

Testimony of Michael A. Cardozo
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Before
The House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
And
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and
International Law

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

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

The federal government has also provided some funding through annual appropriations for screening, monitoring and treatment of responders and community members and for that we are also grateful. But what is needed is long-term, stable funding and a method to address compensation for non-health-related concerns. The City of New York strongly supports H.R. 3543, the James Zadroga

9/11 Health and Compensation Act of 2007 introduced by Chairman Nadler and Representatives Carolyn Maloney and Vito Fossella. That bill would provide the stable funding required for health issues.

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

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

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

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

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

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

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

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

The VCF Worked Well

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

Limitations of the VCF

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

Because of these limitations, there are now many rescue and recovery workers, not to mention those in the community, who report injuries, but have no option for compensation other than litigation. More than 10,000 of those people have sued New York City and/or its contractors. Most of them say they did not develop symptoms of their injury until long after the filing period for the original

VCF passed. Also, many of them were not present at Ground Zero within four days of the attack and were therefore not eligible for compensation from the fund. These individuals, however, if they were hurt as a result of their work helping their country recover from a terrorist attack, or exposure to dust and fumes from the attack, deserve to be compensated by their country for their losses. There is no just reason for them to get nothing while many others, who were in essentially the same position, but who met the strict eligibility requirements for compensation, were compensated.

The Downsides of Litigation

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

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

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

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

Second, even today, some six-and-a-half years after the attacks and since the first suits were filed, we may still be years away from an end to the litigation. To be

prepared for trial on plaintiffs' claims, which they say total billions of dollars, both sides must engage in extensive discovery, which has barely begun. Finally, as with any litigation, if the plaintiffs are successful, much of the compensation awarded will not go to them, but to their lawyers.

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

In the wake of September 11, because of these lawsuits and the inability to obtain insurance, a number of the contractors experienced business difficulties and continue to do so. The defendants all face very substantial potential monetary exposure. To try and alleviate this burden, Congress used a portion of the assistance provided to New York City after the attacks to create an insurance company for the City and the contractors to protect them from the very large potential exposure they face in the lawsuits. The \$1 billion provided was used, as the legislation required, to set up a captive insurance company. This is an insurance company set up under New York State law and regulated by the insurance commissioner of New York to provide insurance to the City and its

contractors for liabilities relating to the rescue, recovery, and debris-removal efforts following the September 11 attacks. It is not a victim compensation fund.

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

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

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

Reopening the Victim Compensation Fund

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

Indemnity

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

The way to eliminate this highly undesirable outcome is to provide for an indemnity for any remaining claims for those who decide not to pursue a VCF award. I emphasize that this indemnity would only cover the claims of those who do not opt for the VCF. Past experience leads us to believe that most will take the award from the reopened VCF. And medical costs would be covered under another

part of the bill. Moreover, once an indemnity is in place, the captive insurance company would no longer be needed and the funds it holds would be available to fund the reopened VCF.

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

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

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