic materials including pulverized concrete, asbestos, lead and many highly toxic chemicals. I think as we all know, the failure of the Federal Government to properly inform and protect these people from these exposures added substantially to their subsequent health risks. Due to the incomplete monitoring of these exposures at the time, we will never know the full range of their exposures and still cannot predict with certainty all of the subsequent adverse health effects.

However, we do know that these exposures and the subsequent accompanying psychological trauma have caused adverse health effects in thousands of those exposed. These are not rare isolated medical conditions. The proportions of those exposed who have become ill is quite alarming. In a recent Mount Sinai Medical Center study of responders and recovery workers, lower respiratory disease symptoms were found in 46 percent of those evaluated, upper respiratory problems in 64 percent, and mental health problems in approximately one-third. Similar studies have been found in other peer-reviewed studies of the exposed population.

As we all know, the federally funded medical programs for responders and recovery workers sometime after September 11 have provided excellent medical care for thousands of these workers. Though it is difficult to document, I believe that these programs have prevented disability in many thousands of the people who have participated in them.

However, the continuation of these medical programs alone is not sufficient to address all the harm being suffered by these individuals. Many of these rescue and recovery workers are no longer able to work because of the progressive disability caused by their health conditions.

In my testimony, I offered two sources of information I compiled on the numbers of those currently disabled that are being treated in the medical program. Based on these, I can conservatively estimate at the present time that at least 2,000 World Trade Center rescue and recovery workers became disabled due to World Trade Center related illnesses, are no longer able to work, and are not currently covered by any compensation program. Many hundreds more are getting some assistance from Workers' Compensation, So-

cial Security, Disability and other programs, which do not adequately cover their income loss and other expenses due to their illness.

In summary, I think the economic needs of several thousand people who willingly risked their health to respond to this terrorist attack are not currently being addressed. I think as we have heard from Mr. Valentin today, and I think there are many other people who have testified at other hearings, many other people I have talked to, the human suffering, including the suffering in their families, is quite devastating to the individuals involved. And I think the individuals like Mr. Valentin speak much more clearly than I can about the problems being experienced by these people.

But where do they look to for assistance?

One possible source of assistance for the people with World Trade Center related conditions is workers' compensation insurance. It is supposed to be a no-fault system to provide workers who are injured or become ill due to job-related factors with compensation for their wage loss as well as full coverage for the medical costs associated with the monitoring and treatment of their medical conditions.

For many reasons I have outlined in my testimony, including the long delays, the difficulty dealing with complex medical cases, and unresolved legal issues related to the compensation legislation, the multiple workers' compensation systems currently covering World Trade Center and recovery workers are unable to provide timely and appropriate medical benefits compensation for economic losses for the World Trade Center responders.

Although some steps have been taken in New York to try to address some of these problems, I think it is unlikely that this can be accomplished in time to provide significant timely relief for World Trade Center rescue and recovery workers through the current compensation systems.

Another possible source of support is the World Trade Center Captive Insurance Company. In March of 2003 when the formation of that was being planned and was being announced, Mayor Bloomberg stated in his press release this legislation is necessary for the city to expedite the payment of claims related to this World Trade Center effort. For many people, including myself, we were hopeful that this would become the source that would address both the medical problems as well as the disability and economic losses being suffered by the many World Trade Center workers.

Unfortunately, as we know, almost 4 years after its formation the fund has paid out less than five actual claims—four or five, I am not sure of the exact number. Meanwhile, thousands of rescue and recovery workers and community residents who have become ill have had to struggle without any compensation and without any assistance until Federal funding recently became available to at least help cover the medical costs involved.

I am not an expert on insurance and cannot speak directly to legal issues involved; however, it seems obvious to me that the $1 billion could have been better used to help these thousands of men and women with their medical bills and compensation for their inability to continue to work rather than being invested in a long-term legal battle in order to protect the city and its contractors.

While I understand that the City of New York and the construction contractors have very legitimate concerns about their financial risks incurred in responding and recovering from the terrorist incident, denying medical benefits and compensation for the many rescue and recovery workers involved in this effort is a tragically misguided policy. Moreover, as Mr. Cardozo has stated, the Captive as currently funded does not appear to be adequate to cover all the medical and economic losses for the rescue and recovery workers and community residents. We certainly need, I think, a more comprehensive solution to this issue.

As I have stated before, I believe that H.R. 3543, introduced by Representatives Maloney, Nadler and Fossella, provides a comprehensive legislative approach to accomplish this. In other hearings I have addressed some of the medical program issues related to this legislation. I would just like to offer two recommendations relative to the compensation portion of that legislation.

First, I believe that reopening the Victims Compensation Fund is the best mechanism for addressing economic losses. I believe that it would provide the flexibility to properly handle claims from workers and community residents with varying circumstances and with varying degrees of economic loss.

I think it is far preferable to relying on the many other compensation systems currently in place that are delaying compensation and lead to gross inequities among the ill claimants due to the specific processes used in each of those systems.

I also believe that the VCF should develop a common mechanism for ensuring that all of the claims are for legitimate World Trade Center-related illnesses. For the most part, this could be based on the designation on mechanisms for World Trade Center medical program currently included in the medical section of the legislation.

At the same time, I believe VCF could then provide an appropriate and equitable way of taking into account individual economic circumstances similar to the approach taken when the VCF was administering the earlier 9/11 claims.

Secondly, I think the long-term medical monitoring and treatment for World Trade Center-related medical problems should be handled separately, as outlined in the currently legislation.

I think that program is best handled in conjunction with the current centers of excellence, and that this approach would also reduce the problem in trying to take into the account the potential costs of future medical care for conditions that might later develop as part of the current economic compensation.

We have already gone over 6 years after 9/11, and I think it is very important for all the people who volunteered and came to the assistance of our country at that time, and did that without hesitation, to now be properly cared for. These are unique circumstances, and I would hope that we could provide a quick and equitable solution for the economic losses and medical problems that these people will face in the future and that will help address what hopefully will not ever occur again which is another terrorist incident like this. Thank you.

[The prepared statement of Dr. Melius follows:]

PREPARED STATEMENT OF JAMES MELIUS

Honorable Chairmen Nadler and Lofgren and other members of the Committee. I greatly appreciate the opportunity to appear before you this morning.

I am James Melius, an occupational health physician and epidemiologist, who currently works as Administrator for the New York State Laborers' Health and Safety Trust Fund, a labor-management organization focusing on health and safety issues for union construction laborers in New York State. During my career, I spent over seven years working for the National Institute for Occupational Safety and Health (NIOSH) where I directed groups conducting epidemiological and medical studies. After that, I worked for several years for the New York State Department of Health where, among other duties, I directed the development of a network of occupational health clinics around the state. I currently serve on the federal Advisory Board on Radiation and Worker Health which oversees part of the federal compensation program for former Department of Energy nuclear weapons production workers.

I have been involved in health issues for World Trade Center responders since shortly after September 11th. Over 3,000 of our union members were involved in response and clean-up activities at the site. One of my staff spent nearly every day at the site for the first few months helping to coordinate health and safety issues for our members who were working there. When the initial concerns were raised about potential health problems among responders at the site, I became involved in ensuring that our members participated in the various medical and mental health services that were being offered. For the past four years, I have served as the chair of the Steering Committee for the World Trade Center Medical Monitoring and Treatment Program. This committee includes representatives of responder groups and the participating medical programs (including the NYC Fire Department) who meet monthly to oversee the program and to ensure that the program is providing the necessary services to the many people in need of medical follow-up and treatment. I also serve as co-chair of the Labor Advisory Committee for the WTC Registry operated by the New York City Department of Health and as a member of the Community Advisory Committee for the WTC Environmental Health Center at Bellevue Hospital. These activities provide me with a good overview of the benefits of the current programs and the difficulties encountered by responders seeking to address their medical problems and other needs.

HEALTH CONSEQUENCES OF SEPTEMBER 11

In the period after September 11, over 50,000 emergency responders and recovery workers were exposed during the initial rescue work at the site and in the subsequent clean-up and recovery activities. Tens of thousands of people living, working, and going to school in the areas around the WTC were exposed immediately after the WTC buildings collapsed or in subsequent weeks or months in their apartments, work places, or schools. These responders, recovery workers, and other people were exposed to a myriad of toxic materials including pulverized concrete, asbestos, lead, and many highly toxic chemicals. As we know, the failure of the government to properly inform and protect these people from these exposures added substantially to their health risks.

Due to the incomplete monitoring of these exposures at the time, we will never know the full range of their exposures and still cannot predict with certainty all of the subsequent adverse health effects from these exposures. However, we do know that these exposures and the accompanying psychological trauma have caused adverse health effects in thousands of those exposed. These adverse health effects include lower respiratory disease (including asthma or asthma like conditions, pulmonary fibrosis, and significant loss of lung function); upper respiratory conditions including chronic sinusitis; gastrointestinal problems most commonly reflux disorder or GERD; and mental health problems including Post Traumatic Stress Disorder and depression. These medical problems have been documented in peer reviewed scientific publications of research studies done by several independent research groups. Similar health problems have been documented in fire fighters, other responders and recovery workers, and WTC community residents, students, and workers (to the extent that this latter group has been evaluated).

There is no doubt that these disorders and others not listed above are occurring at a much higher rate than would be expected in this population and that these health problems are due to the toxic exposures and psychological trauma related to 9/11.

These are not rare isolated medical conditions found in a small number of those exposed. The proportion of those exposed who have become ill is quite alarming. In a recent Mount Sinai Medical Center study of responders and recovery workers, lower respiratory disease was found in 46% of those evaluated; upper respiratory

health problems in 64%; and mental health problems in 32%. Similar results have been found in other studies of the exposed populations. New patients are continuing to come to the monitoring and treatment programs with these illnesses that were not evident before this time. Although many of these conditions do improve with medical treatment, the full scope and the ultimate medical outcome for the people currently being treated or who will become ill in the future is uncertain. Thousands are no longer able to work, and thousands more require lifelong medical monitoring and treatment.

As you may know, the federally funded medical programs for responders and recovery workers some time after September 11 have provided excellent medical care for thousands of these works. Initially, only medical monitoring was available. However, two years ago, Congress also provided funding for medical treatment programs for those with WTC-related medical conditions. In December of last year, Congress also provided money for medical monitoring and treatment for community residents, workers, and students exposed after 9/11. These programs have been an immense help to those who have become ill from their exposures. Although it is difficult to document, I believe that without these program thousands more of these people would have developed much more serious health problems, and many more would have become permanently disabled.

WHY MEDICAL PROGRAMS ARE NOT SUFFICIENT

However, the continuation of these medical programs alone is not sufficient to address all of the harm being suffered by these individuals. Many of these rescue and recovery workers are no longer able to work because of the progressive disability caused by their health conditions. We do not have an exact count of those who have become disabled, but I can provide some estimates. In the fire department, over 800 fire fighters have received disability pensions because of health problems related to their 9/11 exposures. These are people whose illness is so severe that they are no longer capable of working as fire fighters. Over the past year, nearly 1800 hundred patients in the WTC treatment program at Mount Sinai Medical Center have been evaluated by their social work unit. Of these, 870 are no longer able to work because of illness. Of these 870 patients who are out of work, less than 40% are receiving any financial assistance from Workers' Compensation, Disability Retirement, or Social Security Disability. In other words, over 500 of these ill police officers, construction workers, utility repair workers, and others are now without personal income and having to rely on their spouses, families, or other financial resources. Most have lost all health insurance coverage for their families, and many can no longer afford their mortgage payments and have lost their homes. These are, for the most part, blue collar workers without significant financial resources to fall back on.

Another source of information on the number of disabled 9/11 rescue and recovery workers is the the NYC 9/11 Unmet Needs Roundtable, administered by New York Disaster Interfaith Services (NYDIS). Since 2002, the NYC 9/11 Unmet Needs Roundtable has brought together donor agencies and community-based case management agencies to financially assist persons impacted by 9/11, provide emergency assistance, and facilitate victims' long-term recovery and return to self-sufficiency when all other means of assistance are no longer available. In 2007, these organizations provided assistance to over 2300 ill 9/11 responders who are disabled and suffering economic hardship due to their 9/11-related illnesses. Of those 2300 ill 9/11 responders, approximately two thirds are currently unemployed due to their illnesses. The Roundtable used to be one of several charitable and governmental financial assistance programs available to 9/11-impacted persons, but is currently the ONLY program in existence that offers financial assistance to ill 9/11 responders and other 9/11 health-impacted persons while they await the receipt of long-term benefits, such as Workers' Compensation, Social Security, and union disability pensions.

Projecting these numbers to all of the people in the Monitoring and Treatment Program, I can conservatively estimate that, at the present time, there are over 2000 WTC rescue and recovery workers who have become disabled due to WTC-related illnesses, who are no longer able to work, and who are not currently covered by any compensation program. Many hundreds more are getting some assistance from workers' compensation, Social Security Disability, or other programs, most of which do not adequately replace the incomes that these disabled workers received before they became ill. The economic needs of these many people who willingly risked their health to respond to this terrorist attack are not being addressed.

These statistics alone do not convey the economic hardship of the many individuals disabled by their WTC exposures. We will hear from one individual at this hearing and have heard from many others at other 9/11 related hearings. They have

testified about about losing their homes, being unable to provide any assistance for their children to attend college, and relying on food pantries and community charities to feed their families while enduring a seemingly endless process to obtain compensation only to discover that this compensation is far less than what they were previously earning. The individual impact of this frustration on their lives and on their ability to care for their family cannot be conveyed in these statistics.

WORKERS' COMPENSATION

One source of assistance for people with WTC-related conditions is workers' compensation insurance. Workers' compensation is supposed to be a no fault insurance system to provide workers who are injured or become ill due to job-related factors with compensation for their wage loss as well as full coverage for the medical costs associated with the monitoring and treatment of their medical condition.

The WTC program participants are covered by a variety of state, federal, and local programs with different eligibility requirements, benefits, and other provisions. Most private and city workers are covered under the New York State Workers' Compensation system. New York City is self insured while most of the private employers obtain coverage through an outside insurance company. Uniformed services workers are, for the most part, not covered by the New York State Workers' Compensation system but rather have a line of duty disability retirement system managed by New York City. A fire fighter, police officer, or other uniformed worker who can no longer perform their duties because of an injury or illness incurred while on duty can apply for a disability retirement which allows them to leave with significant retirement benefits. However, should a work-related illness first become apparent after retirement, no additional benefits (including medical care) are provided, and the medical benefits for even a recognized line of duty medical problem end when the person retires. Federal workers are covered under the compensation program for federal workers. Coverage for workers who came from out of state will depend on their employment arrangements with their private employer or agency. However, volunteers from New York or from out of state are all covered under a special program established by the New York Workers Compensation Board after 9/11 and supported by federal funding.

A major difficulty with these compensation systems is the long delays in obtaining coverage. For example, the NYS Workers' Compensation system is very bureaucratic. The insurer may challenge every step of the compensation process including even diagnostic medical testing. This challenge usually requires a hearing before a Workers' Compensation Board (WCB) administrative judge to evaluate the case, and this hearing may often be delayed for months. Even once the case is established, the insurer can still challenge treatments recommended for that individual even for a medication that the individual may have been taking for many months for a chronic work-related condition. Thus, it may be many years before the case of a person with a WTC-related condition is fully recognized and adjudicated by the compensation system. The average time for just having a claim established for a WTC-related condition at the Mount Sinai clinic is over three years, and it may be many more months before reimbursement for medical costs or lost income is allowed. Meanwhile, the claimant may not be receiving any medical or compensation benefits or may have had their benefits disrupted many times. These bureaucratic systems are designed to address acute injuries. They are not flexible enough to provide the comprehensive medical support and income replacement needed for a WTC responder who has developed several medical problems requiring frequent medical visits and continual modifications in their treatment.

There are many other difficulties in getting these claims accepted. Their medical circumstances are often quite complicated. Many are being treated for multiple WTC-related medical problems. Legal issues about causality, statutes of limitations for filing claims, and determination of disability are often raised in these cases and may take many months to adjudicate. Claimants are often confronted with a choice to accept lump sum payments or a limited weekly payment. The lump sum payment is often very appealing because of their backlog of unpaid bills and debt incurred while waiting for their claim to be processed. However, accepting the lump sum payment, usually means giving up their options to reopen their claim to cover future medical costs should their condition worsen.

In order to alleviate some of the problems for WTC claimants, two years ago New York State implemented some new programs that were deigned to improve coverage for WTC responders. These included the availability of some medical coverage for people waiting for their claim to be adjudicated and an extension of the time to file a claim. New York is also in the midst of implementing major reforms in the overall workers' compensation system that may also assist with WTC claims. However, all

of these new programs will take some time to implement, and the changes will not alleviate the basic inadequacies of the system to provide support for WTC responders with significant medical problems.

In summary, the multiple workers' compensation systems covering WTC rescue and recovery workers are unable to provide timely and appropriate medical benefits and compensation for economic losses for the WTC providers. Although some steps are being taken to address some of the problems with these programs, it is unlikely that this can be accomplished in time to provide significant relief for WTC rescue and recovery workers.

CAPTIVE INSURANCE

Another possible source of support for workers and community residents who have become ill as a result of their WTC-related exposures is the special captive insurance fund set up after the September 11. The World Trade Center Captive Insurance Company was formed in July of 2004 based on earlier Congressional legislation that allowed FEMA to provide up to $1 billion in coverage for the City and its contractors for claims arising from debris removal after the collapse of the World Trade Center buildings. In March of 2003, Mayor Bloomberg and Governor Pataki announced the introduction of state legislation to allow the implementation of the captive insurance arrangement. Mayor Bloomberg stated in his press release, "This legislation is necessary for the City to expedite the payment of claims relating to this effort."

For many people including myself who were becoming increasingly concerned about the growing number of responders and recovery workers who were becoming ill from their work at the WTC, it appeared as if this insurance entity would become the financial mechanism to assist these ill workers. However, as subsequently became very clear, the WTC Captive Insurance Company had little interest in "expediting claims payment". In fact, while spending millions of dollars in legal and consulting fees, the company has focused all of its efforts on attempting to fight the many thousands of WTC medical claims made against it. Almost four years after its formation, the fund has paid out less than five actual claims, all reportedly for orthopedic injuries related to 9/11 work. Meanwhile, thousands of WTC rescue and recovery workers and community residents who have become ill as a result of their exposures after September 11 have had to struggle to pay the medical bills related to these illnesses until federal funding recently became available to defray these costs. Hundreds more who can no longer work because of their WTC-related illnesses have struggled to support their families while trying to obtain workers' compensation or other disability benefits.

I am not an expert on insurance and cannot speak directly to the legal issues involved. However, it seems obvious to me that the $1 billion could have been better used to help these thousands of men and women with medical bills and compensation for their inability to continue to work rather than invested in a long term legal battle in order to protect the City and its contractors. That was the intent of the federal government providing this funding as Mayor Bloomberg apparently understood it in 2003. I believe that the current policy of the Captive to use all of its resources to challenge and fight claims is misguided and blatantly unfair to the many men and women who put their lives and health as risk to respond to the terrorist attack on our country on 9/11 and are now in need of assistance. While I understand that the City of New York and the construction contractors have legitimate concerns about their financial risks incurred in responding and recovering from a terrorist incident, denying (or at best delaying) medical benefits and compensation for the many rescue and recovery workers involved in this effort is a tragically misguided policy.

Moreover, the Captive as currently funded does not appear to be adequate to cover all of the medical and economic losses for the rescue and recovery workers and community residents with WTC-related illnesses. Medical monitoring and treatment costs for the rescue and recovery workers alone are estimated to cost over $200 million per year. A more comprehensive solution is needed.

WHAT NEEDS TO BE DONE

I believe that we must develop a comprehensive solution to address the medical care and economic losses of the thousands of rescue and recovery workers, community residents, and students whose health has been harmed by exposures related to 9/11. HR 3543 introduced by Representatives Maloney, Nadler and Fossella provides a comprehensive legislative approach to accomplish that. In other hearing, I have addressed the medical program outlined in that legislation. I will focus my rec-

ommendations on the aspects of the legislation related to compensation for economic losses. I would like to make several recommendations.

First, reopening the Victims Compensation Fund (VCF) is the best mechanism for addressing economic losses. I believe that the VCF would provide the flexibility to properly handle claims from workers and community residents with varying circumstances and degrees of economic loss. Relying on the many other compensation systems for disabled workers and community residents for economic compensation would lead to continued long delays and gross inequities among the ill claimants due to the specific processes used for compensation in each of these systems. I also believe that the VCF should develop a common mechanism for ensuring that all of the claims were for legitimate WTC-related illnesses. For the most part, this could be based on the designations and mechanisms for designating World Trade Center-related conditions included in the medical program sections of the legislation. At the same time, the VCF would provide an appropriate and equitable way of taking into account individual economic circumstances (including payments from other sources of compensation) similar to the approach taken when the VCF was administering the earlier 9/11 claims.

Secondly, the long term medical monitoring and treatment for World Trade Center related medical problems should be handled separately as outlined in the current legislation. I believe that medical care for these complex medical conditions would best be delivered in conjunction with the current Centers of Excellence. This approach would also reduce the problem of trying to take into account the potential costs of medical care for conditions that might develop in the future as part of the current economic compensation.

Thank you again for allowing me to testify. I would be glad to answer any questions.

Mr. NADLER. Thank you Dr. Melius. [Applause.]

We will now have a round of questioning. I will recognize myself to begin the questioning for 5 minutes.

The first question is to Mr. Cardozo: While you have stressed that because the Captive is not a victims' compensation fund the city must continue to litigate against virtually all claims, the mayor, back in 2003 stated that the creation of the Captive was necessary "for the city to expedite the payment of claims relating to this effort."

You can see why some of us in Congress are now surprised that 5 years later we have made no progress toward this goal articulated by the mayor. In the same press release, Governor Pataki, then Governor Pataki, stated that the "the city explored various options and decided the formation of the captive insurance company was in its best interest for claims arising out of the cleanup effort at and near the World Trade Center."

Ms. LaSala, at a meeting of the board of directors—I think it was the first meeting or one of the first meetings back in December of 2004—was reported, the minutes say she emphasized that the fundamental purpose behind creating and funding of the Captive is to "conserve and disperse its assets in as equitable a manner that maximizes compensation to those parties who suffered damage as a result of the World Trade Center site debris removal program."

So in light of these—and I could also quote from a letter the entire congressional delegation from New York wrote back in 2002 when we were considering this. It says that the coverage envisioned in this proposal "will ensure that sufficient resources will be available to satisfy legitimate claims by individuals affected by the recovery operations while safeguarding the fiscal health of the city and the contractors."

In light of this, it seems to me evident that the purpose of appropriating that billion dollars and setting up the Captive was to enable the swift compensation of victims, and that the city's or the

Captive's policy of litigating every single claim would be sort of like my insurance company saying "We will never pay for your house burning down until you beat us in a lawsuit."

Mr. CARDOZO. Congressman, if we all knew in 2001 or 2003 the extent of the claims, we perhaps would not be here today.

As I think all of us would agree at this table—although we may differ on other things—the extent of damage to the people who are now, unfortunately, suing us as well as, according to Mr. Feinberg, 25,000 or 30,000 additional people, it was far, far greater than had been anticipated.

And so given the fact that this captive is an insurance company, we are faced with the problem that, at least according to every estimate that we have seen, the billion dollars is not sufficient.

Mr. NADLER. Sir, excuse me, sir, the billion dollars is clearly not sufficient—I think we all recognize that——

Mr. CARDOZO. And then——

Mr. NADLER. Given that fact, therefore, the conclusion is instead of using that billion and trying to get more money from Congress or somebody else, we should pay nobody?

Mr. CARDOZO. Given the fact, Congressman, that this is an insurance company designed, if you look at the conference report and the other legislative history, to be an insurance company to protect the city and the contractors—it is what the appropriation bill says; that is what the conference report says; that is what the IG report for the Department of Homeland Security says.

Given the fact that neither the city nor the contractors believe they did anything wrong and that this is to insure them against claims, there is really no choice that they face but to use—to defend against these claims. The analogy, if I may draw it, the analogy I would suggest is if you had, if someone had a car accident, and you are insured for a million dollars, and the claims against you are for a million-and-a-half dollars, you wouldn't expect your insurance company to pay the million dollars——

Mr. NADLER. Let me—my time is running out, and I have some questions for Mr. Feinberg. First, let me just proceed with one more question.

What, if anything, has the city done to ascertain the availability of other insurance from the Port Authority, the four major contractors, to see if there is enough insurance to perhaps enable a global settlement along the lines that was talked about?

Mr. CARDOZO. That is a very good question, and Judge Hellerstein, who as you know is in charge of that litigation, has ordered that all the available information about insurance be produced right now in discovery on just that subject. It is going on right now.

Mr. NADLER. Okay.

Mr. CARDOZO. The city obviously doesn't know the individual——

Mr. NADLER. Thank you.

Mr. Feinberg, first of all I note—and you wouldn't disagree with this, from your testimony in commenting on Mr. Frank's testimony—that the VCF did compensate the victims who had pulmonary diseases that weren't evident the day after.

So let me ask you the following: You testified that the VCF did not have an indemnity. And I take it that you do not agree with

Mr. Cardozo that if we reauthorize the VCF or reopen it that we should indemnify the contractors, and the city for that matter. Why?

Mr. FEINBERG. Well, I think if you want to indemnify the contractors and hold hearings on the wisdom of that, that is entirely up to Congress. I think the VCF never had to worry about that on a simple one line re-extension because we were able, when we settled the claims, to get full releases from 97 percent of the people that were litigating.

Mr. NADLER. But would you agree, or disagree, or have no opinion on the question of whether—granted that if we reopen the VCF, 97, 98 percent of the people go through it; the other 2 percent might consider lawsuits—would it be as a matter of policy, should we indemnify the city and the contractors? If yes, why? If not, why not?

Mr. FEINBERG. I don't think you should. I don't think you should.

Mr. NADLER. Because?

Mr. FEINBERG. The litigation system will take care of that. If there is—the point I want to emphasize is that that is really a separate issue. Indemnifying any defendant or any litigant from lawsuits is a separate issue from the question of whether or not public compensation should be available to compensate people who are in desperate need of help.

I suggested a liability immunity will politically greatly slow down the likelihood that you will be able to get that type of compensation to the people that most need it.

Mr. NADLER. Thank you. My time is expired. I now recognize the Ranking Member of the Subcommittee on the Constitution, Civil Rights and Civil Liberties, the gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Feinberg, I have been very impressed with your understanding of all this. It is got to be a challenge to do what you had to do given the grave circumstances that surrounded all of it.

And some have proposed that the private contractors be fully indemnified by the Federal Government for claims arising out of the 9/11 attacks such that any damage or awards or settlements resulting from private litigation would be drawn from the U.S. Treasury and paid by taxpayers.

Given your experience, can you elaborate on what you think would be the advantages or disadvantage? What would be the outcome of such a policy?

Mr. FEINBERG. I think that a compensation fund, like the 9/11 Fund which was enacted, should be focused on compensating victims. If the fund works properly, as the 9/11 Fund seemed to have worked, at least statistically, issues concerning liability of would-be defendants become irrelevant because when you settle 97 percent of all the claims brought by the families of lost loved ones, they are waiving their right to litigate against anybody. We are getting a full release for domestic would-be tortfeasors.

And I am suggesting that that solution guarantees compensation to people in need while at the same time avoiding the arguments over liability or no liability. Fault does not become an issue.

Mr. FRANKS. Would you agree that—you mention in your testimony that the standards governing compensation under an expanded fund—if we expanded the fund and changed the rules that, you know, that would differ from those that governed the original fund so that there might be some indication on the part of Congress that they were fomenting ill will among the different categories of victims. If you agree or don't agree, would you elaborate based your experiences in the fund that you were master of?

Mr. FEINBERG. A strong argument can be made, substantively, a strong argument can be made that the original 9/11 Fund was not sufficiently expansive.

It didn't permit, by statute, compensating pure mental trauma without physical injury. It didn't permit it. So I couldn't compensate mental suffering from somebody who, through the grace of God, escaped from the World Trade Center without a scratch and then suffered disability. The statute prohibited me from compensating that individual.

But if you decide to extend the 9/11 Fund and add as an eligibility claim mental trauma without physical injury, that is up to Congress. That could be millions of people that were not eligible under the 9/11 Fund. And my concern is not the legitimacy of those claims—those claims may be very legitimate. But it is pretty hard to reopen the fund and say those people are now eligible, whereas people before weren't eligible.

So Congress has to make that judgment. That is not a judgment for a special master administrator to make.

Mr. FRANKS. Yes. Well, you bring a common sense and a logic to this environment that is more rare than it ought to be.

Mr. Frank, the legislative proposal that we are talking about here, the H.R. 3543, does not limit the ongoing lawsuits against the private contracting companies. So, consequently, some have floated the idea that they should be indemnified, these companies should be indemnified, for their liability in these lawsuits by the Federal Government, much like I asked Mr. Feinberg. Under such a provision, the lawsuits against the companies would be allowed to proceed, but taxpayers would pay any damages that were assessed to the companies.

Do you think that is sound policy, and if not, why not?

Mr. FRANK. The problem there is that there will be a race to be who will be the most generous to the claimants. If the fund is not sufficiently generous to the claimants, people will stay within the litigation system because they have the ultimate deep pocket, the United States Treasury, to draw from.

You will not get that 97 percent response rate that you got in the first compensation fund. And the reason you were able to get a 97 percent response rate was because Special Master Feinberg was able to meet with many of the individual families and say, "Here, here is what you are going to do for you. You are going to get millions of dollars. Come over to us. You will get the millions of dollars immediately, and that will be that."

And that will not be possible in a reopened fund. You are not going to get the 97 percent response rate. You are just going to get a competing set of interests over who can be the most generous to claimants, and at great expense to the Treasury.

Mr. FRANKS. Well, thank you, Mr. Chairman. I think all of this just underscores the importance of doing everything we can in this country to prevent such attacks from occurring in the future——

Mr. NADLER. Would the gentleman yield for a moment?

Mr. FRANKS. Certainly.

Mr. NADLER. I would just ask if the gentleman would ask Mr. Frank why he thinks that what Mr. Feinberg did with the first group of claimants couldn't be done, individually meeting and so forth, to persuade the next group of claimants if we were to reopen the fund to come into the fund as opposed to sue people. In other words, why did you say that was impossible?

Mr. FRANK. Well, it is possible if you just make it a blank check and anybody who shows up gets funding regardless of whether or not their injury was caused by September 11. And, you know, there are tens of thousands of lymphomas every year; there are tens of thousands of lung diseases every year. Not all of them were caused by the World Trade Center. And if all these of people are eligible, and they can just show up and say "Here is my diagnosis, and I will get the check," then you will get a good response rate.

But that is not going to be a few thousand people; that is not going to be ten thousand people; that is not even going to be 25,000 people. That is going to be close to 100,000 people, perhaps more, because you are going to have Napoli, Kaiser & Bern with a van in New York signing up people to get compensation under the World Trade Center Compensation Fund.

Mr. NADLER. Thank you.

I now recognize the distinguished Chairperson of the Subcommittee on Immigration, the co-Chair with me of this hearing, Zoe Lofgren.

Ms. LOFGREN. Thank you.

I just have a quick question. Mr. Feinberg, I don't think you performed purely ministerial functions in your effort. Can you explain how the fund dealt with causation and give your thoughts on how the fund if reopened would deal with the causation issues?

Mr. FEINBERG. Yes. The statute gave us general guidelines on causation that the death or the physical injury——

Ms. LOFGREN. Right.

Mr. FEINBERG [continuing]. Had to occur in the immediate aftermath of 9/11, et cetera. We had to develop regulations—which we publicized; we went around the country to meet with the families—with interim regulations asking them what they thought of the regulations. Is there a way to improve the regulations?

And we came up with a final set of regulations. And we constantly modified those regulations based on the quality of the claims. For example, originally our regulations, as Michael Cardozo correctly points out, originally our regulations required that within 96 hours you not only had to be exposed to respiratory particles in the air, but you had to have manifested an illness and corroborated that illness with a medical visit.

We quickly realized that there were thousands of people like Mr. Valentin who were exposed within 96 hours but didn't manifest any injury, didn't cough up blood, didn't experience asthmatic attacks, until a year or more after the exposure. We quickly changed the regulation to say that anybody who was exposed within 96

hours of the World Trade Center attacks but didn't go to a doctor until 72 hours after the physical manifestation, they were eligible.

So we adjusted the regulations to deal with the problem of causation.

What the medical criteria would be if the 9/11 Fund were reauthorized, what we would require to constitute an eligible claim—we will have to work that out with medical documentation. We rejected 2,000 claims. The idea that we simply rubber-stamped——

Ms. LOFGREN. Yes, you weren't an ATM machine.

Mr. FEINBERG. We rejected 2,000 physical injury claims while compensating 2,680 more.

Ms. LOFGREN. You know, Mr. Chairman, I am very happy that we are having this hearing, and I am eager that we take action, especially listening to Mr. Valentin's testimony—I mean, it is so moving. And we are so grateful to you and to people like you, that I would like to yield the remainder of my time to you. As not only are you co-chairing this hearing, but the Towers were in your district, so I yield the remainder of my time to you.

Mr. NADLER. I thank the gentlelady.

Let me ask Mr. Feinberg, you heard Mr. Frank's testimony that if we were to reopen the VCF it would be very difficult—there are thousands of lymphomas, ten thousands; there would be 100,000 claimants; you couldn't distinguish. Could you comment on that?

Mr. FEINBERG. Well, Mr. Franks makes a good point when he says that if we reopen the fund there will probably be thousands of claims. I think that is likely. We had thousands of claims under the original 9/11 Fund. So I think you will probably have thousands of claims.

The challenging question is whether or not those claims will be limited, like the original 9/11 Fund, to physical injury only.

Mr. NADLER. Including respiratory.

Mr. FEINBERG. That is right.

And then the next challenge will be, assuming that we have an understanding from Congress as to what type of injury is compensable, what are the regulatory requirements—medical and evidentiary, not just medical but evidentiary as well—to justify the compensability of that claim?

Mr. NADLER. And assuming that you had more or less the same regulations from Congress—if we just reenacted it, as you say, except eliminate the "you had to be there within 96 hours" because we know now that that was simply not right—do you think we would get a 97 percent——

Mr. FEINBERG. Yes. Well, I am often glib——

Mr. NADLER. We will allow you 96, but something in that neighborhood——

Mr. FEINBERG. I mean, I think—now, don't forget as the Chairman well knows, the 9/11 Fund had no appropriation, none. Mr. Franks is right on that. The 9/11 Fund simply authorized the special master to authorize payments out of the United States Treasury. There was no appropriation.

So insofar as Mr. Frank says, "You know, if you have no limitations, other than the good sense of the administrator and the Congress oversight, as to what amount will be used to compensate victims"—it is a real challenge.

But I suggest that if the Congress ever went to the limit of extending the fund with a one-line extension and said, basically, "Do what you did before," I would like to think that success promotes success.

Mr. NADLER. You would get roughly 97 percent again you think?

Mr. FEINBERG. I would hope.

Mr. NADLER. Thank you.

My time has expired, or rather the gentlelady's time that she gave to me is expired. I thank the gentlelady again.

And I now recognize the gentleman from Iowa.

Mr. KING. Thank you, Mr. Chairman.

And, again, I appreciate the witnesses' testimony.

I ask first, before I ask a question, if the staff could put the poster back up that shows the percentages of the people that were on the site. I want to make sure I am looking at those numbers because I have a question—thank you very much.

And prior to that, I direct my first question to Dr. Melius. And that is, I would ask if you could quantify this for me. You gave some percentages on the particular types of illnesses that are there. Can you start with the universe of those that have some record of a claim, start with that number, and then break this down for me, in a sense, that I get a better understanding of the scope? And multiple different diagnoses per individual, as we heard in this testimony, can you give me a better sense of what we are really looking at here? I am really vague on the overall picture.

Dr. MELIUS. Yes. First of all, I can't give you the, sort of the percentages to deal with those that have claims against the Captive Fund because most of the public information that is available has to do, that I am familiar with, is related to those that are participating in the medical monitoring and treatment programs.

And most of the information on that doesn't deal as well with the number of people that have become disabled. I gave some figures in my testimony, but frankly we don't have information to exactly pin down the number of those people with different illnesses.

However, I think based on what we know from the medical monitoring and treatment programs, we would say that roughly 75-80 percent of the people that are involved in that have a constellation of illnesses related to the respiratory system. They usually co-exist. So it is sinus problems, gastrointestinal problems and the respiratory health problems.

Mr. KING. Okay. Now, am I hearing you say that of the universe of people who were there on site, 75-80 percent have some symptoms?

Dr. MELIUS. No. No. I think we would say that of the——

Mr. KING. The universe of those——

Dr. MELIUS [continuing]. People that are in the monitoring program, approximately one-third of those have an illness that requires treatment right now through—they are usually referred to treatment within the medical monitoring program——

Mr. KING. Okay. About one in three of those——

Dr. MELIUS. One in three.

Mr. KING [continuing]. That participated had some symptoms.

Dr. MELIUS. Right. Correct.

Mr. KING. That helps me.

Dr. MELIUS. Okay.

Mr. KING. I thank you, Dr. Melius.

And then I direct to Mr.——

Dr. MELIUS. Then it is——

Mr. KING. Yes, go ahead.

Dr. MELIUS. Then—allow me to just follow up—then about roughly about 80 percent of those have health problems related to respiratory, upper respiratory/sinus, lower respiratory/lungs, the asthma kind of problems that Mr. Valentin referred to that—and then approximately——

Mr. KING. The clock is ticking, and I do have the answer, and I appreciate that.

I would like to, if I could, direct Mr. Frank's attention to the poster that says "Police Officers 44.57 percent, Firefighters 10.76 percent, Laborers 33 percent, and then the Other are 11.5 percent. In looking at that deployment, do you know, Mr. Frank, if we have a list of those who were required or authorized to be on site? Is there a full universe of those people that we could start with to start to address the scope of this in a fashion that is broader than we have here at this hearing?

Mr. FRANK. I imagine Mr. Cardozo would have a better sense of that than I would.

Mr. KING. I would then——

Mr. FRANK. I simply don't know.

Mr. KING. Thank you.

Mr. Cardozo?

Mr. CARDOZO. With respect to police officers and firefighters, I think that there is a universe. With respect, of course, to the laborers, that is going to—you would have to go to talk to each individual contractor. And, of course, there is at least a potential some claimants go beyond that——

Mr. KING. But let me ask as my clock ticks, and I am sorry about that. Is it possible to put together a list of those who were required or authorized to be on site?

Mr. CARDOZO. I would say that firefighters and policemen—there are 44,000 people have signed up for the World Trade Center registry. It doesn't mean they are sick, simply says they were there.

Mr. KING. But do we know from their work records that they were required to be on site? Or as a volunteer, I understand as well, some of them came in and volunteered.

Mr. CARDOZO. Congressman, I am not sure. I would be happy to find out and let you know. I don't want to misstate the facts.

Mr. KING. I would appreciate that. And if anyone has any information on laborers at all, so and I will submit some of those questions for the record as the clock ticks down here.

Mr. CARDOZO. I will be happy to do that.

Mr. KING. Thank you.

And I just turn then back to Mr. Frank and ask if—I spent my life in the construction business. I look at the proportionality of that, and I understand the size and the scope of Ground Zero, and it takes a lot of security personnel. But we are not quite 2:1 in security personnel over the number of workers that were there on the site, too.

The proportionality of the claims, does it come in proportion to those percentage of workers that we have? I mean, are we getting more claims from public employee workers than we are from private sector workers? It seems to me that we are, and if so, can you explain that?

Mr. FRANK. There are several possible reasons for that. One is a legitimate reason, which is that the police officers were there at the earliest hours of the Ground Zero time, in which case exposure to toxins would have been greater than, say, workers who were there in February or March.

Second, to the extent that the policemen have a union that is advocating on their behalf and signing them up for litigation, they might be more likely to sue.

But I simply don't know the ratios involved and to what extent they are medically legitimate.

Mr. WEINER. Would the gentleman yield? Would the gentleman yield?

Mr. KING. Yes, I would.

Mr. WEINER. I just want to clarify something. Just because they are listed as police officers doesn't mean they weren't on the pile. It doesn't necessarily mean they were only doing security. A lot of them came to the scene and started looking for their——

Mr. KING [continuing]. Their peers——

Mr. WEINER [continuing]. And were on the actual pile, not just doing security. So even though it says police officers, this universe of people is not just at the perimeter. Many of them were on the pile.

Mr. KING. And I appreciate that, in reclaiming, and I absolutely recognize that. And I want to honor that as well.

And I would ask the indulgence of the Chair and unanimous consent to ask one additional question.

Mr. NADLER. Without objection.

Mr. KING. Thank you, Mr. Chairman.

And I would like to direct it to Dr. Melius. And it is something that I hadn't thought of, that is until I listened to Mr. Frank's comments. Is the proximity to the, let me say, September 11—the closer you arrived there on the pile and worked, does that increase the likelihood of having a respiratory illness? Is it proportional in that fashion, and is it also proportional to the time spent on the pile? Have you got anything that measures that for me?

Dr. MELIUS. Yes, it is actually proportional to both. The amount of time that you spent there increases your likelihood that you become ill, as well as how early you arrived and were involved in working on the pile. So it is the amount of hours spent early on, the total length of time that you worked there as well as, you know, which days you arrived. If you arrived early, you tend to be more likely to have symptoms. There is data on that from scientific studies. There is also a breakdown I can provide for you on the people in the medical monitoring program that breaks it down by their occupation and I think would address your earlier question also.

Mr. KING. Thank you very much. I appreciate it.

And, Mr. Chairman, I yield back.

Mr. NADLER. I thank the gentleman.

I now recognize the distinguished Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman, and Chairwoman Lofgren. This has been fascinating hearing. But it is the American Enterprise Institute's witness, Mr. Theodore Frank, that compels my attention most.

With such minimal requirements for recovery and such potentially broad definitions of eligibility, taxpayers may find themselves paying for psychotherapy for Woody Allen and hundreds of thousands of other New Yorkers, many of whom are among the wealthiest people in the Nation.

Well, I introduce you to the person on your right. A police officer is not one of those in that category, I hope not.

Mr. FRANK. Well, I——

Mr. CONYERS. And that——

Mr. FRANK. Can I answer?

Mr. CONYERS. When I recognize you to answer. When I finish.

Mr. Feinberg, you have been around. What is this? Did you have a wide open policy? Were you letting every psychotic New Yorker that wanted to climb on board? Not that there are many of them in New York—don't get me wrong. Mr. Wiener——

Mr. WEINER. I thank the Chairman.

Mr. CONYERS. What is going on here?

Mr. FEINBERG. The 9/11 statute, Mr. Chairman, did not allow, statutorily did not allow, any compensation for mental trauma alone. There had to be, under the 9/11 Fund, a physical injury: a broken leg, a burn, a respiratory claim, corroborated by doctors. So we didn't pay any psychotherapy mental trauma claims. They were ineligible.

Mr. CONYERS. Feeling better, Mr. Frank?

Mr. FRANK. No, sir. Because section 203 of H.R. 3543 opens up the fund to precisely the injury the Stabilization Act forbid, which was physically or psychologically injured. And, given the fact that the New York City disaster area goes well beyond Mr. Valentin, who is perfectly entitled to compensation to the extent his injuries were caused the problems of working on Ground Zero—and I have no dispute with that, and I say that in my testimony—but that is not what H.R. 3543 does. It is——

Mr. CONYERS. But it——

Mr. FRANK [continuing]. Substantially broader than that. And if you want to fund vet Mr. Valentin, that doesn't require you to open up section 203 to half of Manhattan.

Mr. CONYERS. Okay. So you have got it in for people who may have psychological or mental injuries that are derivative from the basic claim. So you want to take all of them out. In other words—do you have medical background?

Mr. FRANK. Sir, I explain in my testimony why——

Mr. CONYERS. I just asked you the question.

Mr. FRANK. I do not have a medical background——

Mr. CONYERS. Okay. I don't either.

Mr. FRANK [continuing]. Background, and I see what happens when you have broad——

Mr. CONYERS. Well, just a moment now. Here is the problem. I can agree with you to an extent. But who am I or you to determine that there are other kinds of injuries?

It just so happened over the weekend—and this is a fortuitous circumstance—I spoke before the Detroit Chapter of the American Psychiatric Association. So as a disclaimer, I am not carrying any of their water or trying to help them in any way. But don't you see a relationship, a possible relationship, between mental and physical injury? Is that conceivable?

Mr. FRANK. Well, certainly. In the original 9/11 Fund, when people had physical injury and asked for compensation, they were also compensated for their non-economic mental injuries. And that was in the statute, and that was in the definition of how non-economic injury was defined in the Stabilization Act. And they were compensated for that.

Mr. CONYERS. So you go along with that, but you think that this bill now has gone a little bit too far, or a lot too far?

Mr. FRANK. You are holding up Mr. Valentin as who you want to help, but that is not who this bill helps. It helps many hundreds of thousands of people beyond that—helps in terms of just giving away taxpayer money——

Mr. CONYERS. Well, Carolyn Maloney has never given away a dime in taxpayers' money, not even to New Yorkers who were psychos. But, I mean, the problem that we are faced with is how do we address your problem? Now, you are talking with some of the most veteran lawmakers, including my friends on the other side who may not be lawyers, but—and they have a little feeling and attitude about lawyers that we will talk about later—but the fact of the matter is, couldn't you trust it in our tender hands to create a bill that would meet the objections? Because I don't want to be giving out money in the fashion that you derive. I mean, Woody Allen, he ought to be helping us, not us helping him.

Mr. FRANK. Well, that is what I try to do in my written testimony, sir, where I identify the problems in the existing legislation and what Congress needs to do to correct them. And even Mr. Feinberg agrees with me that opening up to psychological injury without proof of physical injury would be a huge can of worms.

Mr. CONYERS. Well, Mr. Feinberg, let me just close with this question: Do you see a relationship between mental and physical injuries? I mean, people can get hurt in a lot of ways.

Mr. FEINBERG. Of course there is a relationship. Of course.

The 9/11 Fund statute did not permit compensation for pure mental trauma without an accompanying physical injury. So if you reenact the 9/11 statute and add to it mental trauma without physical injury, that would be a major shift from the original statute.

Mr. CONYERS. Would you accept an invitation from the American Psychiatric Association in my place next year when they meet?

Mr. FEINBERG. Mr. Chairman, anything you asked me to do.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. NADLER. I thank the gentleman.

And now—— [Applause.]

Mr. NADLER. I now recognize the gentleman from California.

Mr. ISSA. I thank the Chairman.

I am not a psychiatrist, psychologist, medical doctor or an attorney. I have got that off my chest real early. But I am a taxpayer. So I am going to make my line of questioning purely as a taxpayer from the state of California.

Mr. Cardozo, how much money has the Federal Government put out in post-9/11, including the buckets of $10–$20 billion that we just threw at the State and the City of New York versus how much has been paid out by the city and the state of New York to the victims in direct aid? And we are talking about victims—direct, indirect—all the people that this bill is dealing with. What has been your end of the take?

Mr. CARDOZO. Congressman, if you—I don't know the precise answer, certainly. But including the pensions—and I think it is important, apropos of Congressman King's question as to who would be covered here, that New York City as a matter of State law now gives firefighters and police and any other city worker who was affected by 9/11, who can show that he or she became ill as a result of the attack, gives them a three-quater pension basically meaning tax-free. So as a practical matter——

Mr. ISSA. Yes, and you are able to give Federal State tax-free because if you give somebody a medical tax-free status the IRS recognizes that, and they pay no federal.

Mr. CARDOZO. That is right. The State legislature enacted that statute, and most of that money as a pension matter comes from New York City.

The specific answer to your question is, as far as I have said before in response to the Chairman's question, because of the fact that the $1 billion captive insurance fund is, based upon everything we know, not at all sufficient to cover the claims we have been talking about, and because neither the city nor the Captive believe they did anything wrong, we have no choice but to be litigating. And so the Captive has paid virtually none of the claims.

Mr. ISSA. Okay. Because, well, you know, my question from the dais is purely a Federal one. We voted in the wake of 9/11 huge amounts of money to the city and the state of New York. We have spent, arguably, between $1-$2 trillion related to the post-9/11, if you include going to Afghanistan and so on.

I have to ask why damages from a fire that had no dirty bomb in it—it had no chemical munitions in it, it simply was an aircraft, residue of two aircraft, and residue of the materials used to build this building—why the firefighters who went there and everyone in the City of New York needs to come to the Federal Government for the dollars versus, quite frankly, this being primarily a State consideration.

You know, it is very simple: I can't vote for additional money for New York if I can't see why it would be appropriate to do this every single time a similar situation happens, which quite frankly includes any urban terrorist. It doesn't have to be somebody from Al Qaida. It can be somebody who decides that they don't like animal testing at one of our pharmaceutical facilities.

Mr. CARDOZO. Congressman, this was, I believe, an attack on the United States of America. It was located at Ground Zero, but it was an attack on America. The question which Congress answered right

after 9/11 is because it was an attack on America, we should compensate these people.

I am also suggesting to you if, God forbid, there is an attack, be it in San Francisco, Los Angeles, Houston, Seattle, the next time, if we do want the contractors, the city and the workers to give the same kind of response that they gave in New York City, which enabled us to be able to deal with the aftermath, if we want that to happen again we need this kind of an approach.

Mr. ISSA. But we turned $20 billion over to the City of New York almost immediately after it. I think Hillary Clinton went to the White House and walked away, essentially, with the commitment from the President.

Are you saying that this, whether or not we pay to the downwind hazard and anyone else who has alleged emotional problems as a result of the trauma of 9/11, that if we don't do that firemen and police aren't going to go to a fire regardless of how it is caused?

Mr. CARDOZO. No, what I am saying is—and I think if you look at what happened in Katrina alone as an example, and a cautionary example—if you were running the largest construction companies in the world, as they were in New York, and you are faced with this kind of liability, and your government says there has been an attack in Los Angeles, please come in—we know from a fact that there were people slow to come in after Katrina because of that concern.

And I think because this was—and certainly 9/11 was an attack on the Nation, and the only other alternative we all know is the tort system with the inadequacies that we have discussed today—I would suggest to you that, yes, it is an obligation that the Federal Government should take——

Mr. ISSA. I appreciate that.

Mr. Chairman, my time has expired. But I might note that we had Filipinos fighting with us in World War II, and we promised to give them full pensions as military personnel. As of today, we still haven't done that. And I would say that we have to look at this and every other commitment of the Federal Government in light of that. And as a taxpayer, I would have to say that I would like to see my Filipine veterans——

Mr. WEINER. Mr. Chairman——

Mr. ISSA [continuing]. Get that for——

Mr. WEINER [continuing]. Mr. Chairman, we request that the gentleman be given an additional minute to answer just a quick question, if we could.

Mr. NADLER. Without objection.

Mr. WEINER. Would the gentleman yield to a question?

Mr. ISSA. Absolutely.

Mr. WEINER. I just want to make sure an impression is not left here that you don't mean to let. Congress passed the compensation fund. A Republican-controlled Congress.

Mr. ISSA. And it is expired.

Mr. WEINER. And, frankly, the gentleman voted for it.

Mr. ISSA. I did.

Mr. WEINER. The gentleman voted for it because we had the national sense that this was not an attack on New York City. This was an attack on our country. And remember something else, we

also at the same time bailed out the airline industry. And we made a decision that there were two imperatives, that we should not—that a lot of these decisions were made in the context of——

Mr. ISSA [continuing]. And I thank the gentleman. The answer to your question——

Mr. WEINER [continuing]. But I would just, if I could——

Mr. ISSA [continuing]. The answer to your question——

Mr. WEINER. The point that the gentleman seems to miss is that some extant body came in and did this to you. No, in fact, you voted for it because there was a reason to vote for it. And all this is is an extension of the very same conclusion. If you conclude it was then wrong, that is one thing——

Mr. ISSA. Right. And to answer the gentleman's question, so that to be clear, I voted, this Congress voted, in order to stabilize markets, stabilize confidence throughout the country in the wake of 9/11. We did a lot of those things, and I think they were the right things.

I am now asking on the extension whether all the commitments and potential commitments, and we could choose to commit, whether this one rises to the extent of it. And right now I am not convinced. And I cited the Filipine veterans never having——

Mr. NADLER. I would—the time of the gentleman has expired. I hope the gentleman is not suggesting because we shamefully have not met our commitments to Filipino veterans—which we should do—therefore we should be as shameful and not meet our responsibilities to people who gave up their health and their lives——[Applause.]

Mr. ISSA. I just want to——

Mr. NADLER [continuing]. Who gave up their health and the balance of their careers because of an attack on this country.

The time of the gentleman is expired.

I now recognize the gentlelady from Texas.

Ms. JACKSON LEE. Thank you to both Chairmen and to my Chairman of the full Committee.

And I am glad that Chairman is sitting in front of the flag of the United States of America. I happen to be from Texas, but the last thing I recognize is Texas is in the Union, and I am an American. What that means is that America has an obligation to those who were on the front lines of a terrorist act that occurred in 2001 and risked their lives to save Americans. And as well in 1993, terrorist act.

And might I add that we have, likewise, though it is not in the context of a terrorist act, failed badly the people in the Gulf Coast who suffered at the hands of an enormous natural disaster. Hurricane Katrina is a story yet unfinished.

So I am quite quizzical about where we are today, and I thank Chairman Nadler for his legislation. I know that I am on the bill and look forward to not only supporting this bill, but I join him and all uncompensated heroes of America, the Filipino veterans and others. America needs to stand up and own these issues and respond to them.

Mr. Cardozo, I just wanted to try and find out what amount of monies are left, to your knowledge, in the closed 2003 Fund?

Mr. CARDOZO. In the Victim Compensation Fund?

Ms. JACKSON LEE. Yes.

Mr. CARDOZO. None.

Ms. JACKSON LEE. What are you utilizing to—there are 11,000 claims, I understand. And how are you addressing those claims right now?

Mr. CARDOZO. Well, as you know, there is a captive insurance company that Congress set up to defend the city and the contractors against that claim——

Ms. JACKSON LEE. Let me have you stop for a moment. So what you are doing—even though it a breach of Congress—what you are doing is taking money and fighting claims of people who are in need?

Mr. CARDOZO. I don't agree with that characterization, Congressman, because the money as appropriated—as it said it in the Appropriation Act, as it said it in the Inspector General's Report—was to create an insurance company. That insurance——

Ms. JACKSON LEE. And is that the insurance company where the head of it was being paid $350,000 and $20,000 in health benefits?

Mr. CARDOZO. And that, as the Inspector General's Report notes, the reason that captive insurance company was set up was because neither the city nor the contractors could get private insurance. In the ordinary course, FEMA would have paid the premiums and you would have purchased insurance.

Ms. JACKSON LEE. Mr. Cardozo——

Mr. NADLER. Would the gentlelady yield for a moment? Would the gentlelady yield for a moment——

Ms. JACKSON LEE. I——

Mr. NADLER [continuing]. A very short moment?

Ms. JACKSON LEE [continuing]. Would be happy to yield.

Mr. NADLER. Thank you.

Mr. Cardozo keeps referring to the Inspector General's Report. As far as I know, they haven't issued their report yet. So I am wondering what he is referring to.

Mr. CARDOZO. Well, you would know better than I. I am referring to the January 2008 Report of the Inspector General of——

Mr. NADLER. Well, let me just say that is a draft which was withdrawn as inadequate and inaccurate. It was never issued.

Mr. CARDOZO. Well, was that your——

Mr. NADLER. I yield back. [Applause.]

Mr. NADLER. Please, please refrain from cheering or booing, either one.

The time is returned to the gentlelady.

Ms. JACKSON LEE. I thank the gentleman.

Mr. Cardozo, there are often things that Congress does that I vigorously disagree with, and I certainly disagree with any premise or any—it is an interesting name, Captive, because you have really captured and hung out to dry individuals who have been on the front line by using those dollars to fight against, if you will, or defend against claims of individuals who probably legitimately deserve to be compensated. We have someone who, I understand has resigned, but formerly was making $350,000.

I don't know if Congress dictated that or not, but certainly we deserve an F grade if that is what we did, to give money to someone holding back on giving money to others.

Let me try to ask Mr. Feinberg again to get that regulation, I understand it had to do with making sure that someone got to the doctor within 96 hours and then 72 hours. Is that accurate?

Mr. FEINBERG. The regulations accompanying the original statute required exposure at the World Trade Center——

Ms. JACKSON LEE. Right.

Mr. FEINBERG [continuing]. Within 96 hours of the 9/11 attacks and within 72 hours of that——

Ms. JACKSON LEE. Did it have any language in there about latent impact?

Mr. FEINBERG. The subsequent regulations did.

Ms. JACKSON LEE. Okay.

Let me go to Mr. Valentin. Mr. Valentin, thank you for being here. I know that you struggle as well. When did you first sense the impact of your disease, or your diagnosis, and when did you get to the World Trade—within hours, within days?

Mr. VALENTIN. I got to the World Trade Center by 11:30 that morning.

Ms. JACKSON LEE. The day of?

Mr. VALENTIN. The day of.

Ms. JACKSON LEE. All right, sir. And then when did you get this diagnosis?

Mr. VALENTIN. Well, subsequently also, I was at No. 7 when it fell, a block away.

Ms. JACKSON LEE. Yes.

Mr. VALENTIN. I was in the plume dust there.

I became sick in November, roughly November, 2 months later. I went and got a chest X-ray. And they thought I had a pneumonia, but my lungs were clear. But it was a progression of illness, and I didn't really see it until 2004. And it just progressed until it got worse, and——

Ms. JACKSON LEE. So you have a latent impact. And not only do you have a physical illness, but I imagine there is some mental trauma that goes on as you have been speaking about it.

Mr. VALENTIN. Absolutely.

Ms. JACKSON LEE. And so when did you file a claim?

Mr. VALENTIN. I haven't filed a claim with Captive for it.

Ms. JACKSON LEE. And for what reason?

Mr. VALENTIN. There is no way to file a claim.

Ms. JACKSON LEE. So you are in essence barred from ever connecting your disease and your mental trauma to the actions of 9/11——

Mr. VALENTIN. That is right.

Ms. JACKSON LEE [continuing]. Of which you were present?

Mr. VALENTIN. That is correct.

Ms. JACKSON LEE. And you said that your surrounding colleagues also—and maybe some of them did not get to a doctor within 72 hours. Is that accurate?

Mr. VALENTIN. That is accurate.

Ms. JACKSON LEE. And I might just say to you, without making any humor out of it, some of you gentlemen who are in the firefighters and police and others who work every day, you are not apt to go to the doctor every 15 minutes. Am I honest to say that? Is your wife here to join me, understand it?

Mr. VALENTIN. Exactly. That is exactly right.

Ms. JACKSON LEE. You guys just hang in there, is that it?

Mr. VALENTIN. That is right.

Ms. JACKSON LEE. And some of the other workers?

Mr. VALENTIN. That is correct.

Ms. JACKSON LEE. I got him smiling.

Let me just say, Mr. Chairman, I didn't get a chance to talk to Mr. Frank, but the Chairman of the full Committee ably pointed out some inconsistencies in trying to address this question.

There is no doubt that as we sit in this room and as we look at the flag of the United States, you are owed as Americans whether you are from New York, California, Texas, Louisiana—we owe you. This bill is a responsible addressing of the question of individuals who are now experiencing latent damage. How dare we deny the recognition of the tragedy of 9/11, Oklahoma, 1993 World Tower or Hurricane Katrina? We have to stop it now, and I hope that this bill moves quickly through this Committee.

And I thank you, and I yield back.

Mr. NADLER. I thank the gentlelady.

And I recognize the gentleman from Texas.

Mr. GOHMERT. Thank you. And I do appreciate the hearing. It has been very informative testimony, both written and oral has been helpful and very informative.

I am not going to make any political speeches. I am just trying to gather information additionally. But I will say, I mentioned to some of my firefighters back in East Texas just this past week that with all of the horrors that came out of that evil attack on 9/11, I am glad that finally our first responders have begun to be appreciated as they should have been all along. But they have been taken for granted for so long. And after 9/11 people began to realize just what it is they put on the line every day.

I want to ask about the insurance policies that were in effect covering first responders back at the time of 9/11 and whether or not—I guess, Mr. Feinberg, let me ask you—did those come into play at all in consideration in the awards or the compensation to people under the fund?

Mr. FEINBERG. Absolutely. The statute passed by Congress creating the 9/11 Fund required me, once I made the calculations, to deduct from any gross award life insurance, disability insurance, State victims of crime payments. I was required by statute to take into account each individual's insurance situation and deduct those amounts before providing a public check from the U.S. Treasury.

Mr. GOHMERT. Okay. Thank you. And that seems to me to make sense because that is dangers that insurance companies are insuring against.

But in some of the written testimony I had also read that some of the first responders who had not been compensated under the original fund who now appear to be injured as a result have lost their health insurance and are not able to receive health insurance.

Mr. Cardozo, you seem to want to respond, so I am curious about that. I mean, normally the unions have been pretty good about negotiating, I would hope, decent health insurance policies. Are these guys being left out in the cold from health insurance?

Mr. CARDOZO. I am glad to answer that question. And I think there is a two-pronged answer.

First of all, with respect to health insurance, once a union member has to retire because of some kind of disability, there is very good health insurance as a retiree, but it is as a retiree, and there is a co-payment and the usual.

But as a result of both the help of this Congress and Mayor Bloomberg's initiative in particular, every person who has been injured or thinks he or she may be injured is now entitled to free medical care at one of the centers of excellence that the city is funding and that is being funded in part by Federal dollars.

Now, that was not in effect on September 12th, and so there are some people who had some out of pocket medical care. But as far as firefighters and policemen are concerned, they were covered by their insurance as long as they were policemen and firemen. If they needed to retire because of their health problems, they do get health insurance, but they did have to pay the usual co-pay. But now they are getting that for free.

Secondly, and I think this is a very important point I just want to mention, that, again, as far as city workers are concerned, if you do become injured and have to retire or became ill, such as someone unfortunately like Mr. Valentin, you retire on a three-quarter pension which gives you three-quarters of your pay for the rest of your life tax-free. Now, that does not deal, obviously, with any past medical benefits, it does not deal with pain and suffering, but it does compensate you for the lost wages.

Mr. GOHMERT. Well, you mentioned it wasn't in effect on September 12th, are you saying there is a group now even under this new policy that does not have access to the free medical help?

Mr. CARDOZO. Well, no. Today they can come in——

Mr. GOHMERT. Okay.

Mr. CARDOZO. Everyone is covered today.

Mr. GOHMERT. Because that sure caught my attention because if these first responders went in there and then they were not at a point where they could retire and yet then were left in the lurch, that would be a huge problem——

Mr. CARDOZO [continuing]. The gap that I was talking about, Congressman, here——

Mr. GOHMERT. Okay.

Mr. CARDOZO [continuing]. Between September 12th, if you will, and the time these programs went into effect, policemen and firemen who had to retire may have had to put some money out of pocket.

Mr. GOHMERT. Mr. Chairman, because of the lengthy answer, could I ask unanimous consent to ask one quick question of——

Mr. NADLER. Without objection.

Mr. GOHMERT [continuing]. The master?

I am also concerned—most tort systems allow for a discovery rule. And it seems like it would certainly be applicable here if you had firemen or policemen or workers out there who didn't know until much later when the symptoms manifested themselves that they were injured, isn't there some basis for coming in and filing a late claim based on the date of the discovery rather than the date

of the injury so they still may have access to the original fund? Is that possible?

Mr. FEINBERG. Absolutely. We had a regulation—we modified it when we saw this happening, Congressman.

Mr. GOHMERT. Okay.

Mr. FEINBERG. We modified it and allowed anybody who had a latent injury to come in, and we would find them eligible if they had the requisite medical evidence, etcetera. But the statute expired on December 22, 2003. So all of these claims that are now being asserted in court——

Mr. GOHMERT. There is no ability for you to address those.

Mr. FEINBERG. I had no ability to pay them because there was no longer a statute in existence.

Mr. GOHMERT. Okay.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

I now recognize the gentleman from Minnesota.

Mr. ELLISON. I first of all, Mr. Chairman, want to thank you for this hearing and also want to thank and commend all of the New Yorkers who are here in support of their city. I agree that part of what it means to be a citizen of the country is that when one part of our country has a catastrophe, we all come to their aid. So I just want to restate the sentiments already expressed here that I will very gladly and proudly support the legislation.

And with that, I want to yield back to you, Mr. Chairman.

Mr. NADLER. Are you yielding me the balance of your time? Or yielding——

Mr. ELLISON. I am yielding—who wants to——

Mr. NADLER. No, no, no, I. Thank you. Thank you.

I have two questions. I just want to see if anybody else wants it.

Dr. Melius, first of all: Given what Mr. Cardozo just said—he painted a rather bright picture of benefits available to city workers who had to retire on disability because of the tragedy—why is it that we have people like Detective Valentin who have lost their homes, had to pay their 401Ks? Is it true, in other words, or is it a completely accurately picture, I should say, because it is true in come cases, that the city and State benefits now take care of this?

Dr. MELIUS. I think what Mr. Cardozo has presented is a very rosy picture of what the situation is for the many city workers who have become ill and disabled because of their World Trade Center exposures.

They have great difficulty obtaining coverage, particularly those that are disabled and can no longer work. There are long delays in getting compensation, typically 3 years or more before they can receive compensation, so they lose their homes and they have limited health coverage. They have limited ability to be able to pay the high co-pays and so forth that are needed for their medications and so forth. I mean, I don't know whether it is city policy, but it is certainly very common for the city to oppose either the line of duty three-quarters pension disability or the workers' compensation cases filed by other city workers.

Full prompt compensation is just simply not reality and not what we see commonly among the many people that are being treated now in the medical programs.

Mr. NADLER. Thank you.

And Mr. Feinberg, how would you structure a settlement with the Captive Insurance Company and existing insurance funds if you were going to do that?

I said how would you structure a settlement with the Captive Insurance Company and existing insurance funds if you were going to do that?

Mr. FEINBERG. As I say in my testimony, Mr. Chairman, sit down with all of the parties and see if one can negotiate out a settlement that will take into account not only the Captive's available funds but insurance funds that may or may not—I don't know; I haven't seen if there are policies, but would have to see that—other sources of contribution that would increase the overall aggregate amount.

And then try and work out a settlement that would give some monies to those currently ill, put some monies aside for future claims—something of great legitimate concern to the city—and also perhaps find an insurer who might insure these claimants against the likelihood of subsequent serious disease.

Mr. NADLER. Thank you.

I have one quick question for Mr. Cardozo, then I will yield the balance of the time to Mr. Weiner.

Given that you testified about how we have these programs in place now—they are funded to a large extent by the $160 million that Congress voted on a one-time basis in last year's budget—if the President's recommendation of—and the estimate is it cost $250 million, roughly, a year for the health care—if the President's recommendation in this year's budget to cut that $160 million to $25 million goes through, will this impact the ability to provide those medical services?

Mr. CARDOZO. Well, it obviously has that potential, Congressman, which is why we strongly support the rest of this bill to deal with this. Mayor——

Mr. NADLER. And you would strongly support a higher level of appropriation this year?

Mr. CARDOZO. Yes.

Mr. NADLER. Thank you.

Now, would the gentleman from Minnesota yield the balance of his time to the other gentleman from New York, Mr. Weiner?

Mr. ELLISON. Yes.

Mr. NADLER. Thank you.

Mr. WEINER. Thank you, Mr. Chairman.

And thanks to the gentleman.

And I am going to ask on my own time some substantive questions about the legislation, but I can't allow the gentleman from California's remarks about what led us here to go unchallenged.

The notion that this is the City of New York asking for more benefits from the Federal Government because we were the point of attack on our country is patently absurd and, frankly, insulting to no end. The President of the United States, when he stood in our city, did not say New York City was attacked. He said our country was

attacked. There are people, some of them in this audience, that are dying from that attack. That was an attack on our Nation.

The efforts made by this Congress, whatever they might have been, were not the reflection of Congress' generosity. It was a reflection of our national sense that it was New York City that came under this attack, and we had to do what we could to repair the breach in our Nation.

You know, we frequently say that 2,800 some-odd citizens died in that attack. That is not true. There are people who are every single day, bit by bit by bit, who are dying from that attack. And all we are saying here is: How are we going to deal with our national obligation to make those people and their families as whole as is possible?

Mr. NADLER. Gentleman's time has expired.

I now recognize the gentlelady from California.

Ms. WATERS. Thank you very much, Mr. Chairman.

I have sat here and listened with great interest to the debate and discussion about September 11 and the fund that was set up to compensate the victims. But I am really taken back by Mr. Frank's written testimony that is here in the book. It is probably some of the most cynical testimony I have seen since I have served on this Committee.

And I would like to ask Mr. Frank, how do you know that psychiatric treatment is more acceptable in New York than in other places in the country?

Mr. FRANK. I am sorry. I don't understand the question. It was a simple——

Ms. WATERS. Well, let us go back to your testimony where you talk about the likelihood that there will be claims for psychiatric care and where you say that "one strongly suspects that ratio is higher for a cosmopolitan area such as New York City where the stigma of psychiatric care is smaller than in the American population at large." Where did you get that stat from?

Mr. FRANK. That was praise for New York City and for its——

Ms. WATERS. I don't care what it was. Where did you get it from?

Mr. FRANK. That was just common sense, ma'am.

Ms. WATERS. So you made it up.

Mr. FRANK. That particular——

Ms. WATERS. You are making a case here——

Mr. FRANK [continuing]. Praise for New York City——

Ms. WATERS [continuing]. Why——

Mr. FRANK [continuing]. Was made up. You are correct. I made up——

Ms. WATERS [continuing]. The case—you made it up, that is right. You are making a case here why taxpayer money is going to be unwisely spent for psychiatric claims, and you are concluding that it is certainly going to be high in New York because everybody knows that it is more acceptable in New York to have psychiatric problems, and you have concluded that that is going to be costly.

Mr. FRANK. Well, it is well known that New York is a more educated community than the United States at large, and more educated people are more likely to accept psychiatric——

Ms. WATERS. That is not what you said. Anyhow, let us also——

Mr. FRANK. Well, that is what I said.

Ms. WATERS [continuing]. Go to the cynical statement about Woody Allen. What did you mean that taxpayers would find themselves paying for psychotherapy for Woody Allen and hundreds of thousands of other New Yorkers, many of whom are among the richest people in the Nation? What kind of testimony is this?

Mr. FRANK. Well, if you look at H.R 3543 you will see that the definitions of psychiatric injury are very broad, that the definitions of eligible claimants are very broad, and the absurd example demonstrates how just broad it is. This is a bill intended to help heroes like Mr. Valentin, and it is in fact a giveaway for a much larger group of people that you might not be intending to give that money to.

Ms. WATERS. Your extensive testimony, that probably was prepared by 20 or 30 people over at the Institute——

Mr. FRANK. No, ma'am. I prepared that by myself.

Ms. WATERS. You shouldn't be proud of it. This testimony that you have supplied here, making all kind of criticism about the bill, admit—well, at least you gave the master credit for being very responsible in the way that he managed the compensation funds. But then you oppose the master having that kind of authority in H.R. 3543. Why is that?

Mr. FRANK. Well, I don't think the master should have had that authority in the original stabilization——

Ms. WATERS. But you said the master did a good job.

Mr. FRANK. The master did a good job.

Ms. WATERS. He did not abuse the authority.

Mr. FRANK. The master did not abuse the authority he was given. He had the potential to abuse the authority, and I think——

Ms. WATERS. But that leads you to a conclusion that the master shouldn't have this kind of authority in 3543, even though they did a good job in the original compensation fund.

Mr. FRANK. Well, if you are going to put Special Master Feinberg back in charge of this, and if he is going to be as circumspect as he was the first time, but if he is as circumspect as he was the first time, then the policemen and firemen behind me aren't going to be satisfied.

You are talking about a much broader statute with much broader authority for the special master in the original situation. And I also don't know whether Special Master Feinberg wants to spend another 5 years doing this.

Ms. WATERS. Well, but he didn't ask you to decide whether or not he would like to be the master of this fund. You have taken it upon yourself to talk about the fact that he could be good, and only if he had it would you be comfortable with the fact that a master could be as responsible as he was.

Mr. Chairman, I thank you for the time that you have allotted to me.

I would just like to say that I am certainly going to support 3543. I thank you for this hearing. We are spending a lot of time talking about whether or not psychiatric problems, mental health problems, are legitimate for compensation.

And I want to tell you, I am surprised, based on what happened September 11 in New York City, that we don't have more people who have been psychologically damaged than we appear to have.

I think it was one of the most traumatic things that could have happened to anybody, any time, any place, anywhere.

And whether or not we are talking about people who did not know the negative impact it was having on their health at the time or people who discover tomorrow, they deserve to be heard and to be considered. And I hope that the Members of Congress will do just that.

Mr. NADLER. I thank the gentlelady. And I thank the gentlelady for her important comments.

I now recognize the gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Feinberg, how many claims did you say you paid, and how many did you deny? How many claims did you pay, and how many did you deny?

Mr. FEINBERG. We paid about 5,300 claims, and we denied about 2,000 claims. All the denials were physical injury claims.

Mr. SCOTT. Okay. Now, let me just go through this a little bit the way the settlements work. When somebody settles, it is the final settlement—once you settle, that is it?

Mr. FEINBERG. That is it.

Mr. SCOTT. You can't reopen it. And if you settled for the broken bone and give a release and subsequently have asbestos-related problems, that is too bad?

Mr. FEINBERG. That is right.

Mr. SCOTT. And you didn't make partial payments—there is one payment, and that is it?

Mr. FEINBERG. That is correct.

Mr. SCOTT. And if someone was not satisfied with the offer, they could refuse it and go to court?

Mr. FEINBERG. That is correct.

Mr. SCOTT. And was the statute of limitation for the court case told while it was pending with you?

Mr. FEINBERG. No. The statute wasn't told, but the life of the fund was such that the statute of limitations never really entered into this. The fund expired.

Mr. SCOTT. Well, if they wanted to reject your claim and go to court, a lot of them would have exhausted the statute of limitations——

Mr. FEINBERG. No. Because the fund expired by its own terms on December 22, 2003, within the tort litigation statute of limitations period.

Mr. SCOTT. So if they rejected the claim they would still, at that time, be within the statute of limitations——

Mr. FEINBERG. That is correct.

Mr. SCOTT [continuing]. For a court case.

We have heard about legal fees. My discussions with the fine lawyers in Virginia was such to lead me to believe that there was a lot of pro bono legal work being done.

Mr. FEINBERG. Congressman, I am glad you raised that. Legal fees were never an issue in the fund. Virtually all families and physically injured victims who wanted an attorney were provided an attorney pro bono with no fees whatsoever. It just never arose as an issue.

Mr. SCOTT. Thank you. And you mentioned several of the collateral sources. Is workers' compensation a collateral source?

Mr. FEINBERG. It is a collateral source, and it was a very problematic issue.

Mr. SCOTT. Now, Mr. Cardozo, my recollection of workers' comp says that you are eligible if your injury was arising out of in the course of employment.

Mr. CARDOZO. That is right.

Mr. SCOTT. And so that would cover the police officers and the firefighters and whatnot. Would it——

Mr. CARDOZO. No. Forgive me for interrupting, Congressman, but under New York law, neither policeman nor firemen are covered by workers' comp because they get what we call line of duty payments instead.

Mr. SCOTT. Which is the same thing as workers' comp. Well,

Mr. CARDOZO. Well——

Mr. SCOTT. Let me back up a step. Is line of duty pay a collateral source?

Mr. FEINBERG. Yes.

Mr. SCOTT. Okay, now, what happens to the restaurant worker who was just working in the restaurant? Was his injury or death—did that arise out of or in the course of employment?

Mr. CARDOZO. Well, that would depend upon the workers' comp of his private employer. That wouldn't be New York City workers' comp.

Mr. SCOTT. Well, it would be a collateral source——

Mr. CARDOZO. Oh——

Mr. SCOTT [continuing]. That Mr. Feinberg would look into.

Mr. CARDOZO [continuing]. Yes.

Mr. SCOTT. Did anybody in that situation get workers' comp—a restaurant worker in the World Trade Center?

Mr. FEINBERG. I don't—I assume so, but would have to go back and check our files to get an answer to that. I assume it would.

Mr. SCOTT. And if you settled, could workers' comp subsequently pay for some of the subsequent medical expenses?

Mr. FEINBERG. Of private employees? I would assume that they would, yes.

Mr. SCOTT. And that wouldn't be a collateral source that you would want to get——

Mr. FEINBERG. Once the check was cut, we walked away. We would try, Congressman, and calculate what future workers' comp benefits would be over the work life of that injured victim——

Mr. SCOTT. And you would have that——

Mr. FEINBERG [continuing]. And consider whether we had to deduct that or not at that time.

Mr. SCOTT. How much is needed in the WTCC Insurance Fund? A billion isn't enough, Mr. Cardozo?

Mr. CARDOZO. Well, the plaintiffs have said in open court that as to the existing roughly 10,000 claims, a billion dollars is not enough. And, of course, as Mr. Feinberg said, we are faced with the additional possibility of 25,000-30,000 additional claims.

Mr. SCOTT. Mr. Feinberg, if you were to try to do an eligibility, the present requirement is injury had to be in the immediate aftermath of the attack—you are talking about hours—and you have

some geographic limitations. There are some of these injuries—asbestos-related, for example—that you can show were clearly caused by the 9/11 attack. How would they be compensated or not compensated if we extend without amending the statute?

Mr. FEINBERG. I think you would have to look at the existing, the regulations that we enacted in 2001, and decide whether or not those regulations are pertinent in all respects to latent claims that you are focusing on. And perhaps the regulations would have to be adjusted to determine different eligibility——

Mr. SCOTT. Well, if somebody could prove, convince by the fund as to evidence prove that their situation was caused by the 9/11 attack although they didn't have the hours, and they didn't have the proximity, would that be a compensable injury under, if we extended it?

Mr. FEINBERG. We would have to examine that claim and decide, you know, whether or not the assertion is valid. If the assertion is valid, they would have a compensable claim, yes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. Thank the gentleman.

And I yield to the gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman. And thank you for holding the hearing.

I would like to ask unanimous consent to submit for the record an e-mail from a constituent of mine, Jennifer Hovey, just for the purpose of demonstrating that this is not a situation that is only affecting New Yorkers. I am from North Carolina, and I would just like to lift a part of this just to make the point.

She is talking about her father, a 35-year veteran of the New York Police Department Bomb Squad, who suffers from severe asthma and heart-related injuries due to his involvement as a first responder on 9/11. And she talks about some of the things that he could do prior to this response and a number of things that he is unable to do, speaking of her father, Detective Kevin Berry. So I would just like to submit this for the record for that purpose.

Mr. NADLER. Without objection, so ordered.

[The information referred to follows:]

From: Web forms <webforms@heoc-www6.house.gov>

Date: 3/24/2008 5:35:14 PM

To: nc12ima@mail.house.gov

Subject: IMA MAIL ON WEBJUD

Dear Congressman Watt:

I am writing to ask for your support for the upcoming hearing on April 1, 2008 at 10am during the Judiciary Committee's review regarding the WTC Captive Insurance Co. Inc's refusal to pay claims on personal injuries suffered by those working at Ground Zero.

My father a 35 year veteran of the NYPD Bomb Squad suffers from severe Asthma and Heart related injuries due to his involvement as a First Responder on 9/11/01. Prior to 9/11/01 my father was a certified scuba diver; post 9/11/01 he gasps for air as he climbs a flight of stairs. My father routinely participates in voluntary body scans as part of a study by the WTC commission as his co-workers have been diagnosed with Cancer related to ingesting the chemicals, jet fuel and fumes of burning steel. Only time, will tell the extent of the damage done to my father on that fateful day and what his health will look like in the future; he himself has become a ticking time bomb.

My father sustained these injuries while protecting and serving the citizens of the United States and City of New York with selfless regard to his own safety and saved countless lives while doing a job that he loved.

Your support for my father and our family and the numerous victims of this attack is greatly needed, please remember Detective Kevin Barry when listening to this hearing, as your support affects his daughter and his one year old grandson who resides in the Great State of North Carolina.

Thank you for your efforts and time.

Jennifer Harvey

Mr. WATT. Mr. Feinberg, could you quickly give me kind of a snapshot of the kinds of things that you rejected in the 2,000 claims that you rejected?

Mr. FEINBERG. The statute prohibited compensation for mental trauma alone.

Mr. WATT. So, no, no. I thought you told me you rejected some things that were not prohibited under the statute. Is that not the case?

Mr. FEINBERG. Well, of the 2,000 physical injury claims that we rejected, the overwhelming number of those were mental trauma only. The other reason——

Mr. WATT. Okay. So in the 2,000 physical injury claims, you are including emotional trauma claims, not physical injury in the sense that——

Mr. FEINBERG. That is right.

Mr. WATT. Okay.

Mr. FEINBERG. In addition——

Mr. WATT. Are there other kinds of things that you can quickly tell me about——

Mr. FEINBERG. Yes.

Mr. WATT [continuing]. Aside from the trauma claims?

Mr. FEINBERG. Yes. We rejected physical injury claims where the medical documentation did not corroborate the claim.

Mr. WATT. Okay. I am just trying to get a picture of the kinds of things because that seemed to be a fairly high incidence of rejections. What portion of that would you say, the 2,000 that you rejected, were trauma claims, emotional claims, as opposed to physical claims, where you just didn't have the substantiation of the physical connection?

Mr. FEINBERG. I will have to go back, Congressman——

Mr. WATT. Approximate—I am not trying——

Mr. FEINBERG. I really don't know. I would have to go back and provide you that information in the next few days.

Mr. WATT. Now, you suggested that a simple extension, one-sentence extension, but that leaves me a little uneasy because I am—it sounds to me like you all were at some level in your regulations defining a category of things that maybe should have been the province of the Congress. And because when I hear you say you redefined the regulations to fit circumstances, it sounds to me like you as a master were doing a lot of the things that you contemplated we should have done as—and that makes me uneasy as a lawyer and as a legislator when you start redefining this because that allows you to legislate.

Talk to me a little bit about—help me through that uneasiness if you can, because shouldn't we at least be amending the statute to incorporate the regulatory framework that you already acknowledge was legitimate?

Mr. FEINBERG. Well, that is a loaded statement, Congressman. I agree with most of what you say.

I did have the responsibility of trying to clarify some of the ambiguities in the statute. There was nothing ambiguous about mental trauma alone is not compensable. So there is nothing I could do with that. There was nothing ambiguous about collateral offsets

had to be deducted—like comp and life insurance, etcetera. So in certain areas, I had no discretion.

In other areas, what is the immediate aftermath of the attacks? How long is immediate? What is the immediate vicinity of the World Trade Center? Canal Street? South Ferry? Lower Broadway? We had to take regulations and try and clarify what we thought Congress meant when it passed that law.

One problem now that you have, the statute having been initially enacted, the regulations having been initially promulgated, 7,300 applicants having been processed, if Congress goes back now and decides to extend the statute and change the rules, you are going to run into this difficulty, I just—you know it very well——

Mr. WATT. Sure.

Mr. FEINBERG [continuing]. People now will be treated "A" when people back then were treated "B," and you will have a real problem——

Mr. WATT. So your recommendation actually is to extend the statute but incorporate your regulations. You are not saying don't do at least that—because then you are going to have the same conclusion in the opposite direction.

Mr. FEINBERG. I think that is right. Although Congressman Scott——

Mr. NADLER. The time of the gentleman has expired.

The witness may answer this question briefly.

Mr. FEINBERG. Congressman Scott raises a very good point, which is you had regulations back in 2001, 2002 and 2003. If in 2008 there is somebody who can demonstrate medically that they were injured in a geographic area that might be a block away from our regulations but it is now demonstrable—it can be demonstrated and corroborated—I suppose you couldn't ignore that claim, if it could be corroborated.

But other than that, I am agreeing with you that if, if the statute is extended—a position that I discuss in my written testimony is a very difficult philosophic question—if it is extended, a one-line extension is the way to go.

Mr. NADLER. The time of the gentleman has expired.

I have a statement from the husband of a victim who was killed, which I would like unanimous consent to insert into the record.

Without objection, so ordered.

[The information referred to follows:]

Statement for the Record of the Oversight Hearing

"Paying With Their Lives:
The Status of Compensation for 9/11 Health Effects"

by Charles G. Wolf
9/11 Family Member and Founder of "Fix The Fund"

Congress Must Reopen the September 11th Victim Compensation Fund of 2001 For Those Who Have or Will Become Sick, or Who Die Due to the 9/11 Attacks

April 1, 2008

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Personal Background

My name is Charles Wolf. My wife, Katherine Wolf, was killed on September 11, 2001 in Tower 1 (North Tower) of the World Trade Center. She worked for Marsh & McLennan as an executive assistant and was 40 years old at the time of her death. No part of Katherine's body was ever found.

In mid-2002, I founded the advocacy organization "Fix the Fund" and a website www.fixthefund.org, with a twofold purpose: To highlight the inequities in the way Special Master Kenneth R. Feinberg was administering the Victim Compensation Fund (the "Fund" or "VCF") in order to convince him to change his ways, and to get Congress to rescind the "collateral offsets" (which deducted life insurance and 9/11-related government payments) from the VCF. In the end, I was successful on the first part, but not the latter. The Special Master did adjust his practices — enough so that from May 2003 on, I supported him and worked to convince fellow 9/11 "family members" to apply to the Fund. During this time, I became somewhat of an "expert" on the Fund, so much so that as the December 22, 2003 deadline got nearer, Mr. Feinberg referred the press to me to answer their questions.

Special Master Feinberg conducted my hearing personally, where he said, "I must say, I note on the record Charles Wolf's enormous contribution to the Fund, without which the Fund would not be where it is today. Mr. Wolf, we are all in your debt, and we thank you for your just total commitment to the program."

Summary Statement

Congress must reopen the "September 11th Victim Compensation Fund of 2001" to allow new victims of the 9/11 attacks to have the same financial compensation that the initial victims were given. These new victims include first responders, rescue, recovery, and cleanup workers, and local residents, among others.

Background on the Origin of the Fund

The Fund was part of the Airline Bailout Package. Days after the Sept. 11 attacks, the airlines asked Congress for financial help (because the airspace was shut down) and legal protection. American and United Airlines were in imminent danger of having their insurance cancelled due to the potential threat of lawsuits due to negligence. Without insurance, American and United could not have continued operating. Congress would give the airlines $10 billion in loans, $5 billion in grants, and restricted their liability for damages arising from the attacks to the limits of their liability coverage of $1.5 billion for each of the four aircraft involved in 9/11.

Later, other entities, including the City of New York, the Port Authority of New York and New Jersey (the owner of the World Trade Center), and Larry Silverstein (leaseholder of the World Trade Center) were given the same protection.

As a result, everyone who suffered a loss from 9/11 would have had their right to sue restricted. Lawmakers realized this could run afoul of the "due process" clause of the U.S. Constitution's fifth amendment, and would put the Airline Bailout Package in jeopardy of being thrown out in court. The VCF was inserted at the last minute to innoculate the bill against legal action, to keep the courts from being clogged with lawsuits, and as an act of compassion towards the victims and their families.

What is the Victim Compensation Fund?

Per the law: "It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." If you applied to the Fund, you could not sue the airlines or the government; it was a surrogate for litigation and its payment scheme was designed to track the civil criminal justice system.

It was a government program to compensate the surviving victims and the families of deceased victims of the Sept. 11 attacks for their economic and noneconomic losses. The Fund was not an attempt to place "a value on human life" (per Senator Tom Daschle).

Why Should the Fund Be Reopened?

Congress could not set a dollar budget for the Fund when the bill was written because the number of victims was unknown at the time. However, Congress did set a two year lifespan for the Fund, governed by the date the regulations were put into effect (December 22, 2001). What Congress could not have foreseen was that two years would not be enough time to identify all the victims of 9/11.

These victims, unknown at the time the law expired, did not suffer obvious external physical injuries, such as being struck by a piece of one of the aircraft. They suffered latent internal injuries from breathing the dust and the smoke from fires that burned for months after the collapse of the World Trade Center towers. Most of these latent injuries manifested themselves after the December 22, 2003 statutory deadline for entry into the Fund. Even after the injuries were evident, it took time for medical experts to establish a direct link from the illness to the smoke and dust from the collapsed World Trade Center towers.

These "newly discovered" victims must be treated the same as everybody else who was eligible to apply to the VCF. These people are just as much victims as my wife, or someone at the Pentagon who was badly burned. They deserve the same financial compensation under the law that I and the other 9/11 families received, with the same restrictions that applied to us.

It is not enough to cover just their medical expenses. Many cannot work, and they were the primary breadwinner of the family. They must have their losses covered, just as we did.

The Moral Perspective

Many of these victims were first responders or workers on the "pile" during those first horrible weeks and months after the attacks. They went in to find my wife and others. These workers were driven by the faith that under each piece of rubble, a co-worker, a friend, or a family member may be found. They knew this was dangerous work as they could have slipped on a beam and fell to their death. But they set all that aside to do the right thing: to find people who were still alive and rescue them. Then, to do the horrible job of finding the bodies and thousands of body parts amongst the twisted wreckage of two 110 story buildings.

If it weren't for these rescue workers, Port Authority police officers John McLoughlin and William J. Jimeno would not have been found alive in the rubble. They were two of the last survivors extracted from Ground Zero and the rescuers who found them never gave up. Film director Oliver Stone made his movie, *World Trade Center*, starring Nicholas Cage, about these two officers.

The heroic deeds of these injured workers, some who are now dying from their injuries, and the selfless sacrifice of many others who supported them with meals and other logistics and who are also sick, should not be forgotten by this nation or by Congress, all of whom were shocked to the core by this horrific event.

Thank you.

Charles G. Wolf

Mr. NADLER. Before we go to our next questioner, I have to say that unfortunately I have a bill of mine under consideration on the floor imminently, and I need to briefly step out of the hearing. We tried to move the bill so it wouldn't conflict with the hearing, but as you can imagine, trying to manage the schedules of 235 Members of Congress is not always possible. The situation was unavoidable. So you will forgive me, I have to leave. I will come back as soon as possible. And the other co-Chair of this hearing will Chair the hearing. Thank you.

Ms. LOFGREN. [Presiding.] At this point I would recognize the gentleman, Mr. Cohen.

Mr. COHEN. Thank you, Madam Chair.

Mr. Cardozo—and I apologize, I had to be out of the room for a little bit, if you have answered this—but I understand that it is the position of the city that for a person to be paid, they have to sue and win a judgment. Is that accurate?

Mr. CARDOZO. If we can't—obviously, the best way to do this is, we believe, is the Victim Compensation Fund. Barring that, if we cannot settle this entire matter—because the city does not believe, I am talking to the city, that it did anything wrong, and the contractors do not believe that it did anything wrong, the huge liability that far exceeds the available insurance—that we have no choice but to be fighting with people who we don't want to be fighting with. And the answer to your question, therefore, would be yes.

Mr. COHEN. So you don't believe that if somebody has a claim that you believe is a just claim that you could settle it without the necessity of having an adverse appearance?

Mr. CARDOZO. Well, I don't believe—I believe many people are injured, Congressman. But the fact that they are injured does not mean that the city's civil defense immunities are not valid; it does not mean that the city was negligent in any way. And, therefore, I do believe, given the magnitude of what we are talking about that far exceeds the insurance, the city and the contractors have no choice but to say because we don't believe we did anything wrong that we are going to have to litigate.

Mr. COHEN. But don't you sometimes have a claims commissioner or claims adjuster that settles claims even though the city has immunity?

Mr. CARDOZO. Absolutely you do. But that is in a situation where your insurance ultimately will be sufficient to cover. In the analogy I drew before to Congressman Nadler—I don't know if you were here—if you were in a car accident, and your insurance company settled for the full amount of your insurance policy with the first plaintiff and left you uninsured for the second plaintiff, when you don't think you did anything wrong, you would be quite upset.

Since the city does not believe it did anything wrong, it does not mean that these people are not injured, are not sick. But the city does not believe it did anything wrong. It believes that the captive insurance company was created, as it says, to insure the city and the contractors, that it has no choice therefore but to say we are not liable and you are going to have to prove your case in court.

Which is exactly why the answer to this whole problem is what we have been talking about for the last 2 hours: the creation of a victims' compensation fund.

Mr. COHEN. Let me ask the doctor, please——

Thank you, sir.

Dr. Melius, there were some 96 hours, a timeline placed in here in this statute, for immediate aftermath. Ninety-six hours and 1 minute—just as exposed to injury or illness?

Dr. MELIUS. Absolutely. And someone exposed after 96 hours, started their exposure after 96 hours, could also have developed as severe a respiratory health problem or other health problem as someone exposed during that time period.

Mr. COHEN. Is there some period of time where the elements would have dissipated in the immediate area of where the health concern would not have been serious?

Dr. MELIUS. As long as there was work being done on the pile or at Fresh Kills, the other areas, there was always the likelihood that people would develop (have had serious exposure), enough to develop illness. Now, that probably went down as time went by and the exposures might have decreased, but one can't say that across the board absolutely for everybody.

So during the time period of the work on the pile and the other affiliated or associated operations, almost any time someone could have had the exposure and developed disease. The problem was that people were not aware of the severity of the exposure and were not properly protected for most of the time period they were down there.

Mr. COHEN. What would be an appropriate hour, if you could pick one—and it is difficult; there is no magic moment when something starts and stops—but when the likelihood of illness arising as a result of agents just on the pile, when would it have gotten to be considered to be safe? Or was it the whole time that it was there?

Dr. MELIUS. I believe it was the whole time that it was there. It is defining terms of the medical portion of the bill in terms of eligibility for the medical programs for people that worked on the pile. There is a date when that work ended, basically, and that was the time exposure stopped.

However, I will say that there were other people who did not work in the pile but who did some of the cleanup in residences and businesses in the downtown area surrounding there that occurred sometime after. People left buildings or didn't bother to clean them and then came back to try to clean them. So there were even exposures occurring after that time.

I think that can all be defined and constrained within eligibility terms. I don't think that would be a significant problem. But it is a significant period of time.

Ms. LOFGREN. The gentleman's time has expired.

Mr. COHEN. Wow, that was the fastest 5 minutes I have ever experienced. Thank you.

Ms. LOFGREN. Thank you, Mr. Cohen.

The gentleman from New York, Mr. Weiner, is now recognized.

Mr. WEINER. Thank you very much.

Let me just say, I agree, Mr. Cardozo, completely, that this is not the responsibility of the city. This is the responsibility of the Federal Government, and there was very little disagreement about that in the early days after September 11. The Federal Govern-

ment has a responsibility to take care of the people that were harmed in this attack on the people of the United States.

And I have to say that the arguments being made by Mr. Frank are evocative of the early days and the months that went on during the consideration. You know, while we have a certain level of history in our mind about this, let us not forget that the work of Mr. Feinberg was very controversial. Just about every single day, someone would say "Well, what do you do about this circumstance?"

And we empowered the master to make decisions that were very difficult. If you think it is difficult trying to learn whether someone's mental illness was a result of September 11, imagine trying to put a value on someone's life. Imagine trying to be the master when you are coming and you have the victims of a family who was a dishwasher and someone who was a stockbroker and someone who was the CEO of a company and someone who was a police sergeant, and trying to come up with a dollar value. If you think these issues are controversial and are subject to difficult judgment calls, that is why we didn't do it. We left it to the special master.

And I think for all of the notion now that "Wow, that went great. Why don't we do that again?" it was only because of the work of the master. And I just want to say publicly what I have said before, you know, Mr. Feinberg was in a difficult situation because to some degree we in the legislature said he could not do things that many people were demanding he do. For example, the difference between the attack in 1993 and the attack in 2001, you could make a pretty good argument there was no difference. Yet the legislature made it very clear we were going to cover some things and not others.

So I am confident that a special master empowered by Congress will have to make difficult decisions and will make them. And I almost am absolutely convinced that it is true, this universe is going to grow—as was the testimony—this universe is going to grow. But that is a reason why you have to build, not a reason why you don't. That is exactly the reason to take some level of the mystery out of how we are going to deal with this problem.

We have too many people who are short of breath today, who are getting medical treatment today, trying to figure out what it is that they should be doing. We could very easily lawyer this for years and years and years. The imperative that we in Congress have is to try to find a way to solve this problem.

And I think that the Victim Compensation Fund for all its imperfections, for all of its judgment calls, for all of its controversy, worked. We are here because we did this once before, and we found, frankly, a model that worked pretty well. It was not perfect. And I remember seeing articles about the disparities. And listening to Mr. Feinberg trying to explain to all of us the decisions—and I remember thinking as I read these stories, "Boy oh boy, I am glad I didn't have to make that decision."

And the same might happen here. We might have controversy that emerges. We might have people that argue extreme cases and get extreme judgments. We might have people that have said, "You know what, you really have pretty good insurance from some other source, maybe you go elsewhere."

But the idea that this should be the subject of years and years of litigation between the city and the plaintiffs is what we need to stop. We need to make sure that that doesn't happen.

Mr. CONYERS. Would the gentleman yield?

Mr. WEINER. I certainly would.

Mr. CONYERS. That is why I suggested in my opening statement, Mr. Weiner, that this is a perfect opportunity for these parties to begin coming together to make the kind of agreement to work this out so that we don't have lawyers or congressmen going through this, hashing this, rehashing this out for years.

Mr. WEINER. Well, and I just wanted, Mr. Chairman, I just wanted to say one other thing.

You know, another thing about the Victim Compensation Fund that we should remember in the fondest light is how bipartisanly we kind of came together around the idea that this was the right thing to do. I would hope that we kind of remember that spirit and we shouldn't say to someone, "Well, because you are dying more slowly, we are going to turn our back on you." Because that is really what is happening here. We have a group of victims that are just as much a victim of this attack as those people that were in those two buildings and those people that were around.

You know, if you think about it, if we knew then what we know today, I ask all of my colleagues: Would we have not included this class? If someone said to us in 2002, in 2001, "Ladies and gentlemen of the Congress, we believe that we will know fully how many people suffered from this by looking at who developed respiratory diseases up until the year 2012. That is how we are going to do it." We would have said, "Absolutely, put those people in," because those are the people we wanted to help and to serve.

That group of fact is no different than it is today. And let us not forget that a lot of this discussion we had, ruled on it, decided in a bipartisan way we wanted to cover, and so all we are saying with that one-line extension that Mr. Feinberg is suggesting is: Do Congress' will again.

And I yield back the balance of my time.

Ms. LOFGREN. The gentleman yields back.

And I believe we have exhausted the number of members wishing to ask questions. This has been a very helpful hearing. I think it has elicited issues that we might not have fully appreciated at the beginning. I think it is worth noting that the attack on 9/11 was an attack on America. I was born and raised in California. The valedictorian of my high school class, Naomi Solomon, died in those Towers. We had firemen from California who, search and rescue specialists, the entire country responded just as we would expect a response today if there were a very serious issue for our country.

So we want to thank all of the witnesses for their testimony here today.

Without objection, Members will have 5 legislative days to submit any additional written questions to any of you witnesses, which we will forward. And if we are forwarding questions, we would ask that you answer as promptly as you can so that the answers may be made part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of other additional materials.

And, again, our thanks. People don't realize that our witnesses are volunteers who have come here to help inform the Congress so that we can do the best job for our country. We thank you very much.

And with that, the hearing is adjourned.

[Whereupon, at 12:51 p.m., the Subcommittees were adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

In the immediate aftermath of one of our nation's greatest tragedies, Congress created the 9/11 Victims Compensation Fund. By all accounts, the VCF was a stunningly successful program.

At least as far as it went.

The program, a truly bipartisan effort conceived hurriedly during what would become the long shadow of the attacks of 9/11, provided a means to compensate the victims of the 9/11 attacks and their family members. In exchange for consideration of claims through an administrative process of remarkable simplicity, those who elected to apply under the VCF agreed not to pursue lawsuits.

Over the short, 33-month period during which the VCF was conceived and operated, it distributed over $7.049 billion to survivors of 2,880 people killed in the attacks and to 2,680 people injured in the attacks or in the rescue efforts conducted immediately after the attacks.

The average award for families of the dead exceeded $2 million. The average award for injured victims came to nearly $400,000.

According to the final report of Special Master Feinberg, one of our witnesses today, "97% of the families of deceased victims who might otherwise have pursued lawsuits for years . . . received compensation through the fund."

As I said, a stunning success.

And I look forward to hearing today from Mr. Feinberg. His able administration of the fund and his expertise regarding administrative alternatives to tort litigation will help the Committee greatly.

I mention the specter of tort litigation for a reason. Over 10,000 lawsuits have been filed in New York City by people—first responders, building and trades workers, volunteers from around the country who rallied to the World Trade Center site to help locate survivors, recover the dead and clean up the debris from the fallen towers—most of whom have suffered illnesses resulting from their exposure to the toxic dust that covered so much of lower Manhattan and surrounding areas.

These lawsuits—filed by people who, by no fault of their own, were not eligible to be compensated under the VCF because they discovered their illnesses too late, they didn't know they could even apply because they thought the fund was only for those who died, or they came to site a few short hours after the 96-hour "immediate aftermath"—are taking far too long to decide.

The doctors and scientists seem to all agree. People are sick and will continue to get sick because of their exposure to the World Trade Center's noxious dust. From the City's testimony today, it seems clear the City agrees.

The question is what do we do about it? Worker's compensation has failed. Medical programs haven't covered every one. The Congressionally-created Captive Insurance Fund has paid pitifully few claims—five to be exact—while the City defends every claim.

Today's hearing is the beginning of our quest to answer the question: what do we do?

I want to thank Chairman Nadler for his leadership on these issues. The bill, HR 3543, the "James Zadroga 9/11 Health and Compensation Act of 2007," authored by Chairman Nadler, Rep. Maloney and Rep. Fossella represents a good first attempt at addressing the issues.

I believe this hearing will help us begin to answer the question, "What do we do?" I believe we will leave here today with a better sense of the problems people are

facing. From there, I am hopeful that we can begin to structure a fair and just program to compensate those who continue to bear the deep scars from that terrible day in September, almost seven years ago.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIE

In the wake of the World Trade Center attacks, a victims' compensation fund (VCF) was put together quite quickly. That effort was a success, and we are happy to be joined today by the former Special Master in charge of that effort, Kenneth Feinberg.

The VCF, and the legislation that created it, was a response focused on the immediate—the persons killed or injured that morning and those who went into the wreckage while the fires still raged. Those people and their family received assistance through the VCF.

But there were others. Some didn't know that there was a place for them in the VCF because outreach was focused on the families of the dead, rather than on the living. Some weren't eligible for the VCF because they were on-site within the first 96 hours after the planes hit. Others' symptoms have been gradually manifesting themselves, and there is little recourse for them.

What do we see now? 70% of the workers being monitored showing respiratory problems. Hundreds of people already stricken with cancer from airborne particles—cancers so virulent that people have already died. Many of these victims bravely rushed in to help in an emergency. Others trusted their employers who sent them to do clean-up in the months that followed, even though they were sent into the site without protective gear.

Even as the environmental disaster spread a dust of poison over the site and the surrounding area, the EPA, OSHA, the City, and State officials took a "do it yourself" approach to protecting the public. FEMA refused to relocate people from contaminated homes and apartments, and refused to pay for cleanup. The suggestion to just wipe things down with a wet rag was as ineffective a response to asbestos, lead, and PCBs as duct tape would have been to a chemical weapons attack.

In 2003, we put a billion dollars into the World Trade Center Captive Insurance Company (WTCC) to handle continuing claims from debris removal. This was done through FEMA, which was supposed to be the place to go for emergency services. Since then, we have learned a lot more about how FEMA sees its mission, and how it is managed.

The WTCC was supposed to serve these victims by providing a mechanism to pay claims. But instead, the WTCC spends most of its time challenging claims, and even litigating against the very people they were chartered to help! Sadly, instead of a duty to serve the victims, the WTCC has chosen to argue that they have a "duty to defend" against every claim. As a result, the WTCC has only compensated *five* victims. While the WTCC fights and denies, the illnesses worsen.

There are over 8,600 claims outstanding. Will there be any money left to compensate these victims once the WTCC has spent it all on attorneys fees fighting them?

Compare this for a moment against what Mr. Feinberg was able to do with the VCF, where 97% of claimants were compensated.

The WTCC needs to stop wasting the money we gave it, and start dealing with the thousands of people who they were created to serve.

I want thank Chairwoman Zoe Lofgren and Chairman Jerry Nadler for having this joint hearing, and to congratulate Jerry Nadler for all of his hard work on H.R. 3543, legislation that seeks to confront these hard issues.

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OPENING STATEMENT OF
U.S. REPRESENTATIVE JERROLD NADLER (NY-08)

Chairman of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties

Hearing on "Paying With Their Lives: The Status of Compensation for 9/11 Health Effects"

April 1, 2008

First, let me thank Congresswoman Lofgren for agreeing to hold this oversight hearing. Thank you.

This joint hearing of the Subcommittee on the Constitution, Civil Rights and Civil Liberties and the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law will investigate the status of compensation for the tens of thousands of people who are suffering because of the collapse of the World Trade Center on 9/11. While other Congressional investigations have focused on the ongoing health crisis, and this committee has previously investigated the disastrous response to the environmental catastrophe, no previous inquiry has focused on compensation for the victims.

I want to welcome our witnesses and thank them for participating. We are fortunate to have an expert panel with us today to discuss the past successes, current challenges, and proposed solutions in the ongoing struggle to provide proper compensation to the victims of 9/11.

I would also like to recognize those individuals who have traveled to Washington today to attend this hearing, and thank you for coming. Many of are the very people who have been denied proper compensation thus far, and I hope that we can learn today about why the system has failed so many of you.

After the collapse of the Twin Towers on 9/11, tens of thousands of first responders, residents, area workers, and students were exposed to a cocktail of toxic substances said to be worse than the Kuwaiti oil fires. They are now coming down with diseases like sarcoidosis, lymphoma, and rare blood cancers. Last June, Senator Clinton and I held companion hearings on the actions of the Environmental Protection Administration and other federal agencies that allowed workers to work in a toxic environment without proper protection and gave them false assurances as to their safety.

At the House hearing, we heard the callous voice of former EPA Administrator Christie Todd Whitman try to explain why she told New Yorkers that the "air was safe to breathe" when, in fact, she had evidence to the contrary. We reviewed the EPA Inspector General's report which found that her statements "were falsely reassuring, lacked a scientific basis, and were politically motivated." We heard about how the White House changed EPA press releases, "to add reassuring statements and delete cautionary ones."

Obviously, none of the injuries we are talking about would have occurred were it not for the terrorists, who are ultimately to blame, but many or most would have been avoided if the Federal Government had acted in a responsible manner. The federal

government, therefore, has a moral and legal obligation to compensate the victims of 9/11 and to provide for their health.

Many hearings have examined the health issues and we have heard from many who are too sick to work. And we must assume that many more will become sick in the future. In a September 2006 peer-reviewed study conducted by the World Trade Center Medical Monitoring Program, of 9,500 WTC responders, almost 70 percent of them had a new or worsened respiratory symptom that developed during or after their time working at Ground Zero. Furthermore, another study documented that, on average, a New York City firefighter who responded to the World Trade Center has experienced a loss of 12 years of lung capacity.

Which brings us to today's hearing. We have with us the former Special Master of the federal Victim Compensation Program who was responsible for providing approximately $7.1 billion in compensation to the families of those who lost their lives and to those injured in the immediate aftermath of the attacks. He paid claims of about 2900 families of the deceased and 2500 people with physical injuries including respiratory illnesses. The funds he distributed were tax free and every award took into account the recoveries from collateral sources, such as private insurance, pensions, and workers compensation. Claims payments were halted because of a statutory expiration date.

We will also hear from Mike Valentin a police officer and 9/11 first responder who can no longer work, and who long ago exhausted his prescription drug coverage and is now fighting to keep his family financially afloat. Unfortunately, his case is all too typical.

New York City Corporation Counsel Michael Cardozo will discuss the World Trade Center Captive Insurance Company, which established with a $1 billion Congressional appropriation, has spent millions of dollars in administrative and legal costs to contest, rather than to pay, claims filed by first responders and other individuals whom Congress intended to assist. Only a handful of claims have been paid, and none of those have been related to the respiratory problems that so many suffer. I look forward to hearing from him how many claims have been paid out and what he sees as the challenges to compensating 9/11 victims.

I am sure he will discuss last week's Second Circuit Court of Appeals decision, denying New York City and its contractors immunity from World Trade Center-related lawsuits. Some 8,000 victims have filed suit, claiming that they "suffered respiratory injuries due to the failure of the City and the Port Authority to monitor those conditions and to provide them with adequate safety equipment, and/or warn them of the hazards."

Finally, I look forward to the testimony of Dr. Jim Melius who is an expert on the proposed legislative solutions to reopen the victim compensation program and to provide for the long term health needs of those affected by the attacks of 9/11.

I would like to note that my colleagues, Congresswoman Carolyn Maloney and Congressman Vito Fossella, and I have introduced the *9/11 Health and Compensation Act*, which would provide comprehensive medical treatment to any person whose health was affected, and reopen the Victim Compensation Fund so that people can be compensated for their economic losses.

The pain and suffering of the living victims of 9/11 is real and cannot be ignored. I think it is clear that we, as a nation, must do more. During the final months of the Civil War, President Lincoln, in his Second Inaugural Address, noted that the nation had to beyond mourning the dead and needed to look towards what could be done to help the nation recover and reconstruct. Nearly seven years after 9/11, and we are in the same position. We must, as Lincoln remarked, "bind up the nation's wounds [and] care for him who shall have borne the battle and for his widow, and his orphan."

I hope that as we continue to bring the truth to light through these hearings, we can do a better job of repaying a debt that can never fully be repaid to the victims and heroes of 9/11.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW

Chairwoman Lofgren, and Chairman Nadler, ranking members King and Franks, thank you for convening today's very important hearing on "Paying with Their Lives: The Status of Compensation for 9/11 Health Effects." In this hearing, will address past successes, as well as the current and future challenges of compensating people for illnesses and injuries that resulted from the tragic September 11, 2001 attacks on the World Trade Center.

The sad reality is that when the World Trade Center collapsed on 9/11, thousands of first responders, local residents, workers, students, and others inhaled a poisonous mixture of asbestos, lead, PCBs, and other contaminants. More than six years later, many of these people have become sick from the toxic dust, and there is currently no comprehensive federal program to provide them with health care or compensation.

Existing health coverage for this population varies widely, and a number of people are either uninsured or under insured. The existing system of workers compensation has failed, and the World Trade Center Captive Insurance Fund, established with a $1 billion federal appropriation, has spent millions of dollars in administrative and legal costs to fight against rather than to pay claims filed by first responders and others whom Congress intended to assist. Only a handful of claims have been paid.

Following 9/11, over 50,000 individuals responded to the call and engaged in clean0up activities at Ground Zero. Individuals were exposed to asbestos and other harmful chemicals at the site.

Tens of thousands of people were living, working, and going to school in the areas around the World Trade Center. People were exposed to the harmful chemicals weeks or months after the buildings collapsed. There was no complete health monitoring of the risks of exposure to the dangerous substances that were present.

These dangerous substances included hundreds of tons of asbestos, nearly half a million pounds of lead, and vast amounts of glass fibers, steel, and concrete that blanketed New York and the surrounding areas. This dust was blown into nearby buildings, schools, and residences.

Fires burned for many months, in part due to the 150,000 gallons of oil stored in the buildings, which emitted heavy metals, PCBs and other toxic chemicals, like dioxin and benzene. Lower Manhattan had been turned into a 16-acre disaster zone, which resulted in an unprecedented environmental assault for the city. The air was hazardous and caused serious physical injury and death.

A study prepared for New York City Mayor Michael Bloomberg estimates that the number of individuals most heavily exposed to the possible environmental hazards and trauma of the 9/11 attach amount to over 400,000 people.

In the immediate aftermath of 9/11, Congress created the Victim Compensation Fund, a unique program designed to compensate people for losses sustained as a result of the attacks on the World Trade Center, and to limit litigation against the airline industry.

Attorney General John Ashcroft appointed Kenneth Feinberg as the special master over the Fund. The fund was established as an entitlement for eligible individuals and was not subject to appropriation. Mr. Feingold has discretion to determine eligibility and the amount of compensation. In return for accepting these funds, recipients waved their right to sue the airlines.

The fund had an application deadline of December 22, 2003. Over a 33-month period, the Fund distributed over $7 billion to survivors of nearly 2,880 people killed on 9/11, and to 2, 680 people who were injured in the attacks or the rescue efforts.

Families of the deceased were paid in amounts from $800,000 to $6.5 million. Individuals were compensated for physical injuries from $500 to $7.1 million, and the Fund paid $1 billion in claims to people who suffered physical injuries.

The Fund was successful because it provided an alternative to litigation. It was expedient and less costly. Ninety-seven percent of the families that participated in the program received compensation.

There was an application deadline for people to file claims under the Fund. Most of the persons had filed claims with the Fund, but many individuals who were injured as a result of 9/11 were time-barred. The Fund's regulations limited compensation to workers who were injured within the immediate 96 hours after the attack.

Specifically, in 2003 Congress provided $1 billion in 9/11 disaster assistance to the Federal Emergency Management Agency (FEMA) to establish a captive insurance

company for claims arising from removing debris, which also included claims by city employees.

The purpose of the Fund was to remove the financial burden from the City and provide compensation for those working at Ground Zero. In the five years since the fund has closed, thousands of individuals have claimed to be suffering from 9/11-related health effects. Approximately, 8,000 plaintiffs are suing the City of New York and several contractors whose employees worked at Ground Zero.

The City has expressed concern that if it begins paying claims, it would exhaust the $1 billion appropriated by Congress, and that it would be deemed to have waived its claims to immunity. In a recent ruling, the U.S. Court of Appeals for the Second Circuit held that "New York defenses are just that: defenses to liability, rather than from immunity from suit."

Congress has responded with a bipartisan bill, H.R. 3542, "9/11 Health and Compensation Act." This bill introduced by Representatives Maloney, Nadler, and Fossella. I am a proud co-sponsor of this bill.

This bill has two main components. First, it would provide comprehensive health care to everyone who was exposed to the toxins at Ground Zero. Second, it would provide compensation for economic damages and losses by reopening the 9/11 Victim Compensation Fund. These latter provisions are before the Judiciary Committee.

Possible changes to the Fund have been suggested. These include, extending the date for people to submit claims; expanding the definition of "aftermath of 9/11" to cover a longer period; expanding the geographical boundaries to include more people that suffer respiratory ailments; expanding the Fund to include psychological harm; allowing second claims to be made in limited circumstances; expanding the pool of applicants to include residents, area workers, students, and others.

I believe this legislation is taking us in the right direction. I welcome the opportunity to learn more information so that we can craft the best legislation that provides the maximum assistance to the most people.

Thank you, I yield the balance of my time.

PREPARED STATEMENT OF THE HONORABLE DARRELL ISSA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Mr. Chairman, thank you for holding this important hearing. It has been over six years since the tragedies of September 11, 2001 occurred, and I appreciate this opportunity to discuss the status of compensating both the victims of 9/11 as well as those individuals who risked their lives in rescue and cleanup efforts.

As with the assassination of President John F. Kennedy, we can all remember where we were when we first heard of the planes striking the World Trade Center, the Pentagon, and the plane downing in Pennsylvania due to the bravery of those onboard. It was one of the darkest days in American history.

The country responded with a remarkable outpouring of unity and generosity. Americans from all states found some way to assist during the aftermath—everyone wanted to do everything they could to hold a shocked country together.

In Congress, we acted to appropriate at least $20 billion to the City of New York alone for cleanup and rebuilding efforts. We tightened our security at airports and on personal identification, and we launched an unprecedented offense against terrorism worldwide.

Today our country is safer than it was before September 11, but the scars from the attack still remain. Nearly 3000 people lost their lives on 9/11, and many more were injured. The Victims Compensation Fund of 2001 distributed approximately $6 billion to the survivors of those killed on 9/11 and over $1 billion to individuals injured in the attacks or rescue efforts. However, many individuals who worked in the cleanup effort at ground zero were injured at the site, and not all of these injuries occurred immediately.

The Victims Compensation Fund (VCF) is widely held to have been a success. This is in no small part attributable to the fact that the claimants were relatively easily identifiable. We knew who was hurt or killed in the attacks and rescue efforts, and we knew who their survivors were.

H.R. 3543, the "James Zadroga 9/11 Health and Compensation Act of 2007," is a well-intentioned but unrealistic attempt to expand the claimant base of the original VCF. The bill's main goal is to compensate individuals injured by air contaminants in New York following 9/11, but the bill also opens up the pool to people who experienced emotional distress without physical harm. Additionally, the claimants include anyone who lived, worked, or attended school in the New York City disaster

area, an area defined ambiguously at best. I cannot support H.R. 3543 in its current form for several reasons.

While some individuals may deserve compensation for exposure to air contaminants caused by the 9/11 attack, opening the pool to an extremely broad geographic area would generate limitless claims. Also, as we have realized from the World Trade Center Captive Insurance Company established to compensate cleanup workers for injuries, it is extremely difficult to determine which injuries, especially respiratory injuries, were caused by working at and around ground zero. Along those same lines, allowing individuals with only psychological harm access to any compensation pool would exponentially increase the number of claimants. It is not that some people do not have genuine emotional distress and are in need of assistance, it is that it is incredibly difficult to wean out the fraudulent claims from the genuine claims. That is why so many states do not allow damages for emotional distress without physical harm.

I supported past funding efforts for the City of New York following September 11, and I will continue to support efforts to assist individuals harmed during the attacks, rescue efforts, and cleanup. We should be able to work together to find ways to improve this legislation, and I look forward to working with my colleagues on that effort.

FRED H. CATE
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April 14, 2008

The Honorable Jerrold Nadler
Chair, Subcommittee on Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
B-353 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler:

I regret that prior commitments made it impossible for me to participate in person in your hearing on National Security Letters, but I wish to thank you and your colleagues for holding this hearing and for your foresight in introducing H.R. 3189 (the "National Security Letters Reform Act"). I would also like to offer for the record this brief written statement highlighting the urgent need for the type of discipline and oversight that the National Security Letters Reform Act would impose. This statement reflects my views as a scholar and teacher of information privacy and security law, and should not be attributed to Indiana University nor to any other organization with which I may be affiliated.

National Security Letters

As you well know, four federal statutes authorize the Federal Bureau of Investigation and other agencies to issue "NSLs" to telephone companies, financial institutions, internet service providers, and consumer credit agencies, which require the recipients to produce the records that the government seeks.[1] Following changes made in the USA PATRIOT Act, the government need only state that the records sought are relevant to an authorized international terrorism or counterintelligence investigation and that the investigation is not being conducted "solely on the basis of activities protected by the first amendment" (e.g., not based solely on speech, protect, association, or religious practice). No court is involved, and recipients are prohibited from disclosing the contents or even the existence of an NSL.

While the FBI is required to inform Congress twice a year about its use of NSLs, a report from the Department of Justice Inspector General in 2007 found that the FBI had substantially under-reported to Congress the number of NSL it issued between 2003 and 2005. Instead of the

[1] Right to Financial Privacy Act (1978) (codified as amended at 12 U.S.C. § 3401(a)(5)); the Electronic Communications Privacy Act (1986) (codified as amended at 18 U.S.C. § 2709(b)(2)); the Fair Credit Reporting Act (1970) (codified as amended at 15 U.S.C. § 1681u(a)); the 1994 amendments to the National Security Act (1947) (codified as amended at 50 U.S.C. § 436(A)(1)).

52,199 NSLs reported by the FBI, the actual figure is 143,074.[2] For 2006, the FBI did not even attempt to report to Congress on its use of NSLs, but instead left that task to the Inspector General, who found that the FBI issued 49,425 NSLs.[3]

The two Inspector General reports highlight four important features about the FBI's use of NSLs. First, they demonstrate the dramatic growth in the use of NSLs. Not only are many more NSLs issued each year, but each request may seek records concerning many people. In fact, nine NSLs in one investigation sought data on 11,100 separate telephone numbers. The *New York Times* reported in September 2007 that the FBI had issued NSLs seeking data not only about the communications of identified individuals (or telephone numbers), but also of their "community of interest"—the "network of people that the target was in contact with."[4]

Second, the two reports demonstrate the shift in the use of NSLs post-USA PATRIOT Act to increasingly target U.S. persons—from 6,519 in 2003 to 11,517 in 2007.[5]

Third, the Inspector General reports show a pattern of inadequate documentation, inaccurate reporting, poor recordkeeping, inconsistent or erroneous application of internal guidelines, inadequate oversight, incomplete implementation of prior Inspector General requirements, and even inappropriate use of NSLs, resulting in the FBI obtaining information to which it was not legally entitled.[6]

Finally, the Inspector General reports demonstrate plainly the essential need for *external* oversight of the NSL process. It was only because Congress required the Inspector General to report to it on the FBI's use of NSLs—oversight that Justice argued against—that officials within the FBI and Justice, Congress, and the public learned of the FBI's many errors in both its use and reporting of NSLs.[7] Self-reporting did not work; only investigation by a body external to the FBI disclosed the serious defects in the FBI's use of NSLs and corrected the erroneous information supplied by the FBI to Congress.

The National Security Letters Reform Act

The National Security Letters Reform Act responds to the important lessons of the Inspector General's reports and provides seriously needed tools for ensuring that the NSL power is used appropriately and lawfully. The Act would enhance the oversight provided by courts by giving the recipient of an NSL the right to challenge it and its nondisclosure requirement. It would also give notice to the target of an NSL if the government seeks to use the records

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[2] U.S. Department of Justice, Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* 37-38 (2007), available at http://www.usdoj.gov/oig/special/s0703b/final.pdf.

[3] U.S. Department of Justice, Office of the Inspector General, *A Review of the FBI's Use of National Security Letters* 9 (2008), available at http://www.usdoj.gov/oig/special/s0803b/final.pdf.

[4] Eric Lichtblau, "F.B.I. Data Mining Reached Beyond Initial Targets," *New York Times*, Sept. 9, 2007, at A1.

[5] 2007 Report, supra at 10.

[6] Id. at 10-11.

[7] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, 120 Stat. 192 (2006).

obtained from the NSL in a subsequent proceeding, and ensure that the target has an opportunity to receive legal counsel and challenge the use of those records.

The proposed law would also strengthen the power of courts to review NSLs by restoring reasonable limits to the purposes for which an NSL may be used. Instead of the vague and expansive "relevant to an authorized investigation" standard, the Act would return to the pre-USA PATRIOT Act requirement that NSLs be based on "specific and articulable facts giving reason to believe that the information or records sought by that letter pertain to a foreign power or agent of a foreign power." This has the additional benefits of deterring the use of NSLs to target U.S. persons, and building much-needed discipline into the NSL issuing process.

The Act also would give a cause of action to any person aggrieved by the provision of records pertaining to that person as a result of an NSL issued contrary to law or an NSL issued based on a certification made without factual foundation, thus deterring the conduct that the Inspector General found so prevalent at the FBI, and providing an incentive for aggrieved individuals to seek legal protection.

The Act would provide for minimization procedures to ensure that information obtained pursuant to a NSL regarding persons who are no longer of interest in an authorized investigation is destroyed, rather than warehoused in the FBI's growing Investigative Data Warehouse and other federal databases.

The National Security Letters Reform Act also limits one of the most odious provisions of NSLs—the gag order that the administration in the past has argued could restrict the right of a recipient even to seek legal counsel, much less facilitate accurate recordkeeping and effective political protest. Consistent with other U.S. laws and the First Amendment to the U.S. Constitution, the Act would shift the burden to the government to demonstrate that there is specific cause to justify a prior restraint, shorten the duration of such restraints, and empower courts to review their constitutionality.

Finally, the Act would include a five-year sunset provision, after which the laws governing NSLs would revert to their pre-USA PATRIOT Act form. If the administration believes the broader powers granted by the USA PATRIOT Act in the immediate aftermath of the 9/11 terrorist attacks remain necessary, it would have to make that case to Congress and to the public.

The Broader Context

Before concluding, I would like to briefly address the broader context in which NSLs are used. NSLs are only one example of a wide panoply of tools that the government uses to obtain personal, often sensitive, information about U.S. persons. For example:

- Requests for Wiretap Orders, which allow the government to tap phone lines and do require the authorization of a court, have increased from 1,186 in 1997, to 1,491 in 2001, to 1,839 in 2006. In 2006, on average, each order resulted in 2,685 communications being captured, involving 122 people.

- Requirements for financial institutions and a wide range of other entities to file Currency Transaction Reports and Suspicious Activity Reports have resulted in the government collecting and storing more than 75 million reports over the past decade.[8]

- As of December 2006, the Department of the Treasury had issued 65 administrative subpoenas to the Society for Worldwide International Financial Telecommunication, requiring it to produce as many as all of the 2-3 billion messages about international financial transactions it carries each year.[9]

These are only three examples of the hundreds of ways in which the government collects information about individuals: search warrants, surveillance orders, administrative and law enforcement subpoenas, routine regulatory reporting, new identification requirements, access to other governmental databases (e.g., tax records, vehicle registration, etc.), purchase from a third-party supplier, and the use of fabricated tools such as "exigent letters." And these don't include the Terrorist Surveillance Program, Domestic Surveillance Program, the successors to Total Information Awareness, and other classified initiatives through which the government is accessing potentially billions of records about the daily activities and communications of the public. Many of these are not subject to judicial or legislative oversight. And all of the available evidence suggests that government surveillance is growing, and that the data are being retained longer and shared more widely within the government.

In short, NSLs are only one indicator of a sweeping trend in which the government is collecting more and more personal data about its own citizens and mining it for a wide variety of purposes, of which protecting national security is only one. This ubiquitous data collection and use reflects a profound shift in the relationship between the government and the people. The Fourth Amendment to the Constitution reflects the Framers' hostility to "general searches"—searches not based on specific suspicion. Today, these searches appear increasingly to be the norm, as the government devotes more of its resources to ubiquitous data collection about U.S. persons who have done nothing to warrant suspicion. NSLs are an important place to start, but Congress should be concerned with this broader shift as well.

The National Security Letters Reform Act takes an important step in this direction by limiting the disclosure of information obtained by the government through "exigent letters." But there is much more to be done to ensure that the government is investing its resources—especially those related to protecting our nation's security—widely and effectively, and respecting the privacy and constitutionally protected rights of the citizenry.

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[8] Department of the Treasury, *A Report to Congress in Accordance with § 357 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* 4 (2002).

[9] Belgian Data Protection Commission, Opinion No. 37/2006 of 27 Sept. 2006 on the Transfer of Personal Data by the CSLR SWIFT by Virtue of UST (OFAC) Subpoenas, 6. Office of the Privacy Commissioner of Canada, *Commissioner's Findings* ¶ 30 (Apr. 2, 2007), available at http://www.privcom.gc.ca/cf-dc/2007/swift_rep_070402_e.asp.

What is at Stake

There are compelling reasons for Congress to Act. Protecting privacy is one. As Senator Sam Ervin (D-N.C.) wrote in 1974: "Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom. For the more the Government or any institution knows about us, the more power it has over us. When the Government knows all of our secrets we stand naked before official power."[10]

But in addition to protect privacy, appropriate limits on the indiscriminate storage, eollection, and use of personal data by the government are also necessary to enhance our nation's security. As many people have noted, pursuing data just for the sake of amassing more data, or relying on outdated or unreliable data, is as dangerous to security as to privacy. The intelligence failures that led up to the terrorist attacks have frequently been described as a failure to "connect the dots," but rarely as a need for more dots. It is hard to believe that the job of "connecting the dots" is made easier by the billions of additional records added to government databases since 2001, and there is growing suspicion that the government's focus on acquiring more data may be distracting it from the more urgent task of figuring how to make sense of the massive array of data it already has. Moreover, many data-based security tools are of questionable value, since terrorists may be expected to go to great lengths to mask their identities and information, while the government increasingly invests in programs to examine the data of law-abiding citizens.

Effective limits on government access to individual data help to build the discipline into counter-terrorism efforts. By making the government stop and justify its effort to a judge or other senior official, warrant requirements and other privacy protections often help bring focus and precision to law enforcement and national security efforts. In point of fact, courts rarely refuse requests for judicial authorization to conduct surveillance. For example, between 1968 and 2005, courts approved a total of 34,175 wiretap orders (11,861 federal and 22,314 state)—all but 31 sought by the government.[11] Between 1979 and 2006, Foreign Intelligence Surveillance Court judges approved 22,984 FISA warrants (40 percent since the September 11, 2001 terrorist attacks)—all but five that the Attorney General had sought.[12] As government officials often note, one reason for these high success rates is the quality of internal decision-making that the requirement to obtain judicial authorization requires. The Inspector General's reports suggest that in the absence of such a requirement, the FBI's NSL procedures were sloppy, inconsistent, and failed to ensure compliance with the law.

Appropriate limits on government surveillance also help build public confidence in the government's national security efforts. Without that confidence, public and political support for promising national security initiatives wanes, and those government employees tasked with the protecting our nation's security lack the certainty and clear direction necessary to carry out their vital duties. As the Technology and Privacy Advisory Committee appointed to investigate the

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[10] Introductory Remarks of Senate Sam J. Ervin on S. 3418, Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579), Senate Committee on Government Operations and House Committee on Government Operations Subcom. on Government Information and Individual Rights, May 1, 1974.

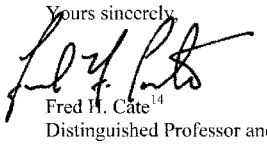
[11] Electronic Privacy Information Center, Title III Electronic Surveillance 1968-2005, available at http://www.epic.org/privacy/wiretap/stats/wiretap_stats.html.

[12] Electronic Privacy Information Center, Foreign Intelligence Surveillance Act Orders 1979-2002, available at http://www.epic.org/privacy/wiretap/stats/fisa_stats.html.

Department of Defense's data mining activities noted in the introduction to its recommendations for new privacy protections: "Our conclusion, therefore, that data mining concerning U.S. persons inevitably raises privacy issues, does not in any way suggest that the government should not have the power to engage in data mining, subject to appropriate legal and technological protections. Quite the contrary, we believe that those protections are essential *so that* the government can engage in appropriate data mining when necessary to fight terrorism and defend our nation."[13]

Adopting those appropriate protections is Congress' job. The National Security Letters Reform Act is an important first step. I applaud you for introducing it and for taking it up at tomorrow's hearing. Our nation will be well served if it is adopted into law, and if it is only the first of a series of measures to protect our privacy and enhance our security. Thank you for this opportunity to comment.

Yours sincerely,



Fred H. Cate[14]
Distinguished Professor and Director
Center for Applied Cybersecurity Research

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[13] U.S. Department of Defense, Technology and Privacy Advisory Committee, *Safeguarding Privacy in the Fight Against Terrorism* 48 (2004),

[14] Fred H. Cate is a Distinguished Professor of Law, Adjunct Professor of Informatics, and director of the Center for Applied Cybersecurity Research at Indiana University, and a senior policy advisor to the Center for Information Policy Leadership at Hunton & Williams. He is a member of the National Academy of Sciences Committee on Technical and Privacy Dimensions of Information for Terrorism Prevention and Other National Goals; a member of Microsoft's Trustworthy Computing Academic Advisory Board; and reporter for the American Law Institute's project on Principles of the Law on Government Access to and Use of Personal Digital Information. Professor Cate served as counsel to the Department of Defense Technology and Privacy Advisory Committee, reporter for the third report of the Markle Task Force on National Security in the Information Age, and a member of the Federal Trade Commission's Advisory Committee on Online Access and Security. He is the author of many articles and books, including *Privacy in the Information Age* and *The Internet and the First Amendment*, and *Privacy in Perspective*. He attended Oxford University and received his J.D. and his A.B. with Honors and Distinction from Stanford University. In 2007 *Computerworld* listed him as the only academic on its list of "Best Privacy Advisers" in the United States and Europe.

World Trade Center Health Registry

Enrollment By State

HOUSE OF REPRESENTATIVES
WASHINGTON, D. C. 20515

JERROLD L. NADLER
8TH DISTRICT, NEW YORK

April 10, 2008

Blake:

Attached is a packet of press clips regarding the April 1, 2008 hearing co-chaired by Congressman Nadler and Congresswoman Lofgren on compensation for 9/11-related health effects. Please feel free to give me a call at ext. 5-5635 if you have any questions. Thanks again for all your help on this.

Best,

Jillian Youngblood
Office of Congressman Jerrold Nadler

Press Clips from

Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law

and

Judiciary Subcommittee on Constitution, Civil Rights and Civil Liberties
Joint Oversight Hearing on

"Paying With Their Lives: The Status of Compensation for 9/11 Health Effects"

Tuesday, April 1, 2008

DAILY NEWS

Editorial
Monday, April 7, 2008

Call in Ken

No one would be better qualified than Kenneth Feinberg to devise a plan for compensating rescue and recovery workers who were sickened by work at Ground Zero. Last week, he offered his services free of charge.

Let's take him up on it.

More than 11,000 responders have sued the city, Port Authority and contractors that dismantled the World Trade Center ruins. Unless the cases are guided to resolution, the injured will wait years for payments. Worse, they'll get creamed by legal fees. Lawyers want up to 40% of recoveries.

There are faster ways to get more money into the pockets of people who need and deserve it. Best would be to reopen the September 11th Victim Compensation Fund, which Feinberg headed. He paid out more than $7 billion to the survivors of people killed in the attack and to people who were injured.

The fund expired in 2003, before many responders knew they were sick. Two House subcommittees, one led by Rep. Jerry Nadler, last week took testimony on the possibility of reopening it. But, unfortunately and unfairly, the prospects appear dim.

Next best would be to settle the suits out of court, as urged by Federal Judge Alvin Hellerstein. Here, Feinberg's expertise could be invaluable.

More than $1 billion in post-9/11 aid was set aside to pay claims. It is waiting to be distributed under terms that are fair to claimants and that protect taxpayers from undue burdens.

At the congressional hearing, Feinberg proposed a settlement effort that would seek to tally legitimate claims while supplementing the available $1 billion with insurance proceeds and other contributions by defendants.

He also floated creative ideas for compensating responders whose conditions worsen or who become sick in the future. Possibilities included insurance for such eventualities.

"What is important is that the litigation be brought to an end and that eligible claimants receive the compensation necessary to move on with their lives as best they can," Feinberg said.

Exactly. Put him to work.

NEW YORK POST
24 HOURS A DAY

OUR SHARED PAIN

April 6, 2008 – I agree wholeheartedly with New York City Corporation Counsel Michael Cardozo that the 9/11 attacks were an attack on America, not just New York City ("'Zero' For Heroes, Says NY-Bash Pol," April 2).

As Rep. Jerrold Nadler said, the people who responded to Ground Zero put New York City back on its feet at the expense of their health. They deserve our help.

I hope that Nadler and Rep. Anthony Weiner remember this the next time California has its annual earthquake, mudslide or forest fire and that they then remind Rep. Darrell Issa that those disasters are state and local problems, not federal issues.

If Issa wants to be myopic and play the game like this, I hope California doesn't get a penny the next time it is in need.

This is not New York . . . or California. This is America. Are we all in it together, or not?

Carl M. Ostergaard, Jr.
Bayside

Newsday

Editorial

Reopen the victims' fund Compensate those made ill by 9/11 work

4 April 2008

Washington should step up and fairly compensate the people who braved toxic fumes to help with the recovery effort at Ground Zero in the harrowing months after 9/11.

About 40,000 of those first responders have since developed chronic health problems. When the nation needed them, they answered, rushing to Manhattan from every state in the union, including thousands from Long Island. Now that they're paying an unforeseen price, they need a hand.

Washington hasn't been miserly. It pumped $20 billion into New York to help the city and state clean up and recover from the devastating World Trade Center attack. And through the Victims' Compensation Fund, it has paid $7.1 billion to 5,560 victims of the attack and their families. But the fund expired in 2003, and that's the rub.

Many of the first responders' health problems were slow to develop. Now they're sick - with respiratory problems, sarcoidosis, lymphoma and rare blood cancers. Some are unable to work and are saddled with medical bills insurance won't cover. Rep. **Jerrold Nadler** (D-Manhattan) has sponsored legislation to reopen the Victims' Compensation Fund to remunerate the newly needy for their financial losses.

Reopening the federal fund to include delayed illnesses will, no doubt, attract some false claims. But that's not an insurmountable problem, nor is it a good reason to leave deserving sick people out in the cold. And in the absence of a federal response, New York City could find itself on the hook. More than 10,000 first responders have already sued the city, and more are likely to follow.

The attack on the World Trade Center was an attack on the United States. First responders answered the nation's call. The nation should return the favor.

Associated Press

Calif. congressman criticized for comments about terrorist attack
By ERICA WERNER Associated Press Writer
Article Launched: 04/03/2008 05:34:39 PM PDT

WASHINGTON—California Congressman Darrell Issa is facing heated criticism from New York lawmakers of both parties after he made comments that seemed to downplay the Sept. 11 terrorist attacks and question federal compensation for New York City firefighters and others.

During a hearing this week about legislation to extend victims' benefits, Issa, a Republican, described the attacks on the World Trade Center as "a fire that had no dirty bomb in it, it had no chemical munitions in it. It simply was an aircraft, residue of two aircraft and residue of the material used to build this building."

He questioned "why the firefighters who went there and everyone in the city of New York needs to come to the federal government for the dollars versus, quite frankly, this being primarily a state consideration."

Issa went on to say that he could not vote for additional compensation money for New York "if I can't see why it would be appropriate to do this every single time a similar situation happens which, quite frankly, includes any urban terrorist. It doesn't have to be somebody from al-Qaida. It can be somebody who decides they don't like animal testing at one of our pharmaceutical facilities."

The comments came during a joint hearing of two House Judiciary subcommittees on Tuesday. They immediately drew indignant responses from New York lawmakers present as well as from the witness Issa was questioning, Michael Cardozo, the top lawyer for New York City.

"Congressman, this was I believe an attack on the United States of America. It was located at Ground Zero, but it was an attack on America," Cardozo said.

Issa, who represents a district in northern San Diego County, was still taking heat on Thursday. An editorial in the New York Daily News called his comments "callous in the extreme."

Rep. Jerrold Nadler, D-N.Y., who chaired Tuesday's hearing, said in an interview Thursday that Issa's statements were "extremely rude, extremely stupid, extremely insensitive, extremely unpatriotic—to put it mildly."

Rep. Pete King, R-N.Y., said in a statement: "New York was attacked by al-Qaida. It doesn't have to be attacked by Congress. I'm really surprised by Darrell Issa. It showed such a cavalier dismissal of what happened to New York. It's wrong and inexcusable."

Issa didn't apologize, but on Wednesday issued a statement insisting that "I continue to support federal assistance for the victims of the 9/11 terrorist attacks," although he did not specify how that should be done.

Issa's spokesman, Frederick Hill, said Thursday that "the congressman recognizes he could have chosen his words better at the hearing."

The controversy did not change Issa's opposition to the legislation being considered by the subcommittees. Among other provisions, it would reopen the Sept. 11 victims compensation fund, which expired at the end of 2003 after distributing about $7 billion, mostly to relatives of those killed and survivors of the attacks.

Roughly $1 billion went to those who were injured, including firefighters, police officers and others who breathed in toxic dust and debris.

The city is facing lawsuits by more than 10,000 others who say they were exposed to toxic trade center dust that made them sick.

The bill would allow people who lived, worked or volunteered in the area to be compensated for psychological as well as physical problems.

Issa cited concerns about extending compensation to people who were not physically injured and did not work at Ground Zero.

On the Net:

Watch video of the hearing with Issa's comments at:
http://judiciary.house.gov/oversight.aspx?ID428

Issa's comments come around 1:42:00.

DAILY NEWS

GOP Rep. Darrell Issa under fire from everywhere after 9/11 comments

BY RICHARD SISK AND MICHAEL MCCAULIFF
DAILY NEWS STAFF WRITERS

Thursday, April 3rd 2008, 4:00 AM

WASHINGTON - The California congressman who called the Sept. 11 attacks "simply" a plane crash ran for cover Wednesday under a barrage of ridicule from fellow Republicans, first responders and victims' families.

San Diego GOP Rep. Darrell Issa was under siege for suggesting the federal government had already done enough to help New York cope with "a fire" that "simply was an aircraft" hitting the World Trade Center.

"That is a pretty distorted view of things," said Frank Fraone, a Menlo Park, Calif., fire chief who led a 67-man crew at Ground Zero. "Whether they're a couple of planes or a couple of missiles, they still did the same damage."

"New York was attacked by Al Qaeda. It doesn't have to be attacked by Congress," added Long Island Rep. Pete King, a Republican.

"I'm really surprised by Darrell Issa," King added. "It showed such a cavalier dismissal of what happened to New York. It's wrong and inexcusable."

Lorie Van Aucken, who lost her husband, Kenneth, in the attacks, slammed Issa's "cruel and heartless" comments.

"It's really discouraging. People stepped up and did the right thing. They sacrificed themselves and now a lot of people are getting really horrible illnesses," she added.

Under pressure from all sides, the Golden State pol - who got rich selling car alarms after getting busted for car theft as a teen - pulled a partial U-turn. He issued a statement but cowered from the press.

"I continue to support federal assistance for the victims of the 9/11 terrorist attacks," he said.

But he didn't retract his wacked-out rhetoric claiming the feds "just threw" buckets of cash at New York for an attack "that had no dirty bomb in it, it had no chemical munitions in it."

He went on: "I have to ask ... why the firefighters who went there and everybody in the city of New York needs to come to the federal government for the dollars versus this being primarily a state consideration."
In his statement yesterday, Issa insisted he only "asked tough questions about the expenditures" during a hearing Tuesday on an aid bill for sick New Yorkers.

"He realized he stepped in it," said Rep. Jerry Nadler (D-Manhattan), who was leading the hearing when Issa popped off.

"The sound I'm hearing is him slamming the brakes and going in reverse," crowed Rep. Anthony Weiner (D-Brooklyn-Queens). Issa also belatedly admitted 9/11 was "an attack on America" in his statement.

It shouldn't have been that hard.

He took to the floor of Congress on Sept. 11, 2001, to argue passionately that America - not just New York - had been attacked, but conveniently forgot that during his Tuesday diatribe.

"It seems that with the passage of time, something happened along the way where the scope of the problem and the real extent of the problem has not drifted out to California," fumed Staten Island GOP Rep. Vito Fossella.

Health officials estimate it could cost $1 billion to care properly for the ailments that may emerge in the people who lived through the horror of Sept. 11 or breathed that toxic dust.

New York lawmakers now want Democratic leaders to bring the 9/11 care bill to the floor soon - before more members of Congress start spouting off like Issa.

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DAILY NEWS

Demeaning 9/11

Thursday, April 3rd 2008, 4:00 AM
Editorial

Well, yes, Rep. Darrell Issa acknowledged Wednesday, America was attacked on 9/11 after all.

Well, yes, the California congressman conceded, the death and destruction that morning were not products of a natural disaster.

And, yes, Issa offered, the federal government does have a responsibility of some kind to help the victims of the worst assault ever perpetrated on U.S. soil.

But Darrell Issa failed to apologize for expressing in the House of Representatives sentiments that nearly fit the yahoo brigade of 9/11 revisionists, minimizers and deniers.

What Issa said Tuesday was callous in the extreme:

"I have to ask, why damages from a fire that had no dirty bomb in it, it had no chemical munitions in it, it simply was an aircraft, residue of two aircraft, and residue from the materials used to build this building, why the firefighters who went there and everybody in the City of New York needs to come to the federal government for the dollars versus this being primarily a state consideration."

Simply an aircraft? Simply the residue of two aircraft? Simply the residue of a building?

Sir, you had forgotten.

Sworn fanatic enemies of America converted those airliners, and two more, into missiles.

They killed 3,000 people, many of whom were rescue workers who rushed in without thought to their own safety.

And particles thrown into the air by the World Trade Center's collapse sickened thousands of responders.

Among them were people from Issa's San Diego district. Forty-four of his constituents signed up with the World Trade Center Health Registry.

None of which seemed of concern when he spoke at a hearing held by Rep. Jerry Nadler to explore U.S. obligations to responders. Should Congress reopen the 9/11 victims' compensation fund? Could Congress help resolve the thousands of suits that have been filed seeking recompense?

Said Issa: "I can't vote for additional money for New York if I can't see why it would be appropriate to do this every single time a similar situation happens, which quite frankly includes any urban terrorist.

"It doesn't have to be somebody from Al Qaeda; it could be somebody who decides they don't like animal testing at one of our pharmaceutical facilities."

Issa also complained about "buckets of ten or twenty billion that we just threw at" New York after 9/11. But yesterday, without a word of regret, he issued a clarification:

"I want to make clear that I strongly support help for victims who suffered physical injury as a result of an attack on America get the help they need, including support from Congress and the federal government."

Sure.

NEW YORK POST
24 HOURS A DAY

9/11 $CROOGE FLIPS ON NY AID

By DAVID SEIFMAN

April 3, 2008 -- The California congressman who infuriated New York lawmakers Tuesday when he said that 9/11 emergency responders shouldn't get any help from the federal government yesterday had a change of heart.

"I want to make clear that I strongly support help for victims who suffered physical injury as a result of an attack on America, including support from Congress and the federal government," said Rep. Darrell Issa yesterday after he said he talked to victims of the 9/11 attacks.

Issa's change of heart also came after a conversation with Rep. Vito Fossella (R-SI) on the House floor, in which, Fosselia spokesman Craig Donner said, the two discussed the difficulties 9/11 workers have in getting health care.

Opinion
How To Encourage Heroism
BABETTE KROLIK
3 April 2008

Last week, the United States Second Circuit Appeals Court rejected New York City's claim of immunity for health injuries caused by the World Trade Center clean up, thereby allowing the 8,000 or more individual cases brought by police, firemen, and other recovery workers to proceed.

The city's finest moments were the months following September 11, 2001, when tens of thousands of individuals, companies, and governmental employees responded heroically and selflessly, working around the clock, to restore the city. The tortuous and expensive course of this litigation ensures that such an outpouring of civic bravery, speed, and dedication will never happen again.

The tort system is helping no one here. Four years after filing, these worker injury cases, although consolidated under Judge Alvin Hellerstein of the federal Southern District Court for New York, are benefiting only the lawyers. Judge Hellerstein recently found Lloyds of London and other insurers liable for defense costs, which already are estimated to have run $100 million. As of March 2007, the city alone had spent an estimated $56 million for defense costs and overhead from its $1 billion dollar captive insurance company, which was created from the $20 billion Congress promised the city following September 11, and whose purpose is to cover the city for additional claims.

In each of the 8,000 or so cases, the claimants have named the same set of hundreds of defendants, a laundry list of downtown property owners, large and small construction-related companies, as well as the City of New York and the Port Authority. So on top of the city's defense costs, these hundreds of private companies, and their insurance carriers, have already spent tens of millions of dollars in legal fees - although discovery in the cases has barely begun, trial is years away, and the workers have received nothing.

The New York Times recently ran a story on a small engineering firm that found itself caught up in the fray and the bewilderment of the owner of the company, to find himself a defendant in 8,000 injury cases because of his involvement in restoring the city. This current litigation will certainly affect the response the next time there is an attack in America. Will the small engineering company, not to mention hundreds of other companies, often working without contracts, rush to help the city next time? This litigation questions the right of even governments to respond speedily to disaster. Both state and federal statutes recognize the need to protect governments and grant immunity for disaster activities. However, the New York State Emergency Defense Act requires the actions to be taken in good faith. Judge Hellerstein, upheld by the Second Circuit's recent decision, has ruled that the law does not grant automatic immunity for facts must be developed at trial to determine if the city acted in good faith.

The city also argued that the federal Stafford Act, which grants complete immunity from suit for federal disaster activities, applies to the city because federal agencies were actively involved in the clean up. But again, the Second Circuit ruled last week that facts must be developed at trial on the extent to which the federal agencies controlled the clean up, in order to convey derivative immunity to the city.

The lesson of these recent rulings is that no municipality can allow its employees and private contractors to rush to help victims and rebuild infrastructure and facilities. Rather, nothing can be done until tests declare the environment safe and measures can be agreed upon to protect workers. Look at the seven years it has taken to remove the Deutsche Bank building. Imagine if it had taken six months of testing before New York could begin to clean up and then had to engage in slow, painstaking remediation action. Lower Manhattan would have been frozen for years in debris, helplessness, and inaction.

There are alternatives to the tort system. While some workers and others exposed to the post September 11th conditions exhibit respiratory symptoms and increased levels of particulates, the long term effects are not known and health care monitoring is recommended, according to a 2007 New England Journal of Medicine article. Thus Reps. Carolyn Maloney and Vito Fossella have proposed Congressional legislation for additional money for monitoring. Others, such as the Partnership for New York City and Senator Clinton, have asked Congress for money for treatment. The New York State Workers Compensation Fund expanded the time period for filing compensation claims for WTC injuries. Workers could be guaranteed health care coverage for life.

Finally, and probably most effectively, the September 11th Victim Compensation Fund, which currently limits benefits to those injured within 72 hours of the disaster, could be reopened. New York Corporation Counsel Michael Cardozo has just testified before Congress in support of Rep. **Jerrold Nadler**'s proposal to do so. The special master of the original Fund, Kenneth Feinberg, is also in favor of this action.

The principles motivating the initial Victim Compensation Fund argue for this approach: a desire to quickly compensate the victims in a simplified, sympathetic forum, to shield the participants from expensive litigation from an event they did not create, and most importantly to express a sense of national support and unity for the actions of those affected, both the responders as well as the victims.

The September 11th Victims Fund and special master dealt efficiently and equitably with the immediate consequences of the attack and avoided years of delay and hundreds of millions of dollars in litigation costs. If anything, the argument for a fund is even more pressing for the recovery workers.

Without the fund and a waiver of litigation, the country has wasted four years and $100 million without helping any of the injured. Not only do we want to fairly treat those who selflessly rush to the City's rescue, but it is important social policy to encourage, not discourage, this type of response in the future. If ever there were a Homeland Security issue, this is it.

Ms. Krolik is general counsel to Terra Holdings, a group of New York City real estate companies, two of whose affiliates were named as defendants in the World Trade Center clean-up cases.

DAILY NEWS

Efforts to take care of sick Ground Zero workers hits a snag in Congress

BY JAMES GORDON MEEK
DAILY NEWS WASHINGTON BUREAU

Wednesday, April 2nd 2008, 4:00 AM

Congressional efforts to take care of sick Ground Zero workers hit a snag Tuesday when a powerful Republican insisted it's New York's problem alone.

California Rep. Darrell Issa, in refusing to send more money New York's way, insisted the planes that struck the twin towers weren't weapons.

"It simply was an aircraft, residue of two aircraft, and residue from the materials used to build this building," Issa said during a hearing into whether a new 9/11 victims' compensation fund should be launched.

An astounded Michael Cardozo, Mayor Bloomberg's corporation counsel, who was testifying before the panel said: "This was an attack, I believe, on the United States of America."

"It was located at Ground Zero, but it was an attack on America," Cardozo repeated.
Rep. Anthony Weiner (D-Brooklyn/Queens) rushed to note that Issa backed original 9/11 funding.

"The gentleman voted for it because we had the national sense that this was not an attack on New York City, this was an attack on our country," Weiner barked.

City Fights for 9/11 Compensation

by Fred Mogul

NEW YORK, NY April 02, 2008 —The city's top attorney told a Congressional panel that the federal government should re-open the September 11th Victims Compensation Fund to pay for the healthcare needs of rescue and recovery workers from the World Trade Center site.

WNYC's Fred Mogul reports.

The city has long maintained that a federal grant of $1 billion made after 9/11 is basically a liability insurance policy against lawsuits that can not be awarded for claims.

Yesterday, before a sub-committee chaired by local Congressman Jerrold Nadler, City Attorney Michael Cardozo said that even if that money were turned over to victims, it wouldn't get very far in compensating the more than 10,000 people who are suing the city.

Instead, the city supports a bill submitted by several members of the New York congressional delegation, calling for more generous and open-ended federal relief.

Also testifying was a researcher from the U.S. General Accountability Office, who reported on prior compensation funds, including one set up for miners and another for people exposed to radiation. She said the common denominator is that these funding programs typically last longer and cost much more than expected.

For WNYC, I'm Fred Mogul.

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Some 9/11 victims weren't compensated
Wednesday, April 2, 2008
BY HERB JACKSON
WASHINGTON CORRESPONDENT

More than 100 people who developed serious illnesses from exposure to Ground Zero overflowed a Capitol Hill hearing room Tuesday and two House subcommittees debated whether the government should compensate them.

The victims, including police, firefighters, construction workers and even former bus driver Gil Gonzalez of Jersey City, likely would have qualified for federal payments from a fund created in 2001, only their symptoms showed up too late.

The 9/11 Victim Compensation Fund paid out more than $7 billion in taxpayer funds to nearly 5,600 survivors and victims, but was required by law to stop accepting claims in December 2003.

Gonzalez used to drive NJ Transit's No. 80 bus route in Jersey City, but after 9/11 spent a couple weeks taking Port Authority police officers from Journal Square through the Holland Tunnel, which was closed to other traffic, to Ground Zero.

"I was approximately 50 to 75 feet away from the pile," Gonzalez said, referring to the burning rubble of the collapsed twin towers. "We would also provide transportation to firefighters already there from one part of Ground Zero to another part of Ground Zero. We weren't supposed to have done that, but we did anyway."

About three months later, he started having trouble breathing, but doctors X-rayed him and found no problems. It wasn't until later that he was diagnosed with asthma and after that, blood clots, an aneurysm and then a stroke forced him to retire on disability.

Gonzalez watched the hearing of two House Judiciary subcommittees from an overflow room, as did Antonio Hernandez of Succasunna. Hernandez developed lymphoma after going to work in lower Manhattan 17 days after 9/11 to lay fiber-optic cables that helped rebuild the communications network the stock markets needed to reopen.

"I was supposed to have a radiation treatment today, but I postponed it to be here," Hernandez said.

Congress members on both sides of the political aisle praised the victims, but there was a split when it came to what should be done for them.

"They need our help, not more salutes," said Rep. Jerrold Nadler, D-N.Y., head of one of two subcommittees. "The pain and suffering of the living victims of 9/11 is real and cannot be ignored. I think it's clear that we, as a nation, must do more."

Nadler said that while terrorists were responsible for the attack, many of the subsequent injuries would have been avoided if the federal government did a better job warning about dangerous air quality and requiring protective equipment at the collapsed twin towers.

The administrator of the 9/11 compensation fund, Kenneth R. Feinberg, said there are about 11,000 people who have filed lawsuits seeking compensation for injuries that would have been covered if the symptoms had shown up before December 2003. Many have lung ailments from breathing air that tests have shown contained asbestos, glass fibers and lead, among other things.

"The only reason they weren't paid is they didn't manifest any injury from their exposure at the World Trade Center site until after the fund was dissolved," Feinberg said. He said that over the next five to 10 years, there have been estimates that another 25,000 to 30,000 victims could come forward.

Republicans at the hearing said construction companies that responded to New York City's call for help also needed protection from the lawsuits they are facing today from former employees.

"They stepped up as corporate good Samaritans, without having to protect themselves with contracts and insurance," Rep. Steve King, R-Iowa, said of the construction companies. "They worked 24/7 and did so without a profit motive. These corporate heroes should not be forgotten by their government."

King also said that if Congress creates a new compensation fund, it needs to ensure that it does not "hand the keys of the Treasury to trial lawyers."

More than 100 people who developed serious illnesses from exposure to Ground Zero overflowed a Capitol Hill hearing room Tuesday and two House subcommittees debated whether the government should compensate them.

NEW YORK POST
24 HOURS A DAY

'ZERO' FOR HEROES, SAYS NY-BASH POL

By DAPHNE RETTER, Post Correspondent

April 2, 2008 – WASHINGTON - A California congressman drew the fury of New York lawmakers yesterday - after he said the feds shouldn't pay another dime to help the 9/11 emergency responders who became ill after working at Ground Zero.

"I have to ask why . . . the firefighters who went there and everyone in the City of New York needs to come to the federal government," Rep. Darrell Issa, a Republican, said during a House subcommittee hearing.

"How much money has the federal government put out post-9/11, including the buckets of $10 and $20 billion we just threw at the State and the City of New York versus how much has been paid out by the City and the State of New York?" Issa asked.

"It's very simple: I can't vote for additional money for New York if I can't see why it would be appropriate to do this every single time a similar situation happens, which quite frankly includes any urban terrorist. It doesn't have to be somebody from al Qaeda. It can be someone who decides that they don't like animal testing at one of our pharmaceutical facilities."

Just minutes after a retired New York City police officer, Michael Valentin, had labored through an emotional description of the serious health problems he has endured since rushing to Ground Zero, Issa downplayed the severity of the attack.

Issa said the destruction of the World Trade Center did not involve a dirty bomb or a chemical weapon designed to make people sick.

"It simply was an aircraft, residue of the aircraft and residue of the materials used to build this building," Issa said.

Sitting nearby, Rep. Anthony Weiner (D-Brooklyn/Queens) was visibly enraged at Issa's remarks.

"The notion that this is the City of New York asking for more money because we were the point of attack on this country is absurd and insulting," Weiner fumed.

Weiner said after the hearing that Issa's comments were some of the worst "New York-bashing" he has heard on the Hill.

"I've never heard anyone speak with such contempt about our heroes as Mr. Issa did today. There was a good reason that he made his remarks and then slithered out of the committee room," Weiner said.

Rep. Jerrold Nadler (D-Manhattan), who chaired the hearing, also defended the emergency responders.

"They gave up their health for the balance of their years because this country was attacked," Nadler said.

New York City Corporation Counsel Michael Cardozo, who testified at the hearing, blasted Issa's statement that New York was trying to get the federal government to pick up the tab for something that should be a state and city responsibility.

"Congressman, this was I believe an attack on the United States of America. It was located at Ground Zero, but it was an attack on America," Cardozo said.

Issa spokesman Frederick Hill said his boss opposes any federal effort to continue funding the now-expired victims' fund, because the case has not been made for "which unique factors make

this different" from wildfires in California or the Oklahoma City bombing in 1996, which killed 167 people.

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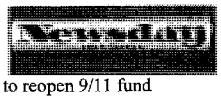

Sick responders ask Congress to reopen 9/11 fund
BY KRISTEN M. DAUM
kristen.daum@newsday.com

April 2, 2008

WASHINGTON -- After 9/11, Michael Valentin of Ronkonkoma spent months helping with recovery efforts among the pulverized concrete, asbestos and toxic fumes where the World Trade Center once stood.

Six and a half years, four surgeries and two tumors later, the now-retired New York City Police Department detective thinks it's time for the federal government to give him a hand.

Valentin, 43, is one of an estimated 40,000 first responders to develop chronic health problems after working at Ground Zero, and yesterday he asked Congress to reopen a key 9/11 fund to help people like him, who face thousands of dollars in medical bills.

"I don't have years to wait," Valentin said at a congressional hearing yesterday. "My colleagues ... who are sick and out of work because of their time at Ground Zero don't have years to wait."

House members expressed support for reopening the 9/11 Victim Compensation Fund to help first responders like Valentin who developed 9/11-related health problems after the fund expired in 2003.

Without a federal aid program in place, as many as 40,000 victims might sue New York City in the next several years because of severe illnesses the victims have suffered after exposure to toxic debris. Already, more than 10,000 claims are awaiting settlement.

"The suffering of the living victims of 9/11 is real and cannot be ignored," said Rep. Jerrold Nadler (D- Manhattan), who convened the hearing in hopes of moving ahead with legislation to reopen the fund.

The original fund paid $7.1 billion in aid to 5,560 victims of 9/11 and their families, but included tight restrictions on who qualified as a 9/11 victim, said the fund's director, Kenneth Feinberg.

Some experts at the hearing argued that revising the compensatory fund to include mental diseases and delayed illnesses would make the government vulnerable to false claims.

But New York City Corporation Counsel Michael Cardozo backed the idea of reinstating the Victim Compensation Fund as an alternative to paying claims through a separate $1

billion insurance fund controlled by the city. Some victims have criticized the city for failing to dip into its own insurance fund to help sick workers.

Such details and questions echo the controversy Congress faced six years ago in how it should help 9/11 victims and first responders who became ill after cleanup efforts.

California Republican Rep. Darrell Issa and New York Democrat Rep. Anthony Weiner of Brooklyn exchanged heated remarks during yesterday's hearing, when Issa asked why "New York City needs to come to the federal government for dollars when it's a state issue."

Weiner called Issa's comment "patently absurd and, frankly, insulting. ... There are people every single day, bit by bit by bit, who are dying from that attack."

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Posted: Tuesday, 01 April 2008 4:38PM
Former Head of 9/11 Fund Supports Reopening It

NEW YORK (AP) -- The former head of a $7 billion fund to compensate Sept. 11 victims said Tuesday reopening the fund to help thousands of people ailing from exposure to trade center dust would be a better alternative to costly litigation.

But Kenneth Feinberg also acknowledged the ``philosophical, political and practical" problems of Congress' reopening of the Sept. 11 Victim Compensation Fund, noting that no similar funds were set up for victims of the 1995 Oklahoma City bombing or Hurricane Katrina.

``It is a fundamental question posed to our elected officials in a free democratic society. Why some victims but not others?" Feinberg said in testimony at a congressional hearing on how to pay to treat ailing post-Sept. 11 workers.

Rep. Jerrold Nadler, D-N.Y., who co-chaired the hearing, and other New York lawmakers introduced a bill last year to reopen the defunct Sept. 11 victim fund, which has been considered problematic because any bill would attract a host of amendments for aid to victims of other disasters.

Feinberg and New York City corporation counsel Michael Cardozo both testified that reopening a fund would be a better alternative to years of litigation.

Cardozo, who is defending the city against lawsuits by more than 10,000 people who say they were exposed to toxic trade center dust that made them sick, said that if the fund were reopened, people who don't participate should not be allowed to sue.

A separate, $1 billion insurance fund has been set up to help the city and contractors defend claims. Lawmakers have said it should be made available immediately to people who are sick or dying of post-Sept. 11 illness, but Cardozo disagreed. ``It is not a victim compensation fund," he said.

The Sept. 11 victim compensation fund, created by Congress after the 2001 terror attacks, distributed about $7 billion, with roughly $1 billion to those who were injured. It expired at the end of 2003.

Others testifying Tuesday included Michael Valentin, a retired New York City police detective who said he is over $160,000 in debt and sold his home after paying to treat respiratory disease he developed after spending months in 2001 at the trade center site.

NBC News

Ground Zero workers fight for insurance funds
Posted on Tuesday, April 01, 2008 4:55 PM PT
By Lisa Myers, NBC News Senior Investigative Correspondent

After 9/11, the federal government set aside $1 billion in insurance funds to protect New York City, and to compensate workers who became ill or injured after working at Ground Zero. Today, thousands of workers say they are sick, and they can't understand why so few of them have gotten any payments.

Workers like Mike Valentin.

Before working for two months at Ground Zero, Valentin, a New York City Police Officer, says he was in perfect health. Today, he has lung disease and an inoperable tumor on his windpipe, conditions he blames on the toxic air at Ground Zero.

"My doctor says that this is something I'm going to live with for the rest of my life," Valentin said. There's no compensation fund for him, like there was for families after 9/11. But Valentin and 10,000 former workers want New York City to pay, claiming they weren't adequately protected on the smoky "pile."

"I wore an American bandana around my face for the first few weeks, then eventually we got a paper mask," said Valentin, who is now suing the city and who is represented by the Napoli Bern Ripka law firm.

The federal government created a $1 billion insurance company almost four years ago to pay legitimate claims, and to protect New York City. But Valentin's case, and thousands more, have not been heard.

"I just need my family taken care of, that's all I want. I'm not looking to drive a Mercedes Benz, you know? I just want my family taken care of," Valentin added.

So far, the World Trade Center insurance fund has paid out only $300,000 in benefits, to six workers with bone injuries. And yet it's spent $100 million on legal fees--mostly to challenge workers' claims in court.

New York City officials say they did adequately protect workers, with masks and other equipment.

And, they say, since Congress set up an insurance fund, the city must carefully weigh each claim, which takes time, lawyers and money.

Michael Cardozo is the New York City Corporation Counsel, the city's top legal officer. "This is ten thousand individual people with very different and complex facts that all have to be sorted out," Cardozo said. "I would certainly prefer to be able not to fight with the people who came out heroically to help clean up Ground Zero. I'm charged, of course, with a duty, and the city must defend itself," Cardozo said.

But lawmakers who set aside those billion dollars say the little guy has been neglected.

"The problem is this fund has erred far too much on the side of not helping the workers, and dispending money," said Sen. Charles Schumer, D-N.Y.

City officials are now lobbying to turn the insurance company into a compensation fund, to better serve the workers who endured the harsh conditions at Ground Zero. At a House hearing today,

Cardozo and other panelists urged Congress to create a true compensation fund to aid the Ground Zero workers.

Washington Times

Article published Apr 1, 2008

House pressed on aid to 9/11 claimants

By Audrey Hudson - Congress needs to regain control of an insurance board it created that is refusing to disburse nearly $1 billion to Sept. 11 recovery workers for medical conditions they incurred during the cleanup, key House members were told this morning.

"My colleagues and the other men and women who are sick and out of work because of their time at ground zero don't have years to wait," Michael Valentin, a former New York City police officer, told two House Judiciary subcommittees.

"What they do have is mounting frustration, worsening illness and disability, bills and mortgages they can't pay and medications they can't afford," said Mr. Valentin, a 43-year-old who was forced to retire because of medical ailments following his work at the cleanup site.

Congress created the World Trade Center Captive (WTCC) Insurance Fund in 2003 for claims from city workers and others who say they have developed respiratory and other illnesses working at ground zero.

However, the WTTC says it has a duty to challenge every claim in federal court and is spending millions of legal fees. Only a handful of nearly 9,000 claims have been paid out of the $1 billion fund.

"We don't have the luxury of time to wait. ... I can't believe that my Congress would have set aside a billion dollars to have that money go to pay insurance executives and law firms hundreds of millions of dollars to fight the very heroes that money should have been helping for these last five years," Mr. Valentin said.

"We need you to take control of that money and see that it reaches the people you intended to help back in 2003," Mr. Valentin said.

Rep. Jerrold Nadler, New York Democrat and chairman of the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, called it an "outrage" that "heroes of that day are still waiting for the help they deserve."

"The federal government has a moral and legal obligation to compensate the living victims of 9/11, to provide for their health and to attempt to make them whole for their subsequent financial losses," Mr. Nadler said.

Rep. Zoe Lofgren, California Democrat and chairwoman of the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, said the insurance program was created to compensate victims, "not to force them into torturous litigation" and that Congress is obligated to ensure it functions effectively.

"Since its creation, the captive insurance fund has managed to only pay five claims. At the same time the fund has spent millions in litigation expenses fighting countless other claims," Mrs. Lofgren said.

New York City, which operates the fund on behalf of the federal government, is challenging the claims for fear that it, too, could be held liable for injuries or medical conditions.

Congress could revisit their legislation and include immunity for the city, and Republicans on the panel said construction companies that immediately responded to the cleanup should also receive liability protections.

The construction companies "stepped up" without first obtaining insurance and worked for nine months until the site was cleared, said Rep. Steve King of Iowa, ranking member of the immigration subcommittee.

"If we in Congress do not address liability exposure, we cannot continue to rely on companies when future disasters strike," Mr. King said.

Rep. John Conyers Jr., Michigan Democrat and chairman of the Judiciary Committee, said construction workers were sent into the disaster without protection in a "do-it-yourself approach."

"Now cancer and lung disease is ravaging these survivors, and the city is in an adversarial stance against the victims of an environmental tragedy," Mr. Conyers said.

"What has really turned out to be the case is the lawyers are suing the victims," he said.

NEW YORK POST
24 HOURS A DAY

HEARING ON AID FOR 9/11'S ILL

By SUSAN EDELMAN

March 30, 2008 -- Manhattan Rep. Jerrold Nadler will hold a congressional hearing this week on the mounting economic losses of ailing Ground Zero rescue workers - and Mayor Bloomberg's refusal to use a $1 billion insurance fund to help them.

"This is a national disgrace, what's happening to us," said retired NYPD Detective Mike Valentin, who will speak for World Trade Center responders at the Judiciary Subcommittee hearing Tuesday in Washington, DC.

Valentin, 43, was forced to retire last year because of restrictive-airway disease and other illnesses.

The father of three receives a line-of-duty disability pension but has no life insurance. He worries he will become bedridden, but he can't afford nursing care.

One of roughly 1,500 NYPD officers suffering 9/11-related health woes, Valentin said he had to sell his Long Island home in 2005 and tap his 401(k) retirement money to pay debts. He and his wife and kids live in his parents' two-family Long Island home.

Also scheduled to testify is Washington, DC, lawyer Ken Feinberg, who ran the federal Victim Compensation Fund. He argues the fund should be reopened for responders whose illnesses developed after a 2003 application deadline.

The city's top lawyer, Michael Cardozo, is expected to tell the panel the city will gladly turn over the $1 billion insurance fund - but only if granted immunity from further liability.

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MEMORANDUM

TO: Representative Sheila Jackson Lee

FROM: Kenneth R. Feinberg, Esq.

DATE: May 2, 2008

SUBJECT: Federal September 11 Victim Compensation Fund of 2001

At the conclusion of the Hearing of the Subcommittee on April 1, 2008, you posed eight questions to me in writing, requesting my written responses. They follow seriatim:

(1) What incentive did a victim's family have for collecting under the victim's compensation fund rather than sue the tortfeasors in court?

Ans.- The generosity of the awards. By statute, I was required to calculate tax free awards taking into account tort concepts, e.g., economic loss, non-economic loss, etc. Accordingly, the average award for a death claim under the Fund was in excess of $2 million (tax free). An unprecedented statutory program. At the same time, it quickly became apparent that there were challenging disincentives to litigate against alleged tortfeasors, including, particularly, the likelihood that such lawsuits would be unsuccessful as a matter of law.

(2) Can you explain how long it would take for a first responder or its family to receive compensation under the Compensation Fund?

Ans. – Once the first responder or his/her family member submitted a "substantially complete" 9/11 Fund application, the claimant was paid within approximately 60 days.

(3) Do you know whether the 94 lawsuits that were filed by families of deceased victims who decided to litigate rather than enter the 9/11 Fund had greater settled at amounts greater than those paid by the Fund?

Ans. – No, I do not know whether those family members who decided to litigate rather than enter the 9/11 Fund received larger or smaller payments than what they would have received if they had filed with the Fund. These settlement amounts are confidential and not subject to public review.

(4) Do you have figures on how many responders are suffering latent ailments that were the result of their exposure to ground zero? I am trying to get a sense of the enormity of the problem.

Ans. - It is apparently an enormous problem. It is my understanding that approximately 11,000 responders are currently litigating in Federal Court in New York City; but, it is estimated that there may be as many as an additional 30,000 individuals who might ultimately exhibit physical injuries resulting from exposure to toxic dust at Ground Zero. These individuals are either first responders, employees of contractors responsible for the cleanup at the World Trade Center, or, perhaps, residents of the surrounding vicinity of the World Trade Center.

(5) Because the FUND has expired, do you know who is paying for the responders' attorneys fees?

Ans. – It is my understanding that responder attorneys' fees will be paid on a contingency basis if, and only if, the responders are successful in their lawsuits. Whatever the fee structure, it is a private matter between each responder litigant and his/her attorney.

(6) The Victims Compensation Fund expired by statute on December 23, 2003, was there any other money left in the fund? What is the money used for presently?

Ans. – The Congress did not appropriate any funds to be distributed by the 9/11 Victim Compensation Fund, so, by definition, there is no money "left in the fund." Instead, the statute creating the 9/11 Fund simply authorized the Special Master to award payments to eligible claimants and such authorization would be honored by the United States Treasury.

(7) You made an interesting statement in your written remarks that deserves a probing, why should Congress consider reenacting the 9/11 Fund, providing millions in additional public compensation to the physical injury victims of the tragic events of September 11, while no such Fund exists at all for the victims of the Oklahoma city bombings, the victims of the first World Trade Center attack in 1993, or the victims of Hurricane Katrina? What are your views, and do not tell me that it is a matter that should best be left to Congress to decide. Thank you.

Ans. – Well, it really is a matter best left to Congress. If pressed, I would maintain that the current responders who are litigating should be awarded compensation in a manner similar to the 9/11 Fund. This is because – as I stated in my testimony – the only reason the current litigants were not paid by the 9/11 Fund is because they did not manifest any physical injury by the time the Fund expired on December 23, 2003. Had they manifested such injuries, they would have been paid (indeed, approximately 2,000 responders were paid over $1 billion because they physically manifested such injuries). Thus, on grounds of elementary fairness, I would maintain they should be paid. However, as I have repeatedly stated, I do not believe a 9/11 type Fund should be established by Congress for other catastrophes or other tragedies.

(8) Should the Victims Compensation Fund be funded by an annual appropriation?

Ans. – No. If the 9/11 Fund is to be reenacted, it should be subject to the same open ended authorization as the original 9/11 Fund i.e., no annual appropriation with authorization by the Special Master being sufficient to justify payment by the United States Treasury. This is particularly important when it comes to alleged responder respiratory injuries since it is unclear how many responders will be eligible for compensation.

The House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
And
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

April 1, 2008

Joint Hearing on Paying With Their Lives: The Status of Compensation for 9/11 Health Effects

Answers to Questions for the Record
From:
Michael A. Cardozo
Corporation Counsel of the City of New York

Questions from Representative Sheila Jackson-Lee

1) *You propose that the Victim's Fund should be reenacted. You further propose that the City and its contractors be indemnified for the claims of any person who does not accept an award from the reopened Victim Compensation Fund. Why would you propose to limit recovery to an award under the Compensation Fund? The goal of the fund was not to mitigate the City's damages but to ensure that victims could recover damages without having to go through the long process of litigation. Please explain your answer.*

ANSWER:

We do not propose to limit recovery to an award under a re-opened Victim Compensation Fund ("VCF"), but to offer an award from the VCF as an alternative to litigation. When Congress created the VCF, it chose to offer eligible parties the option of filing a claim with a no-fault compensation program or pursuing a lawsuit, with all the uncertainties and delays inherent in litigation. This system worked remarkably well, providing compensation to victims as an alternative to the costs and burdens of years of litigation with an uncertain outcome. As Special Master Kenneth R. Feinberg observed, this approach "offered certainty without significant delay, allowing families the option of a type of 'closure.'" See *Final Report of the Special Master for the September 11th Victim Compensation Fund*, at page 1.

We propose to re-open the VCF to allow people who were affected by the collapse of the World Trade Center to forego litigation and apply to receive an award from the fund. For those who choose litigation instead, we propose that the federal government indemnify the City and its contractors for any judgment that might be obtained. Many federal agencies participated in the rescue and recovery operation, and several took leading roles in key aspects of the operation that are the basis of many of the lawsuits against the City and its

contractors. For example, OSHA distributed over 130,000 respirators to WTC workers and was closely involved in fit-testing workers for respirators. It also helped to ensure compliance with health and safety rules at the WTC Site. In addition, the EPA led air testing and analysis efforts and communicated the results to the public. Considering these facts, and because the terrorist attack was an attack on the nation, we believe that it is fair for the federal government to shoulder the costs of the attack.

2) *Do you have any idea of how many new cases are being filed by first responders that are filing lawsuits for latent health injuries from the 9/11 attacks?*

ANSWER:

The litigation pending in the United States District Court for the Southern District of New York includes approximately 11,000 individuals who are suing the City and/or various contractors who worked during the rescue, recovery, and debris removal effort following the 9/11 terrorist attacks. Based on the information available to the City and its contractors through pleadings and discovery to date, most of the first responders and others claim to have developed respiratory conditions (e.g., asthma, sinusitis, and rhinitis) or other medical conditions. Most claim that the conditions manifested themselves for the first time a year, two years or even more after the end of the debris removal operations in June 2002. There are even some claims for cancer allegedly related to claimed WTC exposure. Since most forms of cancer have a latency period of at least ten years from the time of initial exposure to the causative agent, it is not possible to know how many claims for latent health injuries will be made in the future.

3) *Is the captive insurance fund sufficiently capitalized with $1 billion dollars?*

ANSWER:

This question raises an important issue, one raised in my testimony as the City's Corporation Counsel. As I stated, plaintiffs' attorneys have stated in open court that the $1 billion will not be nearly enough to settle all of the current claims. As a result, even with the existence of the WTC Captive Insurance Company, Inc. (the "Captive"), the contractors would remain potentially exposed to billions of dollars of additional liability in excess of the $1 billion of insurance coverage that Congress explicitly provided for them and the City.

Even if the Captive were able to settle all of the current claims for $1 billion or less, such a settlement would leave the City and contractors vulnerable to any claims that might be filed in the future. New cases are being filed every week. The WTC Health Registry has estimated that about 410,000 people were "most heavily exposed" to the dust cloud generated

from the collapse of the World Trade Center. No one can predict if any of these individuals will file suit.

This problem is compounded by the fact that plaintiffs could contend that certain types of late emerging medical conditions were caused by their claimed WTC exposure. For example, solid-tumor cancers typically have long latency periods, ranging anywhere from ten to twenty or more years after exposure to a causative agent. Given these circumstances, the $1 billion of insurance coverage may be insufficient to protect the City and its contractors. Without a renewed VCF, coupled with indemnity from the federal government, the contractors will remain in an indefinite state of financial jeopardy.

(4) The City has paid five (5) physical injury claims. If the City and its contractors are immune from liability, as they claim, why is the Captive willing to pay physical injury claims and not respiratory claims?

ANSWER:

The five claims that were paid were not handled by the Captive. Instead, one of the Captive's insureds tendered the cases to another of its insurance carriers, which handled them. The Captive did not defend the cases, did not have an opportunity to instruct that carrier as to any potential defenses, and did not make any direct payments to the plaintiffs. The City was not involved in these payments.

(5) There were no respiratory claims coming from the Pentagon site because those workers were required to wear respirators and hazmat suits---the workers that volunteered at Ground Zero were working under no less emergent situation. Why were these two groups of volunteer workers treated differently?

See answer to question (6), below.

(6) Why didn't NYC and the contractors protect its workers as the Pentagon did?

ANSWER:

The World Trade Center attacks posed a disaster-response challenge that was unique in nature, scale and scope in the center of a densely-crowded urban landscape. The City, its contractors, and many state and federal agencies had to immediately and continually manage numerous complex hazards unique to the World Trade Center Site and related locations. These included:

- The presence of the remains of nearly 3,000 victims of the attack;
- An unstable, ever-shifting debris pile consisting of approximately 1.8 million tons of debris from 220 stories of office space;
- The risk of a catastrophic collapse of the slurry wall: the concrete retaining structure that prevented the Hudson and East Rivers from flooding the WTC Site and Lower Manhattan;
- Fires within the debris pile that persisted for months and that had the potential to release volatile organic compounds, PCBs, and other potential contaminants;
- An ongoing threat of Freon exposure from one of the world's largest air-conditioning systems.

Despite these and other persistent and recurrent dangerous conditions, first responders relentlessly searched for survivors for weeks. No urban search and rescue operation in American history approaches the scale of the WTC effort. Then, for months afterwards, the workers searched for and retrieved thousands of human remains and items of personal property (which were handled meticulously out of respect for the victims and because Ground Zero represented a massive crime scene). The overall process of rescue, recovery, and debris removal took about ten months.

Worker health and safety was the top priority throughout the WTC rescue and recovery operation. This effort, which included twice-daily safety meetings, involved ongoing and substantial participation by many state and federal agencies. The WTC operations involved unprecedented levels of federal oversight. This included the United States Environmental Protection Agency (EPA) and Occupational Safety and Health Agency (OSHA), both of which maintained a constant presence at Ground Zero starting within the first few days of September 11. Only these federal agencies had the expertise and resources required to oversee these complex health and safety issues. With the EPA taking the lead, federal, state, and city agencies took hundreds of thousands of air samples. Results of the sampling were discussed by safety professionals as they were received.

Respirator distribution, fit-testing, and compliance monitoring efforts formed the cornerstone of worker safety. The City established respirator distribution centers as early as September 12th, with a network of centers put in place by the end of the first week. OSHA assumed responsibility for respirator fit-testing and distribution starting September 20, 2001. OSHA estimated that it distributed over 130,000 respirators over the life of the project.

For all these reasons, the Pentagon rescue and recovery operation cannot fairly be compared to the WTC rescue and recovery effort. For example, the Pentagon fire ended in about a week; there were not an untold number of fires burning under ten-to-twelve stories of rubble that had to be carefully cleared over ten months. The Pentagon and the WTC both suffered

terrorist attacks, and the rescue/recovery operations and protective efforts at both were responsibly and diligently executed. At each site, however, the scope of the particular conditions confronting responders governed the requirements of the operation and the related site safety measures.

(7) Because NYC and the contractors did not protect its workers, as the Pentagon did, how can NYC now claim immunity?

ANSWER:

The City and its contractors worked tirelessly to protect all workers and responders at the WTC Site. The assumption that the City and its contractors did not protect its workers is unfounded and contradicted by the record in the pending litigation. The City and contractors have a legal right to immunity for their WTC-related operations under New York statutory and common law, as well as federal law. These immunity laws serve the essential public interest of encouraging governments, private entities, and ordinary citizens to respond in times of crisis without fear of the burden and expense of litigation. We are not simply seeking to invoke these legal rights like some protective shield. We did, in good faith, everything that reasonably could have been done to protect the workers, as well as the public, throughout this long and trying national disaster response and recovery.

A number of laws, including the New York State Defense Emergency Act ("SDEA"), N.Y. Unconsolid. Law Section 9101 *et seq.* (McKinney 2006), provide immunity to municipal governments (and their agents) for actions and decisions related to civil defense and disaster response. The federal court presiding over the WTC litigation, while denying the City and contractors' motion to dismiss plaintiffs' claims under the SDEA and other laws as premature, nevertheless recognized SDEA immunity as "a valid defense." In re World Trade Center Disaster Site Litigation, 456 F.Supp.2d 520, 556 (S.D.N.Y. 2006), *affirmed in part, dismissed in part* (on other grounds), 521 F.3d 169 (2d Cir. 2008).

The WTC disaster has left deep scars in New York and throughout our country. We are fully aware that these scars include potential impacts on the psychological and physical health of WTC rescue and recovery workers and others who were present. That is why the City has committed substantial funds and other resources to their medical needs (and that of the public) and why the City strongly advocates for the re-opening of the VCF. But this should not compromise the legal rights of the City and contractors to immunity.

(8) If Mayor Bloomberg directs the Captive to settle the claims against it and properly compensate the First Responders, as Congress intended, will the Captive comply?

ANSWER:

The Captive is not a city agency and is not under the Mayor's authority.[1] As such, the Mayor cannot direct how the Captive uses its assets. Mayor Bloomberg, however, has committed extensive City funds and resources to assist WTC rescue and recovery workers and members of the public with potentially WTC-related physical and psychological conditions.

Moreover, Congress did not set up the Captive to act as another VCF. The original VCF, as discussed in the answer to question (1), was a no-fault compensation scheme requiring the applicant to waive his or her right to sue for WTC-related damages. Congress established the VCF in September 2002 as part of the Air Transportation Safety and Stabilization Act (ATSSA). Congress subsequently provided funding for a captive insurance company as part of the Consolidated Appropriations Resolution of 2003, a year after it created the VCF, to provide insurance coverage for the City and its contractors. The Captive is wholly separate and distinct from the VCF.

Congress's mandate was explicit:

> [T]he Federal Emergency Management Agency is directed to . . . provide, from funds appropriated to the Federal Emergency Management Agency for disaster relief for the terrorist attacks of September 11, 2001, in Public Law 107–117, up to $1,000,000,000 to establish a captive insurance company or other appropriate insurance mechanism for claims arising from debris removal, which may include claims made by city employees.

Pub. L. No. 108-7, 17 Stat. 517 (2003). *See also* H.R. Rep. No. 108-10, at 1475–76 (2003).

As any insurance company, the Captive has a duty to defend its insureds: the City and its contractors. The Captive will, of course, pay for the costs of any appropriate settlements or judgments arising out of the WTC litigation.

Questions from Representative Steve King

(1) In your written testimony you advocate that the 9/11 Victim Compensation Fund be reopened "to compensate the Ground Zero workers and area residents who report that they were injured as a result of the terrorist attack." Is there a way to quantify, with any certainty, approximately how many people would be covered by such a reopening of the 9/11 Victims Compensation Fund before Congress passes legislation reopening the fund?

[1] The Mayor does appoint the members of the Captive's Board of Directors, but they act independently of the City and are not accountable to the Mayor or the City or its Contractors in any manner. Their duty is to the Captive.

- *If so, is it further possible to break that group down into subgroups such as city workers, federal government workers, those working for private contractors, volunteers and those that lived or worked in the geographic proximity to the World Trade Center site?*
- *If so, is there a way within that data to quantify the number of individuals that have respiratory or other physical conditions versus solely psychological conditions?*
- *In terms of "Ground Zero workers" or responders, is there a list, or is it possible to compile a list, of people that were authorized to be in and around the World Trade Center site during the rescue, recovery and cleanup efforts?*

ANSWER:

It is not possible to quantify with any certainty exactly how many people would be covered by a re-opened Victim Compensation Fund or how many would avail themselves of it. The World Trade Center Health Registry, using criteria that factored in an individual's residence, location at the time of the attacks, and intensity and duration of exposure, estimated that 410,000 people were "most heavily exposed" to the World Trade Center collapse and its aftermath. Of these, more than 91,000 were rescue and recovery workers and volunteers and more than 360,000 were building occupants, residents, and "people passing by." (About 28% of those potentially exposed met the criteria for more than one category.) Of the rescue and recovery workers, over 20,000 worked for private contractors; almost 27,000 worked for New York City (including police and firefighters); about 8,500 were federal employees; over 26,000 were volunteers.

The Mayor's World Trade Center Health Panel estimated how many people would seek medical and mental health care each year that the people attribute to the collapse of the World Trade Center. Based on a number of assumptions about treatment and medical needs for suspected WTC-related conditions, the size of the potentially-affected populations, and the estimated disease and treatment rates in those populations, the Panel made the following estimates:

- Firefighters: 1,134 for respiratory illness; 3,240 for mental health.
- Police officers: 1,613 for respiratory illness; 1,713 for mental health.
- Other City workers: 274 for respiratory illness; 392 for mental health.
- Other workers and volunteers: 2,268 for respiratory illness; 3,240 for mental health.
- Area residents, workers, and students: 12,272 for respiratory illness; 23,718 for mental health.

We cannot know how many of these people would actually seek compensation from a re-opened VCF or would file a lawsuit. We also cannot know how many of these people might allege a psychological claim alone.

At present, there is no single list of people who were authorized to be at the World Trade Center site during the rescue and recovery operation. The project was a mammoth one and, particularly in the first few days, was somewhat chaotic.

(2) What benefits are city workers, including firefighters and members of the New York City Police Department, who suffered health effects as a result of their work in and around the World Trade Center site already entitled? Are they entitled to these benefits by virtue of being employed or formerly employed by the City? How are these benefits funded (through the City, State or Federal Governments)?

ANSWER:

All City employees who participated in WTC operations had health coverage on 9/11 and would still have it if they are currently employed by the City, or retired with vested health benefits. Beyond that level of baseline coverage, however, additional benefits available to employees can differ significantly depending on agency.

For active-duty uniformed employees, once an agency medical professional determines that a uniformed employee's ailment is work-related, the employee is entitled to free health care services—including physician visits, diagnostic tests, and inpatient care—with no out-of-pocket payments by the employee.

Firefighters can use the services at FDNY's Center of Excellence, which is part of the federally funded WTC Medical Monitoring and Treatment Program. This program provides comprehensive physical and mental health services, including free medication, to all active and retired FDNY and EMS members who responded to the 9/11 attacks.

Other City employees, including police officers, who participated in WTC rescue and recovery operations are eligible for screening and monitoring at the federally-funded Mount Sinai Consortium Center of Excellence. Like the FDNY Center of Excellence, this program also treats rescue and recovery workers who have developed physical and mental health conditions that may be related to the WTC collapse.

City employees who did not participate in WTC rescue and recovery operations but who were exposed to the WTC collapse because they worked in Lower Manhattan are eligible for treatment evaluation at the WTC Environmental Health Center of Excellence, which is funded by New York City to treat residents, area workers and students with potentially-WTC-related health symptoms at three locations in New York City.

A new policy implemented by Mayor Bloomberg in 2007 encourages New York City employees who may have been affected by September 11, 2001 terrorist attacks to undergo a screening or treatment evaluation for potentially-WTC-related physical and

mental health conditions by giving them four hours of time that is not deducted from their sick or vacation leave.

In April 2008, the City augmented the mental health and substance use treatment currently available at the federally funded Centers of Excellence by providing an insurance-like benefit program that is structured to reduce barriers to care for any New York City resident who continues to experience 9/11-related psychological distress. City employees who reside in NYC are able to seek mental health and substance use services through a licensed provider. Although the NYC 9/11 Benefit Program for Mental Health and Substance Use Services is a payor of last resort, which means that New York City residents must exhaust their private insurance before the program will reimburse them, the City has waived this requirement for uniformed responders.

Pensions: New York City's pension system also offers a safety net for City employees who were affected by the WTC attacks. In 2005, the WTC Disability Law took effect in New York State. The bill established a presumption that certain disabilities for certain New York City employees were caused by their participation in WTC rescue, recovery or clean-up operations. The law entitles the employee to accidental disability retirement benefits for participating in WTC operations, subject to certain qualifications, making it easier for eligible employees to obtain accidental disability retirement benefits for participants in WTC operations.

Workers' Compensation: Uniformed City workers are not covered by the Workers Compensation program. They have a line-of-duty disability-retirement system. A uniformed worker who can no longer perform the worker's duties because of an injury or illness incurred while on duty is eligible for a disability retirement that allows the worker to retire with significant retirement benefits. But, as Dr. James Melius, Administrator for the New York State Laborers' Health and Safety Trust Fund, observed in his testimony before the House Appropriations Committee's Subcommittee on Labor-HHS-Education and Related Agencies March 12, 2008 hearing on "World Trade Center 9/11 Health Monitoring and Treatment Program," should a work-related illness first become apparent after retirement, no additional benefits (including medical care) are provided, and the medical benefits for even a recognized line-of-duty medical problem end when the person retires.

Non-uniformed City workers are covered by the New York State Workers' Compensation program. Under the program, workers who are injured or become ill because of job-related factors are compensated for a portion of their wage loss and full coverage for the medical costs associated with treating their job-related medical condition.

The workers' compensation system, however, does not offer a comprehensive solution to address the health ailments that may be related to 9/11 exposure. The system is well designed to handle typical workplace injuries that are apparent from the moment an accident takes place (e.g., a worker who breaks his or her arm while working at the WTC site).

But the conditions alleged to have arisen from 9/11 present novel challenges to the Workers' Compensation law and the entities that administer it, in large part because of the factual issues inherent in a workers' compensation claim. Timing is an initial obstacle. Under the law, a claimant is required to provide notice of a work-related injury to his or her employer "within thirty days after the accident causing such injury."[2] In accordance with the reforms enacted in 2006, a claimant with a qualifying condition has two years from the date of disablement or the date when he or she knew or should have known that the latent condition was causally related to his/her participation in WTC operations to provide notice to the employer.[3] But this law does not eliminate the statute of limitations: the law still requires a determination as to the "date of disablement," as well as a timely filing of a claim within two years of that date, a process that often leads to factual disputes.

And even if the timing issues are resolved, demonstrating causation presents additional difficulties. The Workers' Compensation law places the burden on the employee to prove that his or her injury resulted from participating in the WTC recovery and clean-up operations. Because questions remain about whether particular conditions are caused by exposure to the WTC site, a high proportion of workers' compensation claims require resolution of questions of fact by the state Workers' Compensation Board, leaving employees without benefits during the claim adjudication process.

(3) What is the durational period of the 9/11 rescue, recovery and cleanup effort? To your knowledge, are all (or nearly all) of the claims asserted in the litigation against the City and its Contractors limited to health effects that are alleged to have been caused during this time period?

ANSWER:

The rescue, recovery and clean-up operation began on September 11, 2001 and lasted approximately ten months, with operations coming to an end in about June 2002. The vast majority of claims against the City and its contractors, according to the pleadings and discovery to date, are related to respiratory and other medical conditions alleged to have been caused by exposure to potential contaminants during the course of these operations. Some plaintiffs also claim exacerbation of preexisting conditions.

(4) In your testimony, you indicated that the $1 billion appropriated for the World Trade Center Captive Insurance Company would be insufficient to cover all of the claims against the City and its contractors? Does the City have an estimate of the amount of money that would be needed to cover all claims

[2] New York state Workers' Compensation Law §18.
[3] New York state Workers' Compensation Law §163.

As we stated in response to your first question, we have no way of knowing at this point how many people would make a claim against a re-opened VCF. We therefore cannot know precisely how much would be needed to resolve all of the current and future claims against the City and its contractors.

What we do know is that the attorneys for the plaintiffs have stated that they thought that $1 billion would not nearly be sufficient. Only time will tell if they are right. And there is also a concern that people may come forward in the future claiming illnesses, like cancer, that take years, if not decades, to develop. Only a re-opened VCF, together with indemnity for the City and its contractors, can provide a speedy, fair, and reliable way to compensate the victims of this attack on our nation.

Question from Representative Nadler

(1) As you know, Mr. Feinberg testified to his willingness to assist the Congress and the parties in any manner requested, and to do so pro bono. Would you be willing to allow Mr. Feinberg to use his unique abilities to help work out a compromise as an alternative to continued litigation?

ANSWER:

The City would certainly be willing to consider this possibility and to discuss this with the Captive and the contractors. Any such resolution of the existing lawsuits, however, must adhere to several fundamental conditions. It must remain within the limit of the Captive's resources, leaving sufficient money available to protect the City and its Contractors against possible future claims. It must provide payment only for valid claims for which plaintiffs can provide appropriate proof. In addition, the City would be happy to work with Mr. Feinberg, Congress, and all parties concerned to advance suitable legislation to re-open the VCF.

City of New York -- Response To Congressional Question Re: Lists of WTC Responders

The identities of many New York City first responders and other City personnel who participated in the WTC rescue and recovery operations at Ground Zero, the Fresh Kills Landfill and other locations are reflected in various agency databases and records. Following are examples of the agencies with large numbers of personnel involved:

- The New York City Police Department (NYPD) created an NYPD World Trade Center Database that contains the names of 34,250 then-active employees (including 2,980 civilian members) who participated in the operation; the assignment of uniformed members to the WTC vicinity, Fresh Kills and other locations is also recorded in NYPD daily roster assignment sheets.
- The New York City Fire Department (FDNY) has information that more than 14,300 firefighters and EMS workers reported in their enrollment questionnaires for its medical screening/monitoring program as well as information from interviews and work records.
- Department of Sanitation (DSNY) assignment records indicate WTC-related work by employees, and DSNY also established a database of 3,463 employees who participated in the operations.
- The Department of Correction (DOC) created a database in 2007 to begin tracking employees who had participated in WTC-related work.
- The City Office of Emergency Management (OEM) developed a credentialing program to control access to the WTC vicinity. This evolved from the initial use of authorized agency IDs and secondary forms of ID to individual WTC-site specific identification cards.
- Many other City agencies utilize some form of assignment, attendance or overtime records that indicate employees who were involved in WTC-related assignments.
- In addition, the four primary contractors managing quadrants at Ground Zero used sign in/sign out sheets for their (non-city) workers. The Department of Design and Construction (DDC) also maintains a list of more than 300 contractors and subcontractors who worked at Ground Zero.

The City has also participated in extensive measures to ensure the provision of WTC-health related information and services to its employees. For example, the City encouraged eligible employees to participate in the WTC Health Registry run by the City's Department of Health and Mental Hygiene (DOHMH) and the federal Agency for Toxic Substances and Disease Registry. The City also recently advised personnel of the availability of services at the WTC Medical Monitoring and Treatment Program and the WTC Environmental Health Center and provided four hours of paid time off for employees to access these services. The City has also established the New York City Employees 9/11 Health Communication Service, which allows any city employee to sign up to receive bi-monthly emails about 9/11 related health information. In registering, the employee identifies for what agency he or she worked at the time of 9/11.

Responses to Questions for the Record from Anne-Marie Lasowski

Question: Are the four federally funded programs that you mentioned still in existence?

Response: Yes, the four programs are still in existence.

Question: Can aggrieved persons opt to sue in Court rather than collect under these four programs or funds that you mentioned in your testimony?

Response: The answer varies for each of the four programs covered in my testimony as discussed below.

Black Lung

There is no explicit provision in the Black Lung legislation prohibiting tort lawsuits by miners afflicted by Black Lung disease. However, as explained below, because the federal Black Lung program is coordinated closely with state workers' compensation programs and because those state programs generally preclude lawsuits for workplace injuries, tort lawsuits related to Black Lung disease would be unlikely.

The Black Lung program provides benefits to coal miners or their family members for death or total disability due to Black Lung disease. Under the Black Lung program, a claim for death or disability must be filed with the federal Office of Workers Compensation Programs (OWCP), which provides benefits funded by an excise tax paid by mine operators. A claim also must be filed under the applicable state workers' compensation law where such law provides adequate coverage for Black Lung benefits. Federal Black Lung benefits must be reduced by the amount of any payments to a claimant under a state workers' compensation program for disability caused by Black Lung disease. (Under Department of Labor regulations, a state workers' compensation law is deemed to provide adequate coverage when it is included on a list of such laws maintained by the Secretary of Labor. Currently, no states have been deemed by the Secretary to have adequate coverage.)

Childhood Vaccine

Under the National Childhood Vaccine Injury Act of 1986, an individual alleging a vaccine-related injury may sue in court, but must first file a claim under the Vaccine Injury Compensation Program. (Vaccine-related claims must initially be filed with the United States Court of Federal Claims, where they are initially heard by special masters. Claims for less than $1,000 may be brought in state or federal courts without prior filing under the Vaccine Program.) If the Court of Federal Claims does not award compensation or the claimant is dissatisfied with the compensation awarded, the claimant may choose to reject the judgment and bring a civil action for damages. If the claimant does elect to bring suit, the act limits the claims that the claimant can make against the manufacturer.

Radiation Exposure

The Radiation Exposure Compensation Program provides for compassionate payments to individuals who contracted certain cancers and other serious diseases as a result of their exposure to radiation released during nuclear weapons tests or through exposure to radiation during employment in underground mines. The United States Attorney General makes determinations on these claims and any award made may be offset by the amount of any payment made pursuant to a final settlement or award on a claim arising from a lawsuit external to this process.

Energy Employees Occupational Illness

The Energy Employees Occupational Illness Compensation Program compensates eligible employees and contractors of the Department of Energy (DOE) and its predecessors who developed serious illnesses such as cancer because of exposure to radioactive or toxic substances while working in the atomic weapons industry. The acceptance of compensation under the program is considered in full satisfaction of all claims against the United States, a DOE contractor or subcontractor, or other specified persons. Sums awarded in tort suits may be offset against compensation awarded under the program.

American Enterprise Institute for Public Policy Research

May 8, 2008

Andres Jiminez
Subcommittee on Immigration, Citizenship,
Border Security, and International Law
United States Congress
Cannon House Office Building
Washington, DC 20515

Dear Mr. Jiminez,

I hereby submit responses to questions submitted by Representative Sheila Jackson-Lee dated April 23, 2008.

1) Who were the original intended beneficiaries of the Victim Fund?

I do not claim to be able to divine legislative intent. Some legislators may have voted for the Air Transportation Safety and Stabilization Act to benefit the thousands of people killed and injured on September 11; others may have agreed to the Victim Compensation Fund as a legislative compromise to ensure that airlines would not be unfairly bankrupted by the economic and litigation aftermath of the September 11 attack. Section 403 of the Stabilization Act states that "It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." Section 405 of the Stabilization Act restricts compensation to those present at the crash sites at the time or in the "immediate aftermath" of the September 11 aircraft crashes. It is arguable that the execution of the original Victim Compensation Fund expanded compensation beyond what Congress originally intended by defining "immediate aftermath" to be four days.

2) Why should the Fund be the exclusive remedy to the first responders?

I don't believe a federal Fund should be a remedy for the first responders. New York state workers' compensation laws (including the Zadroga bill, A. 4697, passed by the New York State Assembly in 2007) already provide a substantial remedy.

I do believe that Congress should take steps to shut down the unjust litigation brought against contractors and subcontractors who volunteered to help in an emergency situation, and are being sued as deep-pocketed bystanders, because of the message it sends to Americans that, should they volunteer to help a city recover from a terrorist attack, they will be targeted for litigation by unscrupulous plaintiffs' attorneys.

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I also argue that, if the Victim Compensation Fund is to be expanded to include remedies for first responders, then the Victim Compensation Fund will not be successful unless litigation remedies are limited or eliminated. As I state in my written testimony,

> [C]laimants will not opt in to a voluntary administrative compensation system unless they are confident that the administrative system will provide a superior alternative. Congress can do that only by (1) increasing the attractiveness of the administrative system by making it more generous or lenient; (2) decreasing the attractiveness of the tort system by limiting liability; or (3) eliminating the voluntary aspect of the administrative system by making it the sole exclusive remedy for certain types of injury.
>
> As discussed in Sections II and III, above, H.R. 3543 already risks being too permissive to claims and thus open to substantial abuse. Congress needs to limit or eliminate tort liability over Ground Zero-related injuries to provide the proper incentives for claimants to participate in the VCF rather than resort to the tort system.

3) Why should the Fund exclude recovery of those suffering from psychological injury?

As I state in my written testimony,

> The danger here is not simply the occasional false positive of unmerited compensation, but the creation of a compensation structure that will be subject to pervasive fraud. …
>
> If it is surprisingly easy to manufacture fake claims of lung ailment through mass screenings, it is easier still to manufacture claims of "psychological injury," where self-reporting is the only possible verification, diagnostic criteria are malleable, and falsification is all but impossible for many common psychological injuries within the scope of the definition of "presumed WTC-related injuries." Awarding compensation for minor psychological injuries while avoiding fraud will be impossible unless Congress or the Special Master caps damages at trivial amounts and insists on independent medical evaluations.
>
> Without firm medical criteria and the opportunity of scrutiny of claims on the front end and the promise of criminal penalties for fraud on the back end, H.R. 3543's Fund and the government fisc will be subject to substantial fraud and abuse.

Moreover, as I extensively demonstrate in my written testimony, the definitions in the bill are overbroad, and could be easily interpreted to entitle every New York resident to compensation.

4) Why is it not appropriate that someone that suffered injuries from being a first responder be compensated under the Fund?

I note that New York state law already provides compensation to those who suffer injuries from being a first responder, so the question is whether Congress should provide additional compensation above and beyond the amount that New York state law provides.

The Victim Compensation Fund was unusually, and perhaps overly, generous. Such generosity is problematic enough as a one-time special occasion. There is a fundamental unfairness in distinguishing between victims of this terrorist attack and victims of the 1993 World Trade Center bombing, or the Oklahoma City bombing, or the attack on the U.S.S. Cole or American embassies in Africa. Expanding the Fund to larger and larger populations multiplies the unfairness. About 250 firefighters and police officers a year are killed and thousands more injured in the line of duty without being entitled to millions of dollars of federal funding.

In addition, as I note in my written testimony, there is a distinctive difference between the deaths and injuries from the plane crash and collapse of the towers and the deaths and injuries allegedly caused from exposure to toxins at the World Trade Center site. In the first instance, there is no dispute of causation, and little opportunity for fraud and abuse. In the second case, proving causation is difficult, if not impossible, and any administrative compensation mechanism will either undercompensate victims because of the need for strict medical criteria or be so lenient that taxpayers will be victimized by fraud and abuse. The law firm behind many of the thousands of pending lawsuits already has a track record of manufacturing questionable medical diagnoses for litigation purposes, and the danger of a multi-billion dollar fraud is large.

5) You indicate in your statement that companies should not be driven out of business because of fear of expensive lawsuits, what do you think can reasonably and fairly be done to mitigate damages?

The defendants in the World Trade Center litigation are mostly innocent bystanders who had no say over air quality or safety. The companies being unfairly sued could not have done anything to mitigate damages except refuse to volunteer to help in the recovery and cleanup efforts. The danger is that, in responding to future terrorist attacks, other contractors will be deterred from responding to a crisis because they fear unlimited and potentially bankrupting liability. Unless Congress steps in to limit or eliminate these lawsuits, the only way that such contractors can "mitigate damages" is to refuse to volunteer to help in a crisis. The lawsuits make America worse off.

6) Although the contractors were paid $1 billion dollars, neither the City nor the contractors have been willing to work with 9/11 workers injured in the WTC cleanup to settle their claims and provide a comprehensive solution. How much liability insurance do these multi-billion dollar companies have to supplement the $1 billion already contributed by the federal government to pay the claims of injured workers?

I dispute several of the spoken and unspoken premises of the question: *first*, the vast majority of the contractor defendants being sued are not "multi-billion dollar companies"; *second*, contractors have not been paid "$1 billion dollars"; *third*, it takes two sides to settle, and the plaintiffs are as much to blame for a lack of settlement for failing to make reasonable demands that are related to medical causation and legal liability; *fourth*, it is impossible for the City and contractors to provide a "comprehensive solution" without Congressional intervention to limit or eliminate liability because of the constitutional limitations on the ability of parties to settle alleged mass torts with alleged latent injuries under the Supreme Court cases of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1996) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *fifth*, the vast majority of the defendants being sued have no legal liability, and it is therefore unjust to insist that the their innocent liability insurers cover the tab of the litigation; and *sixth*, it is almost certainly the case that a large number of the thousands of plaintiffs in the September 11 litigation have not been "injured in the WTC cleanup." I discuss these last two issues in my written testimony.

There are dozens of defendants in the WTC cleanup litigation, and I do not know how much liability insurance they have. The question fails to address the underlying problem: even if one were to stick contractors' existing liability insurers with the tab, one has to consider the *ex ante* effect in responding to future terrorist attacks. Liability insurers will simply refuse to permit their insured contractors to volunteer in clean-up efforts if they know they will be unfairly forced by Congress to compensate responders whose injuries had nothing to do with the insureds' conduct. Congress needs to provide prospective immunity to prevent this problem, and retrospective immunity to fix the problem of the unfairness to the September 11 volunteers and their innocent insurers.

Sincerely,

Theodore H. Frank
Resident Fellow,
American Enterprise Institute for Public Policy Research
Director,
AEI Legal Center for the Public Interest

The House Committee on the Judiciary
Subcommittee on the Constitution, Civil rights, and Civil Liberties
and the
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

Questions for the Record from Representative Nadler

For Dr. Melius

"Please provide any data you have concerning mental health problems arising from the 9/11 attack on the World Trade Center."

> There have been several studies published in the scientific literature documenting post-traumatic stress disorder, depression, and other mental health problems persisting in WTC responders, and clean-up workers and among community residents living near the World Trade Center. A recent study published in Environmental Health Perspectives provides documentation for high rates of these illnesses among the rescue and recovery workers (attached). Of the more than 10,000 workers who participated in the Mount Sinai study, 11% met criteria for probable Post Traumatic Stress Disorder (PTSD); 8.8% had probable depression; 5.0% had probable panic disorder; and 62% had substantial stress reaction. According to Mount Sinai, the rate of PTSD among 9/11 responders is significantly greater than in the general population and is on par with the rate experienced by veterans of the war in Afghanistan. This recent study is supported by other studies documenting similar effects among fire fighters, transit workers, NYS personnel, and other groups who worked at the World Trade Center after the 9/11 attack. Studies of community residents living near the WTC have also documented similar mental health problems among those residents as a result of the September 11 attacks.

"Are the Centers for Excellence currently treating individuals with mental health problems arising from the 9/11 attack on the World Trade Center? If so, please provide any information you have concerning the types of assistance being offered, and the number of individuals receiving such assistance."

> The Centers for Excellence are currently treating thousands of rescue and recovery workers for Post Traumatic Stress Disorder, Depression, and other psychological problems resulting from 9/11. Overall, those centers have treated over 6000 rescue and recovery workers for mental health problems resulting from 9/11 and are continuing to treat thousands of these workers. Many also suffer from physical health problems resulting from their exposures at the WTC. Some workers are just starting treatment either because of reluctance to seek mental health treatment or because their symptoms have become much worse. Treatment for individuals with mental health problems include individual and group counseling by a mental health professional and/or the use of medications for these disorders. It should be noted that Post Traumatic Stress Disorder can be quite persistent and is difficult to treat.

Responses from James Melius, MD, PhD, to

Questions for the Record from Representative Sheila Jackson-Lee

1. Are the first responders recovering from Workers Compensation and other funds, apart from the Victim's Compensation Fund to your knowledge?

As I indicated in my testimony, some of the first responders are receiving compensation from Workers' Compensation and other funds (line of duty disability retirement for uniformed workers, Social Security Disability Retirement, etc.). However, it appears that many ill and disabled responders are not yet receiving such compensation. In some cases, their claims have been turned down, and many have applied for compensation and are still waiting for their claims to adjudicated. The claims process in New York is complicated and may take many months or even years before a final decision is reached. Meanwhile, many of the ill responders are unable to work and undergo significant financial hardship.

2. In your experience, have you found that most of the 9/11 responder's ailments are latent and recurring?

The types of illnesses being experienced by the responders are latent and recurring. These include the pulmonary disease, sinus disease, and the mental health problems. For the pulmonary and sinus disease, many of the responders experienced acute symptoms while working at the World Trade Center site (such as cough). Once they stopped working, they felt better for a while and then gradually developed symptoms that were more persistent and more disabling. While some of these responders have partially recovered or at least stabilized with treatment, among others, the illnesses have gotten worse. Although the World Trade Center-related mental health problems are more variable, the chronic, persistent problems are often delayed (or latent). The illnesses are recurring in the sense that the symptoms are persistent but tend to become more severe in an episodic manner. For example, a responder with asthma due to their world trade center exposures will have their symptoms become much worse if they are exposed to large amounts of particulate on their job site and will then have to miss several days of work.

Responses from James Melius, MD, PhD, to

Questions for the Record from Ranking Member Steve King

1. In your written testimony you state that "in the period after September 11, over 50,000 emergency responders and recovery workers were exposed during the initial rescue work at the site and in the subsequent clean-up and recovery activities."

- What percentage of those approximately 50,000 workers have suffered respiratory problems as a result of their work at the World Trade Center site?

From studies that were done within the first few years after 9/11, we know that approximately 90% of the fire fighters at the scene and 70% of the other rescue and recovery workers reported respiratory symptoms while working at the WTC site. Among the approximately 14, 500 fire fighters monitored in the Fire Department program, 31% (approximately 4500) reported continued lower respiratory symptoms , and 32% upper respiratory symptoms over two years after September 11. A significant percentage (approximately 25%) had abnormal pulmonary function tests. Over 2000 (14%) of these fire fighters are currently being treated for WTC-related respiratory health problems in the Fire Department medical program. Among the other responders, nearly 60% reported continued respiratory symptoms 1 to 3 years after September 11. Twenty eight percent had abnormal pulmonary function tests. Of the approximately 21,000 responders being followed in the medical program, over 5800 (28%) were being treated for respiratory health problems.

- Of those workers that have suffered respiratory health problems as a result of their work at the World Trade Center Site, have any recovered completely? If so, approximately what percentage has recovered completely?

A significant percentage of those with initial respiratory symptoms and health problems no longer have symptoms and appear to be much better. Physicians working with these patients are reluctant to state that anyone with symptoms has "recovered completely" as responders continue to come in several years after 9/11 with symptoms that have gotten much worse only recently.

There are no published data to provide a good estimate of those responders who have "recovered completely"

- Have workers (not eligible for recovery under the 9/11 Victims Compensation Fund) suffered non-respiratory long-term, physical health problems as a result of their at the World Trade Center site?

Many of the responders have also suffered from gastric esophageal reflux disease (GERD) and have required treatment for that illness. However, the vast majority of those also have upper and/or lower respiratory health problems requiring treatment. There are also a small number of WTC responders with chronic musculoskeletal problems as a result of their WTC work. Other than these illnesses (and the many people with mental health problems as a result of September 11), no other illnesses have yet been conclusively linked to exposures from the WTC site. The monitoring programs are continually evaluating their findings to determine if other illnesses occurring among these responders are linked.

2. In your written testimony, you state that "tens of thousands of people living, working, and going to school in the areas around the WTC were exposed immediately after the WTC building collapsed or in subsequent weeks or months in their apartments, work places, or schools."
    - What percentage of those living, working, and going to school in the area around the World Trade Center has suffered respiratory problems as a result of their work at the World Trade Center Site?

We know much less about the number of ill people living, working, or going to school in the areas around the World Trade Center. Among the residents surveyed by the NYC Health Department between two and three years after 9/11, more than half reported new or worsening respiratory symptoms after their 9/11 exposures, and 2% reported newly diagnosed asthma. Analysis of these data indicated that exposure to the dust cloud were more likely to report respiratory health symptoms. Among the approximately 2000 patients seen at the Bellevue WTC Environmental health Center, a high percentage are being treated for persistent respiratory problems similar to those seen in the responder population. This population is not necessarily representative of the WTC community residents and includes many people worked cleaning building in the downtown area after September 11. In summary, we do not currently have adequate data to accurately estimate the number of people with persistent respiratory health problems as a result of their September 11 exposures. Studies currently underway by Bellevue and the NYC Department of Health will help to provide a better estimate.

- Of those that have suffered respiratory health problems as a result of living, working, or going to school near the World Trade Center site, have any recovered completely? If so, approximately, what percentage has recovered completely?

As indicated above, we have very little data to estimate the pattern of WTC-related illness among these populations. I am not aware of any available information to address these questions in a quantitative manner.

3. In general, is the severity of the respiratory problems suffered correlated with the intensity of exposure to the World Trade Center site? If so, is this most closely correlated with the time of arrival at the site, amount of time spent at the site, or proximity to the site

In general, is the severity of the respiratory problems suffered correlated with the intensity of exposure to the World Trade Center site? If so, is this most closely correlated with the time of arrival at the site, amount of time spent at the site, or proximity to the site?

Studies of fire fighters and other rescue and recovery workers indicate that the intensity of exposure is associated with the development of respiratory health problems among those groups. Both the time of arrival at the site and duration of exposure are associated with the development of respiratory health problems. Those arriving in the first few days have an increased risk as do those who worked for longer periods of time. There is less information available on proximity to the site because most of the responders and other workers were not stationed in just one area but moved around the site. There is additional research currently underway to better understand the impact of these different exposure factors.

4. If Congress were to extend the 9/11 Victims Compensation Fund to cover those suffering respiratory problems would there be a way to effectively screen those applying for compensation such that only those whose respiratory problems were the result of exposure to airborne toxins from the World Trade Center site received compensation?

For the responders and other people participating in the medical monitoring program, there should be no significant problems ensuring that compensation is limited to those with illnesses related to 9/11. The current legislation has steps to screen people entering the monitoring program (i.e., they worked at the WTC and other eligible sites) and those being treated in the medical program (i.e., they have a WTC-related condition). These screenings could be linked to the VCF program to assist in identifying and ensuring appropriate qualifications for eligibility and that there is adequate evidence that the health problems are WTC-related. For community

residents, downtown workers, and students, this will be more difficult but (as required in the legislation) this could be achieved by building on the criteria and conditions for the responder medical programs. Studies currently underway and the extensive clinical experience of the Bellevue medical program should help to develop fair and appropriate eligibility screening criteria.

5. There are several programs providing health care to New York residents, etc. … Can you give me an example of someone in the city that would not be covered by one of these existing programs?

Although everyone in New York City currently has access to one of the WTC health programs, there are financial limitations for the current programs that limit their ability to provide WTC health monitoring and treatment for all of these populations. In particular, the Bellevue Environmental health Center has limited resources and could not meet the needs for health care for WTC-related medical conditions among downtown residents, workers, and students without additional federal funding (which has not yet been released by DHHS). The responder programs currently have adequate federal funding for the short termbut prior to 2007, there was no federal funding for treatment, and many responders (especially those with limited or no health insurance) struggled to obtain needed care. Without federal funding, the responders would be returned to fragmented and limited medical care that would be detrimental to their recovery.

○