

**JAMES ZADROGA 9/11 HEALTH AND
COMPENSATION ACT OF 2009**

JOINT HEARING

BEFORE THE

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

AND THE

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

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JAMES ZADROGA 9/11 HEALTH AND COMPENSATION ACT OF 2009

TUESDAY, MARCH 31, 2009

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

The Subcommittees met, pursuant to notice, at 10:06 a.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee on the Constitution, Civil Rights and Civil Liberties) presiding.

Present from the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law: Representatives Lofgren, Jackson Lee, Waters, Weiner, King, Harper, Lungren, and Chaffetz.

Present from the Subcommittee on the Constitution, Civil Rights and Civil Liberties: Representatives Nadler, Watt, Scott, Johnson, Conyers, Jackson Lee, Sensenbrenner, Rooney, and King.

Also present: Representative Maloney.

Staff present from Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law: David Shahoulian, Majority Counsel; Zachary Somers, Minority Counsel; and Andrés Jimenez, Majority Professional Staff Member.

Staff present from Subcommittee on the Constitution, Civil Rights, and Civil Liberties: David Lachmann, Subcommittee Majority Chief of Staff; Paul Taylor, Minority Counsel; and Matthew Morgan, Majority Staff Assistant.

Mr. NADLER. [Presiding.] This joint hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, and the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law will now come to order.

We will begin the proceedings by recognizing the distinguished Chair of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law for an opening statement.

Ms. LOFGREN. Thank you, Mr. Nadler.

Last year, the Immigration and Constitution Subcommittees held a joint hearing on the 9/11 Victims Compensation Fund, where we examined the need to reopen the funds for those who were injured

as a result of the 9/11 attacks but whose injuries did not become clear until after the VCF fund expired.

That hearing was instrumental in leading us to the bill we are considering today. Congress created the VCF in the immediate aftermath of the 9/11 attacks. What we learned at the hearing is that the VCF was a stunningly successful program, at least as far as it went.

A truly bipartisan effort quickly conceived days after 9/11, the program established a system to compensate injured 9/11 victims and the family members of the deceased. Over its short existence, the VCF distributed just over \$7 billion, \$6 billion of which was distributed to the surviving family members of 2,880 people who were killed in the attacks and \$1 billion to the 2,680 people who were injured in the attacks during the rescue efforts conducted immediately after the attacks.

The average award for families of the dead was about \$2 million. The average award for injured victims was just under \$400,000. As we learned in our last hearing, this was all done in 33 months, with overheads costs of less than 3 percent and with 97 percent of the families of deceased victims opting into the fund rather than pursuing tort relief in the court.

As Special Master Ken Feinberg states in his written testimony before us today, "This was one of the most efficient, streamlined, and cost-effective programs in American history."

We now have a bill before us that would reopen the VCF and provide protection for those who, by no fault of their own, could not take advantage of the fund when it was available. This is as important as ever.

Last year, we were dealing with some 10,000 lawsuits. We are now up to over 11,000. These suits have been filed by first responders, workers, and volunteers from around the country who rallied to help locate survivors recover the dead and clean up debris from the fallen towers. Most of these people are now suffering because of their exposure to the toxic dust that covered much of Lower Manhattan.

These lawsuits, filed by people who were not eligible to be compensated under the VCF because they discovered their illnesses too late, didn't even know they could even apply because they thought the fund was only for those who died or who worked on the site after the first 96 hours after attacks, taking far too long to decide.

As noted last year, the doctors and scientists already agree: People are sick and will continue to get sick because of their exposure to World Trade Center dust. We must resolve this problem.

The question is, how? Workers' compensation has failed. Medical programs aren't covering enough people. And the Captive Insurance Fund created by Congress to resolve claims has instead used the money to defend against each and every one of them. Five years and \$270 million in administrative and legal costs later, the Captive Insurance Fund has settled less than 10 claims.

Last year's hearing led us to determine it was necessary to reopen the VCF for those who deserve our help. After months of hard work and difficult negotiations, Chairman Nadler, along with Representative Carolyn Maloney, Peter King, and Michael McMahon, arrived at the compromise we have before us today.

I believe this bill, while perhaps not perfect, goes a long way to establish a fair and just program to compensate those who continue to bear the deep scars from 9/11. Now, I look forward to hearing from the witnesses on this bill. Their thoughts and discussions we will have today will help us as we continue to work on these issues and move this bill through the legislative process.

It is unusual to have a joint hearing of two Subcommittees. And although the Immigration Subcommittee is known for immigration, we do have assigned to us a responsibility for claims, which is why we are part of this hearing. And certainly the issue of due process is one that the Constitution Subcommittee plays a lead role in.

And luckily for us, not only is the Chairman of that important Subcommittee here today; he also knows about this because the World Trade Center was in his district, and he is a New Yorker and a terrific lawyer and will run the rest of this hearing.

And I thank the gentleman and yield back.

Mr. NADLER. I thank the gentlelady. And I will now recognize myself for 5 minutes.

Today, these two Subcommittees will investigate the status of compensation for the tens of thousands of people who are suffering because of the collapse of the World Trade Center after the terrorist attack on 9/11.

Last year, we held a hearing that examined the possible mechanisms that could be used to compensate those suffering from 9/11-related health effects. And this year, we have a bill, H.R. 847, the "James Zadroga 9/11 Health and Compensation Act of 2009," which I believe provides the best avenue to making our first responders, area residents, workers, students and others whole.

[The bill, H.R. 847, is available in the Appendix.]

Mr. NADLER. I want to first thank the Chair of the Immigration and Claims Subcommittee, Congresswoman Lofgren, not only for agreeing to hold this joint hearing, but for her support and outstanding work on this issue over the last couple of years.

I would also like to thank my colleagues, Congresswoman Carolyn Maloney, Congressman Peter King, and Congressman Mike McMahon, with whom I have introduced the 9/11 Health and Compensation Act, which would both provide comprehensive medical treatment to any person whose health was affected and would reopen the Victims Compensation Fund so that people can be compensated for their economic losses.

And I particularly want to mention Congresswoman Maloney, who has worked for, what, 6, 7 years now so heroically and on this problem.

We came very close to passing this bill last year, and I am hopeful that, with the changes we have made to the bill this year and with the support of my colleagues on the Committee, we can finally pass it this year and provide relief to so many people who desperately need it.

I also want to welcome our witnesses and thank them for their participation. We are fortunate to have an expert panel with us today to discuss this legislation.

Finally, I would like to recognize those individuals who have traveled to Washington to attend this hearing. I thank you all for coming.

I want to specifically recognize Ms. Leona Hull, the sister of Leon Heyward.

Many of you in the audience are among those who have been denied proper compensation thus far, and I hope we can examine today how this system has failed so many of you and how we can help with this legislation.

After the collapse of the Twin Towers on 9/11, tens of thousands of first responders, residents, area workers, and students were exposed to a cocktail of toxic substances that was said to be worse than the Kuwaiti oil fires. They are now coming down with diseases like sarcoidosis, lymphoma, and rare blood cancers.

In June 2007, then-Senator Clinton and I held companion hearings on the actions of the Environmental Protection Administration and other Federal agencies that clearly were a contributory factor to causing harm to the health of many people.

At the House hearing, we heard the callous voice of former EPA Administrator Christine Todd Whitman trying to explain why she told New Yorkers that the air was safe to breathe, when in fact she had considerable evidence to the contrary. We reviewed the EPA inspector general's report, which found that the EPA's statements "were falsely reassuring, lacked a scientific basis, and were politically motivated."

We heard about how the White House changed the EPA press releases "to add reassuring statements and delete precautionary ones."

After the hearing, I was more convinced than ever that the Federal Government not only failed to protect the first responders, workers, residents, and school children who were in the area, but that the Federal Government bore responsibility for not preventing many of their injuries, which it could well easily have done had it been honest in the first place.

Obviously, none of these injuries would have occurred were it not for the terrorists, who are ultimately to blame, but many of the injuries we are seeing today would have been avoided if the Federal Government had not acted dishonestly. The Federal Government, therefore, has a moral and legal obligation to compensate the victims of 9/11, to provide for their health care, and to attempt to make them whole from their subsequent financial losses.

In 2004, Congress appropriated \$1 billion for what became the World Trade Center Captive Insurance Company in order to provide health care for people who sustained injuries and illnesses in the aftermath of 9/11. I am hopeful that, through this hearing, we can find a way to ensure that this billion dollars goes toward healing those affected by this tragedy, as Congress intended.

I should note that there have been many hearings that examined the health issues and degree of people's illnesses and in which we heard from many who are too sick to work. It is unfortunately very clear that many more people will become sick in the future.

In a September 2006 peer-reviewed study conducted by the World Trade Center Medical Monitoring program, of 9,500 World Trade Center responders, almost 70 percent had a new or worsened respiratory symptom that developed during or after their time working at Ground Zero.

Furthermore, another study documented that, on average, a New York City firefighter who responded to the World Trade Center has experienced a loss of 12 years of lung capacity.

Now, obviously in these kinds of cases, whether by radiation from a nuclear bomb blast or exposure to radiation or exposure to other toxic substances, it is impossible to establish individual causality to 100 percent certainty, but the statistics that show increases of 70 percent or 80 percent from expected rates of illnesses are damning.

The pain and suffering of the living victims of 9/11 is real and cannot be ignored. We as a Nation must do more. John F. Kennedy once remarked that, "as we express our gratitude, we must never forget that the highest appreciation is not to utter words, but to live by them."

In the nearly 8 years after 9/11, we have done enough talking. Now it is time to pass H.R. 847, the 9/11 Health and Compensation Act.

I yield back the balance of my time.

And I now recognize the distinguished Ranking Member of the Constitution Subcommittee for an opening statement.

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

First, I would like to thank all those first responders who risked their lives and health by doing whatever they could do to mitigate the horrors of the September 11th attack and all who supported them.

Those public servants and other volunteers toiled ceaselessly for months under a toxic cloud that hung over and around the former site of the World Trade Center. They, too, suffered as a result of vicious attacks perpetrated by blood-thirsty terrorists whose driving mission was to cause the death and injury of as many innocent people as possible. We must never forget that.

Along with the first responders and other volunteers, private contracting firms played an invaluable role in facilitating the recovery site of the attacks. These contracting firms were asked by the city of New York to immediately begin clean-up efforts, and they responded with the same drive to serve and protect that motivated other public servants.

They did so even though they and the city of New York were unable to secure the liability insurance they would normally obtain before starting a recovery project.

But while other major entities affected by the 9/11 attacks, including the airlines, the World Trade Center, and the Port Authority, were protected by Federal legislation from excessive and undeserved liability exposure, the private contractors and other private entities were left in the lurch.

I regret to say that, when Congress passed the legislation addressing liability concerns in September of 2001, I warned my colleagues that failing to comprehensively address the unprecedented liability issues raised by the 9/11 attacks would inevitably lead us to where we are today.

On the House floor of 2001, I said that, while the airlines would not face bankruptcy as a result of the liability limits in the 2001 legislation, should the bill pass, the failure to limit others' liability will mean that Congress will need to pass corrective legislation

again and again to protect American companies and their workers' jobs because this bill didn't do it right.

Clearly, that bill didn't do it right. But if we seek to correct one failing in the original legislation, we must be careful not to aggravate other failings.

I also opposed the 2001 legislation because it created an entitlement program that set a dangerous precedent in the future.

Again, on the House floor in 2001, I said, "No entitlement was created by Congress to compensate victims of the Oklahoma City bombing, earthquakes in California, hurricanes in Florida, and floods along the Mississippi River. If this entitlement is approved, does Congress really want to say no to victims of future tragedies, whether as a result of natural or manmade disasters?"

"If a disaster strikes in any of our hometowns, how can we explain voting for an entitlement in this bill, but not for our own constituents? Stop and think of the precedent this bill set when a future disaster strikes."

My concerns after 9/11 were confirmed by the findings of the nonpartisan Rand Institute for Civil Justice, which analyzed the September 11th Victims Compensation Fund in 2004 and concluded that, "pre-commitments by government programs reduced the ability of government and society more generally to allocate resources to meet the most pressing needs after an attack."

A 2005 study of four Federal compensation programs by the GAO also cautioned that, "Because these programs may expand significantly beyond the initial cost estimates, policymakers must carefully consider the cost and precedent-setting implications of establishing any new Federal compensation programs, particularly in light of the current Federal deficit."

That deficit was much lower—than what it is today. Today the current economic crisis should magnify such concerns exponentially. At the same time, we have seen too much costly and wasteful legislation pass this Congress without adequate time for thoughtful analysis. I hope the hearing today will help us avoid repeating recent practice.

With that, I look forward to hearing from all of our witnesses and yield back the balance of my time.

Mr. NADLER. I thank the gentleman. I will now recognize the distinguished Ranking Member of the Immigration and Claims Subcommittee for an opening statement.

Mr. KING. Thank you, Mr. Chairman.

I want to thank the witnesses, also, in advance.

On September 11, 2001, terrorists carried out mass murder of innocent Americans on our own soil. These attacks were carried out solely because some people hate our country and the freedoms it represents.

This terrorist attack ripped away our security and devastated thousands of families. My heartfelt sympathy goes out to those who suffered in the wake of the attacks on 9/11.

One of the groups that suffered in the aftermath of 9/11 is Ground Zero workers who worked heroically day and night for months in rescue, recovery and cleanup efforts at the World Trade Center site.

Many of these workers went in without contracts, insurance policies, or knowledge that there were toxins in the air. Some of these workers are having health problems as a result of their work at Ground Zero, as are residents in the area.

Understandably, the Ground Zero workers have looked to the construction companies that hired them for compensation for their health problems. These companies, along with the city of New York, are now being sued by over 10,000 plaintiffs who allege that they were injured from the contaminants in the debris. The victims are being forced to sue because they do not qualify for relief under the 9/11 Victims Compensation Fund, and the companies in the city are being forced to vigorously defend against these lawsuits because of lack of adequate insurance coverage.

In order to address compensation for the victims and to provide liability protection to the construction companies that came to the city's aid after the towers fell, H.R. 847 proposes to use the 9/11 Victims Compensation Fund as a blueprint.

Now, if we are to follow the 9/11 fund as a blueprint, we also must make sure we do so responsibly. First, we must make sure that we provide adequate compensation to the victims without handing the keys to the U.S. Treasury or the trial lawyers.

The 9/11 fund is essentially a no-fault administrative scheme that does not require proof of complex tort theories. Thus, if the fund is reopened, it should include provisions to maximize the victims' recovery by limiting the contingency fees that personal injury lawyers may receive.

In a letter to Congress regarding the original 9/11 fund, the Association of Trial Lawyers of America stated that 100 percent of the compensation funds from the fund should go directly to these families.

Second, if we are going to reopen the 9/11 fund, we must do so in a manner that protects our taxpayers. To be careful stewards of the taxpayers' money, we must require that victims be able to produce proof that they were in immediate proximity of Ground Zero during the cleanup period. We must also require them to medically document that their illnesses are a direct result of exposure to the air around the site.

Additionally, to protect the taxpayers, we should consider limiting the compensation from the fund to objectively verifiable economic damages, such as past and future medical expenses and earnings. What is more, the fund should only be reopened for a reasonable, but limited period of time. H.R. 847 would reopen the 9/11 fund for 22 years, and that will be 30 years beyond September 11th.

But as a former special master, Mr. Feinberg, has pointed out—and we will hear from you today—no latent claims need such an extended date. Moreover, if the reopened period proves to be too short, we can always revisit this issue in Congress.

So, finally, to ensure that the taxpayers are protected if we decide to reopen the 9/11 fund, we need to follow pay-as-you-go rules for this legislation. And in following PAYGO, we need to pay for the reopening of the fund by offsetting government spending, not by increasing taxes.

In closing, let me just say that we owe it to the victims to at least try to provide them with a better path than the ineffective and expensive litigation they are currently pursuing. And we owe it to the contractors that rushed in to help the immediate aftermath of the attacks to limit their liability exposure.

But as we look forward to compensating the victims and providing liability protection to contractors, we need to remember that we also owe it to the American taxpayers to act responsibly with their tax dollars.

I can only think what it is like as a contractor having run to the sound of the guns, not in such a massive way as many of the contractors did in New York on 9/11, but still always deployed our manpower and our machinery at an instant's notice without regard to the risk or the liability when people needed help, I want to see that scenario. That is the American way. Now, that is what we saw in New York and we saw around the country on September 11th.

And whatever comes out of this legislation, I want to encourage that kind of response and not have the threat of litigation hanging over their heads. They did the American thing. They did the right thing. And we need to do the right thing by the contractors.

Thank you, Mr. Chairman. And I would yield back.

Mr. NADLER. I thank the gentleman.

And I will now recognize the distinguished Chairman of the Judiciary Committee for an opening statement.

Mr. CONYERS. Thank you, Mr. Chairman.

I want to welcome everybody here that has traveled to this hearing because I think this is a critical test of what the Congress believes, in terms of helping out these first responders and people who, through no fault of their own, have been put in this incredible health situation.

For some, it is too late. But the rest of us are here can do something.

And I was heartened by my colleague's remarks here. Steve King and I are working on a number of issues. And he has muted his normal hostility toward lawyers in a very admirable way. I feel very good about this hearing.

It is all in the Judiciary Committee. Don't ask me why it is the lawyers that hate the lawyers groups more than anybody else in the Congress. So I am feeling much better about this.

Carolyn Maloney has done a great job, as have Jerry Nadler, Zoe Lofgren, Peter King.

Now, I am composing a letter to a Congressman that came to this Committee in 1981. His name is Chuck Schumer. And he did a brilliant job on this Committee. And I have watched him and all the work he has put in for his country ever since.

He got a little too close to Wall Street for my two cents, but Wall Street was his district. It was in his state. So I forgave him for that.

But now the letter I am going to send the distinguished senior senator from New York will deal with the need for us to close ranks, resolve these differences, and get this show on the road.

Now, I am as sensitive to costs and budget overruns and deficits as the Chairman emeritus of this Committee. But for goodness' sake, I mean, we talk about the war and terrorists and then get

it confused with natural occurrences and natural disasters, as bad as they are. But this is the war that we kept hearing about, these people that attacked us.

And so I want to commend all of our leaders that have pulled together a new bill that makes more sense, that has spoken to some of the problems from before, but we have to move the other body. That is where the problem is.

And I would welcome working with the Chairmen of these Subcommittees and others—

Mr. SENSENBRENNER. Will the gentleman yield?

Mr. CONYERS. Of course.

Mr. SENSENBRENNER. May I make a suggestion on how to get Senator Schumer's attention?

Mr. CONYERS. Please do. I am waiting with baited breath.

Mr. SENSENBRENNER. Bring along a television camera or two.

Mr. CONYERS. Could we instruct—wait a minute—could we instruct the stenographer to strike that phrase from the—

Mr. NADLER. Would the gentleman yield?

Mr. CONYERS. Who seeks? Who wants—

Mr. NADLER. I do.

Mr. CONYERS. Oh, yes. Of course, Mr. Nadler.

Mr. NADLER. I would simply point out that the senior Senator from New York has been very much involved in the negotiations on this bill and in getting the appropriations that have helped with the medical care for the last several years.

So all jesting aside, he has been involved, and we expect him to help with this effort in the Senate, as it still proceeds.

And I yield back to the gentleman.

Mr. CONYERS. I thank the Chairman. Then I am going to put his response to my letter in the record, just to confirm your unyielding confidence in the senior senator. And I thank you for allowing me to make these intemperate remarks.

And I return my time.

Mr. NADLER. I thank the gentleman.

And I recognize for brief comment the distinguished Chair of the Immigration Subcommittee.

Ms. LOFGREN. I just wanted to note that we have been joined here by one of the authors of the bill, Carolyn Maloney. It has been Ranking Member Lamar Smith's policy not to grant unanimous consent to Members of the Committee to actually question witnesses, but we are glad that she is here joining us to listen. And I just wanted to note that for the record, and I thank you for yielding.

Mr. NADLER. Thank you. And I join those comments and your observations.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I ask that other Members submit their statements for the record.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record. Without objection, the Chair will be authorized to declare a recess of the hearing.

We will now turn to our witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their

seniority on the Subcommittees, alternating between majority and minority, provided that the Member is present when his or her turn arrives.

Members who are not present when their turns begin will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

Ken Feinberg served as the special master of the Federal September 11th Victims Compensation Fund estimated by Congress after the attacks of September 11th, 2001. He is currently the managing partner and founder of the Feinberg Group, LLP.

Mr. Feinberg has taught at the Georgetown University Law Center, University of Pennsylvania Law School, New York University School of Law, University of Virginia Law School, and Columbia Law School. Mr. Feinberg received his J.D. from NYU School of Law.

Barbara Burnette is a former New York City police detective. After 18 years of service, she retired from the NYPD due to injuries she sustained while working at the World Trade Center site. She lives in Arverne, New York, with her husband and three children.

Christine LaSala has been the president and CEO of the World Trade Center Captive Insurance Company since its creation by Congress in 2004. In agreeing to serve as president of the Captive, Ms. LaSala came out of retirement after a lengthy career as the first female partner of Johnson & Higgins, the fourth-largest global insurance broker and employee benefits consultant.

Her broad experience in the insurance industry includes 2 years as an underwriter and over 25 years as an insurance broker working with corporations and public institutions to design their risk-management program. She is a graduate of the College of New Rochelle and studied finance at Fordham University.

Dr. James Melius is an occupational physician and epidemiologist. For the past 10 years, his work with the Laborers' International Union of North America and currently as administrator of the New York State Laborers' Health and Safety Trust Fund and director of research for the Laborers' Health and Safety Fund of North America.

He chairs the steering committee of the World Trade Center Medical Monitoring and Steering Committee, which oversees this program for World Trade Center responders. He received his M.D. from the University of Illinois in 1974 and a doctorate in epidemiology from the University of Illinois School of Public Health in 1984.

Michael Cardozo has served as the corporation counsel and chief legal official of New York City since January 2002. He serves as legal counsel to the mayor of New York, elected officials, the city and its agencies, and also heads the Election Modernization Task Force.

Prior to becoming corporation counsel, Mr. Cardozo was a partner at Proskauer Rose, where he served as co-chair of the firm's 150-person litigation department. He is a graduate of Columbia Law School and served as a law clerk for the late Judge Edward

McLean in the United States district court for the southern district of New York.

Ted Frank is the resident fellow and director of the American Enterprise Institute Legal Center for the Public Interest, where he manages the institute's research and studies liability reform. His research areas include price liability, class actions and civil procedure, corporate regulation, antitrust and patent litigation, lifestyle litigation, medical malpractice, and judicial selection, a wide range.

Previously, Mr. Frank was a litigator in private practice. His litigation experience includes defending the 2003 California gubernatorial recall election against an ACLU constitutional challenge, Vioxx, and automobile product liability cases, class-action defense, and antitrust and patent cases.

Richard Wood, our final witness, is the president of Plaza Construction Corporation since 1997, where he has been involved in many of New York City's most complex building projects, including 299 Park Avenue, the St. Thomas Choir School, Random House World Headquarters, 200 Chambers Street, the residential tower at 26th Astor Place, and 11 Times Square, among others. Plaza was among the contractors who worked at the World Trade Center site.

I am pleased to welcome all of you. Your written statements in their entirety will be made part of the record. I would ask each of you to summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow and then to red when the 5 minutes are up.

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

[Witnesses sworn.]

Thank you.

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

You may be seated.

Mr. Feinberg will have to leave early. In order to accommodate the Members, I am going to ask him to testify and then allow Members the opportunity to question him before he has to depart.

So, Mr. Feinberg, microphone please?

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

Mr. FEINBERG. Thank you, Mr. Chairman.

Once again, I am honored to be here at your request. For me, it is sort of a reunion. I worked with closely Chairman Conyers and Congressman Lungren during the years when I was on the Senate Judiciary Committee.

I want to thank the Committee for taking another look at whether or not the 9/11 fund should be reauthorized. I was appointed by the attorney general of the United States, John Ashcroft, to serve as the special master of the original 9/11 fund. It was a bipartisan effort.

I had tremendous support throughout my 33-month tenure as the head of the 9/11 fund, not only from the people on this Committee, but from the American people, Republican, Democrat, liberal, con-

servative. Everybody was very, very supportive, particularly the Department of Defense and the city of New York.

I note Michael Cardozo is here today. On Friday of this week, he becomes the longest-serving corporation counsel in the history of New York City. He either loves his job or he is a glutton for punishment, or maybe both, but he was enormously helpful to me in the administration of the 9/11 fund.

The Chairwoman has pointed out the success of the 9/11 fund, if statistics are any indication.

Should the fund be reauthorized, as it is in this legislation before you? I think it should, but it is a very close question.

Congressman Sensenbrenner points out some of the philosophic difficulties in reauthorizing the 9/11 fund. There is no 9/11 fund for Katrina, for Oklahoma City, for the flood victims this week in North Dakota. There is no 9/11 fund.

Yet, on the other hand, it should be pointed out a fundamental point about this legislation. Many of the people, rescue workers, who are now litigating in New York City, the only reason they are litigating is because the 9/11 fund compensated their brethren but could not compensate them before the fund statutorily expired on December 22, 2003.

Had these people who are now litigating manifested a physical injury within the timeframe set by Congress to be compensated, they would have met all of the criteria, and they would have been compensated.

We compensated over 2,000 rescue workers at a cost to the taxpayer of about \$1 billion of the \$7 billion that was spent. Had the sum of these very litigants today manifested respiratory illness before December 22, 2003, we would have readily under that statute compensated them.

So the answer that Congress may find convincing is that elementary fairness says, if we compensated rescue workers prior to 2003, why not compensate these very same rescue workers post-2003?

That is the dilemma here. It may be an answer to Congressman Sensenbrenner; it may not be. It is a close question. But I think one can make the argument that but for the termination of that statute and the fact that many of the thousands now litigating didn't become eligible with a physical injury until after 2003, they would have been compensated. That is the argument for Congress to consider.

Now, whether or not Congress wants to go beyond the 9/11 fund, with some of these other provisions, both in terms of contractor indemnity or caps, in terms of broadening the eligibility criteria as to who would be eligible if the fund is reauthorized by this legislation, I completely defer to Congress.

I had enough problems determining eligibility and compensating 5,300 people back in 2001. Whether or not a fund like this should be reopened and the eligibility criteria expanded to include additional types of injury, that is up to the Congress to decide.

And whether or not you can expect a special master to serve pro bono for up to 20 years as opposed to 33 months is another question that I defer to Congress.

But those are the arguments pro and con. It is really an interesting dilemma for the Congress to consider whether it is appro-

priate to deal with the unfairness of not compensating some of these rescue workers pursuant to the original 9/11 criteria. And if it should, what other criteria will be made part of this legislation?

The Chairman has asked me to summarize within 5 minutes. I have done so. Thank you very much.

[The prepared statement of Mr. Feinberg follows:]

PREPARED STATEMENT OF KENNETH R. FEINBERG

My name is Kenneth R. Feinberg and I am honored to once again be invited to testify before these two distinguished House Subcommittees.

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

I believe it is worthwhile to once again highlight the success of the 9/11 Fund. If statistics are any barometer of success, the 9/11 Fund served its purposes in providing an efficient and effective administrative no-fault alternative to tort litigation against alleged domestic tortfeasors. Over \$7 billion in public taxpayer funds was paid to 5,560 eligible claimants. Families of 2,880 victims received \$5,996,261,002.08 in compensation; in addition, 2,680 physical injury victims were paid \$1,053,154,534.56 by the 9/11 Fund. Some 97% of all eligible families who lost a loved one on September 11 voluntarily agreed to enter the 9/11 Fund rather than litigate. The average award for a death claim was \$2,082,035.07; the average award for a physical injury claim was \$392,968.11. And all of this was accomplished with 9/11 Fund administrative and overhead costs of less than 3%. I point with pride to the fact that this was one of the most efficient, streamlined and cost effective government programs in American history.

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

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

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

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

However, as already indicated, the 9/11 Fund expired by statute on December 22, 2003, before thousands of responders, and possibly other individuals exposed to the toxic air at the World Trade Center site, manifested any physical injury. This large group of individuals could not be paid from the 9/11 Fund since there was no longer any Fund to process and pay their claims. Accordingly, they have exercised the alternative option of litigating before Judge Hellerstein. It is my understanding that over 11,000 responders have filed lawsuits to date, and that as many as an addi-

tional 29,000 individuals may yet manifest physical injuries in the next few years. It is anticipated that these affected individuals might file suit as well when their physical injuries become apparent.

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

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

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

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

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

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

First, any attempt to reenact and extend the 9/11 Fund should be initiated with the understanding that there would be no changes in the rules and regulations governing the original Fund, that the new law would simply be a "one line" reaffirmation of the law which established the original 9/11 Fund. This will not be easy. Various interested parties, while championing the reenactment of the 9/11 Fund, have called for additional statutory modifications and additions, e.g., indemnity protection for contractors at the World Trade Center site; new eligibility criteria for rescue workers and others who allegedly suffered respiratory injuries well beyond the geographical boundaries of the World Trade Center site; and revised eligibility filing deadlines for claimants who manifested a physical injury during the period of the original 9/11 Fund, but did not make a timely filing claiming they were unaware of 9/11 Fund filing deadlines. These and other well intentioned requests have all been asserted in connection with any attempt to reenact and extend the original 9/11 Fund. But I suggest that any attempt to modify the statutory provisions and accompanying regulations of the original Fund will lead to the type of controversy and disagreement that will undercut political consensus and prevent reenactment of the Fund.

Second, even a "one line" extension of the original 9/11 Fund poses fundamental philosophical and political questions of fairness. Why should Congress be reenacting the 9/11 Fund, providing millions in additional public compensation to the physical injury victims of the September 11 attacks, while no such Fund exists at all for the victims of the Oklahoma City bombing, the victims of the African Embassy bombing, the victims of the first World Trade Center attack in 1993 or, for that matter, the victims of the unprecedented disaster associated with Hurricane Katrina? Why should Congress, which has already enacted legislation authorizing over \$7 billion in public compensation to the families of those who died on September 11, or who

were physically injured as a result of the attacks, now authorize additional millions or even billions in compensation for the remaining September 11 victims, while failing to do anything similar to the other victims of life's misfortunes? It is a fundamental question posed to our elected officials in a free democratic society. Why some victims but not others? On what basis should such distinctions be made? Are some victims more "worthy" than others?

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

II. SETTLEMENT OF THE CURRENT AND FUTURE PHYSICAL INJURY LITIGATION

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

As I understand it, Congress created a September 11 related captive insurance company for the City of New York and its contractors in an amount approximating \$1 billion. This money could be made available as part of an overall comprehensive settlement to resolve the physical injury claims currently pending in federal court against the City of New York, the contractors, and other defendant entities. Two problems have been raised, however, about the availability of these funds and the challenges posed in securing a comprehensive settlement of the litigation.

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

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

Third, is the perplexing and legitimate problem of future physical manifestations resulting in additional litigation. I agree with the City of New York and other defendants that it makes little sense to settle all of the current cases only to find that additional lawsuits are filed by future plaintiffs who do not manifest a physical injury until years after a current settlement. But, again, there are answers to this vexing problem which should help ameliorate defendant concerns. For example, it might be possible to set aside a portion of all available settlement proceeds, to be used if and when additional individual physical injury claims are presented for payment. Alternatively, it might be possible for all current eligible plaintiffs to be paid in installments, with additional funds due and owing depending upon the filing rate of future claims; this is exactly what Federal Judge Jack B. Weinstein did in reorga-

nizing the Manville Trust involving individual asbestos claims. A down payment was made, with future payments depending upon the filing rate of subsequent individual asbestos claims. Another idea is to provide some type of claims registry; an eligible individual exposed to toxic fumes at the World Trade Center, but not yet manifesting any physical injury on the date of the settlement, might receive a modest payment immediately and "register" for participation in the settlement. This potential future plaintiff would immediately receive the available insurance policy in addition to the modest down payment; in return, the individual would surrender all future rights to litigate.

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

* * * * *

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

I thank you for the opportunity to testify here today.

Mr. NADLER. I thank the gentleman. And as I said, we will have questions for Mr. Feinberg now, and then we will go to the other witnesses, since Mr. Feinberg has to leave.

And I recognize myself to start the questioning.

Mr. Feinberg, let me just ask you the following question. We have heard in some of the opening statements the problem that there are 11,000 tort claims pending against the city. We have heard concerns about paying too much to trial lawyers and so forth.

If this bill were to be enacted—and you are familiar with the bill—if this bill were to be enacted, would it reduce the tort claims? Would it reduce the compensation or the amount of money spent on trial lawyers? Would it make sure that more of the money that is paid goes to victims?

What do you think the effect would be in terms of two alternatives, adopting this or not adopting this?

Mr. FEINBERG. Well, I think that, a fortiori, the legislation would vastly reduce the amount of litigation by encouraging those 11,000 litigants to enter a newly enacted 9/11 fund. Now, how many of them would pick up on that option?

Whether they would meet the 9/11 criteria, we would have to go through the 11,000 cases, but I suspect that, as with the 9/11 fund, a substantial number of those currently litigating would take advantage of the provisions of the fund to get prompt payment without the need to litigate any further.

Mr. NADLER. Now, in the original 9/11 fund, 97 percent went to the fund—

Mr. FEINBERG. That is correct.

Mr. NADLER [continuing]. Rather than litigate, correct?

Mr. FEINBERG. Correct.

Mr. NADLER. And this might be 97 percent or it might be somewhat less, depending on different circumstances, but you would think it would be the overwhelming majority.

Mr. FEINBERG. I would hope. I would hope.

Mr. NADLER. Do you have any suspicion?

Mr. FEINBERG. I have no idea.

Mr. NADLER. Okay. I will yield back the balance of—well, actually, since we are only questioning one witness, we are all going to have our 5 minutes. I am sure it is a 5-minute thing now.

But I yield to the distinguished gentleman from Wisconsin.

Mr. SENSENBRENNER. Thank you very much.

Mr. Feinberg, welcome back.

Mr. FEINBERG. Thank you.

Mr. SENSENBRENNER. Let me ask you a question, and it goes to the whole issue of attorneys' fees. This bill proposes what is essentially a no-fault system. And it would be up to the plaintiff or the petitioner to prove up the damages that would be caused.

Obviously, that requires a lot less lawyering than providing liability, particularly with a situation like this. Would you be in favor of having a statutory limit on attorneys' fees, like the 10 percent that we put in private claims bills before they go to the House floor?

Mr. FEINBERG. I don't know if Congress has to actually formalize a cap on attorneys' fees with this legislation. You will recall, Congressman, that when the 9/11 fund was enacted, the overwhelming number of claimants who filed with the fund using lawyers acquired those lawyers pro bono.

The legal profession in the 9/11 fund stepped up. And about 2,000 claimants were represented in which the lawyers voluntarily waived all rights to attorneys' fees.

As to those who required a fee, we had a recommendation in our regulations—not a formal regulation, but a recommendation—that attorneys' fees remain at no more than 5 percent. To my knowledge, with rare exceptions, even in those cases where attorneys did receive a fee, it was a single digit fee.

So in this fund, I don't think it would be necessary to require that fees be capped, because I think the profession would step up and do it voluntarily, as they did with the 9/11 fund.

Mr. SENSENBRENNER. You are a little more optimistic than I am, but then the claims in the original 9/11 fund were immediately in the aftermath of 9/11, when the memory of that horror was very vivid in the minds of the American people.

Five-and-a-half years have gone by since the statute ran out on claims on the original 9/11 fund. And, unfortunately, I think that the American public's memory has been dulled somewhat.

We do have a 10 percent cap on private claims bills that are routinely reported out of this Committee and considered by the House of Representatives. And if jawboning is good enough, I guess we can leave it at that, but let me say that I think that is an open question.

The other question that I have in my 5 minutes, Mr. Feinberg, is, do you believe that there should be kind of a standard compensation schedule like happens in workers' comp claims for var-

ious types of injuries that are alleged by people who are petitioning out of the fund that is re-established in this bill?

Mr. FEINBERG. Yes. You would need, for purposes of efficiency, a streamlined process. We had in the original 9/11 fund for purposes of physical injury compensation—I think it was three levels of compensation, depending and tied directly to the objective determination of physical disability, like workers comp.

If somebody was 100 percent disabled, 60 percent disabled, 40 percent disabled, and could confirm and corroborate objectively that degree of disability, we compensated them at those levels.

Mr. SENSENBRENNER. But you wouldn't be paying someone who is a highly compensated employee more than someone who was a far less compensated employee for the same injury?

Mr. FEINBERG. Oh, yes, we would. Under the 9/11 fund, we were required by Congress to take into account the economic loss suffered as a result of the physical injury of the victim.

Mr. SENSENBRENNER. Do you think that requirement should be maintained in this legislation?

Mr. FEINBERG. If you are reauthorizing the 9/11 fund, it was essential, an essential feature of the 9/11 fund.

Mr. SENSENBRENNER. Okay. But isn't a life a life a life, and a broken arm a broken arm a broken arm?

Mr. FEINBERG. Congressman, you won't have to convince me of that. The Congress in the original legislation required that stock brokers or bankers get more than busboys, waiters, firemen, soldiers, or policemen. The law was the law. I had to follow it.

I have written that that is a very difficult inequitable calculation to make, but it was one that was required by the Congress of the United States.

Mr. SENSENBRENNER. Thank you. I think I have made my point, and I yield back the balance of my time.

Mr. NADLER. Does anyone else wish to ask questions of this witness?

The gentleman from Virginia—oh, I am sorry, the distinguished Chairperson of the Subcommittee.

Ms. LOFGREN. Yes, just one question. When you appeared before us last time, you had a few concerns about the bill as drafted. Does this newly drafted bill address those concerns?

Mr. FEINBERG. It addresses some of them; it doesn't address others. It is a good-faith effort.

Understand, this bill addresses some of the immediate cost concerns—

Ms. LOFGREN. Right.

Mr. FEINBERG [continuing]. At the same time it broadens the eligibility requirements so that more people would be compensated under this fund, if it was re-enacted, than under the original 9/11 fund.

Ms. LOFGREN. Due to time, but not the nature of the illnesses—

Mr. FEINBERG. Oh, there is geographical expansion. There is geographical, that this fund would not only compensate people at the World Trade Center—

Ms. LOFGREN. Right.

Mr. FEINBERG [continuing]. It would compensate those claiming injury transporting material all the way out to Fresh Kills.

Ms. LOFGREN. But the theory is that whether you were transporting the material, or you were in the pit, you were still responding to this disaster.

Mr. FEINBERG. Correct. That is correct.

Ms. LOFGREN. All right.

Mr. FEINBERG. That is the goal, at least.

Ms. LOFGREN. That is the goal.

All right. I yield back, Mr. Chairman. Thank you.

Mr. NADLER. I thank the gentlelady.

I now recognize the gentleman from Iowa.

Mr. KING. Thank you, Mr. Chairman.

Thank you, Mr. Feinberg, for your testimony again. Would you be comfortable with a 5 percent cap on attorney fees?

Mr. FEINBERG. Well, I was comfortable with it in the 9/11 fund. I would be comfortable with it now. It wasn't a formal regulation. It was sort of an legislative history we recommended. And for all intents and purposes, it worked, so I would be comfortable with whatever is decided.

Mr. KING. Thank you. And you have looked this bill over, I take by your testimony, so I would ask you if you have an opinion on as to whether the contractors might have liability for non-economic damages or punitive damages?

Mr. FEINBERG. Congressman, when you say they might have liability, I think that is a fair comment.

Mr. KING. And as you analyze the language that is in the bill, would there be any statutory protection from that to your knowledge?

Mr. FEINBERG. Sure. As I read the bill, there is some protection for the contractors in this legislation, yes. Whether or not it would provide blanket immunity and protection, again, I am not sure of that. But, clearly, there is an attempt to do just that.

Mr. KING. Okay. Let me just say that I think it is worth taking an extra look to ensure that there isn't some punitive damages or non-economic damages, liability on the other side of this bill that might not be properly introduced into the language, so I want to protect the contractors on the other end of this. I am concerned about that.

Mr. FEINBERG. I will look it over and respond directly to your staff.

Mr. KING. I thank you very much. Now, another question would be, if an individual opts into the health care benefits in Title I, is there then a presumption of liability that might go along with that?

Mr. FEINBERG. Oh, I don't think. I will check. I think if an individual opts into Title I, they have made a decision to avoid any debate over liability, in terms of favoring a no-fault compensation system.

Mr. KING. Do you think we know—

Mr. NADLER. Would the gentleman yield?

Mr. KING. I would yield.

Mr. NADLER. I think there is a bit of confusion here as to which is Title I and Title II. You might want to specify at both ends.

Mr. KING. On my side, Title I being the health care benefits component of this and Title II being the compensation beyond the health care.

Mr. FEINBERG. I will have to go back and check as to that distinction.

Mr. KING. Thanks for pointing that out, Mr. Chairman. And so I will just make this point that, if an individual opts into this bill in the package of the Victims Compensation Fund and the health care benefits, which are under Title I, I would think that treatment for health care may provide a presumption then that they could use to file suit against and opt out of the Title II component of this and file a suit against the contractors and the city and the Port Authority, et cetera.

I am just concerned about that, that if they opt into the health care, they also opt in to the Victims Compensation Fund. That is my comment on it.

And in the interest of time, if there is a response——

Mr. FEINBERG. No, no, again, I will check and give you my considered judgment reviewing the language of the bill.

Mr. KING. Thank you, Mr. Feinberg.

Mr. Chairman, I thank you, and I yield back.

Thank you.

Mr. NADLER. I thank the gentleman.

The gentleman from Virginia is recognized.

Mr. SCOTT. Thank you.

If we extended the deadline, do you have a ballpark figure as to how many people might be eligible and how much the potential liability would be?

Mr. FEINBERG. I have no idea. I don't think anybody has any firm idea about that.

Mr. SCOTT. On firefighters and police, why was workers' compensation insufficient?

Mr. FEINBERG. Under the original 9/11 fund?

Mr. SCOTT. Right.

Mr. FEINBERG. Congress trumped workers' compensation by providing a blanket opportunity for workers and others, private citizens not working, not rescue workers, to file with the fund.

Mr. SCOTT. Well, I mean, just for firefighters and police officers, they were eligible for workers' comp.

Mr. FEINBERG. That is correct. And because they were eligible, we had required by law collateral offsets so that, if they recovered workers' compensation, pursuant to program one, we would deduct that compensation in netting their ultimate award.

Mr. SCOTT. You indicated you compensated some who filed on time for injuries?

Mr. FEINBERG. I am sorry. I didn't hear the question.

Mr. SCOTT. You compensated some for injuries. When you compensated them, did you require a release from future payments? Or did you allow sequential payments if their conditions got worse?

Mr. FEINBERG. No, a total release.

Mr. SCOTT. Would an open-ended situation be better? Because with these kinds of injuries, you don't what the future may be, so you wouldn't know when to settle for one check.

Mr. FEINBERG. That is a very good administrative law question. I would just respond by saying the goal of the original 9/11 fund was to compensate as of the date of injury, get a total release, close out the cases, and bring an end to the possibility of litigation. That was the goal, and that is why we required, under the statutory mandate, a total release.

Mr. SCOTT. To be eligible, do you have to prove that you were injured as a proximate cause of 9/11 or do you presume the connection? Obviously, if you have to prove it, you have some that can't prove it that should be eligible, if you have a presumption—

Mr. FEINBERG. We estimated under the 9/11 fund regulations presumptions of proximate cause as to geographical location and time to make it very, very simple to either satisfy or not satisfy proximate cause requirements.

Mr. SCOTT. And the total compensation, what damages could someone recover if they filed a claim? I assume medical care, lost wages, pain and suffering?

Mr. FEINBERG. All of that. There was no cap on the amount that could be compensated. As I recall it, for a physical injury, the least amount that we found eligible was \$500 for a broken finger at the World Trade Center.

And the most that we compensated anybody was a stock broker who came to see me with third-degree burns over 85 percent of her body. She received a little over \$8 million. And in between was the range of all the physical injury payments.

Mr. SCOTT. How would the damages differ from an ordinary negligence case?

Mr. FEINBERG. The damages didn't differ much from ordinary negligence, in terms of the gross calculation, economic loss plus pain and suffering. We were required by Congress, however, unlike tort law, to deduct collateral sources of income, like you mentioned, Congressman, so the net award might have been less.

Mr. SCOTT. Thank you, Mr. Chairman. I yield back. Thank you.

Mr. NADLER. Mr. Feinberg, how much time do you have left?

Mr. FEINBERG. I am okay.

Mr. NADLER. Okay.

The gentleman from California, Mr. Lungren?

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

And it is good to see you, Mr. Feinberg. And thank you for your service as the special master. That was extraordinary work.

You have indicated, I think, in your opening statement that the question of fairness is somewhat elusive in a situation like this. We are trying to do the best we can in a difficult circumstance, and you can't have complete fairness, because, as you pointed out, you have other kinds of tragedies that strike just as heavily on the individual as this did. And Congress made a specific exception to the law in this circumstance, because this was viewed as an act of war, an attack on the American people.

And so, as we try and figure out what we are going to do here, one of my greatest concerns is not just this question of fairness, but the principle or the precedent for the future that, if we have a disaster of this type, we don't have people reluctant to respond, not just because of the obvious physical injuries, but when you bankrupt companies in the process, it is not an encouraging factor to get

them to respond in future events. And I think we ought to keep that in mind.

But let me ask you very specifically about a quote of yours in a piece you wrote in *The New York Times*. And this is the quote directly. It says, "More than \$1 billion in public funds is currently available for distribution as part of the initial Federal appropriation earmark for New York City's 9/11 recovery. If you add financial contributions for those contractors and others involved in litigation, supplement that with funds from various city charities, a total of at least \$500 million is available to settle the pending lawsuits, more than sufficient to pay all eligible claims, as well as lawyers' fees and costs."

Is that your current position? Could you elaborate on that? And when you refer to financial contributions from contractors and others involved in the litigation, are you saying that that would be done to the extent of their insurance coverage or are you saying, whatever assets they had, which would, in my case, in my view, be detrimental to what we are talking about, that is, if they ended up being out of business, we would have that terrible precedent for the future.

Mr. FEINBERG. Thank you. That quotation is accurate. It was in the context of my attempting to suggest that, if there is not going to be a 9/11 fund, if Congress does not reauthorize the 9/11 fund, surely there is a better way to resolve this litigation than continue to litigate ad infinitum in the courts in New York City.

And what I was suggesting was—and I can just see Michael Cardozo starting to raise his hand—but what I was suggesting was that if you take the monies that were appropriated by Congress, perhaps voluntarily, supplement those funds with insurance proceeds from the contractors, you would, in my opinion, have a pot that would be ample to resolve the present litigation and set aside sufficient funds to protect against the possibility of future litigation arising out of latent physical manifestations.

So I was using that as an example, option one, the 9/11 fund; option two, the settlement of the litigation voluntarily; option three, business as usual, which I don't think anybody benefits from.

Mr. LUNGREN. Just one other question, and that is, you have said regarding keeping the 9/11 fund open to the year 2031 that "no latent claims need such an extended date." What do you think would be appropriate?

Mr. FEINBERG. You would have to ask—and there are experts at this table—you would have to ask, what is the maximum time that any reasonable latent physical injury would manifest itself from the time of exposure to toxic products down in the World Trade Center or the Pentagon to the time when reasonable medical diagnosis would say, be it be a physical manifestation.

And that period, it seems to me, would be an appropriate period—5 years, 6 years, 7 years more from 9/11—I think would probably be an appropriate period. But there are doctors who would answer that question.

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

Mr. LUNGREN. I would happily yield to the Chairman.

Mr. NADLER. Thank you. I just want to clarify one point.

Mr. Feinberg's quote that you quoted about the billion dollars, there is some dispute about that. There is \$1 billion that was appropriated to the World Trade Center Captive, headed by Ms. LaSala. The Captive has interpreted that as money as for the defense of suits against the city and contractors.

Some people think it was for payouts. It has not been available for payouts. This bill would make it available for payouts to people who do not opt into the VCF, and it would make that money, along with some other parts of insurance money, available for settling litigation of people who do not opt into the VCF. Right now, it is not being used for that.

Mr. LUNGREN. Right. But you are talking—well, as we often find in this place, money can be fungible. And maybe using—

Mr. NADLER. Well, that is right.

Mr. LUNGREN [continuing]. That for payouts rather than—

Mr. NADLER. I just wanted to clarify the status of that billion dollars.

Mr. LUNGREN. I appreciate it. Thank you very much for your indulgence.

Mr. NADLER. The gentleman from New York, Mr. Weiner, is recognized.

Mr. WEINER. Thank you, Mr. Chairman.

Mr. Feinberg and the panel, thank you all for being here. I think it bears recollecting that the Victims Compensation Fund was a remarkable success in the face of some extraordinary obstacles. You know, Mr. Feinberg had to quite literally put the value on people's lives.

And I think what we learned is that we had got the objectives that we wanted. We wanted to prevent the delays that went with lawsuits. We wanted to prevent the uncertainty that came with a generation of lawsuits against every entity under the sun, including the airlines, including everyone else, and that to a degree a lot of the very tough questions that have to be wrestled with now had to be wrestled with then, that now there are some questions that clearly have arisen, and some of them were just addressed by Mr. Lungren and Mr. Feinberg about how it is you define someone. And it is going to be a medical test.

But I think that if we—the seminal question that we have to ask ourselves—and I think we have reached some consensus here—is that, if we knew in the period—when we passed the Victims Compensation Fund, that sitting out there in the audience or sitting out there beyond the TV cameras were a whole group of people that had a deadly seed that was born on September 11th within them, within their lungs, within their blood, there is no question that, in a bipartisan fashion, we would have included them in the bill.

There really—I don't think there are too many people that would say, oh, no, we would have not. This is simply a matter of additional information that is become clear, and that is the fact that many people are dying to this day.

But we have to understand the imperative here. I am open, frankly—and Mr. King made some good points—I am open to the idea of always creating alternatives to the courthouse for people who want to, in an expeditious way, with money on the barrelhead,

say, in the case of a hurricane or in case of a natural disaster, figure out a way to make that system more expeditious.

I am open to that idea. I am not wedded to the idea of people having to wait and slog through the justice system.

And I think we have also learned that, unlike our tendency sometimes to try to constrict the outcomes when we put people who are well-meaning, smart, who are prepared to make some tough calls, like Mr. Feinberg in charge, we get the outcomes we want, that citizens vote with their feet and say, "I am willing to put my faith in a master's hands."

So then the question only becomes how we define it. And I think that it is true—Mr. Feinberg makes a good point—there are people who are dying today even though they were not literally on top of the pile every moment. And I think we are going to have to ask, in my other Committee, in the Commerce Committee, how we define that.

But there is no doubt that I think we have reached a consensus on this Committee and in this Congress that we want to make sure that contractors in the future, the same way firefighters and police officers in the future, go into these piles and help out. We want to make sure that we don't have a situation where we are facing litigation for years and years, that it is the grandchildren of victims who are getting compensated and not the victims themselves.

So I think that that is what Ms. Maloney and Mr. Nadler's bill does. And I really do think that, when we look back—and now we have some benefit of time—when we look back at the work that Mr. Feinberg and the commission did in dealing with these very tough problems, I think we learned a valuable lesson, in that sometimes less is more.

And I think that Mr. Nadler and Mrs. Maloney's bill says, listen, let's figure out a way to take that and replicate it. Maybe it isn't 22 years. Maybe it is 12 years. Maybe it is 10.

But I think one of the lessons we did learn is, if we don't leave a sufficiently wide window, and we try to do medicine from this side of the rostrum, we make a fundamental mistake.

And I would also have to say that if these panelists—I know you will be leaving, Mr. Feinberg—but in addition to saying thank you, I have to once again point out the uncanny resemblance between you and Mr. Cardozo. I am sure—I don't know if it is something about the legal profession or dealing with these issues long enough, you begin to take on—kind of like we in Congress take on the appearance of our pets or something like that.

But I want to thank you for the service and patriotism you have showed and the wisdom that you have demonstrated in guiding this. A lot of the complaints and concerns were raised. You took the job anyway and did a remarkable job with it. And I haven't heard you volunteer to be the master for the next 22 years, but the job is probably going to be available.

Thank you, sir.

Mr. FEINBERG. Thank you.

Mr. NADLER. I thank the gentleman.

And let me express the thanks to Mr. Feinberg, both for coming here and for his testimony, and for the tremendous job you did, which everybody acknowledges was a tremendous job as the special

master of the original bill. And if this bill passes, you may be drafted a second time. So thank you very much.

Mr. FEINBERG. Thank you very much.

Mr. NADLER. And let me thank the witnesses, the other witnesses for their patience while we question Mr. Feinberg, who has to leave early. Mr. Feinberg is excused, and now we will turn to the other witnesses.

And I recognize for 5 minutes, Ms. Burnette.

**TESTIMONY OF BARBARA BURNETTE, FORMER DETECTIVE,
NEW YORK CITY POLICE DEPARTMENT**

Ms. BURNETTE. Thank you, Chairman Nadler, Chairman Lofgren, Representatives Sensenbrenner and King, and Members of the Subcommittees for inviting me to appear before you today.

My name is Barbara Burnette, and I live in Arverne, NY. I am 45 years old, a wife and a mother of three children. With me today are my husband, Lebro, my son, Lebro, Jr., and my daughter, Tara.

I am a former New York City police detective, retired from the force after 18 years of service. My career ended because of injuries I developed from over 3 weeks of service, about 23 days in total, at the World Trade Center Site.

On September 11, 2001, I was assigned to the Gang Intelligence Division of the NYPD, working in Brooklyn, New York. That morning, when my fellow officers and I learned of the attacks, we rushed to Manhattan the fastest way we could: by taking boats.

We arrived at the piers off the West Side Highway around the time the towers had collapsed. The air was thick and burning, choking dust and smoke. I had to put my hand over my nose and mouth to even breathe.

I worked for about 12 hours in these difficult conditions, all day and into the night, evacuating people from around the World Trade Center site or directing them away. I frequently washed my eyes out with running water.

I was not provided any respirator or any other protection for my lungs and throat. I had to literally wash dust and debris out of my eyes and mouth and throat throughout the day, picking up a hose and letting the dirty, muddy water run out of my mouth and onto the ground.

At one point, EMS rinsed my eyes out. They were swollen and the color of dark red crayons. But none of the rescue workers could stop doing what we had to do.

I left the site at around 10 p.m. the first day. Five hours later, I reported back, arriving for work at 4 in the morning on September 12. We were assigned directly to the debris pile on the second day. I worked until late afternoon, removing debris, by hand and using buckets and shovels, and at no time was I provided with respiratory protection.

I spent my weeks at the World Trade Center site in this routine: shoveling; clearing away debris; searching for survivors; and, later, sifting for the body parts of the dead.

Different construction companies hired by the city guided, as well as many other police officers and firefighters, to certain areas so we could search and remove debris. We did just that. We really

worked hand in hand and side by side with construction and iron workers.

Air quality was never a concern for the city and its contractors, all of which allowed the work to continue 24/7.

For their part, the city and construction firms never gave me a respirator. I live with the consequences of their failure today. I have been diagnosed with interstitial lung disease, more specifically, hypersensitivity pneumonitis, with fibrosis in my lungs.

My lungs are scarred. I cannot move around my house without wheezing or gasping for breath. I take large doses of steroids that add to my weight. And I start each morning by connecting a nebulizer and inhaling multiple doses of medication.

There is serious talk of me needing a lung transplant. I had no history of lung disease before the World Trade Center service. I never smoked. And, in fact, I had a physically demanding lifestyle and career.

Allow me to explain. One of the highlights of my career was my assignment to plainclothes narcotics unit. During my years in narcotics, my assignment required me to walk up to 4 miles a day, standing ready to make arrests in buy-and-bust operations and search warrants.

Making an arrest is tough, intense, and physical. I made over 200 arrests. I was recognized numerous times by the department for excellent police duty. And I have several medals for meritorious police duty.

I was born and raised in Brooklyn, NY. All my life, I have enjoyed being an active person, whether it was on the job or playing sports, especially on the basketball court. In my senior year at John Jay High School, I was named to the New York All-City Basketball Team. I then set off for college on a 4-year basketball scholarship, although my career was interrupted by an orthopedic injury.

On July 11, 1988, a date I will never forget, I joined the NYPD. I earned my bachelor's degree in criminal justice from St. John's University, working full-time. As a detective, not only was I able to advance my career; I was able to enjoy the competition of organized basketball as a guard on the police league women's team.

Life is very different now. I cannot walk up a flight of stairs or down the street without gasping for breath, let alone arrest a drug dealer or do most police work. Walking, a basic life activity, is extremely difficult for me, because my illness has, at times, caused me to black out.

In September 2004, while working full duty, I experienced a blackout at work. There really wasn't any explanation for this. I underwent many medical tests and, in May 2005, having discovered inflammation in my bronchial passages, doctors at Mt. Sinai Center performed two bronchoscopies and an open-lung biopsy.

Granulomas, abnormal tissue formations, were detected in my lungs, and I was placed on daily dosages of Prednisone to fight my inflammation. My condition worsened, and I began to realize I would never go back to work full duty as a detective.

The police department agreed. And on August 11, 2006, its doctors determined that I was permanently disabled with an illness resulting from the World Trade Center site.

As you know, the Victim Compensation Fund closed to applicants in December 2003. There was no reason for me to have even considered filing a claim. I was not sick at the time the fund was open.

You should know that my first concern is my health, and I will continue to do everything I can to get better. At the same time, I am seeking justice.

Along with thousands of other rescue, recovery and construction workers, I have filed an individual lawsuit in the southern district of New York seeking redress for my respiratory injuries.

Injured, years later, we now count the dead and dying among our ranks. My case is now in its fourth year. It has been a long road, and I can tell you that I can't see an end.

I respectfully ask you to do what you can to right this wrong.

Thank you. [Applause.]

[The prepared statement of Ms. Burnette follows:]

PREPARED STATEMENT OF BARBARA BURNETTE

Thank you Chairman Nadler, Chairman Lofgren, Representatives Sensenbrenner and King, and members of the subcommittees for inviting me to appear before you today. My name is Barbara Burnette, and I live in Arverne, New York. I am 45 years old, a wife, and mother of three children. With me today are my husband, Lebro, Sr., my son, Lebro, Jr., and my daughter, Tara.

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On September 11, 2001, I was assigned to the Intelligence Division of the NYPD, working in Brooklyn, New York. That morning, when my fellow officers and I learned of the attacks, we rushed to Manhattan the fastest way we could, by taking boats. We arrived at the piers, off of the West Side Highway, around the time the towers had collapsed.

The air was thick with burning, choking dust and smoke. I had to put my hand over my mouth and nose to even breathe. I worked for about twelve hours in these difficult conditions, all day and into the night, evacuating people from around the World Trade Center Site or directing them away. I frequently washed my eyes out with running water. I was not provided any respirator or other protection for my lungs and throat. I had to literally wash dust and debris out of my eyes, mouth and throat throughout the day, picking up a hose and letting the dirty, muddy water run out of my mouth onto the ground. At one point, EMS rinsed my eyes out. My eyes were swollen and the color of dark red crayons. But my fellow rescue workers and I could not stop doing what we had to do. I left the Site at around 10 pm that first day.

Five hours later, I reported back, arriving for work at 4 in the morning on September 12th. We were assigned directly to the debris pile on the second day. I worked until late afternoon, removing debris, by hand and by using buckets and shovels. At no time was I provided with respiratory protection. Like the day before, I had to run water into my mouth and throat to wash away the dust, spitting it out. My eyes needed constant rinsing. If I wasn't crying over what I was seeing in the ruins, tears streamed down my face from the burning, irritating dust.

I spent my weeks at the World Trade Center Site in this routine: shoveling; clearing away debris; searching for survivors; and, later, sifting for the body parts of the dead. Different construction companies hired by the City guided me, as well as many other police officers and firefighters, to certain areas so we could search and remove debris. We did just that. We really worked hand in hand and side by side with the construction and iron workers. For all of us, no matter what our job, each day was pretty much the same as we made our way across all parts of the rectangular-shaped field of debris, from north to south and east to west.

People ask me now, in the legal proceedings, where exactly I was on the debris pile during those long weeks. Well, the answer is "all over it." There were no landmarks or street signs there; nothing was the same as it had been. All I knew is that we were searching and removing the wreckage of the World Trade Center, and working right on top of the burning, smoking, hot rubble.

Did conditions change down there during my time on the debris pile? No. The fires never stopped burning, and there was always dust and flying debris. Air qual-

ity was never a concern for the City and its contractors, all of which allowed the work to continue 24/7. From my view, the work was tough and dirty, choking and dangerous, but there was no way I would allow myself to stop and leave.

I thought of the thousands of poor victims, including my fellow police officers, and thanked God that I was not one of them.

For their part, the City and its construction firms never gave me a respirator. They sure relied on my work, though, and that of all of the other brave rescue and recovery personnel. We were a willing and courageous group.

If our energy brought the debris removal and recovery efforts closer to completion, the City and construction companies should have taken the precautions necessary to protect all of us. We held up our end of the deal. The City and its contractors failed completely.

I live with the consequences of their failure today. I have been diagnosed with interstitial lung disease, more specifically, hypersensitivity pneumonitis with fibrosis in my lungs. I fail the pulmonary function tests doctors give me. Inflammation in my lungs interferes with my breathing, and destroys the tissues that get oxygen to my blood.

My lungs are scarred. I cannot move around my house without wheezing or gasping for breath. I take large doses of steroids that add to my weight. I start each morning by connecting to a nebulizer, and inhaling multiple doses of medications. There is serious talk of my needing a lung transplant.

I had no history of lung disease before my World Trade Center Service. I never smoked. In fact, I had a physically demanding lifestyle and career. Allow me to explain.

One of the highlights of my career was my assignment to two plainclothes Narcotics Units. During my five years in Narcotics, my assignments required me to walk up to 4 miles a day, standing ready to make arrests in buy and bust operations and search warrants. Making an arrest is tough, intense, and physical. I made over 200 arrests. I was recognized numerous times by the Department for Excellent Police Duty. In addition, I received several medals for Meritorious Police Duty.

I was born and raised in Brooklyn, New York. All my life I have enjoyed being an active person, whether it was on the job or playing sports, especially on the basketball court. In my senior year at John Jay High School, I was named to the New York All City Basketball Team. I then set off for college on a four year basketball scholarship, although my college career was interrupted by an orthopedic injury. On July 11, 1988, a date I will never forget, I joined the NYPD. I earned my Bachelor's Degree in Criminal Justice from St. John's University while working full time. The Police Department was my second home, and I miss it so much. As a detective, not only was I able to advance my career, I was able to enjoy the competition of organized basketball as a guard on the Police League women's team. My squad competed across the United States and internationally, playing against Canada and Australia, and won four championships.

Life is very different now. I cannot walk up a flight of stairs or down the street without gasping for breath, let alone arrest a drug dealer or do most police work. Walking, a basic life activity, is extremely difficult for me. Because my illness has, at times, caused me to black out, I avoid driving, and rely on my husband to get me where I need to go.

In September 2004, while working full duty, I experienced a blackout at work. There wasn't really any explanation for this episode. I underwent many, many medical tests. In May 2005, having discovered inflammation in my bronchial passages, doctors at Mt. Sinai Medical Center performed two bronchoscopies and an open lung biopsy. Granulomas, abnormal tissue formations, were detected in my lungs, and I was placed on daily dosages of Prednisone to fight the inflammation. My condition worsened, and I began to realize that I would never go back to full duty as a detective.

The Police Department agreed, and on August 11, 2006 its doctors determined that I was permanently disabled with an illness resulting from exposure at the World Trade Center Site.

As you know, the Victim Compensation Fund closed to applicants in December 2003. There was no reason for me to have even considered filing a Fund claim. I was not sick at the time the Fund was open.

You should know that my first concern is my health, and I will continue to do everything I can to get better. At the same time, I am seeking justice.

Along with thousands of other rescue, recovery and construction workers, I have filed an individual lawsuit in the Southern District of New York, seeking redress for my respiratory injuries. In violation of New York's municipal and labor laws, the City and its construction companies failed to provide the World Trade Center workers with protective respirators. Injured, years later, we now count the dead and

dying among our ranks. My case is now in its fourth year. It has been a long road, and I can't tell you that I see an end. During that time period, I have been questioned under oath by the City. My attorneys have taken dozens of depositions, briefed two appeals, and exchanged written responses to literally hundreds of questions about my medical condition and World Trade Center Service. The legal work continues today.

After losing an earlier attempt, back in 2006, to dismiss all of the cases, the City and its contractors recently filed papers to dismiss the claims of police officers and firefighters, claiming that New York laws to protect workers do not apply to uniformed service personnel. My attorneys are preparing to fight that argument.

Apart from the constant efforts by the City and its contractors to deprive the workers of justice, what is very frustrating to me is this: In February 2003, Congress approved payment of \$1 billion to the City to insure injury claims arising from World Trade Center debris removal. In announcing the passage of the legislation, Mayor Bloomberg explained, "*This legislation is necessary for the City to expedite the payment of claims relating to this effort.*" To date, the City has not made payment to any one of the approximately 10,000 World Trade Center respiratory claims.

I respectfully ask you to do what you can to right this wrong.

Mr. NADLER. Thank you very much.

The audience will please refrain from expressing applause or condemnation or disapproval or approval.

I now recognize Dr. Melius for 5 minutes.

TESTIMONY OF JAMES MELIUS, MD., ADMINISTRATOR, NEW YORK STATE LABORERS' HEALTH AND SAFETY TRUST FUND

Dr. MELIUS. Thank you, Chairman Nadler, Chairwoman Lofgren, other Members of the Subcommittees. I greatly appreciate the opportunity to appear before you this morning.

I am an occupational physician, epidemiologist. I have been involved with issues at the World Trade Center since shortly after September 11th. Many of our union members work there. I have been very involved with the medical programs that have been developed to provide medical services to the responders and others and, more recently, to the community members living near the World Trade Center.

We know that the exposures following the World Trade Center terrorist attack involved over 50,000 emergency responders, recovery workers, many tens of thousands of people living and working in the area around the World Trade Center.

As a result of these exposures, we know through the medical programs and through peer-reviewed scientific studies that hundreds of these people have developed serious lung diseases, post-traumatic stress disorder, and other serious illnesses. Many of them have become disabled.

We have, through Federal funding, established what I consider to be excellent medical programs that provide medical monitoring, diagnosis of World Trade Center-related conditions, and, for the past few years, providing outstanding medical treatment to people who have developed these World Trade Center medical conditions.

However, these medical programs alone are not sufficient to address all of the harm being suffered by these workers and the others exposed by 9/11. Because so many of them are disabled or becoming disabled and are no longer able to work, they are suffering a great deal of economic hardship because of their illnesses.

We know in looking at the records being kept by the—through the various medical groups and the social agencies that are pro-

viding assistance to these people, that there are hundreds of them who are disabled, unable to work, and are not able so far to receive any assistance from workers' compensation, disability, retirement, or other similar programs.

We know that many of them have lost their health insurance and coverage for their families. We know that many of them have had to move out of their homes because they can no longer afford their mortgage payments. These are for the most blue-collar workers that don't have significant financial resources to fall back on.

You have heard from Detective Burnette today about what happened to her. Another potential witness we talked to was a firefighter, fire officer who is not able to be here, because this weekend he underwent a lung transplant due to the serious lung disease that he suffered.

I would like to talk about one other victim of 9/11. Leon Heyward was an inspector in the New York City Department of Consumer Affairs near the World Trade Center towers. September 11th, he helped to evacuate disabled co-workers from Ground Zero. He later developed respiratory disease, something called sarcoidosis, which we have found through scientific studies that is related to 9/11 exposures.

His disease got worse. He had to stop working. He was denied workers' compensation. He struggled to get by and needed to move to a smaller apartment. He later developed lymphoma and died last year.

Even though he had been denied workers' compensation, the New York City medical examiner, at the request of Mr. Heyward's family, did an autopsy and reported a finding that his death was due to 9/11. Based on their findings at that autopsy, he was considered to be a homicide related to the 9/11 terrorist attack.

So I think it is important to recognize that Mr. Heyward and many other people who are not receiving compensation are having a great deal of difficulty because of this.

I would also add, by the way, that Mr. Heyward's sister, Leona Hull, is here today with us and come from New York to attend this hearing and is very involved in assisting him through the struggles and can relate firsthand all of his difficulties.

I would just like to emphasize that there are many more people like Mr. Heyward, like Ms. Burnette, who have suffered, who have become ill, and that we need a system in place to provide not only the medical programs we have, but also the assistance to them, economic assistance.

The New York Times this morning has an article on how difficult the New York state workers' compensation system is to navigate through, have long delays in that system. And I can tell you from some other work I have done with the Workers' Compensation Board in New York, it is even worse for World Trade Center-related illnesses.

The difficulties there are that these are complicated conditions. Our knowledge of them is evolving over time. We don't know the prognosis for people. It is just more difficult to provide a proper assessment for that.

I think of the time when the Captive Insurance Fund was set up. Many of us hoped that the Captive Insurance Fund would find—

would be able to help many of these people through this. For various reasons which I personally fail to understand, it is not. It has been used —mainly to fight the litigation against the city of New York and against the contractors.

I think that the legislation being introduced now provides the right approach. I think the Victims Compensation Fund, combined with the medical programs, would provide the necessary economic assistance to people that have been injured, developed illnesses as a result of 9/11.

I think that by linking the medical programs to the Victims Compensation Fund, we can ensure that we can provide a fair assessment of people's eligibility for compensation, we can provide a fair and objective assessment of their medical conditions, and we can then, through the system that is the Victims Compensation Fund operated the first time, provide appropriate economic assistance to these people.

It has been going on 8 years now after 9/11. Many people are continuing to suffer because of that, their illnesses as a result of that. And I think it really is time that we should be passing this legislation, getting what I think is excellent legislation in place that addresses these issues, and we will take care of these people for the future.

Thank you.

[The prepared statement of Dr. Melius follows:]

PREPARED STATEMENT OF JAMES MELIUS

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

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

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

HEALTH CONSEQUENCES OF SEPTEMBER 11

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

Due to the incomplete monitoring of these exposures at the time, we still do not know the full extent of their exposures. While we know much about the adverse health effects being experienced by this population, we remain very concerned about latent illnesses that may only become apparent many years after exposure, especially cancers. We do know that these exposures and the accompanying psychological trauma have caused adverse health effects in thousands of those exposed. These adverse health effects include lower respiratory disease (including asthma or asthma like conditions, pulmonary fibrosis, and significant loss of lung function); upper respiratory conditions including chronic sinusitis; gastrointestinal problems most commonly reflux disorder or GERD; and mental health problems including Post Traumatic Stress Disorder and depression. These medical problems have been documented in peer reviewed scientific publications based on research done by several independent research groups. Similar health problems have been documented among fire fighters, other responders and recovery workers, and WTC community residents, students, and workers.

There is no doubt that these disorders and others not listed above are occurring at a much higher rate than would be expected in this population and that these health problems are due to the toxic exposures and psychological trauma related to 9/11. These WTC related medical conditions are being diagnosed using standardized medical protocols by physicians at some of the leading medical institutions in the New York City metropolitan area.

These are not rare isolated medical conditions found in a small number of those exposed. The proportion of those exposed who have become ill is quite alarming. In a recent Mount Sinai Medical Center study of responders and recovery workers, lower respiratory disease was found in 46% of those evaluated; upper respiratory health problems in 64%; and mental health problems in 32%. Similar results have been found in other studies of the exposed populations. New patients are continuing to come to the monitoring and treatment programs with these illnesses that were not evident before this time. Although many of these conditions do improve with medical treatment, the full scope and the ultimate medical outcome for the people currently being treated or who will become ill in the future is uncertain. Thousands are no longer able to work, and thousands more require lifelong medical monitoring and treatment.

As you may know, the federally funded medical programs for responders and recovery workers started some time after September 11 have provided excellent medical care for thousands of these works. Initially, only medical monitoring was available. However, three years ago, Congress also provided funding for medical treatment programs for those with WTC-related medical conditions. In December 2007, Congress also provided funding for medical monitoring and treatment for community residents, workers, and students exposed after 9/11. These programs have been an immense help to those who have become ill from their exposures. Although it is difficult to document, I believe that without these program thousands more of these people would have developed much more serious health problems, and many more would have become permanently disabled.

WHY MEDICAL PROGRAMS ARE NOT SUFFICIENT

However, the continuation of these medical programs alone is not sufficient to address all of the harm being suffered by these rescue and recovery workers and others exposed after 9/11. Many of these rescue and recovery workers are no longer able to work because of the progressive disability caused by their health conditions. We do not have an exact count of those who have become disabled, but I can provide some estimates. In the fire department, over 900 fire fighters have received disability pensions because of health problems related to their 9/11 exposures. This is 100 more than when testified here a year ago. These are fire fighters whose illness is so severe that they are no longer capable of working as fire fighters. Among patients currently being treated at Mount Sinai Medical Center, over 1000 are cur-

rently out of work. Among those, less than half were receiving financial assistance from Workers' Compensation, Disability Retirement, or Social Security Disability. In other words, these ill police officers, construction workers, utility repair workers, and others are now without any personal income and having to rely on their spouses, families, or other financial resources. Most have lost all health insurance coverage for their families, and many can no longer afford their mortgage payments and have lost their homes. These are, for the most part, blue collar workers without significant financial resources to fall back on.

You have already heard from Ms. Burnette. Let me mention a few other individuals. Daniel Arrigo is a 51 year old construction laborer who worked at Ground Zero from September 13, 2001 until January 2002. At one point, he became trapped in an elevator in one of the buildings adjacent to the site and was overcome by smoke and fumes. Over the next few years, he gradually developed severe pulmonary health problems requiring repeated hospitalizations. In early 2008, he had to stop working because of his breathing difficulties. Once he stopped working, he could no longer afford his mortgage and is currently living with his wife and three children in a basement apartment in his brother's home. A few weeks ago, he thought that his workers compensation claim would finally be approved only to have the insurance company delay payments by filing yet another appeal.

Leon Hayward was an inspector in the NYC Department of Consumer Affairs near the WTC towers. On September 11, he helped to evacuate co-workers from Ground Zero to their homes. This involved numerous trips during the time when exposures to the dust cloud were at their highest levels. About one year later, he developed respiratory symptoms that were eventually diagnosed as pulmonary sarcoidosis, an often progressive fibrotic disease of the lungs that has been found to be significantly increased in WTC rescue workers especially in the first year after 9/11. His disease progressed, and he had to stop working in 2005. His workers compensation claim was contested by the NYC Department of Law and denied. He struggled to get by and had to move to a smaller apartment. His sarcoidosis was complicated by the development of a cancer, lymphoma (which could very well also be caused by his WTC exposures), and he died last year at the age of 45. At the request of Mr. Hayward's family, the NYC medical examiner conducted an autopsy and reported the death as a homicide related to the terrorist attack on 9/11 based on the autopsy findings of sarcoidosis caused by WTC dust exposures. While the NYC Medical Examiner recognized Mr. Hayward's illness as related to 9/11, the NYC Law Department had previously denied his worker's compensation claim. As a result, Mr. Hayward struggled to get by with little income and facing severe medical problems. Mr. Hayward's sister, who assisted him through his struggles, has come from New York City today to attend this hearing.

These are just two of the many hundreds of WTC workers and community residents whose health has been seriously damaged by their WTC exposures, who have become disabled, and who now have to struggle to support themselves and their families. Many are not receiving any compensation from workers' compensation or other workplace disability programs. Based on what we have experienced to date in the medical programs, I expect this number to continue to gradually increase over the next several years.

WORKERS' COMPENSATION

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

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

workers. Coverage for workers who came from out of state will depend on their employment arrangements with their private employer or agency. However, volunteers from New York or from out of state are all covered under a special program established by the New York Workers Compensation Board after 9/11 and supported by federal funding.

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

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

In order to alleviate some of the problems for WTC claimants, three years ago New York State implemented some new programs that were designed to improve coverage for WTC responders. These included an extension of the time to file a WTC-related claim. New York is also in the midst of implementing major reforms in the overall workers' compensation system that may also assist with WTC claims. Most of these changes are just now going into effect, and it will take time to assess their impact.

For the past year, I have served on a committee looking at some of the problems in handling of WTC claims. For various reasons, WTC claims are contested and appealed much more often than other claims. This leads to many claims being rejected and many more claims being significantly delayed. Although most claims that are pursued are ultimately approved, a disabled worker will often have spent many months or years without any income while waiting for their claim to be approved. Our committee has made a number of recommendations to alleviate these problems. Some of these recommendations will require legislative changes and will, therefore, take time to address.

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

CAPTIVE INSURANCE

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

isolation is necessary for the City to expedite the payment of claims relating to this effort.”

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

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

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

WHAT NEEDS TO BE DONE

I believe that we must develop a comprehensive solution to address the medical care and economic losses of the thousands of rescue and recovery workers, community residents, and students whose health has been harmed by exposures related to 9/11. HR 847 introduced by Representatives Maloney, Nadler, McMahon, and King provides a comprehensive legislative approach to accomplish that. In previous hearings, I have addressed the medical program outlined in that legislation. I will focus my recommendations on the aspects of the legislation related to compensation for economic losses. I would like to make several recommendations.

First, reopening and the Victims Compensation Fund (VCF) is the best mechanism for addressing economic losses. I believe that the VCF would provide the flexibility to properly and expeditiously handle claims from workers and community residents with varying circumstances and degrees of economic loss. Relying on the many other compensation systems for disabled workers and community residents for economic compensation would lead to continued long delays and gross inequities among the ill claimants due to the specific processes used for compensation in each of these systems. I also believe that the VCF should develop a common mechanism for ensuring that all of the claims were for legitimate WTC-related illnesses. For the most part, this could be based on the designations and mechanisms for designating World Trade Center-related conditions included in the medical program sections of the legislation. A number of the changes made in HR 847 will help to ensure that sound diagnostic criteria will be used in the medical portion of the program and that the program will be carefully monitored. At the same time as the medical program will provide comprehensive, expert medical care for the responders and community residents, the VCF would provide an appropriate and equitable way of taking into account individual economic circumstances (including payments from other sources of compensation) similar to the approach taken when the VCF was administering the earlier 9/11 claims.

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

I strongly urge you to pass HR 847 this year. It is over seven years since the 9/11 terrorist attacks. The health of the rescue and recovery workers and community residents was damaged as a result of these attacks. We should not wait any longer to implement a comprehensive solution to address their medical and personal needs.

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

Mr. NADLER. Thank you.

I will now recognize Ms. LaSala for 5 minutes.

TESTIMONY OF CHRISTINE LASALA, CHIEF EXECUTIVE OFFICER, WORLD TRADE CENTER CAPTIVE INSURANCE FUND

Ms. LASALA. Chairman Nadler, Chairwoman Lofgren, Ranking Member Sensenbrenner and King, and Committee Members, my name is Christine LaSala, and I am the president and CEO of the WTC Captive Insurance Company.

First, let me say that I fully support your effort in H.R. 847 to reopen the Victims Compensation Fund and to limit the liability of the city of New York and its 9/11 contractors.

As a New Yorker who lived through 9/11, I share your concern for the heroic Ground Zero workers.

I also share your concern for the other heroes here today, the city of New York, and the private contractors who took on the dangerous rescue, recovery and debris removal operation. These private contractors ranged in size from one-man operations to small family-run businesses to larger companies.

Unfortunately, these heroes are now pitted against each other in litigation. More than 10,800 workers have sued the city and its 9/11 contractors, claiming that they suffer respiratory and other ailments due to their work at Ground Zero.

The city and the contractors have denied wrongdoing. For years, these lawsuits have proceeded, as they must, through the tort system. The tort system, however, is a costly, contentious, and time-consuming way to resolve disputes of such national significance, disputes in which only the terrorists are to blame.

If Congress wants to compensate the Ground Zero workers who are injured, while protecting the city and contractors from significant financial hardship, then an alternative approach is needed: reopening the Victim Compensation Fund and limiting the liability of the city and its contractors.

The WTC Captive was formed to address a specific problem. After 9/11, the city and contractors could not purchase a sufficient amount of insurance for the massive debris removal operation. Fortunately, the Federal Government stepped in to fill this insurance gap. Congress appropriated \$1 billion to establish a captive insurance company for claims arising from debris removal. That money in turn was used by FEMA to set up the WTC Captive, an insurance company with a duty to defend any lawsuits filed against the city and its contractors.

Recently, the Department of Homeland Security's Office of Inspector General concluded that the WTC Captive is operating in full compliance with its congressional mandate and the FEMA grant. Without question, acting as an insurance company for the city of New York and more than 100 sued contractors has cost a significant amount of money. But in defending this massive litigation, the WTC Captive has consistently sought to preserve taxpayer funds.

We have insisted that the city and contractors primarily work through one lead law firm instead of 100 or more. In addition, we have obtained a judgment against other insurance companies for more than \$100 million. With this recent victory added to our current assets, the total would be more than the initial \$1 billion.

But we cannot prevent the inevitable. The cost of these lawsuits will increase if these cases remain in the tort system. That is why the WTC Captive supports the prompt and reasonable solution to legitimate claims by those injured, but any resolution must take account of the reason that the WTC Captive was created, to protect the city and contractors from uninsured liability.

Thus, any resolution cannot exceed our current assets and must also ensure that the city and contractors are protected from future lawsuits. The tort system does not offer any way to resolve future lawsuits. The WTC Captive would act contrary to its mandate if it distributed a disproportionate amount of its assets to the current plaintiffs and left the city and contractors to fend for themselves against the future lawsuits.

In addition, because many serious illnesses, including most cancers, take years to develop, the WTC Captive cannot pay out all of its funds only to those who have shown signs of injury and leave those with latent injuries without any form of recovery.

The allegations here are of a mass tort, and this mass tort requires a mass solution.

By re-opening the Victims Compensation Fund and limiting liability for the city and its 9/11 contractors, this Congress will ensure that, if there is another terrorist attack, all of America's heroes will again respond, knowing that their Nation stands behind them as they rush into harm's way.

I thank you for your time this morning and welcome your questions.

[The prepared statement of Ms. LaSala follows:]

PREPARED STATEMENT OF CHRISTINE LASALA

Committee on the Judiciary

**Subcommittee on the Constitution, Civil Rights, and
Civil Liberties**

and

**Subcommittee on Immigration, Citizenship, Refugees,
Border Security, and International Law**

**Testimony of Christine LaSala
President and CEO, the WTC Captive Insurance Company, Inc.**

Tuesday, March 31, 2009

Joint Hearing on:

**H.R. 847, the James Zadroga 9/11 Health
and Compensation Act of 2009**

Chairman Nadler, Chairwoman Lofgren, Ranking Members Sensenbrenner and King, and Committee Members. My name is Christine LaSala, and I am the President and CEO of the WTC Captive Insurance Company. Thank you for inviting me to testify. I welcome the opportunity to tell you more about the WTC Captive, our congressionally mandated mission, and how we have worked to fulfill our obligations to our insureds and the American taxpayers.

First, let me thank the Members of this Congress who have authored, sponsored, or supported H.R. 847, the James Zadroga 9/11 Health and Compensation Act. I fully support your effort to re-open the Victim Compensation Fund and to limit the liability of the City of New York and its 9/11 contractors.

As a New Yorker who lived through the terrorist attack of September 11th, I share your commitment to and concern for the heroic Ground Zero workers. I also share your concern for the other heroes here today: the City of New York and the private contractors who took on the dangerous rescue, recovery, and debris removal operation.

These private contractors ranged in size from one-man shops, to small family-run businesses, to larger companies. But, no matter the size of the company, the response was always the same. Within hours of the attack, many responded with equipment and manpower to rescue survivors. Within days, many aided a full-scale operation to continue the search for survivors, recover the remains of the victims, and remove twelve stories of debris, weighing more than 1.5 million tons. And for months thereafter, many helped bring lower Manhattan back to life—restoring electrical power, telecommunications, and transportation to the area. Throughout it all, these private contractors worked around the clock, often without contracts and without an adequate amount of insurance to cover their potential liabilities. The WTC Captive is the third-party liability insurance company—enabled by Congress—for these private contractors

and the City of New York. Like the Ground Zero workers, to me, the City and its contractors are heroes as well.

Unfortunately, these heroes are now pitted against each other in litigation. More than 10,800 workers have sued the City and its 9/11 contractors, claiming that they suffer respiratory and other ailments due to their work at Ground Zero. The City and its contractors have appropriately denied wrongdoing, not believing they were negligent. For years, these lawsuits have proceeded—as they must—through the tort system.

The tort system, however, is a costly, contentious, and time-consuming way to resolve disputes of such national significance—disputes in which both sides are heroes and only the terrorists are to blame. If Congress wants to compensate the Ground Zero workers who are injured, while protecting the City and its contractors from the threat of significant financial hardship, then an alternative approach is needed: re-opening the Victim Compensation Fund and limiting the liability of the City and its contractors as the legislation being considered today proposes.

The History of the WTC Captive

The WTC Captive was formed to address a specific problem: in the aftermath of 9/11, the insurance markets were frozen, and the City and its contractors could not purchase a sufficient amount of liability insurance for the massive debris removal operation. Fortunately, the Federal government stepped in to fill this insurance gap. On February 20, 2003, the President signed Public Law 108-7, which instructed the Federal Emergency Management Agency (“FEMA”) to provide up to \$1 billion to establish a captive insurance company for claims arising from debris removal at the World Trade Center site. The WTC Captive was incorporated in July 2004. In December of that year, it received almost \$1 billion authorized and

appropriated by Congress, and issued an insurance policy under which it was obligated to defend the City and its 9/11 contractors against lawsuits arising out of the debris removal at Ground Zero. For the City and its contractors, the WTC Captive's insurance policy is essential to protect against the thousands of lawsuits that have been filed. Without it, the City would face significant financial hardship, and many of the contractors would simply go out of business.

The WTC Captive is *not* a victim compensation fund. It is a liability insurance company. The differences between the two mechanisms are significant. A victim compensation fund provides for the payment of claims to those with legitimate injuries, *without regard to fault and without resort to the tort system*. A liability insurance company, in contrast, generally works within the tort system to determine which claims are legitimate. Unlike a victim compensation fund, the WTC Captive is legally bound to take sides: it has a duty under the FEMA grant and its insurance policy to defend lawsuits brought against the City and its 9/11 contractors. The WTC Captive has performed this role and has done so in a way that complies faithfully with the terms and conditions of the FEMA grant and its insurance policy.

In doing so, we have established strong working relationships with the Federal and State governments. FEMA, the New York State Department of Insurance, and the New York State Emergency Management Office have oversight of our activities. Each is invited to every meeting of the WTC Captive's Board of Directors. We communicate regularly with these agencies to ensure compliance with our congressional mandate, the FEMA grant, our requirements under New York State insurance law, and our duties under the insurance policy that we issued. We welcome this oversight. As part of this oversight, the Department of Homeland Security's Office of Inspector General ("OIG") recently completed a comprehensive review of the WTC Captive's operations. This OIG Report concluded, unambiguously, that the

WTC Captive is operating in full compliance with its congressional mandate and the terms of its insurance policy.

Without question, acting as the insurance company for the City and more than 100 defendant contractors has cost a significant amount of money. To date, we have spent nearly \$200 million on administrative and defense costs. But these costs are a product of the size and complexity of these lawsuits. More than 10,800 individual plaintiffs have sued, raising more than 566,000 individual claims against our insureds. Tens of millions of pages of documents already have been identified as potentially discoverable in this matter, a number that does not even include the medical records for the 10,800 plaintiffs who have sued. Not only are these lawsuits massive in scale, but they also raise complicated issues of governmental immunity, proof, causation, and fault. As the OIG Report correctly found, the WTC Captive has a duty to defend these lawsuits.

But in defending this massive litigation, the WTC Captive has consistently sought to preserve taxpayer funds. One way that the WTC Captive has managed its costs is through the use of a unified defense. For example, throughout this litigation, the WTC Captive has insisted that the City and its 9/11 contractors primarily work through one lead law firm, instead of 100 or more—one for each contractor sued.

The WTC Captive also has aggressively sought to expand the amount of insurance coverage available to the City and its 9/11 contractors. By seeking contribution from the commercial insurance companies that provided some insurance for the World Trade Center debris removal project, the WTC Captive has obtained more than \$100 million by way of a federal court judgment that is now on appeal. These funds will reduce the amount of costs borne by the WTC Captive and add to the amount of insurance coverage available. Along with a

prudent investment strategy, this effort to seek out additional funds has left the WTC Captive on sound financial footing. Although the WTC Captive has funded almost five years of litigation, when its recent victory is added to its current assets, the total is more than the initial \$1 billion.

The Limitations of the Tort System

But the tort system has significant drawbacks in lawsuits like the ones that the WTC Captive is obligated to defend. The discovery and trial of thousands of individual lawsuits will take years and could cost hundreds of millions of dollars. In addition, any resolution could result in hundreds of millions of dollars going to plaintiffs' lawyers, instead of those who may have suffered injury. Sound financial management and aggressive efforts to seek more insurance funds cannot prevent the inevitable: like any mass tort—such as asbestos litigation—the costs of managing these lawsuits will increase if these cases remain in the tort system.

That is why the WTC Captive fully supports the prompt and reasonable resolution of legitimate and meritorious claims by those injured. At present, we are conducting a thorough analysis of the limited information currently available to us in order to do just that. But any resolution must take account of the reason that the WTC Captive was created: to protect the City and its contractors from uninsured liability. That means that any resolution cannot exceed the current assets of the WTC Captive and also must ensure that the City and its contractors are protected from future lawsuits.

The tort system, however, does not offer any way to resolve future lawsuits. There were 8,600 lawsuits in this matter in June 2007; 9,400 in June 2008; and there are more than 10,800 today. If the parties resolve every case pending today, more lawsuits could follow tomorrow. Required to provide long-term insurance coverage to the City and its contractors, the WTC Captive would act contrary to its mandate if it distributed a disproportionate amount of its assets

to the current 10,800 plaintiffs and left the City and its contractors to fend for themselves against the next 10,800 lawsuits. In addition, among the current 10,800 plaintiffs, there are many who have not yet shown signs of injury. Because many serious illnesses, including most cancers, take years to develop, the WTC Captive cannot pay out all of its taxpayer funds only to those who have shown signs of injury and leave those with potentially latent injuries without any form of recovery. The allegations here are of a mass tort, and this mass tort requires a mass solution.

The Need for a Victim Compensation Fund

When Congress created the WTC Captive, it did so to deal with a specific problem: the fact that the City and its 9/11 contractors could not obtain an adequate amount of liability insurance. The WTC Captive has filled this insurance gap. What nearly five years has shown, however, is that the tort system is a time-consuming and costly way to handle an issue of such national significance. If Congress wants to protect the City and its contractors *and* ensure that injured workers receive compensation, then H.R. 847 provides a better way: it re-opens the Victim Compensation Fund and expressly limits the liability of the City and its contractors.

How we act today will determine how Americans respond if we are the victims of another terrorist attack. Those who rushed to Ground Zero on September 11th did not ask questions about legal liability or insurance coverage before responding to the tragedy. But will they respond in the same way again? Will private companies respond if they will face thousands of lawsuits and the threat of financial ruin for doing their patriotic duty? By re-opening the Victim Compensation Fund and limiting liability for the City and its 9/11 contractors, this Congress will ensure that the next time, all of America's heroes will again respond, without fear or hesitation, knowing that their nation stands behind them as they rush into harm's way.

I would like to thank the Members of this Committee and particularly the Members of the New York delegation for their leadership on this issue. As always, the WTC Captive remains committed to providing Congress with the information it needs to understand our operations, ensure compliance with our congressional mandate, and determine how best to protect and provide for all the heroes of 9/11.

I thank you for your time and welcome your questions.

Mr. NADLER. Thank you.
I now recognize Mr. Cardozo for 5 minutes.

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

Mr. CARDOZO. Thank you.

Thank you, Mr. Chairman, Chairwoman Lofgren, Ranking Members Sensenbrenner and King, Members of the Committee.

And I particularly want to thank 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 a top priority.

About 7½ years ago, over 90,000 people took part in the rescue and debris removal effort at Ground Zero, including workers and volunteers from all 50 states and the constituents of every Member of these Subcommittees and virtually every Member of the House. They were all responding to an attack on America.

As I know you all know, nearly 11,000 of those heroic responders have sued the city and the contractors, asking for compensation for illnesses they say they incurred as a result of their efforts.

And I want to emphasize that there is not going to be any winners in this litigation, which pits one set of heroes, the rescue workers, against another set of heroes, the city and the contractors who responded in a time of need without a written contract and without insurance.

For the plaintiffs to prevail, they will have to prove not only that they are sick and that the sickness stems from the dust at Ground Zero, but also that the city or the contractors were somehow negligent and not entitled to their civil defense immunities.

If the city and the contractors win these litigations, these people who became sick will receive nothing. And if the plaintiffs win, after what promises to be years and years of further litigation, many of the contractors may face huge liability and damages.

The answer to this problem is before us. It is in this bill to reopen the Victims Compensation Fund, with the critical point that you don't need to prove fault.

And in answer to one of the prior questions as to how many people will opt in to the fund rather than litigation, well, of course, we have no guarantee, but the difference between the fund and the litigation is the fact that the plaintiffs will not have to prove fault.

So in my judgment, an overwhelming number of would-be plaintiffs would, in fact, opt in to the fund.

I also want to add that, in the fund as it existed before and as would exist now, there is an offset for the so-called collateral source that people might receive, such as pensions, workers' compensation, and we also must remember that in New York City police and firemen do not receive workers' compensation.

And I correct my colleague, Mr. Feinberg, who apparently looks so much like me, but it is important to note that under New York City law, workers' compensation is not available to police and firemen.

But the critical point, as Mr. Feinberg pointed out—

Mr. SCOTT. Could you say that again?

Mr. CARDOZO. Under New York law, policemen and firemen do not receive workers' compensation. There is a separate law that

provides them with separate pension benefits. If they become injured, they get what is called accidental disability pension if they are out for life, but they are not covered by workers' compensation.

Other city workers, sanitation, law department, various other people, are covered. But firefighters and police are specifically not included.

The VCF, as it existed, not only had a limitation with respect to having to file your claim before a certain period of time, but also that you had to be at Ground Zero within 4 days of the attack. And that means that, if you were at Ground Zero 5 or 6 days after, you were not eligible.

Let me just add to what Ms. LaSala said and what has been said before, reopening the Victims Compensation Fund must have with it a cap on the liability, which is what this bill provides, so that those who do not go into the fund and continue the litigation, so that the contractors and others will know that their liability will be capped by available insurance.

We hope that 9/11 never happens again, but we must assure the country that, if it does, people will respond and we must treat the people who were not eligible for the Victims Compensation Fund, for the limitations, we must allow those people to be fairly compensated and not continue the litigation as it exists today.

Thank you very much.

[The prepared statement of Mr. Cardozo follows:]

PREPARED STATEMENT OF MICHAEL A. CARDOZO

Good morning, Chairman Nadler, Chairwoman Lofgren, ranking members Sensenbrenner and King, and committee members. I am Michael A. Cardozo, and I serve as 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 with respect 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 terrorist attack.

The federal government contributed substantially to New York City's economic and physical recovery from the 9/11 attack. 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 as Mayor Bloomberg has said for many years now, what is needed is long-term, stable funding for these health-care programs, as well as a method to address overall compensation for those potentially injured. Several Representatives—led by Congresswoman Carolyn Maloney and Congressmen Jerry Nadler, Mike McMahon and Pete King—have introduced H.R. 847, the James Zadroga 9/11 Health and Compensation Act of 2009. That bill provides for reopening the Victim Compensation Fund and limiting liability, the provisions we are here today to discuss. The City of New York strongly supports those provisions. The bill also provides for a system of stable funding for the long-term health needs of those affected by the attacks of September 11. Those provisions are within the jurisdiction of the Energy and Commerce Committee. The City supports that effort, though we have concerns about the effect of that portion of the bill on the City's finances and on our ability to ensure the effective use of City funds. We are confident that these issues can be addressed when Congress takes up the health care portion of the bill.

But I am here today to testify in support of the provisions of the bill that address compensation for the victims of the 9/11 terrorist attacks on our country. First, the bill 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 demonstrate that they were injured as a result of the terrorist attack. Second, the bill would broaden the existing limitation on liability for damages arising from the response to the terrorist attack, thereby protecting the contractors that came to the

City's aid from potentially ruinous liability and helping to ensure that the City and other municipalities can get the help they need from the private sector in the event of a future disaster, an occasion that we hope will *never*, but unfortunately may, occur.

Approximately seven-and-a-half years ago, over ninety thousand people took part in the rescue, recovery and debris removal effort at Ground Zero—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 that the City retained in the rescue, recovery and clean-up efforts in response to 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, nearly 11,000 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—people and companies will once again quickly and selflessly 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 limitations 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. Almost 11,000 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, a number 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 in fact they were hurt as a result of their work in helping their country recover from a terrorist attack, or as a result of 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 from the fund, 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 in the suits now pending in the federal court in New York, must prove, in addition to establishing that his or her illness stemmed from the dust at Ground Zero:

1. that the City or its contractors are not entitled to the civil defense immunities and other defenses 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 seven-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 trials on plaintiffs' claims, which plaintiffs' counsel say total billions of dollars, both sides must engage in extensive discovery, which is still in its early stages. Judge Alvin Hellerstein, who is presiding over these cases, has established an aggressive schedule for discovery during 2009 and for trial of thirty selected cases beginning in May 2010. However, even if those first thirty cases go to trial in 2010, as scheduled, the great majority of the cases will still need to be addressed.

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 legally prove that the City or its contractors were at fault, the lawsuit necessarily pits the City and the patriotic companies that rushed to the City's aid without a written contract or an adequate amount of insurance against the heroic workers, who also rushed to the scene of the devastation. 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 have experienced business difficulties and, especially in these difficult economic times, continue to do so. The City and its contractors all faced very substantial potential monetary exposure. To try to 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. The \$1 billion provided was used, as the legislation required, to set up a captive insurance company. As the Inspector General of DHS has confirmed in his June 2008 report on the Captive, this is an insurance company set up under New York State law and regulated by the New York State Superintendent of Insurance 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 to be used to settle the claims brought by the nearly 11,000 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 each of the plaintiffs 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 the claims.

Second, even if the Captive were able to settle all of the current claims for \$1 billion, that would not protect against any claim that might be filed in the future. New cases are literally being filed every month; more than 1,000 new complaints have been filed in the last year. 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 a limitation on liability, which I will speak about shortly, even 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 responders and the City and its contractors. And there will be no need to continue using the valuable and limited resources of the federal judiciary.

Limiting Liability

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. As was said, 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 City and its contractors remain exposed to potential liability for their patriotic actions.

The Zadroga Act would eliminate this highly undesirable outcome by limiting liability for any remaining claims for those who decide not to pursue a VCF award. Liability would be capped at the amount of available insurance, including the insurance provided by the WTC Captive, plus an additional \$350 million to be paid, if necessary, by the City.

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. Indeed, I understand that, because of the lessons the contractors learned from 9/11, some engineering firms were reluctant to participate in the recovery following Hurricane Katrina.

The bill you are considering today will address everyone's concerns. Re-opening the Victim Compensation Fund will provide fast, fair, and certain relief to the workers and area residents. And limiting the liability of 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. We all know who was responsible for 9/11—nineteen terrorists who carried out the attacks. Responders, workers and residents should not have to try to prove that the City or the contractors are somehow responsible for their harms—which we think, and are obligated to prove, is not the case. This bill eliminates that burden, and ensures that those harmed by 9/11 get the compensation they are entitled to.

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

Mr. NADLER. Thank you.

I now recognize Mr. Frank for 5 minutes.

TESTIMONY OF THEODORE H. FRANK, AMERICAN ENTERPRISE INSTITUTE

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

I serve as a resident fellow at the American Enterprise Institute, but I am not testifying here on its behalf, and the views that I am sharing here are my own.

The September 11th Victim Compensation Fund, or VCF, was a short-term administrative program to compensate victims of the terrorist attacks while limiting litigation against innocent third parties who had also been victimized.

Unfortunately, H.R. 847 fails to fully protect innocent third parties from unfair litigation, does not have many of the advantages that made the fund successful, and magnifies the disadvantages and fairness problems of the fund.

The original fund used a non-adversarial structure to compensate a limited set of claimants in time and place with relatively uncon-

ventional claims. This structure will not work for a longer-term compensation scheme involving a substantially larger set of potential claimants with injuries with much more ambiguous causation.

While H.R. 847 is a substantial improvement over the earlier version of the bill in the last Congress, it still has many problems. I discussed these problems in much more detail in my written testimony, but let me touch on a few of them briefly.

First of all, the compensation program created by H.R. 847 is especially susceptible to error and fraud. The fund was not designed to resolve causation issues. Someone on the September 11th planes or killed or injured in the towers or Pentagon was plainly entitled to compensation from the fund. Thus, for the most part, determining eligibility for compensation was largely a ministerial function.

The fund's structure was not designed to vet recipients' claims, but it is not the case that anyone with a pulmonary or cancerous ailment who worked at Ground Zero is an appropriate claimant. The fund is required by law to adjudicate claims within 120 days but has no provisions for independent medical review or testing of the claims made against it.

This creates a "Field of Dreams" problem. If you build it, they will come. If Congress creates a system where geographic proximity and a diagnosis are the only prerequisites for a large government check and an attorney's contingent fees, attorneys will have every incentive to manufacture such diagnoses.

The law firm behind many of the thousands of pending 9/11 lawsuits of plaintiffs who will be eligible for reopened fund compensation have previously used questionable medical diagnoses to attain huge sums in the Fen-phen litigation.

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

And to the extent that the bill is modified to protect the Federal Government against fraud, the program will be unlikely to end the third-party litigation unless the bill is also amended to make the fund the exclusive remedy for September 11th-related injuries.

Two, the bill fails to correct the problem of the original stabilization act, which gave unbounded authority to the special master. Now, this was perhaps forgivable in the rush to provide compensation in September 2001. The bill was passed that very same month. But if a program is to be reopened for 2 more decades, Congress has the time to define more structure for it.

For example, a 2-pack-a-day smoker working 1 day as a construction worker directing traffic at the debris removal site in August 2002, long after the fires were out, may, if the special master's regulations and adjudications are generous enough, receive fund compensation for pulmonary disease.

And as Special Master Feinberg testified, the average—we are talking \$1 billion for 2,000 claimants the last time around. That is \$500,000 a person.

Even the original fund failed to stay within its original estimates for expense, which were \$4.8 billion in 2001, but ended up paying out \$7 billion when it closed.

Three, the bill 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, which is left out of the exemption in the bill, so plaintiffs' attorneys will still have that leverage against those innocent parties. The exception just about swallows the rule.

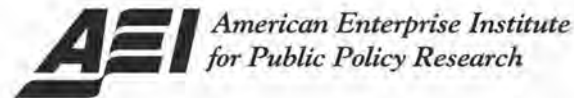
Four, the liability limitations provisions of the bill, by leaving insurers of these innocent parties on the hook, fails to solve the problem of future subcontractors being deterred from volunteering to help the government, raises insurance costs, and creates moral hazard problems.

Five, Section 408(a)(5)'s proposal in the bill to create tranches of priority for claims payments through litigation presents additional 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.

My time is just about up. There are many more issues that outstrip the time that I have, and I welcome your questions.

[The prepared statement of Mr. Frank follows:]

PREPARED STATEMENT OF THEODORE H. FRANK



Statement before the House Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Civil Liberties and
Subcommittee on Immigration, Citizenship, Refugees, Border Security and
International Law
On the James Zadroga 9/11 Health and Compensation Act

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

Theodore H. Frank
Resident Fellow
American Enterprise Institute

March 31, 2009

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.

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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

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 I (2004).

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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.

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

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.

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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 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

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.

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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

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 CIRCUIT. 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).

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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

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*, 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.

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").

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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 parties³⁹ who had

³³ In re *Dier 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

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).

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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 claim⁴⁴—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

⁴³ FEINBERG, *supra* note 1 at 1.

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

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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

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.

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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* settlement⁴⁶ 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

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).

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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

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 Saylor, *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).

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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.

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.

Mr. NADLER. I thank the gentleman.
And our final witness is Mr. Wood, who is recognized for 5 minutes.

**TESTIMONY OF RICHARD WOOD, PRESIDENT,
PLAZA CONSTRUCTION CORPORATION**

Mr. WOOD. Madam Chairwoman, Mr. Chairman, distinguished Members, good morning. My name is Richard Wood, and I am president of Plaza Construction Corporation.

My company is one of the five major contractors that responded immediately after our country was attacked by terrorists in New York City on September 11, 2001.

I am here representing Plaza, but I am speaking on behalf of all the prime contractors—Bovis Lend Lease, LMB; Turner Construction; Tully Construction; AMEC Construction Management—in offering our full support and endorsement of H.R. 847, the bill before you today.

Thanks to the steadfast work of Representatives Maloney, Peter King, and Nadler, as well as the tremendous efforts of Speaker Pelosi, you are considering this bipartisan bill. This bill comprehensively addresses the basic needs and concerns of those who immediately responded to the attack on our Nation and our great city.

We urge your Committee, as well as the Energy and Commerce Committee, to act quickly to pass this desperately needed bill. We urge Speaker Pelosi, who has been extraordinarily sensitive to our plight, to schedule this bill for a vote as soon as possible.

In my mind, our Federal Government has the responsibility to do so. The attacks on September 11th were attacks on our country. The companies and individuals who responded immediately did so because we were attacked and because our first concern was that of everyone, to save lives and to rescue people from the unprecedented and massive destruction caused by the foreign enemy attack.

Thousands of people showed up to help as they could. Our companies showed up because we had access to the equipment, the trained manpower, and the expertise to best negotiate the rescue and then recovery efforts at the 14-story-high pile of burning wreckage where the Twin Towers once stood.

I was one of those people who rushed out to help on September 11th. I worked at the site, side by side with our city's uniformed and emergency workers, construction workers, and all of the other volunteers, every day for the first month.

I came home to eat, shower, and rest for a few hours when I was able to, and then I went right back. I believed this was my duty as an American. After this time, I was down at the site nearly every day for the next few months, and all of the contractors acted similarly and did so at the expense of running their companies and businesses.

You have my written testimony, but I would like to talk to you about my personal experience. I was in a meeting at the Fisher Brothers offices, the parent company of Plaza Construction, when Arnold Fisher's assistant whispered in his ear that a second plane had hit the buildings. He immediately canceled the meeting, and

we went in front of the TV to see the news coverage to find out what was happening.

As we were there watching the towers burn, having seen a fire in an office building before, we knew that there was devastating damage occurring to those buildings, but nobody knew exactly what could happen to those buildings.

I received a call from my office and was told to get right back to the office. I walked up Madison Avenue about a 10-block walk, and there were people from the first tower already streaming up Madison Avenue. We knew that something dramatic had happened, but I really didn't know exactly what it was.

I got back to my office. My reception area was filled with 100 people, and they were very upset, and some of them were crying. I immediately said to them, "Everybody, go home to your families. Make sure they are safe. Take care of them, but get back to work tomorrow. Get on your buses and trains. Do not let whoever did this to us affect our lives."

As I was talking, somebody mentioned to me that I needed to get to my office right away to speak to Chris Mills. Chris Mills is a young man that worked for me. Chris had his head in his hands, saying, "What happened? What happened?" His girlfriend, soon-to-be-fiancee Danielle was in one of the towers on the 104th floor, and he was on the phone with her as the towers collapsed.

At that moment, I asked Chris what he wanted to do. I said, "Would you like to go down and look for her?" And he said, "Yes."

I went back into the reception area, and I told everybody in the reception area that we are a construction company. There is mass devastation downtown. They could use our expertise. I said, "Anybody who wants to go down there with me to try to help, please join me. And those of you that will remain behind, please call our subcontractors, the unions, and mobilize as many people and as much equipment as you possibly can."

Getting down to the site, you couldn't imagine the devastation that was in front of you. TV and pictures could not describe the massive destruction and the smoke clouds and fires that existed downtown.

We met up with other contractors and immediately formed a bond that we were going to work together not as competitors, but as one large unit to make sure that we mobilize this place and assist the emergency workers as much as we possibly can.

The Department of Design and Construction, DDC, was the lead agency and ultimately was the group that hired us. We worked under their direction. We were directed to work with emergency personnel and were directed to different quadrants. Each one of us had a quadrant.

There was a lead fire department person and police department person in each one of the quadrants. I recall seeing the bridge that led from the towers to the world financial center collapsed on top of two fire trucks that were completely obliterated and stood there as a fire captain watched those two fire trucks, wondering what happened to his people.

While we are sitting there and as equipment is arriving and people are showing up and burning equipment is there, we are trying to figure out how to move these massive members that are disorga-

nized in a way that wouldn't damage people, were they still to be alive.

Much to our dismay, there were not many people alive. But we worked together as a group.

I recall the first meeting that we had. It was in a kindergarten class in a school just south of Stuyvesant High School. It was quite a scene to see the largest contractors in the city and some in the country sitting in kindergarten chairs, figuring out how to solve the problems that we had down there.

After the first couple of days, I realized what a soldier feels like at war. My second day down there, I was walking past an area, and I saw what appeared to be the trunk of a body with the head still attached. A fireman standing next to me said, "She was a woman." Immediately, I felt what happened to her family? What is her family going to think? What was this person's life like?

We were very committed. It was a very serious place. This was not something to be taken lightly.

For months, we worked down there. And this was an emergency for months. The fires burned in the quadrant I was at for many months. We used steel from the center of the pile long after 9/11 to keep our hands warm when it started getting cold later into the fall.

This was never a cleanup. It was an emergency, and it was a recovery. The entire time we were there, I had FBI agents, CIA agents, and Secret Service agents standing by my side. The quadrant we were assigned to clean up was 7 World Trade; 7 World Trade had the offices of those groups in it.

We responded to this attack. This was an attack on our country. This was an attack by foreign terrorists. We completely support this bill. And I appreciate the opportunity to address you today.

In closing, let me say that support for this bill should be universal. There should be no divide along party lines. I submit to you that this bill protects Americans, both individuals and companies, who serve their country in a time of crisis. And this bill also protects America.

In the event some future attack or disaster should occur, people and companies need to know that their country they are striving to protect will do the right thing and protect them in return. The injured need care and support, and the companies upon which people rely for their livelihoods and support for their families need to know that the next time they are needed, they can again respond without a moment's hesitation.

I ask all of you and all the Members of Congress to appreciate both the importance of this bill, as well as the need to move it quickly to passage. The situation of protracted litigation in which we now find ourselves is wasteful and protects no one. Our resources are better spent caring for the sick and protecting those who deserve our protection.

Ladies and gentlemen, if this happens again, I assure you, as an individual, I will show up to the next disaster that occurs in this country, and I can assure you there will be many volunteers from my company. But I will have to think twice about dedicating the resources of my company and putting it at risk for fear of the litigation that may ensue.

I appreciate your time listening to us today, and thank you for your efforts.

[The prepared statement of Mr. Wood follows:]

PREPARED STATEMENT OF RICHARD WOOD

Madam Chairwoman, Mr. Chairman: Good morning. My name is Richard Wood, and I am the President of Plaza Construction Corporation. My company is one of the five major construction contractors that responded immediately after our country was attacked by Al-Qaida terrorists in New York City on September 11, 2001.

I am here representing Plaza. But I am speaking on behalf of all of the prime contractors—Bovis Lend Lease, LMB, Turner Construction, Tully Construction, and AMEC Construction Management—in offering our full support and endorsement of H.R. 847, the bill before you today.

Thanks to the steadfast work of Representatives Maloney, Peter King and Nadler—as well as the tremendous efforts of Speaker Pelosi—you are considering this bipartisan bill. This bill comprehensively addresses the basic needs and concerns of those who immediately responded to the attack on our nation and our great city.

We urge your committee, as well as the Energy and Commerce Committee, to act quickly to pass this desperately needed bill. We urge Speaker Pelosi, who has been extraordinarily sensitive to our plight, to schedule this bill for a vote as soon as possible. In my mind, our federal government has the responsibility to do so. The attacks on September 11th were attacks on our country. The companies and individuals who responded immediately did so because we were attacked, and because their first concern was that of everyone: To save lives and to rescue people from the unprecedented and massive destruction caused by a foreign enemy attack.

Thousands of people showed up to help in any way they could. Our companies showed up because we had access to the equipment, the trained manpower and the expertise to best negotiate the rescue and then recovery efforts at the 14-story high pile of burning wreckage where the twin towers once stood.

I was one of those people who rushed down to help on September 11th. I worked at the site, side by side with our city's uniformed and emergency workers, construction workers, and all of the other volunteers, every day for at least a month. I came home to eat, shower and rest for a few hours when I was able to, and then I went right back. I believe this was my duty as an American. After this time, I was down at the site just about every day for the next few months laboring and organizing the clean up efforts. All of the contractors—our executives, engineers, and workers—did so at the expense of running our companies' businesses.

On the morning of September 11th, I was in a meeting at the offices of Fisher Brothers on Park Avenue and 49th Street. As many of you know, the Fisher family lends tremendous support to our nation's military and their families. At the time of the first strike, we all thought that a small plane had crashed into the side of one of the World Trade Center buildings. When we learned that the second tower had been hit, Mr. Arnold Fisher ended the meeting and we turned on the television to watch the coverage. We knew immediately that our country was under attack by terrorists.

While construction is my business and I knew that the fires would have a dramatic impact on steel structure of the towers, I did not imagine that the towers were going to fall as they did. I received an urgent call from Plaza's offices and I returned there immediately. When I arrived, I addressed a group of nearly 100 people gathered in our reception area, many of whom were crying. I told them to go home to their families and to make sure everyone is safe—and then to return here to work the next day. I told them that we could not and would not let those who attacked us win by allowing their actions to alter our lives. Someone came up to me and said "Go see Mills," referring to Chris Mills, a colleague and a friend.

Chris was sitting in my office with his head in his hands. "She's gone," he said. "She's gone." He told me that he had been speaking on the phone with his girlfriend, Danielle, who was on the 104th floor of the North Tower, just before it collapsed. Chris said he didn't know what to do. I went back out to the reception area and told people about Chris and Danielle. I told them that I was going downtown to help, and that anyone who wanted to should come with me. A number of us headed down to the site. I told those remaining at our offices to call the unions and tell them to mobilize and start sending people down. I knew we needed to assist in what was sure to be a massive rescue operation.

I attended meetings downtown with the other prime contractors and the City's Department of Design and Construction (DDC). The contractors assisted the DDC and emergency services personnel to get as close to the epicenter as possible to join

the rescue effort. We also met with city officials, including officials from the Mayor's office. The contractors there—Bovis, Tully, AMEC, and the Turner and Plaza joint venture—were each assigned an area to organize at the direction of the DDC. We were working under the direction of the FDNY and NYPD and our focus was to rescue any survivors.

I did not for a moment think of this tragedy, this attack on our country, as an opportunity to make money. We were there, as were the other contractors, because we were attacked and because there was work that needed to be done that we were in the best position to do. We were there because it was the right thing to do.

I can best describe what we found as a war zone. I now believe I know how a soldier must feel who has witnessed death and must continue to go on. I saw maimed bodies. I saw the torso of what I was told was a woman's body with no limbs. I saw a body with his or her face burnt off. I felt paralyzed that day.

The next day was more of the same, though the horrors were no longer new to me. Every once in a while a horn would go off, signaling an emergency. We were all supposed to run up West Street when we heard it. Hordes of people would run, and then come back. There were rumors that there were terrorists "in the wire," meaning inside the area and on "the pile." We had no feeling of security. We believed we were still under attack.

My company was operating under emergency conditions the entire time we were there. I worked alongside FBI, CIA and Secret Service agents. We were told that sensitive information may be in the pile and that it needed to be retrieved. Building #7 came down because of a massive internal fire. Steel that was cherry red from the heat was still being pulled from the pile long after September 11th. We would sometimes use it to keep ourselves, particularly our hands, warm. At one point in the fall, before our work was completed, we asked the city if we should start to work eight to twelve hour days. We were directed by the DDC to continue working 24 hours a day.

We felt like we were doing something for our country. I still know that we were, and that we stood tall at a time when our nation and the world were watching. We are proud of our accomplishments. We performed the work more safely and efficiently than anyone expected. In fact, there was not a single fatality at the site during the entire clean up—a tremendous accomplishment given the dangerous conditions at the site. And we did not do the work to make a profit. We were there because thousands of people needed to be organized and the city needed our companies and our expertise to help do that. We were there because the people of our city and our country needed us to be there.

What happened on September 11th was unprecedented. The immediate mobilization of forces from both the public and private sectors in the aftermath, however, is something from which we need to learn. When our companies, our people, our equipment and our expertise were needed, we were there. Now, as we face thousands of lawsuits that could potentially bankrupt our businesses, we need and ask for your help and support today. We all want to be in a position to help our country again if called upon to do so.

Litigation is simply not the solution to the position we all find ourselves in. The World Trade Center Captive Insurance Company, which was created by Congress, is defending our companies and the City of New York in the thousands of individual lawsuits that have been brought against us. Nonetheless, we have all been forced to hire lawyers and expend our corporate assets in these troubled economic times to defend ourselves, despite the fact that we dropped everything to answer the call for help. We came to the aid of our country, our city and its people immediately after we were attacked. And now we are being forced to defend ourselves and our companies' very existences in court.

Our companies believe that anyone who may have been injured as a result of their work on the pile—anyone who came to help others at the expense of their own health—deserves to be taken care of medically and to be fairly compensated for their injuries. These people should not be forced into the legal system to be treated fairly any more than our companies should be forced to litigate against them. Collectively, we were the ones who showed up on September 11th and beyond. Any injuries sustained were directly caused by the terrorists, and it would be an injustice to hold our companies responsible in their place.

These are some of the reasons why we support the reopening of the Victim Compensation Fund in Title II of this Bill. The Victim Compensation Fund will provide, as it did for those killed or injured on September 11th, fair compensation for the injured without raising issues of fault and liability. We can and should all agree that the fault lies with the terrorists. We may offer some technical suggestions on the provision in Title II which limits the liability of the companies, but we believe

that it largely hits the mark. We want to ensure that the final language of the bill is fair and achieves the goal of fully protecting our companies as well as the injured.

We also fully support the concept of a medical program in Title I of the bill for people who were injured at the site. Ironically, I may be one who might someday qualify for that program.

I appreciate the opportunity to address you today. In closing, let me say that support for this bill should be universal. There should be no divide along party lines. I submit to you that this bill protects Americans, both individuals and companies, who served their country in a time of crisis. And this bill also protects America. In the event that some future attack or disaster should occur, people and companies need to know that their country, which they are striving to protect, will do the right thing and protect them in return. The injured need care and support, and the companies—upon which so many people rely for their livelihoods and support for their families—need to know that the next time they are needed they can again respond without a moment's hesitation.

I ask all of you, and all members of Congress, to appreciate both the substantive importance of this bill as well as the need to move it quickly to passage. The situation of protracted litigation in which we now find ourselves is wasteful and protects no one. Our resources are better spent caring for the sick and protecting those who deserve our protection.

Thank you.

Mr. NADLER. Thank you.

I will now recognize myself for 5 minutes to begin the questioning. My first questions will be to everybody, and I would just ask for a yes-or-no answer. Does anyone think that the current situation is working well, with 11,000 lawsuits and victims not being compensated?

[Witnesses jointly respond, "No."]

Mr. NADLER. Does everyone agree that we need to do something different?

[Witnesses jointly respond, "Yes."]

Mr. NADLER. Does everyone agree that the current bill is an improvement to the current situation, that by reopening the VCF we can reduce the number of lawsuits and ensure a speedy payment to those in need?

[Witnesses jointly respond, "Yes."]

Mr. NADLER. No one disagrees with that? Maybe?

Mr. FRANK. Maybe.

Mr. NADLER. Mr. Frank says, "Maybe." Okay. Does everyone agree the current bill is better than the previous bills?

[Witnesses jointly respond, "Yes."]

Mr. NADLER. And I think we can all acknowledge that the bill can stand to be improved, and that is what this hearing is about, and I want to hear your comments and suggestions on the bills, but now I have a number of specific questions.

Dr. Melius, Mr. Frank said that it is not the case that anyone involved in debris removal with a pulmonary ailment is an appropriate claim, and lung disease is common without exposure to Ground Zero. And, in fact, he said we can't tell who among those who present all the symptoms, the sarcoidosis or whatever, are victims of 9/11.

Could you comment on that? And, therefore, it would be compensated. Could you comment on that, please?

Dr. MELIUS. Yes, I can. First of all, I think—well, made one sort of misstatement, mischaracterization. The original VCF actually did compensate a significant number of people with illnesses. I

think Mr. Feinberg said that. I think it was about 2,500 people that were ill.

Mr. NADLER. Thank you.

Dr. MELIUS. I have evaluated what he has done, and it has been in some of the reports, and I think he did an excellent job taking the—

Mr. NADLER. Thank you. Could you answer about what Mr. Franks said about—

Dr. MELIUS. Frank, excuse me, yes.

Mr. NADLER [continuing]. We don't know who the—we don't know who is a victim.

Dr. MELIUS. Right. And I think that, with the current protocols that are in place, medical protocols, the current ways for ascertaining whether people were working there and were exposed, I think that there should not be a great deal of difficulty determining whether or not people's health problems were related to their exposures at 9/11, as opposed to cigarette smoking or some other—

Mr. NADLER. It is not a great problem?

Dr. MELIUS. It is not a great problem.

Mr. NADLER. Thank you.

Mr. Frank, you said a number of things which were interesting. H.R. 847 fails to fully protect the innocent subcontractors. The liability provisions leave some insurers of innocent parties on the hook, and fails to solve the problem of future subcontractors. The program is unlikely to end the third-party litigation. It fails to provide adequate protection to taxpayers that taxpayer money will be spent on compensation of victims, rather than attorneys' fees.

Wouldn't you agree that, even though it doesn't do enough or might not do enough, in each of these situations, it improves on the existing situation?

Mr. FRANK. Not necessarily. It depends on the regulation that the special master passes. And that is a complete unknown, because they are not defined here. They will be promulgated by the special master, and the special master has tremendous discretion to do that.

He could create a program that wastes tens of billions of dollars of taxpayer money, makes matter much worse, or you could create a very wise program—

Mr. NADLER. I will come back to my questioning of you in a moment.

Ms. Lofgren has to leave, so let me recognize Ms. Lofgren.

Ms. LOFGREN. Thank you for yielding, Mr. Chairman.

I would just—

Mr. NADLER. I am not yielding. I am—well—

Ms. LOFGREN [continuing]. Take 30 seconds to thank this panel. Mr. Wood, your description actually brought me back to that scene so vividly. And I think all the testimony here has been enormously valuable and compelling.

And I was supportive of this bill when I walked in. I now am more than supportive. I just want to thank the witnesses for an excellent job.

And I thank you, Mr. Chairman, and yield back.

Mr. NADLER. Well, I thank you for all your work on this and for your support of this. Let me resume my questioning.

Mr. Frank, you are saying that this might not necessarily be an improvement, even though the alternative is unlimited tort liability lawsuits, as we see now, by 10,000 people or 11,000 people?

Mr. FRANK. It is entirely possible the southern district in New York gets it right and finds the city and the contractors—

Mr. NADLER. Okay. May I ask Mr. Wood, how would you respond to Mr. Frank's argument that this bill is not good for the 9/11 contractors, that it doesn't sufficiently protect you, that it wouldn't help?

Mr. WOOD. As I understand the bill, it would limit the liability to what is left in the Captive. And the Victims Compensation Fund would take a lot of the litigants away, leaving the Captive available for those who opted out, to continue with and pursue legal means, and therefore the Captive still in place would be what would defend us in the future. And we would be capped at the value left in the Captive.

So, therefore, I do believe, from my understanding, that it would defend us.

Mr. NADLER. Thank you very much.

And I would like to make, before my time expires, just one comment, because I think that Mr. Frank didn't quite understand one provision of the bill, perhaps.

He says in his testimony Section 408 does not sufficiently change the dynamic of punishing the subcontractors by subjecting them to lawsuits. 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. The liability limits in the bill would be illusory. Once they are reached, contractors will face crippling legal expenses when insurers no longer have a duty to defend.

Well, the fact is, in this bill, once the legal liability limits are reached, there is no further possibility of lawsuits. There is complete indemnity at that point. So this should put your mind at ease, sir.

Mr. FRANK. Well, there is an exception in the bill for punitive damages. And most of—

Mr. NADLER. All right. Punitive damages for deliberate—or for deliberate tort, yes, but nobody is talking about that. No one is aware of that.

Mr. FRANK. The bill doesn't say—

Mr. NADLER. I see my time has expired.

I now recognize the distinguished Ranking minority Member of the Immigration Subcommittee, Mr. King.

Mr. KING. Thank you, Mr. Chairman.

And I think to start this out, I would like to turn to Mr. Frank and ask him, would you like to explain your concern about the gross negligence provisions in the bill?

Mr. FRANK. Certainly. The Chair seems to think that the exception only applies to intentional torts, but the exception explicitly states that it includes acts of gross negligence.

And as I discussed in my written testimony, New York state's definition of gross negligence is relatively broad and could argu-

ably—and certainly the plaintiffs are claiming—includes what the contractors and subcontractors did on the site.

Mr. KING. If I might follow up on that, Mr. Frank, also looking at language under the exception language you are referring to that accepts acts of gross negligence. And then here is an even broader one, “or other such acts to the extent to which punitive damages are awarded.” Could it be more broad?

Mr. FRANK. Well, it could be more broad, but it is certainly an exception that comes close to swallowing the rule. There will be additional indemnity. It is an improvement. But because it is very likely that the limits of liability will be reached, and there will be likely thousands and thousands more claims as the years go on, the exception is enough that subcontractors and contractors still face danger of liability.

Mr. KING. And that being my concern—and I think about this. Let’s just say there are 11,000 cases, and perhaps this legislation passes, and all but one of them would go into the fund and opt into the fund that is established under the bill. The other one might sue Mr. Wood.

And might appear through the insurance protection that is there, under these open—under gross negligence or other such acts, to the extent to which punitive damages are awarded, then it would be such that one individual out of 11,000 could get grossly rich, to use a term, while the others opt for a far more modest compensation.

Is that a possibility, to make it an extreme case so that we can talk about the—

Mr. FRANK. That is an extreme case, certainly. What is more likely is, because the bill is structured to incentivize people to go into the fund by giving them sort of a free bite at the fund—they can go into the fund. And if the fund denies their claim, they can reinstitute the litigation. And that is the most likely source of additional litigation.

Mr. KING. And I hope to work with some of the protections that I think we need, because I am concerned about Mr. Wood. I am impressed by everybody’s testimony, and service here. I think Mr. Wood brought out what I see as the events and the emotion of the time.

And having run to the sound of the guns as you did, as the other contractors did, and being faced with this, it is got to be a weight on you every day. And you know where I stand on wanting to protect the contractors in particular.

And, Mr. Wood, I would ask you: Have you looked at this language that we are talking about that allows for punitive damages that could potentially still be your liability if this bill passes?

Mr. WOOD. I have not looked at it. I have not read that particular provision, but I share with you the long-term concerns. It has been 7½ years now that we have had this weighing on it, and, you know, we do want to see people who are sick taken care of, and we think that should be done right away.

And we want to be able to respond in the future. And having this hang over our head, if there is a loophole in the bill, I would like to see it closed.

Mr. KING. Thank you. It looks to me like there is, and I don't think it is intentional at all, and that is what happens around here, unintended consequences.

But I think it will be a particular nightmare to go through 7½ years of this liability hanging over your head, finally get a bill passed, breathe a sigh of relief, and find out the litigation is coming at you again.

Mr. WOOD. We are very happy that we are finally having the chance to figure out how to protect people and protect ourselves. And we are here sitting very happy that we have a bill in front of you. And if it can be improved, great, but we are still very, very pleased that there is a bill out there.

Mr. KING. And I thank you, Mr. Wood.

And is there anyone in the panel that would object to capping attorney fees under the fund at 5 percent?

Hearing no response, let the record reflect that no one volunteered to take up that issue.

And so I would just conclude, there are some things that I am looking at. One of them is the gross negligence provision and the broader language that is part of the bill and then my concern that we don't have protection that if one receives medical care until Title I of the bill that they—I would want them to automatically then opt into Title II of the bill, rather than be able to litigate.

And the limit to economic damages would be another piece that I would want to stand, cap the attorney fees, and I have a couple other ideas, but that gives you a sense of what I pull out of here as I listen to the witnesses.

If the Chairman is all right, I would be happy to recognize Mr. Cardozo for his response.

Mr. CARDOZO. I just wanted to make one point. I think, if you study the bill carefully, the concern you expressed before, that if you opt into Title I that somehow you have, in effect, have admitted or not admitted in Title II, the standards in those sections are very different, so that if you have opt into Title I for health care purposes, I don't think that has any effect at all, if you read the fine print of the bill, at least as I have read it.

I don't think that has an impact one way or the other. The standards are different. The presumptions are different. So I don't think that that concern—I think, as drafted, that is not a problem.

I would also like to point out to you that, in the regulations that Mr. Feinberg had—I don't remember if it was in the bill or not—once you opted into the fund, before you knew what your award would be, you made an unequivocal choice. You could not say, "Oh, I only got \$100. I am going to forget it and sue." You cannot—as structured, once you went into the fund, you made an unequivocal choice.

So I don't think the other concern that—the concern you expressed in that regard is one that need concern you.

Mr. KING. Thank you, Mr. Cardozo.

And in response, I will say that I think the statutory construction on it, you are correct. I think there would still be a de facto presumption that may exist in the litigation.

I thank you, Mr. Chairman, and I yield back.

Mr. NADLER. I thank the gentleman.

Who is next?

The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

Mr. Cardozo, you indicated that police officers and firemen were not covered by workers' comp. They are, in fact, covered by another plan—

Mr. CARDOZO. Yes.

Mr. SCOTT [continuing]. That is actually more generous than—

Mr. CARDOZO. Yes, that is what I was trying to intimate.

Mr. SCOTT. So they are not—we don't want to leave the impression that they are out in the cold.

Mr. CARDOZO. No, I just wanted to suggest to you, because it was a collateral source offset issue that you had raised.

Mr. SCOTT. But it was—it would be the same—it is workers' comp-like. If they are on the job, injured on the job, they get coverage?

Mr. CARDOZO. That is correct.

Mr. SCOTT. Okay.

Mr. Wood, you responded, your company responded and many employees responded to this situation. Would you have responded and sent your workers into the World Trade Center area if you had been told accurately of the danger rather than being told by Federal officials that it was okay for employees to be in that area?

Mr. WOOD. I personally would have responded regardless.

Mr. SCOTT. Would you have sent your employees knowing that it was a present danger to their health?

Mr. WOOD. When we went down there, I requested volunteers.

Mr. SCOTT. Would you have—

Mr. WOOD. I didn't direct anybody to go down.

Mr. SCOTT. Okay. Would you have better protected your employees had you known what the danger was?

Mr. WOOD. I would have protected my employees with whatever means possible. There were 50,000 people down at the site, you know, and, you know, we were there responding to emergencies and making sure people were trying to be saved.

Mr. SCOTT. Now, a lot of companies in your position are being sued. Have there been any plaintiffs' verdicts against companies like yours?

Mr. WOOD. No.

Mr. SCOTT. Are these class actions or individual lawsuits?

Mr. WOOD. I wouldn't know how to classify, you know, whether it is a class action or not. We know there are over 10,000 litigants.

Mr. SCOTT. Mr. Cardozo?

Mr. CARDOZO. These are all individual cases, since it is a tort case and you have to analyze each person's individual problems. Judge Hellerstein has ruled that it could not be brought as a class action, but they are all consolidated cases before him that are presently in—

Mr. SCOTT. Have they consolidated on the issue of liability?

Mr. CARDOZO. Well, the liability issues, of course, will depend—and that is one of the basic problems we have—among the many issues are, when did someone work? When was he exposed? Was he or she given a mask? At what point in time? So to make general determinations about liability is simply not feasible.

Mr. SCOTT. Okay. Were all of those who were actually working that day covered by workers' comp?

Mr. CARDOZO. Well, the city—

Mr. SCOTT [continuing]. Collapse of the building something that arises out of or in the course of employment?

Mr. CARDOZO. From the city—those who were city employees, if they had filed a workers' comp claim within the statutory time limits and a statutory time limit was then subsequently extended, they would have been entitled to what is relatively modest benefits of the workers' comp.

Mr. SCOTT. But they would be covered by workers' comp? Now, have any insurance companies been unable to pay because of the catastrophic nature of this event?

Mr. CARDOZO. I am not familiar with that.

Mr. SCOTT. I mean, everybody who worked with workers' comp at least got those benefits? No?

Mr. CARDOZO. Well, the workers' comp—of course, people had to recognize that, in fact, they had been ill. And that was, of course, one of the problems that we have.

There have been—I can get you the statistics in a moment—there have been workers' comp claims that have been made and paid out that total in about \$9 million in total. But there are severe statutory limitations as to how much each individual's workers' comp can be.

Mr. SCOTT. Say again? I am sorry?

I will yield to the gentleman from New York.

Mr. NADLER. Thank you. I just wanted to suggest that Dr. Melius might want to answer the question about workers' comp.

Dr. MELIUS. Yes, sorry. I said in my testimony and the experience that there are literally thousands of people who have not been able to get their workers' comp claims recognized in the system. There are various statutory issues. There are various issues with the private insurance companies, the city of New York contesting those claims.

Mr. Hayward, who I talk about in my testimony, his claim was denied. I am not sure the exact reasons for that. But there are many that have been unable to get the workers' compensation system to recognize their claim.

There are also people within the police, fire and sanitation departments who have had difficulty with their line-of-duty disability pension claims being recognized. So it is an ongoing problem. It is complicated by some of the timing issues and complicated by the nature of these illnesses that don't quite fit the normal system.

Mr. SCOTT. Mr. Chairman, are you going to have another round?

Mr. NADLER. No. Without objection, I will grant the gentleman an additional 2 minutes.

Mr. SCOTT. Thank you.

Doctor, as I understand the progression of the respiratory diseases, you start with non-symptomatic changes in your lungs and progress gradually into symptoms and more and more problems.

Can you accurately predict who will progress from one stage to another?

Dr. MELIUS. No. We cannot. Through the medical monitoring programs, we can carefully track people—

Mr. SCOTT. Okay.

Dr. MELIUS [continuing]. And follow what happens to them. But predicting who is going to go into a more serious decline in their pulmonary function is different.

Mr. SCOTT. And for smokers subjected to asbestos, the problem may be that you are not compensating them for smoking, because asbestosis for a smoker does a lot more damage than the smoking would have done. Is that right?

Dr. MELIUS. Correct.

Mr. SCOTT. And one of the problems with dealing with this—because you can't predict who is going to be who—is the requirement that somebody sign a release as a condition of getting any payment. I mean, that is a normal practice in most lawsuits, but it certainly creates a hardship on the plaintiff if you can't calculate who is going to need the payments in the future.

So, Mr. Cardozo, let me ask you. Would it be more desirable in this to allow partial payments as you go along, as the patients actually need it?

Mr. CARDOZO. Well, I am not sure you are ending the constant litigation problem that you have. As Mr. Feinberg said, you—any, really, even in a tort case, you do try to make judgments as to what is going to happen down the road.

Mr. SCOTT. But if you have 100 plaintiffs and some are going to get a lot sicker and some aren't, how do you fairly compensate them without overcompensating everybody or undercompensating everybody?

Mr. CARDOZO. I think you have to rely upon the best medical evidence that is available to you at the time. But it is another thing to keep in mind is the other part of this bill dealing with the whole health benefits. If, in fact, that part of the bill is enacted, that with an assurance of the ability for Congress and the city jointly to be funding the health part of this, there will also be an assurance that, to the extent that people need future health care, that that would be available.

Mr. SCOTT. And that wouldn't be part of the relief?

Mr. CARDOZO. Pardon me? I don't believe so, no.

Mr. SCOTT. That would not be part of the relief?

Thank you, Mr. Chairman.

Mr. NADLER. Without objection, the gentleman's extended 1 additional minute. Would the gentleman yield to me?

Mr. SCOTT. I yield.

Mr. NADLER. Thank you.

Ms. LaSala, I have three quick questions for you. How much have you paid—has the Captive paid out in recoveries?

Ms. LASALA. It has paid a modest amount, Congressman Nadler, about \$350,000.

Mr. NADLER. Three hundred and fifty thousand dollars. And is it correct you have spent in legal defense defending against claims about \$260 million?

Ms. LASALA. I think that is a slight—

Mr. NADLER. Over \$200 million?

Ms. LASALA. Nearly \$200 million is the accurate number.

Mr. NADLER. Okay. And would you agree that \$200 million is more than 5 percent of \$300,000?

Ms. LASALA. Whatever the math is, I would agree, yes.

Mr. NADLER. Thank you very much.

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

Mr. Wood, as I suggested earlier in my question to Mr. Feinberg, there is no perfect solution here, but we want to see how we can compensate people in a reasonable manner, but at the same time due it in such a way that does not bankrupt companies that assisted, as your company did and as you did.

So, Mr. Wood, could you actually give us some details about what the continuing threat of litigation truly means to you? There has been some discussion here about, have you been sued? Have there been plaintiffs claims against you, et cetera?

But just in terms of somebody who wants to keep a company together, number one, and as I understand it, you represent other companies here, not just your own company—

Mr. WOOD. That is correct.

Mr. LUNGREN, What is the reality of the situation that faces you now with respect to this continuing uncertainty with respect to litigation, both in terms of keeping the company together and other companies that you represent here, and also in terms of the ability to respond to emergency requests such as this?

I hope we are not going to get in a situation where next time we have a disaster the first thing you do is call up your attorney, rather than calling your people together to try and respond.

Mr. WOOD. Unfortunately, we may have to. You know, just the fact that I am here today, you know, takes away from our ability to do business. And this has been ongoing for 7½ years. And all the contractors are living a similar fate.

I know, right after Katrina, one of the contractors that I am speaking for today had a local office near New Orleans. And they had to question themselves about whether or not to go in to help in the aftermath of Katrina. They made a decision to take care of their own people and make sure that they properly got evacuated and didn't run in to help after Katrina because of their experiences at 9/11.

Many of the companies that are represented here are also national companies. And we have offices in other places in the country. And I am concerned that a mass mobilization of this kind, where tens of thousands of workers and hundreds or thousands of pieces of equipment showed up immediately, which was really the—us being the only resource that could properly provide that in a massive disaster, whether it be natural or another terrorist attack. I am concerned that it may not be there.

I truly believe that every major contractor in the country is waiting to see what happens here today. And, you know, like I said to you, I will be there myself, and I know thousands will come as volunteers, but we are not going to dedicate the resources of our company until we know that the Federal Government is going to stand behind us.

This was a massive attack by a foreign entity. It was an act of war. And we responded to an act of war. Looking to find blame at this point is really counter to what we did. I am very pleased for this opportunity for this bill is out there.

Did I answer your question?

Mr. LUNGREN. I think you did. In another life, I did tort litigation, both plaintiff and defendant. And from the outside looking in, I think some people get the idea that the system is set up so that it is almost perfect, that somehow we can figure out exactly what an individual has suffered, what they are going to suffer in the future, what the loss of income is going to be, and somehow we come to this judgment.

But having been a part of it, I realize that you have a plaintiff, you have a defendant, you have lawyers, you have juries, you have a judge. You do the best you can. Our system is set up to try and do rough justice, if you will, but it is an extremely difficult thing.

Why do we say that somebody gets a bigger settlement or a bigger judgment because they happen to have a job that has a greater income than somebody else? Because we are trying to give people recompense for the lost earnings and we do the best job we can.

Who knows? Maybe that person would have changed their job. Maybe they would have invented something. Maybe they would have made more—we don't know those things, so we do the best we can.

And here we have the same sort of situation, except it appears that everybody believes that extended litigation over a long period of time defeats the very purposes of what we are attempting to do. At least that is the way I see why we are here doing this.

So I would like to ask the panelists this: Is there any concern any of you have that this bill, as we attempt to do that, gives too great a discretion to the special master? Or should we in Congress do more of a job of trying to fill in the detail?

This is giving a special master tremendous leeway over an extended period of time. It is a tremendous power. And I just wonder if anybody would have any comments on that from the panel.

Mr. CARDOZO. Well, we are going to give the discretion to somebody. And we have, I think, a very positive experience with Mr. Feinberg, who dealt in an extraordinarily difficult case and different situation. And as he pointed out, about 2,700 of the people who he made awards to were people who were injured at Ground Zero.

Yes, he had enormous discretion. After he did promulgate regulations that had been preceded by some hearings, he did an extraordinary job.

If we continue down this front, that is going to be up to Judge Hellerstein and the jury, assuming that they are—proving that someone did something wrong, is going to have to do exactly the same thing. They are going to have to, when the—under the limits of the tort system, make the same kind of judgment.

So I think your question really is, yes, you could perhaps write in more safeguards in this legislation. I think we could be having a debate for years of each particular potential safeguard, which is why you have regulations.

So, yes, there is going to be discretion to the special master, but I think it is an infinitely more preferable approach than what we have now.

Dr. MELIUS. Can I just add that, from a medical perspective, given the uncertainties about what is going to happen in the future with the illnesses and how these illnesses may develop over time,

may get better, may get worse, and so forth, I think having this type of system is preferable to other, more static compensation systems.

For this particular situation, it can work. And you need the discretion and the flexibility to be able to respond.

Mr. FRANK. I would say that there is a happy medium between what Congress should be doing and what the regulators should be doing. And in particular, the special master here is outside many of the protections of the Administrative Procedure Act, so even as a regulator, there is unusual discretion being vested in the special master by the original stabilization act.

And as I discuss in my written testimony, that is one thing when you are trying to quickly pass legislation, within a couple of weeks of 9/11, but we are talking here about a 22-year program. And Congress should take the time to get some of the details right.

Mr. NADLER. The time of the gentleman has expired.

I now recognize the gentlelady from Texas for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, let me thank you very much for what I think is a very instructive hearing, and also Chairwoman Lofgren, as well, both Committees I serve as a Member on both Subcommittees

Call me a soft sap, but I will stand alongside a suffering people any day against tall buildings and, if you will, corporate blockades. I do recall that this bill was sent in or introduced some years ago, and we look forward to the bipartisan assistance of our good friends on the other side of the aisle.

But I recall the testimony of the special master that indicated that most of the early practitioners who helped did it pro bono. And he felt very comfortable in working through not only through his process, but I believe state law may, in fact, govern compensation. And I am understanding that New York state law in tort actions is not, if you will, a softie.

So I would like to move on to the human suffering. Mr. Wood, I really believe that Mr. Scott's question was not a fault question. It was simply a question saying or asking—and I had just wanted to make sure you understood it was not blame.

It was that, if you had been notified, you might have stopped at the local hardware store or wherever you might stop, might have had a mask or otherwise, you would have gone because of your patriotism.

But what we are asking is, if you had any notice—we are trying to suggest—or let me not put words in your mouth—that you are not to blame. You came down as a volunteer, and so did your workers, because you were called. If you had a big red sign or a SOS that said, “On the way down, get a mask, it is absolutely imperative,” you might have done that. Is that my understanding, sir?

Mr. WOOD. I would have offered that to anybody else who was a volunteer. I would have kept going. It truly was an act of war, ma'am.

Ms. JACKSON LEE. And I don't take that away from you. Thank you so very much, sir. I just wanted to make sure that, if you had that notice, you would have provided for others, maybe not yourself. And we do appreciate it.

Let me ask—to just give me that number again so that I could hear it clearly. And then—I think it is Ms. LaSala? Ms. LaSala?

Ms. LASALA. Yes, LaSala.

Ms. JACKSON LEE. Yes. Could you give me—you paid how much, please?

Ms. LASALA. In claims?

Ms. JACKSON LEE. Yes.

Ms. LASALA. We have paid approximately \$350,000.

Ms. JACKSON LEE. And then what did you utilize for defense fees or lawyers that were involved in the matter?

Ms. LASALA. In the management of this company since its inception, we have spent close to \$200 million both in defense of the litigation, understanding the nature of the injuries, the management of the company, the preservation of the corpus that was entrusted to us.

Ms. JACKSON LEE. And, Ms. LaSala, I never attempt to reproach anyone personally. I will not ask you any more questions. I will just editorialize as I ask Ms. Barbara Burnette questions about the human suffering.

But right now, my stomach is churning. If I was not appropriate and respectful of my Chairman, I might run out of the room. My hair is on fire. And that would be very disastrous for this. I have indigestion. I can't even speak. Three hundred thousand dollars?

[Applause.]

Three hundred thousand dollars and \$200 million plus for defense and understanding someone's pain and suffering is obscene. And so I am hoping we can work across the aisle on this legislation.

Let me quickly go to Ms. Burnette, who played basketball, played on behalf of the New York City Police Department. When you went there, were you told or did you see other people wearing respirators, Ms. Burnette? And thank you for being here.

Ms. BURNETTE. No, I didn't. I was just concerned with rescue and recovery.

Ms. JACKSON LEE. And you got right in the middle of it?

Ms. BURNETTE. Yes.

Ms. JACKSON LEE. And you are now—are you retired? Are you still working for the—

Ms. BURNETTE. Retired.

Ms. JACKSON LEE. You are now retired. Would you have retired this early in life? Obviously, you look like a very young woman, but—

Ms. BURNETTE. No.

Ms. JACKSON LEE. You would not have retired. Were you used to looking out the window at the crime or the criminal or were you used to tracking him down, running him down, and getting him?

Ms. BURNETTE. Running him down and getting him.

Ms. JACKSON LEE. And in terms of the impact on your family and the kind of medication that you are taking, do you see your life being changed, between night and day, pre-9/11, which I want you to get on the record that you would have, if 9/11 came again, God forbid, you were in that capacity as a detective, you would go down there again. I want that to be on the record. I don't want to put words in your mouth.

Ms. BURNETTE. Yes, I would go down there.

Ms. JACKSON LEE. You would go down again. But do you see a difference between your life pre-9/11, your physical condition, and where you are today?

Ms. BURNETTE. Yes, I do. I can't do anything I did pre-9/11.

Ms. JACKSON LEE. Why don't you tell us?

Ms. BURNETTE. Pre-9/11, I still played basketball. I was able to play with my kids and my grandkids. Now, the most I do is cough. I am taking my medications. I don't breathe well. I am suffering because I am still in denial that I am sick. I know that there is talk of me needing a double lung transplant, because I am scarred—three-quarters scarred on both lungs.

Ms. JACKSON LEE. Your family is impacted?

Ms. BURNETTE. Yes, they are.

Ms. JACKSON LEE. And my last—you understand the bill that is before us?

Ms. BURNETTE. Yes.

Ms. JACKSON LEE. And would this legislation going through the Congress, signed by the President of the United States, would this, you believe, help you and your fellow victims who are now still in pain after 9/11?

Ms. BURNETTE. Yes.

Ms. JACKSON LEE. Mr. Chairman, let me indicate, as indicated, that I think Ms. Burnette and, obviously, Mr. Wood have spoken for thousands who cannot be here.

But I would think, in the cost analysis that we in Congress have to do, to juxtapose going forward and helping victims versus a past history of \$200 million for lawyers' fees and only \$300,000 for victims, I think we would be in good stead for any decision made on this particular legislation.

And I want to offer my enthusiast support for H.R. 847. I yield back to the gentleman.

Mr. NADLER. I thank the gentlelady for her support and for yielding back.

The gentleman from New York, Mr. Weiner, is recognized.

Mr. WEINER. Thank you, Mr. Chairman.

And I think that the gentlelady from Texas I think launched a good way for us to wrap up this hearing, and that is by focusing on the victims. You know, we are going to have a chance to vet the legislation here, but, you know, when the financial markets had a heart attack, we responded in about 72 hours with about \$700 billion of funds.

We have a situation where thousands of our neighbors, 70 percent of the first responders, have some form of respiratory ailment. And we seem to want to delay and delay and delay.

This is an acknowledgement—this hearing is an acknowledgement that the delay has to come to an end, that this is a question of whether or not we are going to help people who are being slowly, but surely killed by the events of September 11th.

We have to make sure that, in the future, Mr. Wood and his colleagues are protected. There is no doubt about that. I would love to be in the room as we are making an emergency response plan that involves private contractors and see how many times someone asks, "Well, are we going to be covered if we do A, B and C?"

But there is also an imperative to take care of the victims today. And we have the benefit that we rarely have with legislation, in that we have a sample of model that worked. And I think we have to move quickly to replicate it.

Detective Burnette, you, I think, are on this panel not just for yourself, but for hundreds, if not thousands of your fellow first responders, of people who did their job.

Ms. BURNETTE. Yes.

Mr. WEINER. You know, you expressed in your testimony, you know, having dirt come out of your lungs—well, not all of it came out, I think you are learning. I think a lot of it is still in there.

You know, it takes scientists months to figure out what was in the dust at Ground Zero. Well, now they can go back and find thousands of firefighters, police officers, of contractors, of volunteers who were in that same situation.

You were given on your best day, probably a paper mask, the kind of which they give out at Home Depot for when you are painting at home. We know that the Environmental Protection Agency didn't protect citizens from the environment during those periods, in fact, went on television and said quite the opposite, "Everyone is safe. You can go ahead and go down there."

I think the fact is that we have let you down. I think there is no other way to say it, except that we have let you and the other victims down for too long. And while we stroke our beards and think about the legislation and make sure every word is right, I think the first imperative we have to take care of is to make sure that the victims are made whole to the best extent that we can.

You are a hero, Detective Burnette. The many people who are here in this audience and those that you represent are heroes, the people that worked for the city and people that volunteered in their off-hours and people who worked for Mr. Wood. You are a hero.

And we are not treating you that way right now. We are treating you like cogs in a legislative machine that turns ever so slowly, so slowly, so slowly. And I think that Congressman Nadler and Congresswoman Maloney, Congressman Fossella, who used to serve here, Congressman King, I think all of us—Mayor Bloomberg, Mr. Cardozo, all of us are at the point where we have to now push it into the end zone.

We have been, in a football metaphor, playing in the red zone for the last 5 years. It is enough already. Let's just get this bill out, get it to the floor. Let's put smart people in charge. Let's get people—you know, we can do oversight, I say to my colleagues, and I want to thank Congressman King and Congressman Lungren, who have expressed the right tone.

We want to get this right, but let's get it done already. And I yield back, Mr. Chairman.

Mr. NADLER. I thank the gentleman for his questions and for his comments.

I certainly want to express my hope—we have been working on this legislation and on this problem with the fact that so many of the heroes of 9/11 have gone through so much suffering unnecessarily and without the help that they are entitled to get from their government—

Ms. JACKSON LEE. Mr. Chairman? Mr. Chairman?

Mr. NADLER. Yes?

Ms. JACKSON LEE. May I have unanimous consent to make an inquiry of you for clarification on the record, please, that I did not—

Mr. NADLER. Without objection.

Ms. JACKSON LEE. I understand, on the Captive fund, there was an expenditure of \$300,000—I am seeking a clarification—that the lawyers' fees might have been utilized out of interest, which means there is still \$1 billion left. Maybe I can have a clarification. This is a question that I posed that said there was \$200 million in lawyers' fees, but it almost seems to me that the fund is not barely touched.

Can I have a clarification on that, Mr. Chairman, or—

Mr. NADLER. Well, for clarification for the record, Ms. LaSala, how much is left now?

Ms. LASALA. There is approximately \$940 million in the fund.

Mr. NADLER. Of the original billion, there is \$940 million left, minus the \$200 million—minus the payouts and plus the interest?

Ms. JACKSON LEE. And, Mr. Chairman, if I can further—

Ms. LASALA. And, Congressman Nadler, if I could just add one point, that we are the beneficiaries of a significant ruling in favor of the Captive of \$100 million, a judgment from other insurance companies. That judgment is on appeal, but with it added to the current assets of the company, we will be in excess of the billion dollars we were initially entrusted with.

Mr. NADLER. Thank you.

Ms. JACKSON LEE. Mr. Chairman, further clarifying. That means that we have at least \$1 billion still sitting? Is that right?

Mr. NADLER. There is about \$1 billion still sitting, \$900 million or \$1 billion, depending on the outcome of that litigation. In the legislation, it provides that that \$1 billion, plus some other pots, would be used in an ordered way, without being the first, for compensation of the victims who do not go into the VCF, but elect to maintain litigation.

Ms. JACKSON LEE. Well, I—

Mr. NADLER. And the liability of the contractors and the city is capped at the amount in those pots, the \$1 billion, plus a few other pots.

Ms. JACKSON LEE. Well, concluding and yielding back, I think what that notes is that the victims who are in this audience and these sponsors, yourselves, Ms. Maloney and I think Mr. King, are—

Mr. NADLER. You are talking about Peter King, not—

Ms. JACKSON LEE. He is standing here with a green tie on.

Mr. NADLER. Oh.

Ms. JACKSON LEE. But Mr. King—

Mr. NADLER. Let the record reflect that our colleague from New York, Representative Peter King, who is a sponsor of the legislation, is standing over there.

[Applause.]

Ms. JACKSON LEE. That you are also being responsible in the approach that is being taken through this legislation. I just wanted to make sure that was on the record—

Mr. NADLER. Thank you.

Ms. JACKSON LEE [continuing]. And wanted to clarify the amount of money that is still remaining that is available in certain instances.

I thank you. And I yield back. Thank you, Mr. Chairman.

Mr. NADLER. I thank the gentelady.

And, again, I would hope that this hearing has been productive and conducive to passing this legislation so that both the victims, the heroes of 9/11, and the contractors, who were also both heroes and victims, can be dealt with fairly and decently, as this society should.

Without objection, all Members have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward, and ask the witnesses to respond as promptly as they can, so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

And with that—and, again, thanking our witnesses and thanking the people, the 9/11 workers and others who have come here to witness this hearing—this hearing is adjourned.

[Whereupon, at 12:38 p.m., the Subcommittees were adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF PREPARED STATEMENT OF CHRISTINE C. QUINN,
SPEAKER, NEW YORK CITY COUNCIL

I write today to express the City Council's support for HR 847, the 9/11 Health and Compensation Act, and more specifically the portion of it that would reopen the 9/11 Victims Compensation Fund. I first must applaud the tireless advocacy of the main sponsors of this bill, Congress Members Carolyn Maloney and Jerrold Nadler.

This bill must pass for a variety of reasons. First and foremost, it is quite simply a moral imperative that our government takes care of those from around the country who risked their lives and have become ill as a result of their efforts to recover bodies and remains and to help put out the fires.

Secondly, this bill must pass so that there may be a comprehensive revenue stream to provide for those who have been made sick as a result of their efforts on 9/11 and the recovery and cleanup efforts that followed. Our members of Congress who advocate for such funding should not be required to come hat in hand every year to try to obtain funding for First Responders, construction workers, volunteers, and others who have become ill as a result of 9/11 and its aftermath. The bill that you are considering would recognize that there will be ongoing needs for funding for many years to come and will provide for those needs.

Third, the bill provides for science to take priority in determining the best action to take. The events of 9/11 and the toxins released were unprecedented. There must be continuing research to deal with the scientific challenges that have occurred as a result of this event.

Fourth, the re-opening of the 9/11 Victims Compensation fund is necessary. Presently, the City of New York is involved in litigating claims brought by First Responders and others who have become ill after 9/11. Re-opening the Victims Compensation Fund is necessary to put the adversarial nature of these proceedings to an end, and finally provide compensation for those who are becoming sick and will become sick in the future.

Finally I must note that the issue of First Responders becoming ill as a result of 9/11 is not just a New York issue, but a national one. People from around the nation responded to this crisis by coming here to help and as a result, are now sick and are in need of our government's assistance. In fact, enrollment in the WTC Health Registry spans all 50 states.

I urge you to support the 9/11 Health and Compensation and pass it as quickly as possible. Thank you.

PREPARED STATEMENT OF ASSOCIATED BUILDERS AND CONTRACTORS (ABC)



Statement of Associated Builders and Contractors

House Committee on the Judiciary

Joint Hearing of the

Subcommittee on Immigration Citizenship, Refugees, Border
Security, and International Law

Chairwoman Zoe Lofgren and Ranking Member Steve King

and the

Subcommittee on Constitution, Civil Rights, and Civil Liberties

Chairman Jerrold Nadler and Ranking Member John Sensenbrenner, Jr.

on

H.R. 847

"James Zadroga 9/11 Health Compensation Act of 2009"

March 31, 2009

The Voice of the Merit Shop

Associated Builders and Contractors (ABC) appreciates the opportunity to submit the following statement for the official record.

We would like to thank the Committee Chairman, John Conyers, Jr. and Ranking Member Lamar Smith, and the Subcommittee Chairs Zoe Lofgren and Jerrold Nadler and Ranking Members Steve King and John Sensenbrenner, Jr., as well as the members of the Immigration Citizenship, Refugees, Border Security, and International Law and the Constitution, Civil Rights, and Civil Liberties subcommittees for holding today's hearing on H.R. 847, the "James Zadroga 9/11 Health Compensation Act of 2009."

ABC is a national construction industry trade association representing more than 25,000 merit shop contractors, subcontractors, materials suppliers and construction-related firms within a network of 79 chapters throughout the United States and Guam. ABC member contractors employ more than 2.5 million skilled construction workers, whose training, skills, and experience span all of the twenty-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. This philosophy is based on the principles of full and open competition unfettered by the government, nondiscrimination based on labor affiliation, and the award of construction contracts to the lowest responsible bidder through open and competitive bidding. This process assures that taxpayers and consumers will receive the most for their construction dollar.

The purpose of our statement is to express our support for H.R. 847 and, in particular, section 204 of Title II, which would limit the liability of construction general contractors and subcontractors for all claims and actions for compensatory damages, contribution and indemnification related to the removal of debris created by the terrorist attack on the World Trade Center on September 11, 2001 and reinstitute the Victim Compensation Fund for workers and volunteers at the site.

Immediately following that attack, New York City's major construction contractors, as well as from areas of the country went to the site of that devastation – now known as "Ground Zero" – to lend their skills, expertise and resources to assist in the removal of the debris and rubble that the terrorist attack caused. They did so without fear or thought first being given to what, if any, risk of liability their companies might be exposed to by sending workers to the site of the devastation. To the contrary, they did so because their countrymen needed them and it was the right thing to do.

Immediately following the attack, those construction contractors moved in cranes, heavy machinery and tools through clogged streets, where they began digging for survivors and clearing tons of rubble. Those contractors, just as the other emergency responders, faced burning fires, the constant threat of additional collapse of remaining structures, and countless other perils. Ultimately, those construction contractors worked round-the-clock for nine (9) months until every last bit of the debris had been removed.

Those very same heroic contractors are now being forced to battle another significant,

albeit unanticipated, consequence of that attack – having to defend themselves against an onslaught of civil liability claims that have been instituted. Ironically, the great bulk of these lawsuits have not been brought by the contractors' employees, but by others who were compelled to sue the contractors solely due to the requirements of the captive insurance company which Congress assisted the State of New York to create as a result of the attack.

Not only are those contractors being forced to expend significant resources and incur huge expenses to defend these claims, there is no foreseeable end of the litigation in sight. Moreover, in light of the current economy, there is a growing possibility that some companies could end up being forced out of business as a result of being sued over a tragic event for which they clearly had no responsibility.

These contractors should not be the next round of victims from the 9/11 terrorist attacks that occurred more than seven years ago. Neither should the public also become a future victim of that attack, solely because contractors could no longer afford being the Good Samaritan out of fear that they too would risk significant liability costs and exposure.

The passage of H.R. 847, and in particular section 204 of Title II would protect the 9/11 contractors from the liability exposure and costs they currently face. Those contractors were genuinely heroic and they deserve the protection and fair treatment that the enactment of this legislation would provide.

Beyond this, Title II provides an alternative way in which those who worked or volunteered at the site can seek compensation for injuries outside of the court system. We support that provision as well because there is an inherent federal responsibility to help those who showed up to help the nation after the terrorist attacks.

Although ABC support the bill, ABC also believes there is still room for improvement. We believe that economic damages should be limited and that the length that the victim compensation fund is left open should be considerably shortened. In addition, ABC feels that limitations on attorneys' fees should be added to the language. These concerns notwithstanding, we feel this bill, specifically section 204, adds much-needed protection for America's construction industry.

111TH CONGRESS
1ST SESSION

H. R. 847

To amend the Public Health Service Act to extend and improve protections and services to individuals directly impacted by the terrorist attack in New York City on September 11, 2001, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 4, 2009

Mrs. MALONEY (for herself, Mr. NADLER of New York, Mr. KING of New York, Mr. MCMAHON, Mr. RANGEL, Mr. ACKERMAN, Mr. ARCURI, Mr. BISHOP of New York, Mr. BURGESS, Mr. CROWLEY, Mr. ENGEL, Mr. HALL of New York, Mr. HIGGINS, Mr. HIMES, Mr. HINCHHEY, Mr. ISRAEL, Mr. LEE of New York, Mrs. LOWEY, Mr. MAFFEI, Mr. MASSA, Mrs. MCCARTHY of New York, Mr. MCGOVERN, Mr. McHUGH, Mr. MERKS of New York, Mr. PASCRELL, Mr. SERRANO, Ms. SUTTON, Mr. TONKO, Mr. TOWNS, Mr. WEINER, Ms. WOOLSEY, and Ms. CLARKE) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Public Health Service Act to extend and improve protections and services to individuals directly impacted by the terrorist attack in New York City on September 11, 2001, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

2 (a) SHORT TITLE.—This Act may be cited as the
3 “James Zadroga 9/11 Health and Compensation Act of
4 2009”.

5 (b) TABLE OF CONTENTS.—The table of contents of
6 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings.

TITLE I—WORLD TRADE CENTER HEALTH PROGRAM

Sec. 101. World Trade Center Health Program.

“TITLE XXX—WORLD TRADE CENTER HEALTH PROGRAM

“Subtitle A—Establishment of Program; Advisory and Steering Committees

“Sec. 3001. Establishment of World Trade Center Health Program within NIOSH.

“Sec. 3002. WTC Health Program Scientific/Technical Advisory Committee.

“Sec. 3003. WTC Health Program Steering Committees.

“Sec. 3004. Community education and outreach.

“Sec. 3005. Uniform data collection.

“Sec. 3006. Centers of excellence.

“Sec. 3007. Entitlement authorities.

“Sec. 3008. Definitions.

“Subtitle B—Program of Monitoring, Initial Health Evaluations, and Treatment

“PART 1—FOR WTC RESPONDERS

“Sec. 3011. Identification of eligible WTC responders and provision of WTC-related monitoring services.

“Sec. 3012. Treatment of certified eligible WTC responders for WTC-related health conditions.

“PART 2—COMMUNITY PROGRAM

“Sec. 3021. Identification and initial health evaluation of eligible WTC community members.

“Sec. 3022. Followup monitoring and treatment of certified eligible WTC community members for WTC-related health conditions.

“Sec. 3023. Followup monitoring and treatment of other individuals with WTC-related health conditions.

“PART 3—NATIONAL ARRANGEMENT FOR BENEFITS FOR ELIGIBLE INDIVIDUALS OUTSIDE NEW YORK

“Sec. 3031. National arrangement for benefits for eligible individuals outside New York.

“Subtitle C—Research Into Conditions

“Sec. 3041. Research regarding certain health conditions related to September 11 terrorist attacks in New York City.

“Subtitle D—Programs of the New York City Department of Health and Mental Hygiene

“Sec. 3051. World Trade Center Health Registry.

“Sec. 3052. Mental health services.

TITLE II—SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001

Sec. 201. Definitions.

Sec. 202. Extended and expanded eligibility for compensation.

Sec. 203. Requirement to update regulations.

Sec. 204. Limited liability for certain claims.

1 **SEC. 2. FINDINGS.**

2 Congress finds the following:

3 (1) Thousands of rescue workers who responded
4 to the areas devastated by the terrorist attacks of
5 September 11, local residents, office and area work-
6 ers, and school children continue to suffer significant
7 medical problems as a result of compromised air
8 quality and the release of other toxins from the at-
9 tack sites.

10 (2) In a September 2006 peer-reviewed study
11 conducted by the World Trade Center Medical Moni-
12 toring Program, of 9,500 World Trade Center re-
13 sponders, almost 70 percent of World Trade Center
14 responders had a new or worsened respiratory symp-
15 tom that developed during or after their time work-
16 ing at the World Trade Center; among the respond-

1 ers who were asymptomatic before 9/11, 61 percent
2 developed respiratory symptoms while working at the
3 World Trade Center; close to 60 percent still had a
4 new or worsened respiratory symptom at the time of
5 their examination; one-third had abnormal pul-
6 monary function tests; and severe respiratory condi-
7 tions including pneumonia were significantly more
8 common in the 6 months after 9/11 than in the
9 prior 6 months.

10 (3) An April 2006 study documented that, on
11 average, a New York City firefighter who responded
12 to the World Trade Center has experienced a loss of
13 12 years of lung capacity.

14 (4) A peer-reviewed study of residents who lived
15 near the World Trade Center titled “The World
16 Trade Center Residents’ Respiratory Health Study:
17 New Onset Respiratory Symptoms and Pulmonary
18 Function”, found that data demonstrated a three-
19 fold increase in new-onset, persistent lower res-
20 piratory symptoms in residents near the former
21 World Trade Center as compared to a control popu-
22 lation.

23 (5) Previous research on the health impacts of
24 the devastation caused by the September 11 terrorist
25 attacks has shown relationships between the air

1 quality from Ground Zero and a host of health im-
2 pacts, including lower pregnancy rates, higher rates
3 of respiratory and lung disorders, and a variety of
4 post-disaster mental health conditions (including
5 posttraumatic stress disorder) in workers and resi-
6 dents near Ground Zero.

7 (6) A variety of tests conducted by independent
8 scientists have concluded that significant WTC con-
9 tamination settled in indoor environments sur-
10 rounding the disaster site. The Environmental Pro-
11 tection Agency's (EPA) cleanup programs for indoor
12 residential spaces, in 2003 and 2005, though lim-
13 ited, are an acknowledgment that indoor contamina-
14 tion continued after the WTC attacks.

15 (7) At the request of the Department of En-
16 ergy, the Davis DELTA Group at the University of
17 California conducted outdoor dust sampling in Octo-
18 ber 2001 at Varick and Houston Streets (approx-
19 imately 1.2 miles north of Ground Zero) and found
20 that the contamination from the World Trade Cen-
21 ter "outdid even the worst pollution from the Ku-
22 wait oil fields fires". Further, the United States Ge-
23 ological Survey (USGS) reported on November 27,
24 2001, that dust samples collected from indoor sur-

1 faces registered at levels that were “as caustic as
2 liquid drain cleaners”.

3 (8) According to both the EPA’s own Inspector
4 General’s (EPA IG) report of August 21, 2003 and
5 General Accountability Offices’s (GAO) report of
6 September 2007, no comprehensive program has
7 ever been conducted in order to characterize the full
8 extent of WTC contamination, and therefore the full
9 impact of that contamination—geographic or other-
10 wise—remains unknown.

11 (9) Such reports found that there has never
12 been a comprehensive program to remediate WTC
13 toxins from indoor spaces. Thus, area residents,
14 workers and students may continue to be exposed to
15 WTC contamination in their homes, workplaces and
16 schools.

17 (10) Because of the failure to release federally
18 appropriated funds for community care, a lack of
19 sufficient outreach, the fact that many community
20 members are receiving care from physicians outside
21 the current City-funded World Trade Center Envi-
22 ronmental Health Center program and thus fall out-
23 side data collection efforts, and other factors, the
24 number of community members being treated at the
25 World Trade Center Environmental Health Center

1 underrepresents the total number in the community
2 that have been affected by exposure to Ground Zero
3 toxins.

4 (11) Research by Columbia University's Center
5 for Children's Environmental Health has shown neg-
6 ative health effects on babies born to women living
7 within 2 miles of the World Trade Center in the
8 month following 9/11.

9 (12) Federal funding allocated for the moni-
10 toring of rescue workers' health is not sufficient to
11 ensure the long-term study of health impacts of Sep-
12 tember 11.

13 (13) A significant portion of those who have de-
14 veloped health problems as result of exposures to
15 airborne toxins or other hazards resulting from the
16 September 11, 2001, attacks on the World Trade
17 Center have no health insurance, have lost their
18 health insurance as a result of the attacks, or have
19 inadequate health insurance.

20 (14) The Federal program to provide medical
21 treatments to those who responded to the September
22 11 aftermath, and who continue to experience health
23 problems as a result, was finally established more
24 than five years after the attacks, but has no certain
25 long-term funding.

1 (15) Rescue workers and volunteers seeking
2 workers' compensation have reported that their ap-
3 plications have been denied, delayed for months, or
4 redirected, instead of receiving assistance in a timely
5 and supportive manner.

6 (16) A February 2007 report released by the
7 City of New York estimated that approximately
8 410,000 people were the most heavily exposed to the
9 environmental hazards and trauma of the September
10 11 terrorist attacks. More than 30 percent of the
11 Fire Department of the City of New York first re-
12 sponders were still experiencing some respiratory
13 symptoms more than five years after the attacks and
14 according to the report, 59 percent of those seen by
15 the WTC Environmental Health Center at Bellevue
16 Hospital (which serves community members) are
17 without insurance and 65 percent have incomes less
18 than \$15,000 per year. The report also found a need
19 to continue and expand mental health services.

20 (17) Since the 5th anniversary of the attack
21 (September 11, 2006), hundreds of workers a month
22 have been signing up with the monitoring and treat-
23 ment programs.

24 (18) In April 2008, the Department of Health
25 and Human Services reported to Congress that in

1 fiscal year 2007 11,359 patients received medical
2 treatment in the existing WTC Responder Medical
3 and Treatment program for WTC-related health
4 problems, and that number of responders who need
5 treatment and the severity of health problems is ex-
6 pected to increase.

7 (19) The September 11 Victim Compensation
8 Fund of 2001 was established to provide compensa-
9 tion to individuals who were physically injured or
10 killed as a result of the terrorist-related aircraft
11 crashes of September 11, 2001.

12 (20) The deadline for filing claims for com-
13 pensation under the Victim Compensation Fund was
14 December 22, 2003.

15 (21) Some individuals did not know they were
16 eligible to file claims for compensation for injuries or
17 did not know they had suffered physical harm as a
18 result of the terrorist-related aircraft crashes until
19 after the December 22, 2003, deadline.

20 (22) Further research is needed to evaluate
21 more comprehensively the extent of the health im-
22 pacts of September 11, including research for
23 emerging health problems such as cancer, which
24 have been predicted.

1 (23) Research is needed regarding possible
2 treatment for the illnesses and injuries of September
3 11.

4 (24) The Federal response to medical and fi-
5 nancial issues arising from the September 11 re-
6 sponse efforts needs a comprehensive, coordinated
7 long-term response in order to meet the needs of all
8 the individuals who were exposed to the toxins of
9 Ground Zero and are suffering health problems from
10 the disaster.

11 (25) The failure to extend the appointment of
12 Dr. John Howard as Director of the National Insti-
13 tute for Occupational Safety and Health in July
14 2008 is not in the interests of the administration of
15 such Institute nor the continued operation of the
16 World Trade Center Medical Monitoring and Treat-
17 ment Program which he has headed, and the Sec-
18 retary of Health and Human Services should recon-
19 sider extending such appointment.

20 **TITLE I—WORLD TRADE CENTER**
21 **HEALTH PROGRAM**

22 **SEC. 101. WORLD TRADE CENTER HEALTH PROGRAM.**

23 The Public Health Service Act is amended by adding
24 at the end the following new title:

1 **“TITLE XXX—WORLD TRADE**
2 **CENTER HEALTH PROGRAM**
3 **“Subtitle A—Establishment of Pro-**
4 **gram; Advisory and Steering**
5 **Committees**

6 **“SEC. 3001. ESTABLISHMENT OF WORLD TRADE CENTER**
7 **HEALTH PROGRAM WITHIN NIOSH.**

8 “(a) IN GENERAL.—There is hereby established with-
9 in the National Institute for Occupational Safety and
10 Health a program to be known as the ‘World Trade Center
11 Health Program’ (in this title referred to as the ‘WTC
12 program’) to provide—

13 “(1) medical monitoring and treatment benefits
14 to eligible emergency responders and recovery and
15 clean-up workers (including those who are Federal
16 employees) who responded to the September 11,
17 2001, terrorist attacks on the World Trade Center;
18 and

19 “(2) initial health evaluation, monitoring, and
20 treatment benefits to residents and other building
21 occupants and area workers in New York City who
22 were directly impacted and adversely affected by
23 such attacks.

24 “(b) COMPONENTS OF PROGRAM.—The WTC pro-
25 gram includes the following components:

1 “(1) MEDICAL MONITORING FOR RESPOND-
2 ERS.—Medical monitoring under section 3011, in-
3 cluding clinical examinations and long-term health
4 monitoring and analysis for individuals who were
5 likely to have been exposed to airborne toxins that
6 were released, or to other hazards, as a result of the
7 September 11, 2001, terrorist attacks on the World
8 Trade Center.

9 “(2) INITIAL HEALTH EVALUATION FOR COM-
10 MUNITY MEMBERS.—An initial health evaluation
11 under section 3021, including an evaluation to deter-
12 mine eligibility for followup monitoring and treat-
13 ment.

14 “(3) FOLLOW-UP MONITORING AND TREAT-
15 MENT FOR WTC-RELATED CONDITIONS FOR RE-
16 SPONDERS AND COMMUNITY MEMBERS.—Provision
17 under sections 3012, 3022, and 3023 of follow-up
18 monitoring and treatment and payment, subject to
19 the provisions of subsection (d), for all medically
20 necessary health and mental health care expenses
21 (including necessary prescription drugs) of individ-
22 uals with a WTC-related health condition.

23 “(4) OUTREACH.—Establishment under section
24 3004 of an outreach program to potentially eligible
25 individuals concerning the benefits under this title.

1 “(5) UNIFORM DATA COLLECTION.—Collection
2 under section 3005 of health and mental health data
3 on individuals receiving monitoring or treatment
4 benefits, using a uniform system of data collection.

5 “(6) RESEARCH ON WTC CONDITIONS.—Estab-
6 lishment under subtitle C of a research program on
7 health conditions resulting from the September 11,
8 2001, terrorist attacks on the World Trade Center.

9 “(c) NO COST-SHARING.—Monitoring and treatment
10 benefits and initial health evaluation benefits are provided
11 under subtitle B without any deductibles, copayments, or
12 other cost-sharing to an eligible WTC responder or any
13 eligible WTC community member.

14 “(d) PAYOR.—

15 “(1) IN GENERAL.—Except as provided in para-
16 graphs (2) and (3), the cost of monitoring and treat-
17 ment benefits and initial health evaluation benefits
18 provided under subtitle B shall be paid for by the
19 WTC program.

20 “(2) WORKERS’ COMPENSATION PAYMENT.—

21 “(A) IN GENERAL.—Except as provided in
22 subparagraph (B), payment for treatment
23 under subtitle B of a WTC-related condition in
24 an individual that is work-related shall be re-
25 duced or recouped to the extent that the Sec-

1 retary determines that payment has been made,
2 or can reasonably be expected to be made,
3 under a workers' compensation law or plan of
4 the United States or a State, or other work-re-
5 lated injury or illness benefit plan of the em-
6 ployer of such individual, for such treatment.
7 The provisions of clauses (iii), (iv), (v), and (vi)
8 of paragraph (2)(B) of section 1862(b) of the
9 Social Security Act (42 U.S.C. 1395y(b)(2))
10 and paragraph (3) of such section shall apply to
11 the recoupment under this paragraph of a pay-
12 ment to the WTC program with respect to a
13 workers' compensation law or plan, or other
14 work-related injury or illness plan of the em-
15 ployer involved, and such individual in the same
16 manner as such provisions apply to the reim-
17 bursement of a payment under section
18 1862(b)(2) of such Act to the Secretary, with
19 respect to such a law or plan and an individual
20 entitled to benefits under title XVIII of such
21 Act.

22 “(B) EXCEPTION.—If the WTC Program
23 Administrator certifies that the City of New
24 York has contributed the matching contribution
25 required under section 3006(a)(3) for a 12-

1 month period (specified by the WTC Program
2 Administrator), subparagraph (A) shall not
3 apply for that 12-month period with respect to
4 a workers' compensation law or plan, including
5 line of duty compensation, to which the City is
6 obligated to make payments.

7 “(3) HEALTH INSURANCE COVERAGE.—

8 “(A) IN GENERAL.—In the case of an indi-
9 vidual who has a WTC-related condition that is
10 not work-related and has health coverage for
11 such condition through any public or private
12 health plan, the provisions of section 1862(b) of
13 the Social Security Act (42 U.S.C. 1395y(b))
14 shall apply to such a health plan and such indi-
15 vidual in the same manner as they apply to a
16 group health plan and an individual entitled to
17 benefits under title XVIII of such Act pursuant
18 to section 226(a). Any costs for items and serv-
19 ices covered under such plan that are not reim-
20 bursed by such health plan, due to the applica-
21 tion of deductibles, copayments, coinsurance,
22 other cost-sharing, or otherwise, are reimburs-
23 able under this title to the extent that they are
24 covered under the WTC program.

1 “(B) RECOVERY BY INDIVIDUAL PRO-
2 VIDERS.—Nothing in subparagraph (A) shall be
3 construed as requiring an entity providing mon-
4 itoring and treatment under this title to seek
5 reimbursement under a health plan with which
6 the entity has no contract for reimbursement.

7 “(4) WORK-RELATED DESCRIBED.—For the
8 purposes of this subsection, a WTC-related condition
9 shall be treated as a condition that is work-related
10 if—

11 “(A) the condition is diagnosed in an eligi-
12 ble WTC responder, or in an individual who
13 qualifies as an eligible WTC community mem-
14 ber on the basis of being a rescue, recovery, or
15 clean-up worker; or

16 “(B) with respect to the condition the indi-
17 vidual has filed and had established a claim
18 under a workers’ compensation law or plan of
19 the United States or a State, or other work-re-
20 lated injury or illness benefit plan of the em-
21 ployer of such individual.

22 “(e) QUALITY ASSURANCE AND MONITORING OF
23 CLINICAL EXPENDITURES.—

24 “(1) QUALITY ASSURANCE.—The WTC Pro-
25 gram Administrator working with the Clinical Cen-

1 ters of Excellence shall develop and implement a
2 quality assurance program for the medical moni-
3 toring and treatment delivered by such Centers of
4 Excellence and any other participating health care
5 providers. Such program shall include—

6 “(A) adherence to medical monitoring and
7 treatment protocols;

8 “(B) appropriate diagnostic and treatment
9 referrals for participants;

10 “(C) prompt communication of test results
11 to participants; and

12 “(D) such other elements as the Adminis-
13 trator specifies in consultation with the Clinical
14 Centers of Excellence.

15 “(2) FRAUD PREVENTION.—The WTC Program
16 Administrator shall develop and implement a pro-
17 gram to review the program’s health care expendi-
18 tures to detect fraudulent or duplicate billing and
19 payment for inappropriate services. Such program
20 shall be similar to current methods used in connec-
21 tion with the Medicare program under title XVIII of
22 the Social Security Act. This title is a Federal
23 health care program (as defined in section 1128B(f)
24 of such Act) and is a health plan (as defined in sec-

1 tion 1128C(e) of such Act) for purposes of applying
2 sections 1128 through 1128E of such Act.

3 “(f) WTC PROGRAM ADMINISTRATION.—The WTC
4 program shall be administered by the Director of the Na-
5 tional Institute for Occupational Safety and Health, or a
6 designee of such Director.

7 “(g) ANNUAL PROGRAM REPORT.—

8 “(1) IN GENERAL.—Not later than 6 months
9 after the end of each fiscal year in which the WTC
10 program is in operation, the WTC Program Admin-
11 istrator shall submit an annual report to the Con-
12 gress on the operations of this title for such fiscal
13 year and for the entire period of operation of the
14 program.

15 “(2) CONTENTS OF REPORT.—Each annual re-
16 port under paragraph (1) shall include the following:

17 “(A) ELIGIBLE INDIVIDUALS.—Informa-
18 tion for each clinical program described in para-
19 graph (3)—

20 “(i) on the number of individuals who
21 applied for certification under subtitle B
22 and the number of such individuals who
23 were so certified;

24 “(ii) of the individuals who were cer-
25 tified, on the number who received medical

1 monitoring under the program and the
2 number of such individuals who received
3 medical treatment under the program;

4 “(iii) with respect to individuals so
5 certified who received such treatment, on
6 the WTC-related health conditions for
7 which they were treated; and

8 “(iv) on the projected number of indi-
9 viduals who will be certified under subtitle
10 B in the succeeding fiscal year.

11 “(B) MONITORING, INITIAL HEALTH EVAL-
12 UATION, AND TREATMENT COSTS.—For each
13 clinical program so described—

14 “(i) information on the costs of moni-
15 toring and initial health evaluation and the
16 costs of treatment and on the estimated
17 costs of such monitoring, evaluation, and
18 treatment in the succeeding fiscal year;
19 and

20 “(ii) an estimate of the cost of med-
21 ical treatment for WTC-related conditions
22 that have been paid for or reimbursed by
23 workers’ compensation, by public or private
24 health plans, or by the City of New York
25 under section 3012(c)(4).

1 “(C) ADMINISTRATIVE COSTS.—Informa-
2 tion on the cost of administering the program,
3 including costs of program support, data collec-
4 tion and analysis, and research conducted under
5 the program.

6 “(D) ADMINISTRATIVE EXPERIENCE.—In-
7 formation on the administrative performance of
8 the program, including—

9 “(i) the performance of the program
10 in providing timely evaluation of and treat-
11 ment to eligible individuals; and

12 “(ii) a list of the Clinical Centers of
13 Excellence and other providers that are
14 participating in the program.

15 “(E) SCIENTIFIC REPORTS.—A summary
16 of the findings of any new scientific reports or
17 studies on the health effects associated with
18 WTC center exposures, including the findings
19 of research conducted under section 3041(a).

20 “(F) ADVISORY COMMITTEE REC-
21 COMMENDATIONS.—A list of recommendations by
22 the WTC Scientific/Technical Advisory Com-
23 mittee on additional WTC program eligibility
24 criteria and on additional WTC-related health
25 conditions and the action of the WTC Program

1 Administrator concerning each such rec-
2 ommendation.

3 “(3) SEPARATE CLINICAL PROGRAMS DE-
4 SCRIBED.—In paragraph (2), each of the following
5 shall be treated as a separate clinical program of the
6 WTC program:

7 “(A) FDNY RESPONDERS.—The benefits
8 provided for eligible WTC responders described
9 in section 3006(b)(1)(A).

10 “(B) OTHER ELIGIBLE WTC RESPOND-
11 ERS.—The benefits provided for eligible WTC
12 responders not described in subparagraph (A).

13 “(C) ELIGIBLE WTC COMMUNITY MEM-
14 BERS.—The benefits provided for eligible WTC
15 community members in section 3006(b)(1)(C).

16 “(h) NOTIFICATION TO CONGRESS WHEN REACH 80
17 PERCENT OF ELIGIBILITY NUMERICAL LIMITS.—The
18 WTC Program Administrator shall promptly notify the
19 Congress—

20 “(1) when the number of certifications for eligi-
21 ble WTC responders subject to the limit established
22 under section 3011(a)(5) has reached 80 percent of
23 such limit; and

24 “(2) when the number of certifications for eligi-
25 ble WTC community members subject to the limit

1 established under section 3021(a)(5) has reached 80
2 percent of such limit.

3 “(i) GAO REPORT.—Not later than 3 years after the
4 date of the enactment of this Act, the Comptroller General
5 of the United States shall submit to the Congress a report
6 on the costs of the monitoring and treatment programs
7 provided under this title.

8 “(j) NYC RECOMMENDATIONS.—The City of New
9 York may make recommendations to the WTC Program
10 Administrator on ways to improve the monitoring and
11 treatment programs under this title for both eligible WTC
12 responders and eligible WTC community members.

13 **“SEC. 3002. WTC HEALTH PROGRAM SCIENTIFIC/TECH-**
14 **NICAL ADVISORY COMMITTEE.**

15 “(a) ESTABLISHMENT.—The WTC Program Admin-
16 istrator shall establish an advisory committee to be known
17 as the WTC Health Program Scientific/Technical Advisory
18 Committee (in this section referred to as the ‘Advisory
19 Committee’) to review scientific and medical evidence and
20 to make recommendations to the Administrator on addi-
21 tional WTC program eligibility criteria and on additional
22 WTC-related health conditions.

23 “(b) COMPOSITION.—The WTC Program Adminis-
24 trator shall appoint the members of the Advisory Com-
25 mittee and shall include at least—

1 “(1) 4 occupational physicians, at least two of
2 whom have experience treating WTC rescue and re-
3 covery workers;

4 “(2) 1 physician with expertise in pulmonary
5 medicine;

6 “(3) 2 environmental medicine or environmental
7 health specialists;

8 “(4) 2 representatives of eligible WTC respond-
9 ers;

10 “(5) 2 representatives of WTC community
11 members;

12 “(6) an industrial hygienist;

13 “(7) a toxicologist;

14 “(8) an epidemiologist; and

15 “(9) a mental health professional.

16 “(c) MEETINGS.—The Advisory Committee shall
17 meet at such frequency as may be required to carry out
18 its duties.

19 “(d) REPORTS.—The WTC Program Administrator
20 shall provide for publication of recommendations of the
21 Advisory Committee on the public website established for
22 the WTC program.

23 “(e) AUTHORIZATION OF APPROPRIATIONS.—For the
24 purpose of carrying out this section, there are authorized
25 to be appropriated such sums as may be necessary, not

1 to exceed \$100,000, for each fiscal year beginning with
2 fiscal year 2009.

3 “(f) DURATION.—Notwithstanding any other provi-
4 sion of law, the Advisory Committee shall continue in op-
5 eration during the period in which the WTC program is
6 in operation.

7 “(g) APPLICATION OF FACCA.—Except as otherwise
8 specifically provided, the Advisory Committee shall be sub-
9 ject to the Federal Advisory Committee Act.

10 **“SEC. 3003. WTC HEALTH PROGRAM STEERING COMMIT-**
11 **TEES.**

12 “(a) ESTABLISHMENT.—The WTC Program Admin-
13 istrator shall establish two steering committees (each in
14 this section referred to as a ‘Steering Committee’) as fol-
15 lows:

16 “(1) WTC RESPONDERS STEERING COM-
17 MITTEE.—One steering committee, to be known as
18 the WTC Responders Steering Committee, for the
19 purpose of facilitating the coordination of medical
20 monitoring and treatment programs for the eligible
21 WTC responders under part 1 of subtitle B.

22 “(2) WTC COMMUNITY PROGRAM STEERING
23 COMMITTEE.—One steering committee, to be known
24 as the WTC Community Program Steering Com-
25 mittee, for the purpose of facilitating the coordina-

1 tion of initial health evaluations, monitoring, and
2 treatment programs for eligible WTC community
3 members under part 2 of subtitle B.

4 “(b) MEMBERSHIP.—

5 “(1) INITIAL MEMBERSHIP OF WTC RESPOND-
6 ERS STEERING COMMITTEE.—The WTC Responders
7 Steering Committee shall initially be composed of
8 members of the WTC Monitoring and Treatment
9 Program Steering Committee (as in existence on the
10 day before the date of the enactment of this title).

11 In addition, the committee membership shall in-
12 clude—

13 “(A) a representative of the Police Com-
14 missioner of the City of New York;

15 “(B) a representative of the Department of
16 Health of the City of New York;

17 “(C) a representative of another agency of
18 the City of New York, selected by the Mayor of
19 New York City, which had a large number of
20 non-uniformed City workers who responded to
21 the WTC disaster; and

22 “(D) three representatives of eligible WTC
23 responders;

24 in order that eligible WTC responders constitute half
25 the members of the Steering Committee.

1 “(2) INITIAL MEMBERSHIP OF WTC COMMUNITY
2 PROGRAM STEERING COMMITTEE.—

3 “(A) IN GENERAL.—The WTC Community
4 Program Steering Committee shall initially be
5 composed of members of the WTC Environ-
6 mental Health Center Community Advisory
7 Committee (as in existence on the day before
8 the date of the enactment of this title) and shall
9 initially have, as voting members, the following:

10 “(i) 11 representatives of the affected
11 populations of residents, students, area
12 workers, and other community members.

13 “(ii) The Medical Director of the
14 WTC Environmental Health Center.

15 “(iii) The Executive Director of the
16 WTC Environmental Health Center.

17 “(iv) Three physicians, one each rep-
18 resenting the three WTC Environmental
19 Health Center treatment sites of Bellevue
20 Hospital Center, Gouverneur Healthcare
21 Services, and Elmhurst Hospital Center.

22 “(v) Five specialists with WTC re-
23 lated expertise or experience in treating
24 non-responder WTC diseases, such as a pe-
25 diatrician, an epidemiologist, a psychiatrist

1 or psychologist, an environmental/occupa-
2 tional specialists or a social worker from a
3 WTC Environmental Health Center treat-
4 ment site, or other relevant specialists.

5 “(vi) A representative of the Depart-
6 ment of Health and Mental Hygiene of the
7 City of New York.

8 “(B) APPOINTMENTS.—

9 “(i) WTC EHC COMMUNITY ADVISORY
10 COMMITTEE.—The WTC Environmental
11 Health Center Community Advisory Com-
12 mittee as in existence on the date of the
13 enactment of this title shall nominate
14 members for positions described in sub-
15 paragraph (A)(i).

16 “(ii) NYC HEALTH AND HOSPITALS
17 CORPORATION.—The New York City
18 Health and Hospitals Corporation shall
19 nominate members for positions described
20 in clauses (iv) and (v) of subparagraph
21 (A).

22 “(iii) TIMING.—Nominations under
23 clauses (i) and (ii) shall be recommended
24 to the WTC Program Administrator not

1 later than 60 days after the date of the en-
2 actment of this title.

3 “(iv) APPOINTMENT.—The WTC Pro-
4 gram Administrator shall appoint members
5 of the WTC Community Program Steering
6 Committee not later than 90 days after the
7 date of the enactment of this title.

8 “(v) GENERAL REPRESENTATIVES.—
9 Of the members appointed under subpara-
10 graph (A)(i)—

11 “(I) the representation shall re-
12 flect the broad and diverse WTC-af-
13 fected populations and constituencies
14 and the diversity of impacted neigh-
15 borhoods, including residents, hard-to-
16 reach populations, students, area
17 workers, school parents, community-
18 based organizations, Community
19 Boards, WTC Environmental Health
20 Center patients, labor unions, and
21 labor advocacy organizations; and

22 “(II) no one individual organiza-
23 tion can have more than one rep-
24 resentative.

1 “(3) ADDITIONAL APPOINTMENTS.—Each
2 Steering Committee may appoint, if approved by a
3 majority of voting members of the Committee, addi-
4 tional members to the Committee.

5 “(4) VACANCIES.—A vacancy in a Steering
6 Committee shall be filled by the Steering Committee,
7 subject to the approval of the WTC Program Ad-
8 ministrator, so long as—

9 “(A) in the case of the WTC Responders
10 Steering Committee, the composition of the
11 Committee includes representatives of eligible
12 WTC responders and representatives of each
13 Clinical Center of Excellence and each Coordinating
14 Center of Excellence that serves eligible
15 WTC responders and such composition has eli-
16 gible WTC responders constituting half of the
17 membership of the Steering Committee; or

18 “(B) in the case of the WTC Community
19 Program Steering Committee, the composition
20 of the Committee includes representatives of eli-
21 gible WTC community members and represent-
22 atives of each Clinical Center of Excellence and
23 each Coordinating Center of Excellence that
24 serves eligible WTC community members and

1 the nominating process is consistent with para-
2 graph (2)(B).

3 “(5) CO-CHAIRS OF WTC COMMUNITY PROGRAM
4 STEERING COMMITTEE.—The WTC Community Pro-
5 gram Steering Committee shall have two Co-Chairs
6 as follows:

7 “(A) COMMUNITY/LABOR CO-CHAIR.—A
8 Community/Labor Co-Chair who shall be chosen
9 by the community and labor-based members of
10 the Steering Committee.

11 “(B) ENVIRONMENTAL HEALTH CLINIC
12 CO-CHAIR.—A WTC Environmental Health
13 Clinic Co-Chair who shall be chosen by the
14 WTC Environmental Health Center members
15 on the Steering Committee.

16 “(c) RELATION TO FACIA.—Each Steering Com-
17 mittee shall not be subject to the Federal Advisory Com-
18 mittee Act.

19 “(d) MEETINGS.—Each Steering Committee shall
20 meet at such frequency necessary to carry out its duties,
21 but not less than 4 times each calendar year and at least
22 two such meetings each year shall be a joint meeting with
23 the voting membership of the other Steering Committee
24 for the purpose of exchanging information regarding the
25 WTC program.

1 “(e) DURATION.—Notwithstanding any other provi-
2 sion of law, each Steering Committee shall continue in op-
3 eration during the period in which the WTC program is
4 in operation.

5 **“SEC. 3004. COMMUNITY EDUCATION AND OUTREACH.**

6 “(a) IN GENERAL.—The WTC Program Adminis-
7 trator shall institute a program that provides education
8 and outreach on the existence and availability of services
9 under the WTC program. The outreach and education
10 program—

11 “(1) shall include—

12 “(A) the establishment of a public website
13 with information about the WTC program;

14 “(B) meetings with potentially eligible pop-
15 ulations;

16 “(C) development and dissemination of
17 outreach materials informing people about the
18 program; and

19 “(D) the establishment of phone informa-
20 tion services; and

21 “(2) shall be conducted in a manner intended—

22 “(A) to reach all affected populations; and

23 “(B) to include materials for culturally and
24 linguistically diverse populations.

1 “(b) PARTNERSHIPS.—To the greatest extent possible, in carrying out this section, the WTC Program Administrator shall enter into partnerships with local governments and organizations with experience performing outreach to the affected populations, including community and labor-based organizations.

7 **“SEC. 3005. UNIFORM DATA COLLECTION.**

8 “(a) IN GENERAL.—The WTC Program Administrator shall provide for the uniform collection of data (and analysis of data and regular reports to the Administrator) on the utilization of monitoring and treatment benefits provided to eligible WTC responders and eligible WTC community members, the prevalence of WTC-related health conditions, and the identification of new WTC-related medical conditions. Such data shall be collected for all individuals provided monitoring or treatment benefits under subtitle B and regardless of their place of residence or Clinical Center of Excellence through which the benefits are provided.

20 “(b) COORDINATING THROUGH CENTERS OF EXCELLENCE.—Each Clinical Center of Excellence shall collect data described in subsection (a) and report such data to the corresponding Coordinating Center of Excellence for analysis by such Coordinating Center of Excellence.

1 “(c) PRIVACY.—The data collection and analysis
2 under this section shall be conducted in a manner that
3 protects the confidentiality of individually identifiable
4 health information consistent with applicable legal require-
5 ments.

6 **“SEC. 3006. CENTERS OF EXCELLENCE.**

7 “(a) IN GENERAL.—

8 “(1) CONTRACTS WITH CLINICAL CENTERS OF
9 EXCELLENCE.—The WTC Program Administrator
10 shall enter into contracts with Clinical Centers of
11 Excellence specified in subsection (b)(1)—

12 “(A) for the provision of monitoring and
13 treatment benefits and initial health evaluation
14 benefits under subtitle B;

15 “(B) for the provision of outreach activities
16 to individuals eligible for such monitoring and
17 treatment benefits, for initial health evaluation
18 benefits, and for follow-up to individuals who
19 are enrolled in the monitoring program;

20 “(C) for the provision of counseling for
21 benefits under subtitle B, with respect to WTC-
22 related health conditions, for individuals eligible
23 for such benefits;

24 “(D) for the provision of counseling for
25 benefits for WTC-related health conditions that

1 may be available under Workers' Compensation
2 or other benefit programs for work-related inju-
3 ries or illnesses, health insurance, disability in-
4 surance, or other insurance plans or through
5 public or private social service agencies and as-
6 sisting eligible individuals in applying for such
7 benefits;

8 “(E) for the provision of translational and
9 interpretive services as for program participants
10 who are not English language proficient; and

11 “(F) for the collection and reporting of
12 data in accordance with section 3005.

13 “(2) CONTRACTS WITH COORDINATING CEN-
14 TERS OF EXCELLENCE.—The WTC Program Ad-
15 ministrator shall enter into contracts with Coordi-
16 nating Centers of Excellence specified in subsection
17 (b)(2)—

18 “(A) for receiving, analyzing, and report-
19 ing to the WTC Program Administrator on
20 data, in accordance with section 3005, that has
21 been collected and reported to such Coordi-
22 nating Centers by the corresponding Clinical
23 Centers of Excellence under subsection (d)(3);

24 “(B) for the development of medical moni-
25 toring, initial health evaluation, and treatment

1 protocols, with respect to WTC-related health
2 conditions;

3 “(C) for coordinating the outreach activi-
4 ties conducted under paragraph (1)(B) by each
5 corresponding Clinical Center of Excellence;

6 “(D) for establishing criteria for the
7 credentialing of medical providers participating
8 in the nationwide network under section 3031;

9 “(E) for coordinating and administrating
10 the activities of the WTC Health Program
11 Steering Committees established under section
12 3003(a); and

13 “(F) for meeting periodically with the cor-
14 responding Clinical Centers of Excellence to ob-
15 tain input on the analysis and reporting of data
16 collected under subparagraph (A) and on the
17 development of medical monitoring, initial
18 health evaluation, and treatment protocols
19 under subparagraph (B).

20 The medical providers under subparagraph (D) shall
21 be selected by the WTC Program Administrator on
22 the basis of their experience treating or diagnosing
23 the medical conditions included in the list of identi-
24 fied WTC-related conditions for responders and of

1 identified WTC-related conditions for community
2 members.

3 “(3) REQUIRED PARTICIPATION BY NEW YORK
4 CITY IN MONITORING AND TREATMENT PROGRAM
5 AND COSTS.—

6 “(A) IN GENERAL.—In order for New
7 York City, any agency or Department thereof,
8 or the New York City Health and Hospitals
9 Corporation to qualify for a contract for the
10 provision of monitoring and treatment benefits
11 and other services under section 3006, New
12 York City is required to contribute a matching
13 amount of 10 percent of the amount of the cov-
14 ered monitoring and treatment payment (as de-
15 fined in subparagraph (B)).

16 “(B) COVERED MONITORING AND TREAT-
17 MENT PAYMENT DEFINED.—For the purposes
18 of this paragraph, the term ‘covered monitoring
19 and treatment payment’ means payment under
20 paragraphs (1) and (2), including under such
21 paragraph as applied under section 3021(b),
22 3022(a), and 3023, and reimbursement under
23 3006(e) for items and services furnished by a
24 Clinical Center of Excellence or Coordinating
25 Center of Excellence, and providers designated

1 by the WTC Program under section 3031, after
2 the application of paragraphs (2) and (3) of
3 section 3001 (d).

4 “(C) PAYMENT OF NEW YORK CITY SHARE
5 OF MONITORING AND TREATMENT COSTS.—The
6 WTC Program Administrator shall—

7 “(i) bill the amount specified in sub-
8 paragraph (A) directly to New York City;
9 and

10 “(ii) certify periodically, for purposes
11 of section 3001(d)(2), whether or not New
12 York City has paid the amount so billed.

13 “(D) LIMITATION ON REQUIRED
14 AMOUNT.—In no case is New York City re-
15 quired under this paragraph to contribute more
16 than a total of \$500,000,000 over any 10-year
17 period.

18 “(b) CENTERS OF EXCELLENCE DEFINED.—

19 “(1) CLINICAL CENTER OF EXCELLENCE.—In
20 this title, the term ‘Clinical Center of Excellence’
21 means the following:

22 “(A) FOR FDNY RESPONDERS.—With re-
23 spect to an eligible WTC responder who re-
24 sponded to the 9/11 attacks as an employee of

1 the Fire Department of the City of New York
2 and who—

3 “(i) is an active employee of such De-
4 partment—

5 “(I) with respect to monitoring,
6 such Fire Department; and

7 “(II) with respect to treatment,
8 such Fire Department (or such entity
9 as has entered into a contract with
10 the Fire Department for treatment of
11 such responders) or any other Clinical
12 Center of Excellence described in sub-
13 paragraph (B), (C), or (D); or

14 “(ii) is not an active employee of such
15 Department, such Fire Department (or
16 such entity as has entered into a contract
17 with the Fire Department for monitoring
18 or treatment of such responders) or any
19 other or any other Clinical Center of Ex-
20 cellence described in subparagraph (B),
21 (C), or (D).

22 “(B) OTHER ELIGIBLE WTC RESPOND-
23 ERS.—With respect to other eligible WTC re-
24 sponders, whether or not they reside in the New
25 York Metropolitan area, the Mt. Sinai coordi-

1 nated consortium, Queens College, State Uni-
2 versity of New York at Stony Brook, University
3 of Medicine and Dentistry of New Jersey, and
4 Bellevue Hospital.

5 “(C) WTC COMMUNITY MEMBERS.—With
6 respect to eligible WTC community members,
7 whether or not they reside in the New York
8 Metropolitan area, the World Trade Center En-
9 vironmental Health Center at Bellevue Hospital
10 and such hospitals or other facilities, including
11 but not limited to those within the New York
12 City Health and Hospitals Corporation, as are
13 identified by the WTC Program Administrator.

14 “(D) ALL ELIGIBLE WTC RESPONDERS
15 AND ELIGIBLE WTC COMMUNITY MEMBERS.—
16 With respect to all eligible WTC responders and
17 eligible WTC community members, such other
18 hospitals or other facilities as are identified by
19 the WTC Program Administrator.

20 The WTC Program Administrator shall limit the
21 number of additional Centers of Excellence identified
22 under subparagraph (D) to ensure that the partici-
23 pating centers have adequate experience in the treat-
24 ment and diagnosis of identified WTC-related med-
25 ical conditions.

1 “(2) COORDINATING CENTER OF EXCEL-
2 LENCE.—In this title, the term ‘Coordinating Center
3 of Excellence’ means the following:

4 “(A) FOR FDNY RESPONDERS.—With re-
5 spect to an eligible WTC responder who re-
6 sponded to the 9/11 attacks as an employee of
7 the Fire Department of the City of New York,
8 such Fire Department.

9 “(B) OTHER WTC RESPONDERS.—With re-
10 spect to other eligible WTC responders, the Mt.
11 Sinai coordinated consortium.

12 “(C) WTC COMMUNITY MEMBERS.—With
13 respect to eligible WTC community members,
14 the World Trade Center Environmental Health
15 Center at Bellevue Hospital.

16 “(3) CORRESPONDING CENTERS.—In this title,
17 a Clinical Center of Excellence and a Coordinating
18 Center of Excellence shall be treated as ‘cor-
19 responding’ to the extent that such Clinical Center
20 and Coordinating Center serve the same population
21 group.

22 “(c) REIMBURSEMENT FOR NON-TREATMENT, NON-
23 MONITORING PROGRAM COSTS.—A Clinical or Coordi-
24 nating Center of Excellence with a contract under this sec-
25 tion shall be reimbursed for the costs of such Center in

1 carrying out the activities described in subsection (a),
2 other than those described in subsection (a)(1)(A), subject
3 to the provisions of section 3001(d), as follows:

4 “(1) CLINICAL CENTERS OF EXCELLENCE.—
5 For carrying out subparagraphs (B) through (F) of
6 subsection (a)(1)—

7 “(A) CLINICAL CENTER FOR FDNY RE-
8 SPONDERS IN NEW YORK.—The Clinical Center
9 of Excellence for FDNY Responders in New
10 York specified in subsection (b)(1)(A) shall be
11 reimbursed—

12 “(i) in the first year of the contract
13 under this section, \$600 per certified eligi-
14 ble WTC responder in the medical treat-
15 ment program, and \$300 per certified eli-
16 gible WTC responder in the monitoring
17 program; and

18 “(ii) in each subsequent contract year,
19 subject to paragraph (3), at the rates spec-
20 ified in this subparagraph for the previous
21 contract year adjusted by the WTC Pro-
22 gram Administrator to reflect the rate of
23 medical care inflation during the previous
24 contract year.

1 “(B) CLINICAL CENTERS SERVING OTHER
2 ELIGIBLE WTC RESPONDERS IN NEW YORK.—A
3 Clinical Center of Excellence for other WTC re-
4 sponders in New York specified in subsection
5 (b)(1)(B) shall be reimbursed the amounts
6 specified in subparagraph (A).

7 “(C) CLINICAL CENTERS SERVING WTC
8 COMMUNITY MEMBERS.—A Clinical Center of
9 Excellence for eligible WTC community mem-
10 bers in New York specified in subsection
11 (b)(1)(C) shall be reimbursed—

12 “(i) in the first year of the contract
13 under this section, for each certified eligi-
14 ble WTC community member in a medical
15 treatment program enrolled at a non-hos-
16 pital-based facility, \$600, and for each cer-
17 tified eligible WTC community member in
18 a medical treatment program enrolled at a
19 hospital-based facility, \$300; and

20 “(ii) in each subsequent contract year,
21 subject to paragraph (3), at the rates spec-
22 ified in this subparagraph for the previous
23 contract year adjusted by the WTC Pro-
24 gram Administrator to reflect the rate of

1 medical care inflation during the previous
2 contract year.

3 “(D) OTHER CLINICAL CENTERS.—A Clin-
4 ical Center of Excellence or other providers not
5 described in a previous subparagraph shall be
6 reimbursed at a rate set by the WTC Program
7 Administrator.

8 “(E) REIMBURSEMENT RULES.—The reim-
9 bursement provided under subparagraphs (A),
10 (B) and (C) shall be made for each certified eli-
11 gible WTC responder and for each WTC com-
12 munity member in the WTC program per year
13 that the member receives such services, regard-
14 less of the volume or cost of services required.

15 “(2) COORDINATING CENTERS OF EXCEL-
16 LENCE.—A Coordinating Centers of Excellence spec-
17 ified in section (a)(2) shall be reimbursed for the
18 provision of services set forth in this section at such
19 levels as are established by the WTC Program Ad-
20 ministrator.

21 “(3) REVIEW OF RATES.—

22 “(A) INITIAL REVIEW.—Before the end of
23 the third contract year of the WTC program,
24 the WTC Program Administrator shall conduct
25 a review to determine whether the reimburse-

1 ment rates set forth in this subsection provide
2 fair and appropriate reimbursement for such
3 program services. Based on such review, the
4 Administrator may, by rule beginning with the
5 fourth contract year, may modify such rates,
6 taking into account a reasonable and fair rate
7 for the services being provided.

8 “(B) SUBSEQUENT REVIEWS.—After the
9 fourth contract year, the WTC Program Ad-
10 ministrator shall conduct periodic reviews to de-
11 termine whether the reimbursement rates in ef-
12 fect under this subsection provide fair and ap-
13 propriate reimbursement for such program serv-
14 ices. Based upon such a review, the Adminis-
15 trator may by rule modify such rates, taking
16 into account a reasonable and fair rate for the
17 services being provided.

18 “(C) GAO REVIEW.—The Comptroller
19 General of the United States shall review the
20 WTC Program Administrator’s determinations
21 regarding fair and appropriate reimbursement
22 for program services under this paragraph.

23 “(d) REQUIREMENTS.—The WTC Program Adminis-
24 trator shall not enter into a contract with a Clinical Center
25 of Excellence under subsection (a)(1) unless—

1 “(1) the Center establishes a formal mechanism
2 for consulting with and receiving input from rep-
3 resentatives of eligible populations receiving moni-
4 toring and treatment benefits under subtitle B from
5 such Center;

6 “(2) the Center provides for the coordination of
7 monitoring and treatment benefits under subtitle B
8 with routine medical care provided for the treatment
9 of conditions other than WTC-related health condi-
10 tions;

11 “(3) the Center collects and reports to the cor-
12 responding Coordinating Center of Excellence data
13 in accordance with section 3005;

14 “(4) the Center has in place safeguards against
15 fraud that are satisfactory to the Administrator;

16 “(5) the Center agrees to treat or refer for
17 treatment all individuals who are eligible WTC re-
18 sponders or eligible WTC community members with
19 respect to such Center who present themselves for
20 treatment of a WTC-related health condition;

21 “(6) the Center has in place safeguards to en-
22 sure the confidentiality of an individual’s individ-
23 ually identifiable health information, including re-
24 quiring that such information not be disclosed to the

1 individual's employer without the authorization of
2 the individual;

3 “(7) the Center provides assurances that the
4 amounts paid under subsection (c)(1) are used only
5 for costs incurred in carrying out the activities de-
6 scribed in subsection (a), other than those described
7 in subsection (a)(1)(A); and

8 “(8) the Center agrees to meet all the other ap-
9 plicable requirements of this title, including regula-
10 tions implementing such requirements.

11 **“SEC. 3007. ENTITLEMENT AUTHORITIES.**

12 “Subject to subsections (b)(4)(C) and (c)(5) of sec-
13 tion 3012, subtitle B constitutes budget authority in ad-
14 vance of appropriations Acts and represents the obligation
15 of the Federal Government to provide for the payment for
16 monitoring, initial health evaluations, and treatment in ac-
17 cordance with such subtitle and section 3006(e) con-
18 stitutes such budget authority and represents the obliga-
19 tion of the Federal Government to provide for the payment
20 described in such section.

21 **“SEC. 3008. DEFINITIONS.**

22 “In this title:

23 “(1) The term ‘aggravating’ means, with re-
24 spect to a health condition, a health condition that
25 existed on September 11, 2001, and that, as a result

1 of exposure to airborne toxins, any other hazard, or
2 any other adverse condition resulting from the Sep-
3 tember 11, 2001, terrorist attacks on the World
4 Trade Center requires medical treatment that is (or
5 will be) in addition to, more frequent than, or of
6 longer duration than the medical treatment that
7 would have been required for such condition in the
8 absence of such exposure.

9 “(2) The terms ‘certified eligible WTC re-
10 sponder’ and ‘certified eligible WTC community
11 member’ mean an individual who has been certified
12 as an eligible WTC responder under section
13 3011(a)(4) or an eligible WTC community member
14 under section 3021(a)(4), respectively.

15 “(3) The terms ‘Clinical Center of Excellence’
16 and ‘Coordinating Center of Excellence’ have the
17 meanings given such terms in section 3006(b).

18 “(4) The term ‘current consortium arrange-
19 ments’ means the arrangements as in effect on the
20 date of the enactment of this title between the Na-
21 tional Institute for Occupational Safety and Health
22 and the Mt. Sinai-coordinated consortium and the
23 Fire Department of the City of New York.

1 “(5) The terms ‘eligible WTC responder’ and
2 ‘eligible WTC community member’ are defined in
3 sections 3011(a) and 3021(a), respectively.

4 “(6) The term ‘initial health evaluation’ in-
5 cludes, with respect to an individual, a medical and
6 exposure history, a physical examination, and addi-
7 tional medical testing as needed to evaluate whether
8 the individual has a WTC-related health condition
9 and is eligible for treatment under the WTC pro-
10 gram.

11 “(7) The term ‘list of identified WTC-related
12 health conditions’ means—

13 “(A) for eligible WTC responders, the
14 identified WTC-related health condition for eli-
15 gible WTC responders under section 3012(a)(3)
16 or 3012(a)(4); or

17 “(B) for eligible WTC community mem-
18 bers, the identified WTC-related health condi-
19 tion for WTC community members under sec-
20 tion 3022(b)(1) or 3022(b)(2).

21 “(8) The term ‘Mt.-Sinai-coordinated consor-
22 tium’ means the consortium coordinated by Mt.
23 Sinai hospital in New York City that coordinates the
24 monitoring and treatment under the current consor-
25 tium arrangements for eligible WTC responders

1 other than with respect to those covered under the
2 arrangement with the Fire Department of the City
3 of New York.

4 “(9) The term ‘New York City disaster area’
5 means the area within New York City that is—

6 “(A) the area of Manhattan that is south
7 of Houston Street; and

8 “(B) any block in Brooklyn that is wholly
9 or partially contained within a 1.5-mile radius
10 of the former World Trade Center site.

11 “(10) The term ‘New York metropolitan area’
12 means an area, specified by the WTC Program Ad-
13 ministrator, within which eligible WTC responders
14 and eligible WTC community members who reside in
15 such area are reasonably able to access monitoring
16 and treatment benefits and initial health evaluation
17 benefits under this title through a Clinical Centers
18 of Excellence described in subparagraphs (A), (B),
19 or (C) of section 3006(b)(1).

20 “(11) Any reference to ‘September 11, 2001’
21 shall be deemed a reference to the period on such
22 date subsequent to the terrorist attacks on the
23 World Trade Center on such date.

24 “(12) The term ‘September 11, 2001, terrorist
25 attacks on the World Trade Center’ means the ter-

1 rorist attacks that occurred on September 11, 2001,
2 in New York City and includes the aftermath of
3 such attacks.

4 “(13) The term ‘WTC Health Program Steer-
5 ing Committee’ means such a Steering Committee
6 established under section 3003.

7 “(14) The term ‘WTC Program Administrator’
8 means the individual responsible under section
9 3001(f) for the administration of the WTC program.

10 “(15) The term ‘WTC-related health condition’
11 is defined in section 3012(a).

12 “(16) The term ‘WTC Scientific/Technical Ad-
13 visory Committee’ means such Committee estab-
14 lished under section 3002.

15 **“Subtitle B—Program of Moni-**
16 **toring, Initial Health Evalua-**
17 **tions, and Treatment**

18 **“PART 1—FOR WTC RESPONDERS**

19 **“SEC. 3011. IDENTIFICATION OF ELIGIBLE WTC RESPOND-**
20 **ERS AND PROVISION OF WTC-RELATED MONI-**
21 **TORING SERVICES.**

22 “(a) ELIGIBLE WTC RESPONDER DEFINED.—

23 “(1) IN GENERAL.—For purposes of this title,
24 the term ‘eligible WTC responder’ means any of the
25 following individuals, subject to paragraph (5):

1 “(A) CURRENTLY IDENTIFIED RE-
2 SPONDER.—An individual who has been identi-
3 fied as eligible for medical monitoring under the
4 current consortium arrangements (as defined in
5 section 3008(4)).

6 “(B) RESPONDER WHO MEETS CURRENT
7 ELIGIBILITY CRITERIA.—An individual who
8 meets the current eligibility criteria described in
9 paragraph (2).

10 “(C) RESPONDER WHO MEETS MODIFIED
11 ELIGIBILITY CRITERIA.—An individual who—

12 “(i) performed rescue, recovery, demo-
13 lition, debris cleanup, or other related serv-
14 ices in the New York City disaster area in
15 response to the September 11, 2001, ter-
16 rorist attacks on the World Trade Center,
17 regardless of whether such services were
18 performed by a State or Federal employee
19 or member of the National Guard or other-
20 wise; and

21 “(ii) meets such eligibility criteria re-
22 lating to exposure to airborne toxins, other
23 hazards, or adverse conditions resulting
24 from the September 11, 2001, terrorist at-
25 tacks on the World Trade Center as the

1 WTC Program Administrator, after con-
2 sultation with the WTC Responders Steer-
3 ing Committee and the WTC Scientific/
4 Technical Advisory Committee, determines
5 appropriate.

6 The WTC Program Administrator shall not
7 modify such eligibility criteria on or after the
8 date that the number of certifications for eligi-
9 ble responders has reached 80 percent of the
10 limit described in paragraph (5) or on or after
11 the date that the number of certifications for eli-
12 gible community members has reached 80 per-
13 cent of the limit described in section
14 3021(a)(5).

15 “(2) CURRENT ELIGIBILITY CRITERIA.—The
16 eligibility criteria described in this paragraph for an
17 individual is that the individual is described in either
18 of the following categories:

19 “(A) FIRE FIGHTERS AND RELATED PER-
20 SONNEL.—The individual—

21 “(i) was a member of the Fire De-
22 partment of the City of New York (wheth-
23 er fire or emergency personnel, active or
24 retired) who participated at least one day
25 in the rescue and recovery effort at any of

1 the former World Trade sites (including
2 Ground Zero, Staten Island land fill, and
3 the NYC Chief Medical Examiner’s office)
4 for any time during the period beginning
5 on September 11, 2001, and ending on
6 July 31, 2002; or

7 “(ii)(I) is a surviving immediate fam-
8 ily member of an individual who was a
9 member of the Fire Department of the
10 City of New York (whether fire or emer-
11 gency personnel, active or retired) and was
12 killed at the World Trade site on Sep-
13 tember 11, 2001; and

14 “(II) received any treatment for a
15 WTC-related mental health condition de-
16 scribed in section 3012(a)(1)(B) on or be-
17 fore September 1, 2008.

18 “(B) LAW ENFORCEMENT OFFICERS AND
19 WTC RESCUE, RECOVERY, AND CLEAN-UP
20 WORKERS.—The individual—

21 “(i) worked or volunteered on-site in
22 rescue, recovery, debris-cleanup or related
23 support services in lower Manhattan (south
24 of Canal St.), the Staten Island Landfill,
25 or the barge loading piers, for at least 4

1 hours during the period beginning on Sep-
2 tember 11, 2001, and ending on Sep-
3 tember 14, 2001, for at least 24 hours
4 during the period beginning on September
5 11, 2001, and ending on September 30,
6 2001, or for at least 80 hours during the
7 period beginning on September 11, 2001,
8 and ending on July 31, 2002;

9 “(ii)(I) was a member of the Police
10 Department of the City of New York
11 (whether active or retired) or a member of
12 the Port Authority Police of the Port Au-
13 thority of New York and New Jersey
14 (whether active or retired) who partici-
15 pated on-site in rescue, recovery, debris
16 clean-up, or related services in lower Man-
17 hattan (south of Canal St.), including
18 Ground Zero, the Staten Island Landfill or
19 the barge loading piers, for at least 4
20 hours during the period beginning Sep-
21 tember 11, 2001, and ending on Sep-
22 tember 14, 2001;

23 “(II) participated on-site in rescue,
24 recovery, debris clean-up, or related serv-
25 ices in at Ground Zero, the Staten Island

1 Landfill or the barge loading piers, for at
2 least one day during the period beginning
3 on September 11, 2001, and ending on
4 July 31, 2002;

5 “(III) participated on-site in rescue,
6 recovery, debris clean-up, or related serv-
7 ices in lower Manhattan (south of Canal
8 St.) for at least 24 hours during the period
9 beginning on September 11, 2001, and
10 ending on September 30, 2001; or

11 “(IV) participated on-site in rescue,
12 recovery, debris clean-up, or related serv-
13 ices in lower Manhattan (south of Canal
14 St.) for at least 80 hours during the period
15 beginning on September 11, 2001, and
16 ending on July 31, 2002;

17 “(iii) was an employee of the Office of
18 the Chief Medical Examiner of the City of
19 New York involved in the examination and
20 handling of human remains from the
21 World Trade Center attacks, or other
22 morgue worker who performed similar
23 post-September 11 functions for such Of-
24 fice staff, during the period beginning on

1 September 11, 2001 and ending on July
2 31, 2002;

3 “(iv) was a worker in the Port Au-
4 thority Trans-Hudson Corporation tunnel
5 for at least 24 hours during the period be-
6 ginning on February 1, 2002, and ending
7 on July 1, 2002; or

8 “(v) was a vehicle-maintenance worker
9 who was exposed to debris from the former
10 World Trade Center while retrieving, driv-
11 ing, cleaning, repairing, and maintaining
12 vehicles contaminated by airborne toxins
13 from the September 11, 2001, terrorist at-
14 tacks on the World Trade Center during a
15 duration and period described in subpara-
16 graph (A).

17 “(3) APPLICATION PROCESS.—The WTC Pro-
18 gram Administrator in consultation with the Coordi-
19 nating Centers of Excellence shall establish a proc-
20 ess for individuals, other than eligible WTC respond-
21 ers described in paragraph (1)(A), to apply to be de-
22 termined to be eligible WTC responders. Under such
23 process—

1 “(A) there shall be no fee charged to the
2 applicant for making an application for such
3 determination;

4 “(B) the Administrator shall make a deter-
5 mination on such an application not later than
6 60 days after the date of filing the application;
7 and

8 “(C) an individual who is determined not
9 to be an eligible WTC responder shall have an
10 opportunity to appeal such determination before
11 an administrative law judge in a manner estab-
12 lished under such process.

13 “(4) CERTIFICATION.—

14 “(A) IN GENERAL.—In the case of an indi-
15 vidual who is described in paragraph (1)(A) or
16 who is determined under paragraph (3) (con-
17 sistent with paragraph (5)) to be an eligible
18 WTC responder, the WTC Program Adminis-
19 trator shall provide an appropriate certification
20 of such fact and of eligibility for monitoring
21 and treatment benefits under this part. The Ad-
22 ministrator shall make determinations of eligi-
23 bility relating to an applicant’s compliance with
24 this title, including the verification of informa-
25 tion submitted in support of the application,

1 and shall not deny such a certification to an in-
2 dividual unless the Administrator determines
3 that—

4 “(i) based on the application sub-
5 mitted, the individual does not meet the
6 eligibility criteria; or

7 “(ii) the numerical limitation on eligi-
8 ble WTC responders set forth in paragraph
9 (5) has been met.

10 “(B) TIMING.—

11 “(i) CURRENTLY IDENTIFIED RE-
12 SPONDERS.—In the case of an individual
13 who is described in paragraph (1)(A), the
14 WTC Program Administrator shall provide
15 the certification under subparagraph (A)
16 not later than 60 days after the date of the
17 enactment of this title.

18 “(ii) OTHER RESPONDERS.—In the
19 case of another individual who is deter-
20 mined under paragraph (3) and consistent
21 with paragraph (5) to be an eligible WTC
22 responder, the WTC Program Adminis-
23 trator shall provide the certification under
24 subparagraph (A) at the time of the deter-
25 mination.

1 “(5) NUMERICAL LIMITATION ON ELIGIBLE
2 WTC RESPONDERS.—

3 “(A) IN GENERAL.—The total number of
4 individuals not described in subparagraph (C)
5 who may qualify as eligible WTC responders for
6 purposes of this title, and be certified as eligible
7 WTC responders under paragraph (4), shall not
8 exceed 15,000, subject to adjustment under
9 paragraph (6), of which no more than 2,500
10 may be individuals certified based on modified
11 eligibility criteria established under paragraph
12 (1)(C). In applying the previous sentence, any
13 individual who at any time so qualifies as an el-
14 igible WTC responder shall be counted against
15 such numerical limitation.

16 “(B) PROCESS.—In implementing subpara-
17 graph (A), the WTC Program Administrator
18 shall—

19 “(i) limit the number of certifications
20 provided under paragraph (4) in accord-
21 ance with such subparagraph; and

22 “(ii) provide priority in such certifi-
23 cations in the order in which individuals
24 apply for a determination under paragraph
25 (3).

1 “(C) CURRENTLY IDENTIFIED RESPOND-
2 ERS NOT COUNTED.—Individuals described in
3 this subparagraph are individuals who are de-
4 scribed in paragraph (1)(A).

5 “(6) POTENTIAL ADJUSTMENT IN NUMERICAL
6 LIMITATIONS DEPENDENT UPON ACTUAL SPENDING
7 RELATIVE TO ESTIMATED SPENDING.—

8 “(A) INITIAL CALCULATION FOR FISCAL
9 YEARS 2009 THROUGH 2011.—If the WTC Pro-
10 gram Administrator determines as of December
11 1, 2011, that the WTC expenditure-to-CBO-es-
12 timate percentage (as defined in subparagraph
13 (D)(iii)) for fiscal years 2009 through 2011
14 does not exceed 90 percent, then, effective Jan-
15 uary 1, 2012, the WTC Program Administrator
16 may increase the numerical limitation under
17 paragraph (5)(A), the numerical limitation
18 under section 3021(a)(5), or both, by a number
19 of percentage points not to exceed the number
20 of percentage points specified in subparagraph
21 (C) for such period of fiscal years.

22 “(B) SUBSEQUENT CALCULATION FOR FIS-
23 CAL YEARS 2009 THROUGH 2015.—If the Sec-
24 retary determines as of December 1, 2015, that
25 the WTC expenditure-to-CBO-estimate percent-

1 ages for fiscal years 2009 through 2015 and for
2 fiscal years 2012 through 2015 do not exceed
3 90 percent, then, effective January 1, 2015, the
4 WTC Program Administrator may increase the
5 numerical limitation under paragraph (5)(A),
6 the numerical limitation under section
7 3021(a)(5), or both, as in effect after the appli-
8 cation of subparagraph (A), by a number of
9 percentage points not to exceed twice the lesser
10 of—

11 “(i) the number of percentage points
12 specified in subparagraph (C) for fiscal
13 years 2009 through 2012, or

14 “(ii) the number of percentage points
15 specified in subparagraph (C) for fiscal
16 years 2012 through 2015.

17 “(C) MAXIMUM PERCENTAGE INCREASE IN
18 NUMERICAL LIMITATIONS FOR PERIOD OF FIS-
19 CAL YEARS.—The number of percentage points
20 specified in this clause for a period of fiscal
21 years is—

22 “(i) 100 percentage points, multiplied
23 by

24 “(ii) one minus a fraction the numer-
25 ator of which is the net Federal WTC

1 spending for such period, and the denomi-
2 nator of which is the CBO WTC spending
3 estimate under this title for such period.

4 “(D) DEFINITIONS.—For purposes of this
5 paragraph:

6 “(i) NET FEDERAL SPENDING.—The
7 term ‘net Federal WTC spending’ means,
8 with respect to a period of fiscal years, the
9 net Federal spending under this title for
10 such fiscal years.

11 “(ii) CBO WTC SPENDING ESTIMATE
12 UNDER THIS TITLE.—The term ‘CBO
13 WTC medical spending estimate under this
14 title’ means, with respect to—

15 “(I) fiscal years 2009 through
16 2011, \$900,000,000;

17 “(II) fiscal years 2012 through
18 2015, \$1,890,000,000; and

19 “(III) fiscal years 2009 through
20 2015, the sum of the amounts speci-
21 fied in subclauses (I) and (II).

22 “(iii) WTC EXPENDITURE-TO-CBO-ES-
23 TIMATE PERCENTAGE.—The term ‘WTC
24 expenditure-to-estimate percentage’ means,

1 with respect to a period of fiscal years, the
2 ratio (expressed as a percentage) of—

3 “(I) the net Federal WTC spend-
4 ing for such period, to

5 “(II) the CBO WTC spending es-
6 timate under this title for such period.

7 “(b) MONITORING BENEFITS.—

8 “(1) IN GENERAL.—In the case of an eligible
9 WTC responder under section 3011(a)(4) (other
10 than one described in subsection (a)(2)(A)(ii)), the
11 WTC program shall provide for monitoring benefits
12 that include medical monitoring consistent with pro-
13 tocols approved by the WTC Program Administrator
14 and including clinical examinations and long-term
15 health monitoring and analysis. In the case of an eli-
16 gible WTC responder who is an active member of
17 the Fire Department of the City of New York, the
18 responder shall receive such benefits as part of the
19 individual’s periodic company medical exams.

20 “(2) PROVISION OF MONITORING BENEFITS.—

21 The monitoring benefits under paragraph (1) shall
22 be provided through the Clinical Center of Excel-
23 lence for the type of individual involved or, in the
24 case of an individual residing outside the New York

1 metropolitan area, under an arrangement under sec-
2 tion 3031.

3 **“SEC. 3012. TREATMENT OF CERTIFIED ELIGIBLE WTC RE-**
4 **SPONDERS FOR WTC-RELATED HEALTH CON-**
5 **DITIONS.**

6 **“(a) WTC-RELATED HEALTH CONDITION DE-**
7 **FINED.—**

8 **“(1) IN GENERAL.—**For purposes of this title,
9 the term ‘WTC-related health condition’ means—

10 **“(A)** an illness or health condition for
11 which exposure to airborne toxins, any other
12 hazard, or any other adverse condition resulting
13 from the September 11, 2001, terrorist attacks
14 on the World Trade Center, based on an exam-
15 ination by a medical professional with experi-
16 ence in treating or diagnosing the medical con-
17 ditions included in the applicable list of identi-
18 fied WTC-related conditions, is substantially
19 likely to be a significant factor in aggravating,
20 contributing to, or causing the illness or health
21 condition, as determined under paragraph (2);
22 or

23 **“(B)** a mental health condition for which
24 such attacks, based on an examination by a
25 medical professional with experience in treating

1 or diagnosing the medical conditions included in
2 the applicable list of identified WTC-related
3 conditions, is substantially likely be a signifi-
4 cant factor in aggravating, contributing to, or
5 causing the condition, as determined under
6 paragraph (2).

7 In the case of an eligible WTC responder described
8 in section 3011(a)(2)(A)(ii), such term only includes
9 the mental health condition described in subpara-
10 graph (B).

11 “(2) DETERMINATION.—The determination of
12 whether the September 11, 2001, terrorist attacks
13 on the World Trade Center were substantially likely
14 to be a significant factor in aggravating, contrib-
15 uting to, or causing an individual’s illness or health
16 condition shall be made based on an assessment of
17 the following:

18 “(A) The individual’s exposure to airborne
19 toxins, any other hazard, or any other adverse
20 condition resulting from the terrorist attacks.
21 Such exposure shall be—

22 “(i) evaluated and characterized
23 through the use of a standardized, popu-
24 lation appropriate questionnaire approved

1 by the Director of the National Institute
2 for Occupational Safety and Health; and

3 “(ii) assessed and documented by a
4 medical professional with experience in
5 treating or diagnosing medical conditions
6 included on the list of identified WTC-re-
7 lated conditions.

8 “(B) The type of symptoms and temporal
9 sequence of symptoms. Such symptoms shall
10 be—

11 “(i) assessed through the use of a
12 standardized, population appropriate med-
13 ical questionnaire approved by Director of
14 the National Institute for Occupational
15 Safety and Health and a medical examina-
16 tion; and

17 “(ii) diagnosed and documented by a
18 medical professional described in subpara-
19 graph (A)(ii).

20 “(3) LIST OF IDENTIFIED WTC-RELATED
21 HEALTH CONDITIONS FOR CERTIFIED ELIGIBLE WTC
22 RESPONDERS.—For purposes of this title, the term
23 ‘identified WTC-related health condition for eligible
24 WTC responders’ means any of the following health
25 conditions:

- 1 “(A) AERODIGESTIVE DISORDERS.—
2 “(i) Interstitial lung diseases.
3 “(ii) Chronic respiratory disorder-
4 fumes/vapors.
5 “(iii) Asthma.
6 “(iv) Reactive airways dysfunction
7 syndrome (RADS).
8 “(v) WTC-exacerbated chronic ob-
9 structive pulmonary disease (COPD).
10 “(vi) Chronic cough syndrome.
11 “(vii) Upper airway hyperreactivity.
12 “(viii) Chronic rhinosinusitis.
13 “(ix) Chronic nasopharyngitis.
14 “(x) Chronic laryngitis.
15 “(xi) Gastro-esophageal reflux dis-
16 order (GERD).
17 “(xii) Sleep apnea exacerbated by or
18 related to a condition described in a pre-
19 vious clause.
20 “(B) MENTAL HEALTH CONDITIONS.—
21 “(i) Post traumatic stress disorder
22 (PTSD).
23 “(ii) Major depressive disorder.
24 “(iii) Panic disorder.
25 “(iv) Generalized anxiety disorder.

1 “(v) Anxiety disorder (not otherwise
2 specified).

3 “(vi) Depression (not otherwise speci-
4 fied).

5 “(vii) Acute stress disorder.

6 “(viii) Dysthymic disorder.

7 “(ix) Adjustment disorder.

8 “(x) Substance abuse.

9 “(xi) V codes (treatments not specifi-
10 cally related to psychiatric disorders, such
11 as marital problems, parenting problems
12 etc.), secondary to another identified
13 WTC-related health condition for WTC eli-
14 gible responders.

15 “(C) MUSCULOSKELETAL DISORDERS.—

16 “(i) Low back pain.

17 “(ii) Carpal tunnel syndrome (CTS).

18 “(iii) Other musculoskeletal disorders.

19 “(4) ADDITION OF IDENTIFIED WTC-RELATED
20 HEALTH CONDITIONS FOR ELIGIBLE WTC RESPOND-
21 ERS.—

22 “(A) IN GENERAL.—The WTC Program
23 Administrator may promulgate regulations to
24 add an illness or health condition not described
25 in paragraph (3) to be added to the list of iden-

1 tified WTC-related conditions for eligible WTC
2 responders. In promulgating such regulations,
3 the Secretary shall provide for notice and op-
4 portunity for a public hearing and at least 90
5 days of public comment. In promulgating such
6 regulations, the WTC Program Administrator
7 shall take into account the findings and rec-
8 ommendations of Clinical Centers of Excellence
9 published in peer reviewed journals in the deter-
10 mination of whether an additional illness or
11 health condition, such as cancer, should be
12 added to the list of identified WTC-related
13 health conditions for eligible WTC responders.

14 “(B) PETITIONS.—Any person (including
15 the WTC Health Program Scientific/Technical
16 Advisory Committee) may petition the WTC
17 Program Administrator to propose regulations
18 described in subparagraph (A). Unless clearly
19 frivolous, or initiated by such Committee, any
20 such petition shall be referred to such Com-
21 mittee for its recommendations. Following—

22 “(i) receipt of any recommendation of
23 the Committee; or

24 “(ii) 180 days after the date of the re-
25 ferral to the Committee,

1 whichever occurs first, the WTC Program Ad-
2 ministrator shall conduct a rulemaking pro-
3 ceeding on the matters proposed in the petition
4 or publish in the Federal Register a statement
5 of reasons for not conducting such proceeding.

6 “(C) EFFECTIVENESS.—Any addition
7 under subparagraph (A) of an illness or health
8 condition shall apply only with respect to appli-
9 cations for benefits under this title which are
10 filed after the effective date of such regulation.

11 “(D) ROLE OF ADVISORY COMMITTEE.—
12 Except with respect to a regulation rec-
13 ommended by the WTC Health Program Sci-
14 entific/Technical Advisory Committee), the
15 WTC Program Administrator may not propose
16 a regulation under this paragraph, unless the
17 Administrator has first provided to the Com-
18 mittee a copy of the proposed regulation, re-
19 quested recommendations and comments by the
20 Committee, and afforded the Committee at
21 least 90 days to make such recommendations.

22 “(b) COVERAGE OF TREATMENT FOR WTC-RELATED
23 HEALTH CONDITIONS.—

1 “(1) DETERMINATION BASED ON AN IDENTI-
2 FIED WTC-RELATED HEALTH CONDITION FOR CER-
3 TIFIED ELIGIBLE WTC RESPONDERS.—

4 “(A) IN GENERAL.—If a physician at a
5 Clinical Center of Excellence that is providing
6 monitoring benefits under section 3011 for a
7 certified eligible WTC responder determines
8 that the responder has an identified WTC-re-
9 lated health condition, and the physician makes
10 a clinical determination that exposure to air-
11 borne toxins, other hazards, or adverse condi-
12 tions resulting from the 9/11 terrorist attacks is
13 substantially likely to be a significant factor in
14 aggravating, contributing to, or causing the
15 condition—

16 “(i) the physician shall promptly
17 transmit such determination to the WTC
18 Program Administrator and provide the
19 Administrator with the medical facts sup-
20 porting such determination; and

21 “(ii) on and after the date of such
22 transmittal and subject to subparagraph
23 (B), the WTC program shall provide for
24 payment under subsection (c) for medically
25 necessary treatment for such condition.

1 “(B) REVIEW; CERTIFICATION; AP-
2 PEALS.—

3 “(i) REVIEW.—A Federal employee
4 designated by the WTC Program Adminis-
5 trator shall review determinations made
6 under subparagraph (A) of a WTC-related
7 health condition.

8 “(ii) CERTIFICATION.—The Adminis-
9 trator shall provide a certification of such
10 condition based upon reviews conducted
11 under clause (i). Such a certification shall
12 be provided unless the Administrator de-
13 termines that the responder’s condition is
14 not an identified WTC-related health con-
15 dition or that exposure to airborne toxins,
16 other hazards, or adverse conditions result-
17 ing from the 9/11 terrorist attacks is not
18 substantially likely to be a significant fac-
19 tor in significantly aggravating, contrib-
20 uting to, or causing the condition.

21 “(iii) APPEAL PROCESS.—The Admin-
22 istrator shall provide a process for the ap-
23 peal of determinations under clause (ii) be-
24 fore an administrative law judge.

1 “(2) DETERMINATION BASED ON OTHER WTC-
2 RELATED HEALTH CONDITION.—

3 “(A) IN GENERAL.—If a physician at a
4 Clinical Center of Excellence determines pursu-
5 ant to subsection (a) that the certified eligible
6 WTC responder has a WTC-related health con-
7 dition that is not an identified WTC-related
8 health condition for eligible WTC responders—

9 “(i) the physician shall promptly
10 transmit such determination to the WTC
11 Program Administrator and provide the
12 Administrator with the facts supporting
13 such determination; and

14 “(ii) the Administrator shall make a
15 determination under subparagraph (B)
16 with respect to such physician’s determina-
17 tion.

18 “(B) REVIEW; CERTIFICATION.—

19 “(i) USE OF PHYSICIAN PANEL.—
20 With respect to each determination relat-
21 ing to a WTC-related health condition
22 transmitted under subparagraph (A)(i),
23 the WTC Program Administrator shall
24 provide for the review of the condition to
25 be made by a physician panel with appro-

1 piate expertise appointed by the WTC
2 Program Administrator. Such a panel shall
3 make recommendations to the Adminis-
4 trator on the evidence supporting such de-
5 termination.

6 “(ii) REVIEW OF RECOMMENDATIONS
7 OF PANEL; CERTIFICATION.—The Adminis-
8 trator, based on such recommendations
9 shall determine, within 60 days after the
10 date of the transmittal under subpara-
11 graph (A)(i), whether or not the condition
12 is a WTC-related health condition and, if
13 it is, provide for a certification under para-
14 graph (1)(B)(ii) of coverage of such condi-
15 tion. The Administrator shall provide a
16 process for the appeal of determinations
17 that the responder’s condition is not a
18 WTC-related health condition before an
19 administrative law judge.

20 “(3) REQUIREMENT OF MEDICAL NECESSITY.—

21 “(A) IN GENERAL.—In providing treat-
22 ment for a WTC-health condition, a physician
23 shall provide treatment that is medically nec-
24 essary and in accordance with medical protocols
25 established under subsection (d).

1 “(B) MEDICALLY NECESSARY STAND-
2 ARD.—For the purpose of this title, health care
3 services shall be treated as medically necessary
4 for an individual if a physician, exercising pru-
5 dent clinical judgment, would consider the serv-
6 ices to be medically necessary for the individual
7 for the purpose of evaluating, diagnosing, or
8 treating an illness, injury, disease or its symp-
9 toms, and that are—

10 “(i) in accordance with the generally
11 accepted standards of medical practice;

12 “(ii) clinically appropriate, in terms of
13 type, frequency, extent, site, and duration,
14 and considered effective for the individual’s
15 illness, injury, or disease; and

16 “(iii) not primarily for the conven-
17 ience of the patient or physician, or an-
18 other physician, and not more costly than
19 an alternative service or sequence of serv-
20 ices at least as likely to produce equivalent
21 therapeutic or diagnostic results as to the
22 diagnosis or treatment of the individual’s
23 illness, injury, or disease.

24 “(C) DETERMINATION OF MEDICAL NE-
25 CESSITY.—

1 “(i) REVIEW OF MEDICAL NECES-
2 SITY.—As part of the reimbursement pay-
3 ment process under subsection (c), the
4 WTC Program Administrator shall review
5 claims for reimbursement for the provision
6 of medical treatment to determine if such
7 treatment is medically necessary.

8 “(ii) WITHHOLDING OF PAYMENT FOR
9 MEDICALLY UNNECESSARY TREATMENT.—
10 The Administrator may withhold such pay-
11 ment for treatment that the Administrator
12 determines is not medically necessary.

13 “(iii) REVIEW OF DETERMINATIONS
14 OF MEDICAL NECESSITY.—The Adminis-
15 trator shall provide a process for providers
16 to appeal a determination under clause (ii)
17 that medical treatment is not medically
18 necessary. Such appeals shall be reviewed
19 through the use of a physician panel with
20 appropriate expertise.

21 “(4) SCOPE OF TREATMENT COVERED.—

22 “(A) IN GENERAL.—The scope of treat-
23 ment covered under such paragraphs includes
24 services of physicians and other health care pro-
25 viders, diagnostic and laboratory tests, prescrip-

1 tion drugs, inpatient and outpatient hospital
2 services, and other medically necessary treat-
3 ment.

4 “(B) PHARMACEUTICAL COVERAGE.—With
5 respect to ensuring coverage of medically nec-
6 essary outpatient prescription drugs, such drugs
7 shall be provided, under arrangements made by
8 the WTC Program Administrator, directly
9 through participating Clinical Centers of Excel-
10 lence or through one or more outside vendors.

11 “(C) TRANSPORTATION EXPENSES.—To
12 the extent provided in advance in appropri-
13 ations Acts, the WTC Program Administrator
14 may provide for necessary and reasonable
15 transportation and expenses incident to the se-
16 curing of medically necessary treatment involv-
17 ing travel of more than 250 miles and for which
18 payment is made under this section in the same
19 manner in which individuals may be furnished
20 necessary and reasonable transportation and ex-
21 penses incident to services involving travel of
22 more than 250 miles under regulations imple-
23 menting section 3629(e) of the Energy Employ-
24 ees Occupational Illness Compensation Program

1 Act of 2000 (title XXXVI of Public Law 106–
2 398; 42 U.S.C. 7384t(e)).

3 “(5) PROVISION OF TREATMENT PENDING CER-
4 TIFICATION.—In the case of a certified eligible WTC
5 responder who has been determined by an examining
6 physician under subsection (b)(1) to have an identi-
7 fied WTC-related health condition, but for whom a
8 certification of the determination has not yet been
9 made by the WTC Program Administrator, medical
10 treatment may be provided under this subsection,
11 subject to paragraph (6), until the Administrator
12 makes a decision on such certification. Medical
13 treatment provided under this paragraph shall be
14 considered to be medical treatment for which pay-
15 ment may be made under subsection (c).

16 “(6) PRIOR APPROVAL PROCESS FOR NON-CER-
17 TIFIED NON-EMERGENCY INPATIENT HOSPITAL
18 SERVICES.—Non-emergency inpatient hospital serv-
19 ices for a WTC-related health condition identified by
20 an examining physician under paragraph (b)(1) that
21 is not certified under paragraph (1)(B)(ii) is not
22 covered unless the services have been determined to
23 be medically necessary and approved through a proc-
24 ess established by the WTC Program Administrator.
25 Such process shall provide for a decision on a re-

1 quest for such services within 15 days of the date
2 of receipt of the request. The WTC Administrator
3 shall provide a process for the appeal of a decision
4 that the services are not medically necessary.

5 “(c) PAYMENT FOR INITIAL HEALTH EVALUATION,
6 MEDICAL MONITORING, AND TREATMENT OF WTC-RE-
7 LATED HEALTH CONDITIONS.—

8 “(1) MEDICAL TREATMENT.—

9 “(A) USE OF FECA PAYMENT RATES.—

10 Subject to subparagraph (B), the WTC Pro-
11 gram Administrator shall reimburse costs for
12 medically necessary treatment under this title
13 for WTC-related health conditions according to
14 the payment rates that would apply to the pro-
15 vision of such treatment and services by the fa-
16 cility under the Federal Employees Compensa-
17 tion Act.

18 “(B) PHARMACEUTICALS.—

19 “(i) IN GENERAL.—The WTC Pro-
20 gram Administrator shall establish a pro-
21 gram for paying for the medically nec-
22 essary outpatient prescription pharma-
23 ceuticals prescribed under this title for
24 WTC-related conditions through one or
25 more contracts with outside vendors.

1 “(ii) COMPETITIVE BIDDING.—Under
2 such program the Administrator shall—

3 “(I) select one or more appro-
4 priate vendors through a Federal com-
5 petitive bid process; and

6 “(II) select the lowest bidder (or
7 bidders) meeting the requirements for
8 providing pharmaceutical benefits for
9 participants in the WTC program.

10 “(iii) TREATMENT OF FDNY PARTICI-
11 PANTS.—Under such program the Admin-
12 istrator may enter select a separate vendor
13 to provide pharmaceutical benefits to cer-
14 tified eligible WTC responders for whom
15 the Clinical Center of Excellence is de-
16 scribed in section 3006(b)(1)(A) if such an
17 arrangement is deemed necessary and ben-
18 efcial to the program by the WTC Pro-
19 gram Administrator.

20 “(C) OTHER TREATMENT.—For treatment
21 not covered under a preceding subparagraph,
22 the WTC Program Administrator shall des-
23 ignate a reimbursement rate for each such serv-
24 ice.

1 “(2) MEDICAL MONITORING AND INITIAL
2 HEALTH EVALUATION.—The WTC Program Admin-
3 istrator shall reimburse the costs of medical moni-
4 toring and the costs of an initial health evaluation
5 provided under this title at a rate set by the Admin-
6 istrator.

7 “(3) ADMINISTRATIVE ARRANGEMENT AUTHOR-
8 ITY.—The WTC Program Administrator may enter
9 into arrangements with other government agencies,
10 insurance companies, or other third-party adminis-
11 trators to provide for timely and accurate processing
12 of claims under this section.

13 “(4) CLAIMS PROCESSING SUBJECT TO APPRO-
14 PRIATIONS.—The payment by the WTC Program
15 Administrator for the processing of claims under
16 this title is limited to the amounts provided in ad-
17 vance in appropriations Acts.

18 “(d) MEDICAL TREATMENT PROTOCOLS.—

19 “(1) DEVELOPMENT.—The Coordinating Cen-
20 ters of Excellence shall develop medical treatment
21 protocols for the treatment of certified eligible WTC
22 responders and certified eligible WTC community
23 members for identified WTC-related health condi-
24 tions.

1 and meets any of the current eligibility criteria
2 described in a subparagraph of paragraph (2).

3 “(C) COMMUNITY MEMBER WHO MEETS
4 MODIFIED ELIGIBILITY CRITERIA.—An indi-
5 vidual who is not an eligible WTC responder
6 and meets such eligibility criteria relating to ex-
7 posure to airborne toxins, other hazards, or ad-
8 verse conditions resulting from the September
9 11, 2001, terrorist attacks on the World Trade
10 Center as the WTC Administrator determines
11 eligible, after consultation with the WTC Com-
12 munity Program Steering Committee, Coordin-
13 ating Centers of Excellence described in sec-
14 tion 3006(b)(1)(C), and the WTC Scientific/
15 Technical Advisory Committee.

16 The Administrator shall not modify such criteria
17 under subparagraph (C) on or after the date that
18 the number of certifications for eligible community
19 members has reached 80 percent of the limit de-
20 scribed in paragraph (5) or on or after the date that
21 the number of certifications for eligible responders
22 has reached 80 percent of the limit described in sec-
23 tion 3021(a)(5).

24 “(2) CURRENT ELIGIBILITY CRITERIA.—The
25 eligibility criteria described in this paragraph for an

1 individual are that the individual is described in any
2 of the following subparagraphs:

3 “(A) A person who was present in the New
4 York City disaster area in the dust or dust
5 cloud on September 11, 2001.

6 “(B) A person who worked, resided or at-
7 tended school, child care or adult day care in
8 the New York City disaster area for—

9 “(i) at least four days during the 4-
10 month period beginning on September 11,
11 2001, and ending on January 10, 2002; or

12 “(ii) at least 30 days during the pe-
13 riod beginning on September 11, 2001,
14 and ending on July 31, 2002.

15 “(C) Any person who worked as a clean-up
16 worker or performed maintenance work in the
17 New York City disaster area during the 4-
18 month period described in subparagraph (B)(i)
19 and had extensive exposure to WTC dust as a
20 result of such work.

21 “(D) A person who was deemed eligible to
22 receive a grant from the Lower Manhattan De-
23 velopment Corporation Residential Grant Pro-
24 gram, who possessed a lease for a residence or
25 purchased a residence in the New York City

1 disaster area, and who resided in such residence
2 during the period beginning on September 11,
3 2001, and ending on May 31, 2003.

4 “(E) A person whose place of employ-
5 ment—

6 “(i) at any time during the period be-
7 ginning on September 11, 2001, and end-
8 ing on May 31, 2003, was in the New
9 York City disaster area; and

10 “(ii) was deemed eligible to receive a
11 grant from the Lower Manhattan Develop-
12 ment Corporation WTC Small Firms At-
13 traction and Retention Act program or
14 other government incentive program de-
15 signed to revitalize the Lower Manhattan
16 economy after the September 11, 2001,
17 terrorist attacks on the World Trade Cen-
18 ter.

19 “(3) APPLICATION PROCESS.—The WTC Pro-
20 gram Administrator in consultation with the Coordi-
21 nating Centers of Excellence shall establish a proc-
22 ess for individuals, other than individuals described
23 in paragraph (1)(A), to be determined eligible WTC
24 community member. Under such process—

1 “(A) there shall be no fee charged to the
2 applicant for making an application for such
3 determination;

4 “(B) the Administrator shall make a deter-
5 mination on such an application not later than
6 60 days after the date of filing the application;
7 and

8 “(C) an individual who is determined not
9 to be an eligible WTC community member shall
10 have an opportunity to appeal such determina-
11 tion before an administrative law judge in a
12 manner established under such process.

13 “(4) CERTIFICATION.—

14 “(A) IN GENERAL.—In the case of an indi-
15 vidual who is described in paragraph (1)(A) or
16 who is determined under paragraph (3) (con-
17 sistent with paragraph (5)) to be an eligible
18 WTC community member, the WTC Program
19 Administrator shall provide an appropriate cer-
20 tification of such fact and of eligibility for fol-
21 lowup monitoring and treatment benefits under
22 this part. The Administrator shall make deter-
23 minations of eligibility relating to an applicant’s
24 compliance with this title, including the
25 verification of information submitted in support

1 of the application and shall not deny such a
2 certification to an individual unless the Admin-
3 istrator determines that—

4 “(i) based on the application sub-
5 mitted, the individual does not meet the
6 eligibility criteria; or

7 “(ii) the numerical limitation on cer-
8 tification of eligible WTC community mem-
9 bers set forth in paragraph (5) has been
10 met.

11 “(B) TIMING.—

12 “(i) CURRENTLY IDENTIFIED COMMU-
13 NITY MEMBERS.—In the case of an indi-
14 vidual who is described in paragraph
15 (1)(A), the WTC Program Administrator
16 shall provide the certification under sub-
17 paragraph (A) not later than 60 days after
18 the date of the enactment of this title.

19 “(ii) OTHER MEMBERS.—In the case
20 of another individual who is determined
21 under paragraph (3) and consistent with
22 paragraph (5) to be an eligible WTC com-
23 munity member, the WTC Program Ad-
24 ministrator shall provide the certification

1 under subparagraph (A) at the time of
2 such determination.

3 “(5) NUMERICAL LIMITATION ON CERTIFI-
4 CATION OF ELIGIBLE WTC COMMUNITY MEMBERS.—

5 “(A) IN GENERAL.—The total number of
6 individuals not described in subparagraph (C)
7 who may be certified as eligible WTC commu-
8 nity members under paragraph (4) shall not ex-
9 ceed 15,000. In applying the previous sentence,
10 any individual who at any time so qualifies as
11 an eligible WTC community member shall be
12 counted against such numerical limitation.

13 “(B) PROCESS.—In implementing subpara-
14 graph (A), the WTC Program Administrator
15 shall—

16 “(i) limit the number of certifications
17 provided under paragraph (4) in accord-
18 ance with such subparagraph; and

19 “(ii) provide priority in such certifi-
20 cations in the order in which individuals
21 apply for a determination under paragraph
22 (4).

23 “(C) INDIVIDUALS CURRENTLY RECEIVING
24 TREATMENT NOT COUNTED.—Individuals de-

1 scribed in this subparagraph are individuals
2 who—

3 “(i) are described in paragraph
4 (1)(A); or

5 “(ii) before the date of the enactment
6 of this title, have received monitoring or
7 treatment at the World Trade Center En-
8 vironmental Health Center at Bellevue
9 Hospital Center, Gouverneur Health Care
10 Services, or Elmhurst Hospital Center.

11 The New York City Health and Hospitals Cor-
12 poration shall, not later than 6 months after
13 the date of enactment of this title, enter into
14 arrangements with the Mt. Sinai Data and
15 Clinical Coordination Center for the reporting
16 of medical data concerning eligible WTC re-
17 sponders described in paragraph (1)(A), as de-
18 termined by the WTC Program Administrator
19 and consistent with applicable Federal and
20 State laws and regulations relating to confiden-
21 tiality of individually identifiable health infor-
22 mation.

23 “(D) REPORT TO CONGRESS IF NUMER-
24 ICAL LIMITATION TO BE REACHED.—If the
25 WTC Program Administrator determines that

1 the number of individuals subject to the numer-
2 ical limitation of subparagraph (A) is likely to
3 exceed such numerical limitation, the Adminis-
4 trator shall submit to Congress a report on
5 such determination. Such report shall include
6 an estimate of the number of such individuals
7 in excess of such numerical limitation and of
8 the additional expenditures that would result
9 under this title if such numerical limitation
10 were removed.

11 “(b) INITIAL HEALTH EVALUATION TO DETERMINE
12 ELIGIBILITY FOR FOLLOWUP MONITORING OR TREAT-
13 MENT.—

14 “(1) IN GENERAL.—In the case of a certified el-
15 igible WTC community member, the WTC program
16 shall provide for an initial health evaluation to deter-
17 mine if the member has a WTC-related health condi-
18 tion and is eligible for followup monitoring and
19 treatment benefits under the WTC program. Initial
20 health evaluation protocols shall be approved by the
21 WTC Program Administrator, in consultation with
22 the World Trade Center Environmental Health Cen-
23 ter at Bellevue Hospital and the WTC Community
24 Program Steering Committee.

1 conditions for certified eligible WTC responders, except
2 that such monitoring shall only be available to those cer-
3 tified as eligible for treatment under this title. Under sec-
4 tion 3006(a)(3), the City of New York is required to con-
5 tribute a share of the costs of such treatment.

6 “(b) LIST OF IDENTIFIED WTC-RELATED HEALTH
7 CONDITIONS FOR WTC COMMUNITY MEMBERS.—

8 “(1) IDENTIFIED WTC-RELATED HEALTH CON-
9 DITIONS FOR WTC COMMUNITY MEMBERS.—For pur-
10 poses of this title, the term ‘identified WTC-related
11 health conditions for WTC community members’
12 means any of the following health conditions:

13 “(A) AERODIGESTIVE DISORDERS.—

14 “(i) Interstitial lung diseases.

15 “(ii) Chronic respiratory disorder—
16 fumes/vapors.

17 “(iii) Asthma.

18 “(iv) Reactive airways dysfunction
19 syndrome (RADS).

20 “(v) WTC-exacerbated chronic ob-
21 structive pulmonary disease (COPD).

22 “(vi) Chronic cough syndrome.

23 “(vii) Upper airway hyperreactivity.

24 “(viii) Chronic rhinosinusitis.

25 “(ix) Chronic nasopharyngitis.

- 1 “(x) Chronic laryngitis.
- 2 “(xi) Gastro-esophageal reflux dis-
- 3 order (GERD).
- 4 “(xii) Sleep apnea exacerbated by or
- 5 related to a condition described in a pre-
- 6 vious clause.
- 7 “(B) MENTAL HEALTH CONDITIONS.—
- 8 “(i) Post traumatic stress disorder
- 9 (PTSD).
- 10 “(ii) Major depressive disorder.
- 11 “(iii) Panic disorder.
- 12 “(iv) Generalized anxiety disorder.
- 13 “(v) Anxiety disorder (not otherwise
- 14 specified).
- 15 “(vi) Depression (not otherwise speci-
- 16 fied).
- 17 “(vii) Acute stress disorder.
- 18 “(viii) Dysthymic disorder.
- 19 “(ix) Adjustment disorder.
- 20 “(x) Substance abuse.
- 21 “(xi) V codes (treatments not specifi-
- 22 cally related to psychiatric disorders, such
- 23 as marital problems, parenting problems
- 24 etc.), secondary to another identified

1 WTC-related health condition for WTC
2 community members.

3 “(2) ADDITIONS TO IDENTIFIED WTC-RELATED
4 HEALTH CONDITIONS FOR WTC COMMUNITY MEM-
5 BERS.—The provisions of paragraph (4) of section
6 3012(a) shall apply with respect to an addition to
7 the list of identified WTC-related conditions for eli-
8 gible WTC community members under paragraph
9 (1) in the same manner as such provisions apply to
10 an addition to the list of identified WTC-related con-
11 ditions for eligible WTC responders under section
12 3012(a)(3).

13 **“SEC. 3023. FOLLOWUP MONITORING AND TREATMENT OF**
14 **OTHER INDIVIDUALS WITH WTC-RELATED**
15 **HEALTH CONDITIONS.**

16 “(a) IN GENERAL.—Subject to subsection (c), the
17 provisions of section 3022 shall apply to the followup mon-
18 itoring and treatment of WTC-related health conditions
19 for eligible WTC community members in the case of indi-
20 viduals described in subsection (b) in the same manner
21 as such provisions apply to the followup monitoring and
22 treatment of WTC-related health conditions for WTC
23 community members. Under section 3006(a)(3), the City
24 of New York is required to contribute a share of the costs
25 of such monitoring and treatment.

1 “(b) INDIVIDUALS DESCRIBED.—An individual de-
2 scribed in this subsection is an individual who, regardless
3 of location of residence—

4 “(1) is not a eligible WTC responder or an eli-
5 gible WTC community member; and

6 “(2) is diagnosed at a Clinical Center of Excel-
7 lence (with respect to an eligible WTC community
8 member) with an identified WTC-related health con-
9 dition for WTC community members.

10 “(c) LIMITATION.—

11 “(1) IN GENERAL.—The WTC Program Admin-
12 istrator shall limit benefits for any fiscal year under
13 subsection (a) in a manner so that payments under
14 this section for such fiscal year do not exceed the
15 amount specified in paragraph (2) for such fiscal
16 year.

17 “(2) LIMITATION.—The amount specified in
18 this paragraph for—

19 “(A) fiscal year 2009 is \$20,000,000; or

20 “(B) a succeeding fiscal year is the
21 amount specified in this paragraph for the pre-
22 vious fiscal year increased by the annual per-
23 centage increase in the medical care component
24 of the consumer price index for all urban con-
25 sumers.

1 **“PART 3—NATIONAL ARRANGEMENT FOR BENE-**
2 **FITS FOR ELIGIBLE INDIVIDUALS OUTSIDE**
3 **NEW YORK**

4 **“SEC. 3031. NATIONAL ARRANGEMENT FOR BENEFITS FOR**
5 **ELIGIBLE INDIVIDUALS OUTSIDE NEW YORK.**

6 “(a) IN GENERAL.—In order to ensure reasonable ac-
7 cess to benefits under this subtitle for individuals who are
8 eligible WTC responders or eligible WTC community
9 members and who reside in any State, as defined in sec-
10 tion 2(f), outside the New York metropolitan area, the
11 WTC Program Administrator shall establish a nationwide
12 network of health care providers to provide monitoring
13 and treatment benefits and initial health evaluations near
14 such individuals’ areas of residence in such States. Noth-
15 ing in this subsection shall be construed as preventing
16 such individuals from being provided such monitoring and
17 treatment benefits or initial health evaluation through any
18 Clinical Center of Excellence.

19 “(b) NETWORK REQUIREMENTS.—Any health care
20 provider participating in the network under subsection (a)
21 shall—

22 “(1) meet criteria for credentialing established
23 by the Coordinating Centers of Excellence;

24 “(2) follow the monitoring, initial health evalua-
25 tion, and treatment protocols developed under sec-
26 tion 3006(a)(2)(B);

1 “(3) collect and report data in accordance with
2 section 3005; and

3 “(4) meet such fraud, quality assurance, and
4 other requirements as the WTC Program Adminis-
5 trator establishes.

6 **“Subtitle C—Research Into**
7 **Conditions**

8 **“SEC. 3041. RESEARCH REGARDING CERTAIN HEALTH CON-**
9 **DITIONS RELATED TO SEPTEMBER 11 TER-**
10 **RORIST ATTACKS IN NEW YORK CITY.**

11 “(a) IN GENERAL.—With respect to individuals, in-
12 cluding eligible WTC responders and eligible WTC com-
13 munity members, receiving monitoring or treatment under
14 subtitle B, the WTC Program Administrator shall conduct
15 or support—

16 “(1) research on physical and mental health
17 conditions that may be related to the September 11,
18 2001, terrorist attacks;

19 “(2) research on diagnosing WTC-related
20 health conditions of such individuals, in the case of
21 conditions for which there has been diagnostic un-
22 certainty; and

23 “(3) research on treating WTC-related health
24 conditions of such individuals, in the case of condi-

1 tions for which there has been treatment uncer-
2 tainty.

3 The Administrator may provide such support through con-
4 tinuation and expansion of research that was initiated be-
5 fore the date of the enactment of this title and through
6 the World Trade Center Health Registry (referred to in
7 section 3051), through a Clinical Center of Excellence, or
8 through a Coordinating Center of Excellence.

9 “(b) TYPES OF RESEARCH.—The research under
10 subsection (a)(1) shall include epidemiologic and other re-
11 search studies on WTC-related conditions or emerging
12 conditions—

13 “(1) among WTC responders and community
14 members under treatment; and

15 “(2) in sampled populations outside the New
16 York City disaster area in Manhattan as far north
17 as 14th Street and in Brooklyn, along with control
18 populations, to identify potential for long-term ad-
19 verse health effects in less exposed populations.

20 “(c) CONSULTATION.—The WTC Program Adminis-
21 trator shall carry out this section in consultation with the
22 WTC Health Program Steering Committees and the WTC
23 Scientific/Technical Advisory Committee.

24 “(d) APPLICATION OF PRIVACY AND HUMAN SUB-
25 JECT PROTECTIONS.—The privacy and human subject

1 protections applicable to research conducted under this
2 section shall not be less than such protections applicable
3 to research otherwise conducted by the National Institutes
4 of Health.

5 “(c) AUTHORIZATION OF APPROPRIATIONS.—For the
6 purpose of carrying out this section, there are authorized
7 to be appropriated \$15,000,000 for each fiscal year, in
8 addition to any other authorizations of appropriations that
9 are available for such purpose.

10 **“Subtitle D—Programs of the New**
11 **York City Department of Health**
12 **and Mental Hygiene**

13 **“SEC. 3051. WORLD TRADE CENTER HEALTH REGISTRY.**

14 “(a) PROGRAM EXTENSION.—For the purpose of en-
15 suring on-going data collection for victims of the Sep-
16 tember 11, 2001, terrorist attacks on the World Trade
17 Center, the WTC Program Administrator, shall extend
18 and expand the arrangements in effect as of January 1,
19 2008, with the New York City Department of Health and
20 Mental Hygiene that provide for the World Trade Center
21 Health Registry.

22 “(b) AUTHORIZATION OF APPROPRIATIONS.—There
23 are authorized to be appropriated \$7,000,000 for each fis-
24 cal year to carry out this section.

1 **“SEC. 3052. MENTAL HEALTH SERVICES.**

2 “(a) IN GENERAL.—The WTC Program Adminis-
3 trator may make grants to the New York City Department
4 of Health and Mental Hygiene to provide mental health
5 services to address mental health needs relating to the
6 September 11, 2001, terrorist attacks on the World Trade
7 Center.

8 “(b) AUTHORIZATION OF APPROPRIATIONS.—There
9 are authorized to be appropriated \$8,500,000 for each fis-
10 cal year to carry out this section.”.

11 **TITLE II—SEPTEMBER 11TH VIC-**
12 **TIM COMPENSATION FUND OF**
13 **2001**

14 **SEC. 201. DEFINITIONS.**

15 Section 402 of the Air Transportation Safety and
16 System Stabilization Act (49 U.S.C. 40101 note) is
17 amended—

18 (1) in paragraph (6) by inserting “, or debris
19 removal, including under the World Trade Center
20 Health Program established under section 3001 of
21 the Public Health Service Act,” after “September
22 11, 2001”;

23 (2) by inserting after paragraph (6) the fol-
24 lowing new paragraphs and redesignating subse-
25 quent paragraphs accordingly:

1 “(7) CONTRACTOR AND SUBCONTRACTOR.—The
2 term ‘contractor and subcontractor’ means any con-
3 tractor or subcontractor (at any tier of a subcon-
4 tracting relationship), including any general con-
5 tractor, construction manager, prime contractor,
6 consultant, or any parent, subsidiary, associated or
7 allied company, affiliated company, corporation,
8 firm, organization, or joint venture thereof that par-
9 ticipated in debris removal at any 9/11 crash site.
10 Such term shall not include any entity, including the
11 Port Authority of New York and New Jersey, with
12 a property interest in the World Trade Center, on
13 September 11, 2001, whether fee simple, leasehold
14 or easement, direct or indirect.

15 “(8) DEBRIS REMOVAL.—The term ‘debris re-
16 moval’ means rescue and recovery efforts, removal of
17 debris, cleanup, remediation, and response during
18 the immediate aftermath of the terrorist-related air-
19 craft crashes of September 11, 2001, with respect to
20 a 9/11 crash site.”;

21 (3) by inserting after paragraph (10), as so re-
22 designated, the following new paragraph and redesi-
23 gnating the subsequent paragraphs accordingly:

24 “(11) IMMEDIATE AFTERMATH.—The term ‘im-
25 mediate aftermath’ means any period beginning with

1 the terrorist-related aircraft crashes of September
2 11, 2001, and ending on August 30, 2002.”; and

3 (4) by adding at the end the following new
4 paragraph:

5 “(14) 9/11 CRASH SITE.—The term ‘9/11 crash
6 site’ means—

7 “(A) the World Trade Center site, Pen-
8 tagon site, and Shanksville, Pennsylvania site;

9 “(B) the buildings or portions of buildings
10 that were destroyed as a result of the terrorist-
11 related aircraft crashes of September 11, 2001;

12 “(C) any area contiguous to a site of such
13 crashes that the Special Master determines was
14 sufficiently close to the site that there was a de-
15 monstrable risk of physical harm resulting from
16 the impact of the aircraft or any subsequent
17 fire, explosions, or building collapses (including
18 the immediate area in which the impact oc-
19 curred, fire occurred, portions of buildings fell,
20 or debris fell upon and injured individuals); and

21 “(D) any area related to, or along, routes
22 of debris removal, such as barges and Fresh
23 Kills.”.

1 **SEC. 202. EXTENDED AND EXPANDED ELIGIBILITY FOR**
2 **COMPENSATION.**

3 (a) INFORMATION ON LOSSES RESULTING FROM DE-
4 BRIS REMOVAL INCLUDED IN CONTENTS OF CLAIM
5 FORM.—Section 405(a)(2)(B) of the Air Transportation
6 Safety and System Stabilization Act (49 U.S.C. 40101
7 note) is amended—

8 (1) in clause (i), by inserting “, or debris re-
9 moval during the immediate aftermath” after “Sep-
10 tember 11, 2001”;

11 (2) in clause (ii), by inserting “or debris re-
12 moval during the immediate aftermath” after
13 “crashes”; and

14 (3) in clause (iii), by inserting “or debris re-
15 moval during the immediate aftermath” after
16 “crashes”.

17 (b) EXTENSION OF DEADLINE FOR CLAIMS UNDER
18 SEPTEMBER 11TH VICTIM COMPENSATION FUND OF
19 2001.—Section 405(a)(3) of such Act is amended to read
20 as follows:

21 “(3) LIMITATION.—

22 “(A) IN GENERAL.—Except as provided by
23 subparagraph (B), no claim may be filed under
24 paragraph (1) after the date that is 2 years
25 after the date on which regulations are promul-
26 gated under section 407(a).

1 “(B) EXCEPTION.—A claim may be filed
2 under paragraph (1), in accordance with sub-
3 section (c)(3)(A)(i), by an individual (or by a
4 personal representative on behalf of a deceased
5 individual) during the period beginning on the
6 date on which the regulations are updated
7 under section 407(b) and ending on December
8 22, 2031.”.

9 (c) REQUIREMENTS FOR FILING CLAIMS DURING
10 EXTENDED FILING PERIOD.—Section 405(c)(3) of such
11 Act is amended—

12 (1) by redesignating subparagraphs (A) and
13 (B) as subparagraphs (B) and (C), respectively; and
14 (2) by inserting before subparagraph (B), as so
15 redesignated, the following new subparagraph:

16 “(A) REQUIREMENTS FOR FILING CLAIMS
17 DURING EXTENDED FILING PERIOD.—

18 “(i) TIMING REQUIREMENTS FOR FIL-
19 ING CLAIMS.—An individual (or a personal
20 representative on behalf of a deceased indi-
21 vidual) may file a claim during the period
22 described in subsection (a)(3)(B) as fol-
23 lows:

24 “(1) In the case that the Special
25 Master determines the individual

1 knew (or reasonably should have
2 known) before the date specified in
3 clause (iii) that the individual suffered
4 a physical harm at a 9/11 crash site
5 as a result of the terrorist-related air-
6 craft crashes of September 11, 2001,
7 or as a result of debris removal, and
8 that the individual knew (or should
9 have known) before such specified
10 date that the individual was eligible to
11 file a claim under this title, the indi-
12 vidual may file a claim not later than
13 the date that is 2 years after such
14 specified date.

15 “(II) In the case that the Special
16 Master determines the individual first
17 knew (or reasonably should have
18 known) on or after the date specified
19 in clause (iii) that the individual suf-
20 fered such a physical harm or that the
21 individual first knew (or should have
22 known) on or after such specified date
23 that the individual was eligible to file
24 a claim under this title, the individual
25 may file a claim not later than the

1 last day of the 2-year period begin-
2 ning on the date the Special Master
3 determines the individual first knew
4 (or should have known) that the indi-
5 vidual both suffered from such harm
6 and was eligible to file a claim under
7 this title.

8 “(ii) OTHER ELIGIBILITY REQUIRE-
9 MENTS FOR FILING CLAIMS.—An indi-
10 vidual may file a claim during the period
11 described in subsection (a)(3)(B) only if—

12 “(I) the individual was treated by
13 a medical professional for suffering
14 from a physical harm described in
15 clause (i)(I) within a reasonable time
16 from the date of discovering such
17 harm; and

18 “(II) the individual’s physical
19 harm is verified by contemporaneous
20 medical records created by or at the
21 direction of the medical professional
22 who provided the medical care.

23 “(iii) DATE SPECIFIED.—The date
24 specified in this clause is the date on which

1 the regulations are updated under section
2 407(a).”.

3 (d) CLARIFYING APPLICABILITY TO ALL 9/11 CRASH
4 SITES.—Section 405(c)(2)(A)(i) of such Act is amended
5 by striking “or the site of the aircraft crash at Shanksville,
6 Pennsylvania” and inserting “the site of the aircraft crash
7 at Shanksville, Pennsylvania, or any other 9/11 crash
8 site”.

9 (e) INCLUSION OF PHYSICAL HARM RESULTING
10 FROM DEBRIS REMOVAL.—Section 405(c) of such Act is
11 amended in paragraph (2)(A)(ii), by inserting “or debris
12 removal” after “air crash”.

13 (f) LIMITATIONS ON CIVIL ACTIONS.—

14 (1) APPLICATION TO DAMAGES RELATED TO
15 DEBRIS REMOVAL.—Clause (i) of section
16 405(c)(3)(C) of such Act, as redesignated by sub-
17 section (c), is amended by inserting “, or for dam-
18 ages arising from or related to debris removal” after
19 “September 11, 2001”.

20 (2) PENDING ACTIONS.—Clause (ii) of such sec-
21 tion, as so redesignated, is amended to read as fol-
22 lows:

23 “(ii) PENDING ACTIONS.—In the case
24 of an individual who is a party to a civil
25 action described in clause (i), such indi-

1 vidual may not submit a claim under this
2 title—

3 “(I) during the period described
4 in subsection (a)(3)(A) unless such in-
5 dividual withdraws from such action
6 by the date that is 90 days after the
7 date on which regulations are promul-
8 gated under section 407(a); and

9 “(II) during the period described
10 in subsection (a)(3)(B) unless such in-
11 dividual withdraws from such action
12 by the date that is 90 days after the
13 date on which the regulations are up-
14 dated under section 407(b).”.

15 (3) AUTHORITY TO REINSTITUTE CERTAIN
16 LAWSUITS.—Such section, as so redesignated, is fur-
17 ther amended by adding at the end the following
18 new clause:

19 “(iii) AUTHORITY TO REINSTITUTE
20 CERTAIN LAWSUITS.—In the case of a
21 claimant who was a party to a civil action
22 described in clause (i), who withdrew from
23 such action pursuant to clause (ii), and
24 who is subsequently determined to not be
25 an eligible individual for purposes of this

1 subsection, such claimant may reinstitute
2 such action without prejudice during the
3 90-day period beginning after the date of
4 such ineligibility determination.”.

5 **SEC. 203. REQUIREMENT TO UPDATE REGULATIONS.**

6 Section 407 of the Air Transportation Safety and
7 System Stabilization Act (49 U.S.C. 40101 note) is
8 amended—

9 (1) by striking “Not later than” and inserting

10 “(a) IN GENERAL.—Not later than”; and

11 (2) by adding at the end the following new sub-
12 section:

13 “(b) UPDATED REGULATIONS.—Not later than 90
14 days after the date of the enactment of the James Zadroga
15 9/11 Health and Compensation Act of 2008, the Special
16 Master shall update the regulations promulgated under
17 subsection (a) to the extent necessary to comply with the
18 provisions of title II of such Act.”.

19 **SEC. 204. LIMITED LIABILITY FOR CERTAIN CLAIMS.**

20 Section 408(a) of the Air Transportation Safety and
21 System Stabilization Act (49 U.S.C. 40101 note) is
22 amended by adding at the end the following new para-
23 graphs:

24 “(4) LIABILITY FOR CERTAIN CLAIMS.—

1 “(A) IN GENERAL.—Notwithstanding any
2 other provision of law, subject to subparagraph
3 (B), liability for all claims and actions (includ-
4 ing claims or actions that have been previously
5 resolved, that are currently pending, and that
6 may be filed through December 22, 2031) for
7 compensatory damages, contribution or indem-
8 nity, or any other form or type of relief, arising
9 from or related to debris removal, against the
10 City of New York, any entity (including the
11 Port Authority of New York and New Jersey)
12 with a property interest in the World Trade
13 Center on September 11, 2001 (whether fee
14 simple, leasehold or easement, or direct or indi-
15 rect) and any contractors and subcontractors
16 thereof, shall not be in an amount that exceeds
17 the sum of the following:

18 “(i) The amount of funds of the WTC
19 Captive Insurance Company, including the
20 cumulative interest.

21 “(ii) The amount of all available in-
22 surance identified in schedule 2 of the
23 WTC Captive Insurance Company insur-
24 ance policy.

1 “(iii) The amount that is the greater
2 of the City of New York’s insurance cov-
3 erage or \$350,000,000. In determining the
4 amount of the City’s insurance coverage
5 for purposes of the previous sentence, any
6 amount described in clauses (i) and (ii)
7 shall not be included.

8 “(iv) The amount of all available li-
9 ability insurance coverage maintained by
10 any entity, including the Port Authority of
11 New York and New Jersey, with a prop-
12 erty interest in the World Trade Center,
13 on September 11, 2001, whether fee sim-
14 ple, leasehold or easement, or direct or in-
15 direct.

16 “(v) The amount of all available liabil-
17 ity insurance coverage maintained by con-
18 tractors and subcontractors.

19 “(B) EXCEPTION.—Subparagraph (A)
20 shall not apply to claims or actions based upon
21 conduct held to be intentionally tortious in na-
22 ture or to acts of gross negligence or other such
23 acts to the extent to which punitive damages
24 are awarded as a result of such conduct or acts.

1 “(5) PRIORITY OF CLAIMS PAYMENTS.—Pay-
2 ments to plaintiffs who obtain a settlement or judg-
3 ment with respect to a claim or action to which
4 paragraph (4)(A) applies, shall be paid solely from
5 the following funds in the following order:

6 “(A) The funds described in clause (i) or
7 (ii) of paragraph (4)(A).

8 “(B) If there are no funds available as de-
9 scribed in clause (i) or (ii) of paragraph (4)(A),
10 the funds described in clause (iii) of such para-
11 graph.

12 “(C) If there are no funds available as de-
13 scribed in clause (i), (ii), or (iii) of paragraph
14 (4)(A), the funds described in clause (iv) of
15 such paragraph.

16 “(D) If there are no funds available as de-
17 scribed in clause (i), (ii), (iii), or (iv) of para-
18 graph (4)(A), the funds described in clause (v)
19 of such paragraph.

20 “(6) DECLARATORY JUDGMENT ACTIONS AND
21 DIRECT ACTION.—Any party to a claim or action to
22 which paragraph (4)(A) applies may, with respect to
23 such claim or action, either file an action for a de-
24 claratory judgment for insurance coverage or bring

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1 a direct action against the insurance company in-
2 volved.”.

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