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by

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Joint Hearing on Paying With Their Lives: The Status of Compensation for 9/11 Health Effects

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10 a.m.

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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.