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International Law
On the James Zadroga 9/11 Health and Compensation Act

Analysis of H.R. 847
9/11 Health and Compensation Act

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The views expressed in this testimony are those of the author alone and do not necessarily represent those of the American Enterprise Institute.

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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 Title II of H.R. 847, the proposed 9/11 Health and Compensation Act.

I serve as a Resident Fellow at the American Enterprise Institute for Public Policy Research, but I am not testifying here on its 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. While H.R. 847 is a substantial improvement over an earlier version of the bill in the last Congress, it 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. H.R. 847 fails to correct the problem of the original Stabilization Act, which gave unbounded authority to the Special Master. That was perhaps forgivable in the rush to provide compensation in September 2001, but if the program is to be reopened for two more decades, Congress should define more structure.

3. H.R. 847 creates a compensation program that is especially susceptible to error and fraud.

4. H.R. 847 fails to fully protect the innocent subcontractors who are faced with tremendous liability simply for volunteering to help New York City in its hour of need, often without pay. Many of the lawsuits against contractors and subcontractors include claims for punitive damages, and plaintiffs' attorneys will still have that leverage against those innocent parties.

5. The liability limitation provisions of H.R. 847, by leaving insurers of innocent parties on the hook, fail to solve the problem of future subcontractors being deterred from volunteering to help the government.

6. Section 408(a)(5)'s proposal to create tranches of priority for claims payments through litigation presents potential problems of moral hazard and risks of collusion that could mean that unimpaired claimants receive government funding while leaving true victims entirely uncompensated by litigation.

7. To the extent that H.R. 847 protects the federal government against fraud, the program is unlikely to end the third-party litigation unless H.R. 847 is also amended to make the VCF the exclusive remedy for September 11-related injuries.

8. H.R. 847 fails to provide adequate protection to taxpayers that taxpayer money will be spent on compensation of victims, rather than on attorneys' fees.

9. H.R. 847 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 R. 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

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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. 645 (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).

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 from the Fund.[4] Thus, determining eligibility for compensation was, aside from the 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]

Many of these advantages are missing in H.R. 847's expansion of the Fund, while the disadvantages of the Fund are amplified.

II. H.R. 847's definitions are vague and overinclusive, and grant too much power to the Special Master

H.R. 847, 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.

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[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);

[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.

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. 847 is, however, at least an order of magnitude greater than the original VCF, and will reopen the VCF for twenty-two years.[10] It is potentially problematic that H.R. 847 does not fully constrain the ability of the Special Master to disburse money to thousands, or even tens of thousands, of claimants.

The current bill closes one loophole by requiring a showing of physical harm,[11] thus formalizing regulations put in place by Special Master Feinberg. But there remain other loopholes that could expand the cost of the VCF dramatically.

The original regulations for VCF claimants limited non-economic damages to a presumed $350,000 (plus $100,000 per dependent),[12] 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."[13] Those non-economic losses limitations in the original VCF were entirely the discretionary doing of Special Master Feinberg, because the original Stabilization Act had no such limitations. A different Special Master could undo those regulatory limitations, and open the Treasury to arbitrary non-economic damages awards to thousands of claimants.

The original unconstrained VCF could have cost taxpayers billions more than it did; if Congress is to reopen the VCF, it should at the same time close this loophole. 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;[14] 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.

While the Title I program has a limit on the number of claimants,[15] no such limit exists in Title II's reopening of the VCF—other than a requirement to make claims by the year 2031. A two-pack-a-day smoker working one day directing traffic at the debris removal site in August 2002—long after

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[10] H.R. 847, § 202(b).

[11] H.R. 847, § 202(c)(2).

[12] 28 CFR § 104.44; KENNETH R. FEINBERG, WHAT IS LIFE WORTH? 75-76 (2005).

[13] 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.

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

[15] H.R. 847, Title I, creating 42 U.S.C. § 3012.

the fires were out—may, if the regulations and adjudications are generous enough, receive VCF compensation.

The history of unbounded 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.[16] 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,[17] but the fund paid out $7 billion when it closed.

III. H.R. 847 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 present detailed computations or analyses. Instead, they needed only to supply the fund with easily obtained data."[18]

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. 847, 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 involved in debris removal with a pulmonary ailment is an appropriate claimant. Lung disease is common without exposure to Ground Zero. Some patients who will get pulmonary disease decades in the future will have contracted it from working at Ground Zero, but that is not true of all such claimants. Nothing in the current version of Section 405(a)(2) requires claimants to submit information on other possible causes of pulmonary disease or psychological injury, 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

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

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

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

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."[19]

- 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 peripheral involvement directing traffic for a few days in 2002.[20] 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. 847, 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."[21] Rather, Hirsch argues, Zadroga died from injecting ground-up prescription drugs into his bloodstream; the binders, or nonsoluble fillers, accumulated in his lungs, scarring

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

[20] 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).

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

them and causing his death.[22] Zadroga's family disputes this finding, but anyone who has read a recent *New Yorker* story discussing the evidence can only conclude that Hirsch is correct.[23] The very 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.[24] 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.[25]

The only hurdle the bill creates is Section 405(c)(3)(A)(ii)—proof that one contemporaneously sought medical treatment. This may succeed in winnowing out especially meritless claims that have already been brought, but the bar is quite low for future claimants.

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 making statements that go beyond what their studies have confirmed";[26] and they have presented findings in "scientifically questionable ways."[27]

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

[23] Jennifer Kahn, A *Cloud of Smoke*, THE NEW YORKER (Sept. 15, 2008), available at http://www.newyorker.com/reporting/2008/09/15/080915fa_fact_kahn.

[24] 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?*, 61 S.M.U. L. REV. 1221 (2008); 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). The problem is a centuries-old one. *See* Dauber, *supra* note 1 (documenting fraud in compensation fund for victims of War of 1812).

[25] *Id.*

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

[27] *Id.*

A compensation fund like the one reopened by H.R. 847 will suffer from what Professor Richard Nagareda calls the *Field of Dreams* problem: "If you build it, they will come."[28] 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, often with the cooperation of unions. "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."[29] Ninety percent of such diagnoses erroneously favor the claimant.[30] 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"),[31] 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.[32] 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 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.

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[28] NAGAREDA, *supra* note 1 at 143.

[29] Lester Brickman, *False Witness*, WALL. ST. J. (Dec. 2, 2006).

[30] *Id. See also* note 24, *supra*.

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

[32] Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 S.M.U. L. REV. 1221 (2008); 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").

> 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.[33]

Napoli has suffered no disciplinary or criminal consequences.[34] 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.[35] 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.

H.R. 847 does not change the structure of the VCF, which required the Special Master to resolve claims within 120 days.[36] Given the likely volume of claims and the complexity of the underlying causation and timeliness issues, it will be extraordinarily unlikely that the next Special Master will be able to adequately review claims for merit. 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, the reopening of the VCF will be subject to substantial fraud and abuse.

IV. H.R. 847 fails to provide adequate protection for volunteer subcontractors, and will not be effective without full immunity

The pulmonary injuries to Ground Zero rescue workers are reminiscent of an earlier government program where safety was sacrificed in favor of exigency.[37] 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 dangerous levels of asbestos.[38] The government then failed to compensate those workers, and stood by as trial lawyers sued into bankruptcy asbestos suppliers and other third parties[39] who had

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[33] 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").

[34] 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 31; 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); *cf. 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).

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

[36] Stabilization Act § 405(b)(3).

[37] 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).

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

[39] 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).

nothing to do with Navy working conditions, thus victimizing not only government workers but government contractors. H.R. 847 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, even as it purports to do so.

Section 408(a)(4) (created by § 204 of the bill) is intended to limit liability for contractors and subcontractors, but § 408(a)(4)(B)'s exception for punitive damages almost swallows the rule. Most of the existing lawsuits already seek punitive damages,[40] so contractors and subcontractors will still face the overhang of litigation. The ones that do not can recreate that leverage by amending their complaints to change the allegation of "negligence" to "gross negligence." The difference between "gross negligence" and "negligence" under New York law technically requires proof of a "reckless disregard for the rights of others," but there are New York cases where negligence—or even happenstance—in conjunction with dramatic consequences has been deemed to create a triable issue of fact on the question.[41] Such "reckless disregard" for the safety of others in a New York personal injury case is sufficient for punitive damages. These cases will be harder for plaintiffs to win before a nuanced fact-finder, but the exception all but swallows the rule.

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.[42] As of September 30, there are 10,686 lawsuits pending against the City and its contractors and subcontractors. 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.

Section 408 does not sufficiently change this dynamic. Trial lawyers will still be able to use the threat of decades of endless litigation against contractors and subcontractors. The liability limits will be illusory: once they are reached, subcontractors and contractors will face crippling legal expenses when insurers no longer have a duty to defend. And none of these direct expenses include the indirect expenses of being tied up in depositions and discovery.

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. 847 provides no recourse for them. Congress should bar litigation against contractors assisting the

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[40] Jean Macchiaroli Eggen, *Toxic Torts at Ground Zero*, 39 ARIZ. ST. L.J. 383, 411 (2007).

[41] *E.g.*, Sommer v. Federal Signal Corp., 79 N.Y.2d 540 (1992) (allegation of miscommunication by single employee at fire-alarm company leading to inadvertent shut-off of alarm system on same day that fire broke out held to create triable issue of fact); Food Pageant, Inc. v. Consolidated Edison Co., 54 N.Y.2d 167 (1981) (power company found to be grossly negligent for blackout caused by two lightning strikes eighteen minutes apart because it did not have peak-power generation ready to be used during expected off-peak load, creating liability despite contractual protection against consequential damages for negligence).

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

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.[43] 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.

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 in individual cases; 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. 847 already risks being too permissive to claims and thus open to substantial abuse. Indeed, the program is so lenient that a claimant that dismisses his or her lawsuit to participate in the VCF is allowed to reinstitute the lawsuit without prejudice if the Fund denies his or her claim[44]—a clear case of "heads I win, tails don't count." Unless Congress is going to entirely dismiss the likelihood of abuse of the VCF system, it will need to limit damages in individual cases 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.

As it is, the bill's limitations on liability mean that, at some point between now and 2031, the limits in Section 408(a)(4) have been reached. At that point, one of two things will happen: future lawsuits will be foreclosed (except for lawsuits for punitive damages), and the VCF will become the

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

[44] H.R. 847, § 202, adding new § 405(c)(3)(C)(iii).

exclusive remedy for those victims by default, or Congress will amend the Stabilization Act again to ask taxpayers to increase the funds available to the WTC Captive Insurance Company.

If Congress is willing to let claimants in 2030 rely solely on the VCF as an exclusive remedy, it should be at least as willing to funnel claimants in 2010 to the VCF as the exclusive remedy. This is especially true because the types of possible pulmonary injuries we are talking about here usually take decades to become apparent. Such injuries are much more likely to manifest themselves in 2020 than in 2005, which means that many of the current claimants are victims of nothing more than coincidence, yet will end up with greater legal options than the most deserving victims.

Moreover, § 408(a)(4)(A) has a tremendous ambiguity. The description of the liability limits are for "the amount of funds of the WTC Captive Insurance Company, including the cumulative interest," or "the amount of all available liability insurance coverage maintained by contractors and subcontractors." But this underdefines the amount of money available. For example, as of a year ago, the Captive Insurance Company had already spent $104 million on legal defense costs (a number that seems large, but works out to about $10,000 per filed case).[45] Private insurers' coverage often subtracts the costs of the duty to defend. Unless the liability limits are more clearly defined, there will be collateral litigation over whether the liability limits include the costs of defense spent already and in the future, and, depending on the result of that litigation, who is legally responsible for that excess expense.

Most importantly, these liability limits only act retroactively. They provide no legal certainty in the case of the next emergency that those who assist the government would not face bankrupting liability. Indeed, because Section 408(a)(5) continues to hold innocent insurers responsible, any sensible insurer that sees this legislation will be drafting their next policy to exclude coverage for volunteer work in government emergencies—or raising their rates to reflect the future contingency.

In this sense, the bill is underinclusive; it makes an attempt to solve the problem created in this particular case by trial lawyers seeking to profit by blaming good Samaritans for injuries that are the responsibility of foreign terrorists. But it does not solve the expectation problem for the next terrorist attack that has been caused by this litigation disaster. Only prospective immunity can do that.

V. Section 408(a)(5) creates problems of moral hazard and collusion

In addition, the bill creates new problems through its structuring of the liability limitation. Section 408(a)(5) creates tranches of liability, where funding for settlements will first come from federal funding, then insurers for governmental authorities, then private insurers. This provision potentially overrides the normal contractual provisions between the Captive Insurance Company

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[45] Department of Homeland Security Office of the Inspector General, *A Review of the World Trade Center Captive Insurance Company*, OIG-08-21 (June 2008). It should be noted that this $104 million includes $20 million in document management costs, *id.* at 17, something Congress should consider when evaluating potential changes to the Federal Rules of Civil Procedure on controlling the costs of discovery in civil litigation.

and the insureds, meaning that there may be inadequate oversight of the settlements to ensure that they are legitimate or proportional before payout occurs.

If so, there will be a pot of government money of over a billion dollars free for the taking. This may encourage suits that might not otherwise been brought. There is a potential for collusion between trial lawyers and the insureds to extract and split rents from the Captive Insurance Company. 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[46] to such a defendant to share in the recovery from the government.

To take an extreme hypothetical example, imagine a family-run subcontractor; three family-member employees sue their employer for purported Ground Zero debris-removal injuries. Their father, who runs the company, agrees to settle each of their cases for $10 million, which is then automatically paid by the WTC Captive Insurance Company. As the statute is currently drafted, such a theft of taxpayer money may be entirely legal.

Given the moral hazard problem and the fact that the first tranche of liability is to be paid by taxpayers, it should be made clear that settlements and litigation strategy must be cleared and controlled by the government or the Captive Insurance Company for as long as they are liable. Moreover, if Congress refuses to make the VCF the exclusive remedy for potential claimants, but taxpayers are going to pay for most of 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.

VI. H.R. 847 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*;[47] 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.)[48]

In contrast, many of the intended beneficiaries of H.R. 847 are already engaged in litigation, with contingent-fee agreements with attorneys likely providing as much as 40% to 50% of recovery. This bill keeps the VCF's original structure of providing resolution within 120 days.[49] If the VCF is to be continued as a non-adversarial program without need to prove causation, then it would be

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[46] 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).

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

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

[49] Stabilization Act § 405(b)(3).

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.[50] 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. 847 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 system's peculiar, often arbitrary rules and who is also sufficiently insured or secure financially to pay the judgment.[51]

H.R. 847 compounds this problem in many ways. In Title I, 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 on the debris removal routes) will receive benefits, while insurers of Ground Zero contractors get no protection from unfair litigation. As

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

[51] Schuck, *supra* note 1; *see also* Copland, *supra* note 4 at 22-23; Mike Steenson and Joseph Michael Sayler, *The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 Wm. Mitchell L. Rev. 524, 541 (2008); Kenneth Feinberg, *The Building Blocks of Successful Victim Compensation Programs*, 20 OHIO ST. J. ON DISP. RESOL. 273, 274 (2005).

mentioned in Section IV, the claimants in 2025 will end up with different legal rights than the claimants in 2010.

There are two additional areas of unfairness. The original VCF required compensation to be offset by collateral sources of insurance.[52] The effect was to punish victims for having the foresight to purchase private insurance: those who faithfully paid premiums for years in the event of catastrophe found that their recovery was reduced dollar for dollar. H.R. 847 fails to undo this unjust and economically irrational public policy choice. Moreover, by redistributing contractors' and subcontractors' insurance coverage to fund the liability limits, H.R. 847 leads to a scenario where contractors who purchased larger insurance policies are cross-subsidizing contractors who purchased less coverage.

When the government regularly puts the uninsured, underinsured, and the insured on the same financial footing, as it does in the collateral source rules of the VCF and the liability limitation provisions,[53] 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.[54] Legislation should not promote such distortions in the economy.

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;[55] 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—already 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. 847, while an improvement over earlier versions of the bill, fails to meet these criteria, in part because the September 11 Victim Compensation Fund of 2001 was not designed to carry the weight that H.R. 847 places on it.

I welcome your questions.

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[52] Stabilization Act § 405(b)(6).

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

[54] A similar moral hazard problem was created by the Troubled Assets Relief Program—with the additional distortion that hundreds of billions of dollars will be allocated based on the quality of lobbying, rather than the quality of economic judgment.

[55] DIXON AND STERN 56.