

*For Immediate Release*

**REMARKS OF CORPORATION COUNSEL MICHAEL A. CARDOZO  
TO THE CITIZENS BUDGET COMMISSION  
ON THE CITY'S LEGAL & FINANCIAL "CATCH-22'S"**

*THE PRINCETON CLUB, NEW YORK, SEPTEMBER 22, 2011*

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**Introduction**

I appreciate the opportunity to share with this audience the efforts made by the New York City Law Department to increase revenue and decrease expenses for the City.

Before I address the topic at hand let me give you a quick overview of the Law Department, which I head as Corporation Counsel.

The Office, which has existed since 1683, employs approximately 650 attorneys and roughly the same number of support staff. The work we do ranges from prosecuting juvenile delinquents, to serving as counsel for the City's major economic development projects, to being responsible for the more than \$16 billion in contracts the City enters into every year, and much more.

Don't worry, I don't plan to discuss those topics this morning, or we would be here all day. Instead, I want to focus on the following expense and revenue figures.

In the fiscal year ending June 30, the Law Department collected, on behalf of the City, \$125 million, and we have claims pending that could net us another 100 million or more. At the same time, we defended against tax certiorari claims seeking approximately \$300 million in refunds. Of particular significance for this audience, last year the City paid out more than half a billion dollars in tort and other cases – \$561 million to be exact. This morning I would like to discuss how we can improve all of these numbers, especially on the expense side.

**Revenue Enhancement**

I will begin with the revenue side of the ledger.

In many ways, the City acts as a very large corporation; in fact, I view my role, at least in part, as the chief

lawyer of a multi-billion dollar company. Insurance is one example of this approach. When an insurance company fails to honor its coverage obligations the City, like any other company would do, sues, sending a message – that statistics show has increasingly been heard – that insurance companies should honor their commitments. Last year those companies paid out over \$58 million in settlements or judgments covering damage claims against the City. In addition, the insurance companies provided defense counsel to the City for these and other matters, thereby saving the time and resources of Law Department attorneys.

To give you a sense of the other kinds of affirmative suits the City brings to enforce its contractual and statutory rights, consider these examples.

We bring numerous suits against entities that damage City property or fail to live up to their financial obligations to the City. Last year, for example, our lawsuits produced \$9.5 million from Amtrak because it had failed to reimburse us for the cost of fixing two bridges for which it was responsible, and \$8 million from the State because, as a result of a computer glitch, it had improperly charged the City for certain Medicaid expenditures.

New York City was one of the first municipalities to sue asbestos manufacturers to recover the cost of abating asbestos in schools and other public buildings. To date it has collected over \$130 million from asbestos-related defendants, an amount that exceeds that of any other entity in the country.

Because the New York City pension plans combined constitute one of the largest pension systems in the country, we have served as lead plaintiff in major securities fraud cases seeking to recover losses on behalf of investors. For example, we were co-lead plaintiff in the federal securities class action against Countrywide, which involved the sub-prime mortgage debacle, and which was recently settled for over \$600 million dollars.

In the environmental area last year, we obtained a \$104 million jury verdict against Exxon-Mobil for allowing a gasoline additive to seep into the groundwater in Queens. That verdict is now on appeal.

One of the more interesting series of cases in which we have recently been involved centers on our efforts to enforce city tax laws on cigarettes, a revenue stream for the City that has averaged \$175 million annually over the last four years. Given the high City and State taxes on cigarettes -- totaling \$5.85 per pack – there is an obvious incentive for many to try to avoid the tax. To prevent this tax avoidance we have brought a number of lawsuits including suing companies who falsely advertised that buying cigarettes on the internet allows the purchaser to avoid taxes; enjoining cigarette retailers on the Native American reservation in Suffolk County from selling tax-free cigarettes to non-tribe members; and suing cigarette wholesalers who provide tax-free cigarettes to the reservation sellers. While not all of these suits have been successful – we lost one case in the United States Supreme Court by a 5-3 vote – they have resulted in many former purchasers of tax-free cigarettes now buying at retail stores and paying the requisite taxes. In addition, the publicity generated by these cases has helped to galvanize our State government to begin enforcement of the cigarette tax laws that limit the sale of untaxed cigarettes on Native American reservations.

An added benefit of these enforcement efforts is that, as numerous studies have shown, and as the Mayor's recent announcement on the decline in cigarette smoking in the City highlights, enforcing cigarette taxes results in a decrease in the number of smokers, as would-be smokers decide to quit and avoid the tax altogether. We bring numerous other cases designed to improve other aspects of the quality of life in this City – such as our suits against out-of-state gun dealers. Unfortunately, time prevents me from discussing those cases now.

## **Real Estate Taxes**

Before I move to the expense side of the ledger, I want to say a few words about one other area for which the Law Department has responsibility: the defense of the City's real estate tax base.

Last year the City's real estate tax generated \$16.8 billion, representing approximately 38% of all New York City revenue. During that year, nearly 1500 new tax cases – known as certiorari proceedings – were commenced challenging the real estate tax assessments and roughly the same number of matters were

settled. Despite the high stakes involved – the aggregate assessed values levied on these settled cases exceeded \$16.5 billion – we were able to preserve the overwhelming majority of the City's real property tax revenue.

## **Tort Payouts**

I want to devote my remaining time to expenses and particularly the challenges the City faces in tort and related cases. As I will discuss, the City pays a huge price for State tort laws that urgently need reform – and I ask the Citizens Budget Commission to join us in advocating for these needed statutory changes.

In the 2011 fiscal year, as the chart (*see first chart in attached slideshow*) I have just put up shows, New York City litigation payouts totaled \$561 million. This number covers tort suits, including those allegedly committed in City operated hospitals, as well as police, labor and other cases. It does not include the 10,000 World Trade Center tort suits, most of which have recently been settled by the WTC Captive Insurance Company, the real estate tax cases I just mentioned, or worker's compensation payments, which totaled about \$215 million last year.

As you can see from the chart, the payout number has remained in the \$525 to \$560 million range throughout the Bloomberg Administration. Given 30% inflation in the metropolitan area over this time frame, and the courts' increased approval of large jury awards, this is at least some good news. But, in 1978 the comparable number was \$21.4 million. The 2,600% increase from 1978 to today is certainly not explained by inflation.

To give you an idea of the volume of the cases we have, not just the amount we pay out, let me show you this chart (*see second chart in attached slideshow*) indicating the number of tort cases pending, and the number of those cases commenced, in each of the last ten years. You can see that, as a result of a far more aggressive litigation and settlement approach, we have substantially reduced the number of pending cases from almost 49,000 in 2002 to fewer than 17,000 today. In addition, in the past few years, thanks in significant part to a more pro-active pre-litigation approach by the Comptroller, about 6,400 cases have been commenced against the City annually, compared to 8,800 ten years ago.

Unlike New York State, which has its tort cases decided by a judge, not a jury, cases brought against the City are tried before juries. As is true in most litigation contexts, most of these cases are resolved – by dismissal or settlement – before trial. But last year, as has been true in the recent past, we picked juries in about 350 cases, and tried to final verdict about one-third of that number. While precise comparisons are difficult to come by, I doubt very much that there is any other entity in the world that tries as many civil cases as we do. Perhaps more significantly, there is also no other entity in the world, with the possible exception of the federal government, that pays out more money in settlements and judgments than the City of New York.

We must find a way to bring this \$561 million tort number under control. In a time of financial crisis and budgetary cuts, this is not just a huge number – it represents an unacceptable tradeoff in favor of individual plaintiffs at the expense of providing needed services to New Yorkers. As Mayor Bloomberg told the State Bar Association in January, inflated tort payouts are paid by taxpayers and siphon funds away from the programs we need the most. The tort laws must be changed to even the playing field. At the very least, New York should follow the lead of other states, like New Jersey, that have passed tort reforms that relieve governmental entities of some of the laws' plaintiff-friendly provisions.

As the Mayor said to the State Bar, no one disputes that the City should fairly compensate people who are injured when the City is primarily at fault, but limiting payouts to such cases would not amount to anywhere near the more than half billion dollars a year we currently pay. The tort laws in New York, unlike those in virtually any other state in the nation, not only make a victim whole, they too often compensate the person for far more than the amount of the injury suffered. And under the law as it exists today, the City is frequently required to pay even when its actions were not the primary cause of the accident.

For example (and what I am about to say comes from real cases) consider the pain and suffering laws. A car swerves to avoid a City-driven ambulance and strikes a tree. A twelve-year-old passenger unfortunately suffers a severe leg fracture requiring surgeries. In addition to economic damages, the jury

awards pain and suffering damages against the City for the fractured leg that ultimately amount to \$4.8 million.

Last year, the Governor proposed a major reform in this area that, if it had been adopted, and it was not, would have capped pain and suffering awards at \$250,000, although only in medical malpractice cases. I should add that, unlike New York, almost half the states in the country impose limitations, or caps, on pain and suffering awards.

Another example, joint and several liability rules: A driver high on drugs speeds through an intersection, swerves to avoid a City sanitation truck and injures an innocent bystander. In a suit against the driver and the City, the jury finds the City 23% responsible for the accident. Because the law, unlike that in most states, requires that a co-defendant, as the City was in this case, must pay the entire amount of a plaintiff's economic damages even if it is only 1% responsible, the City had to pay the resulting economic damages. But incredibly, the law also provides that if the accident involves a motor vehicle, a co-defendant like the City is also liable for the pain and suffering damages as well. As a result, the City had to pay the entire five and a quarter million dollar judgment resulting from the druggies' dangerous conduct.

I could continue for hours giving examples of pro- plaintiff, anti-defendant, particularly anti-government, tort laws. Yet persuading the New York legislature to enact any tort reforms, even if only limited to governmental entities, is a difficult task, to say the least, but it is essential to stop this raid on the public fisc.

So that you can appreciate how challenging it is to achieve even modest tort changes, let me give you one final example of a clearly needed change. I start by giving this sophisticated audience a piece of inside investment information. Notwithstanding today's economy, there is still one place in New York where you can realize a guaranteed 9% return on your investment. Invest in judgments. New York law provides that if you obtain a judgment in New York you will receive 9% interest per annum. As a result, if you are a plaintiff, the longer it takes the appellate court to decide the better off you are. In fact, the City has won some appeals, where the court has reduced jury verdicts by hundreds of thousands of dollars, but the City nevertheless has lost by appealing because the interest it has to pay exceeds the amount of the reduction. Although the farcical nature of such a result is clear, efforts to change the interest rate on judgments have fallen on deaf ears in Albany.

Despite the political realities we simply cannot give up in our efforts to reform the tort laws at least in so far as they affect governmental entities. Changing the laws to relieve municipalities across the state from this tort albatross would remove what in effect is an unfunded mandate, save New York City approximately \$100 million a year, and benefit other governmental entities throughout the State as well.

Clearly, given the economic climate we face, and the difficult spending choices governments must make, we must make every effort to try to achieve these reforms.

I should add that in the one tort reform area where the City Council has the authority to legislate – injuries on sidewalks – we have made major progress that has saved the City \$40 million a year. In 2003, the Council changed a decades old law and provided, with limited exceptions, that adjacent property owners, who have always been responsible for maintaining public sidewalks, not the City, would now be liable if someone was injured because of a fall on an unsafe sidewalk. The result, as you can see from this chart (*see third chart in attached slideshow*), has been a dramatic decrease in payments made in such cases.

## **Conclusion**

For the last ten years I have had the honor of heading what I believe to be one of the great public law offices of the nation. We will continue our efforts both to collect money that is owed to the City, and resist efforts to make the City pay for unjustified claims. But to really make a difference, we must change the laws in the ways that I have suggested. I do hope the Citizens Budget Commission will join us in these efforts. Thank you.

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# **Citizens Budget Commission**

## **September 22, 2011**

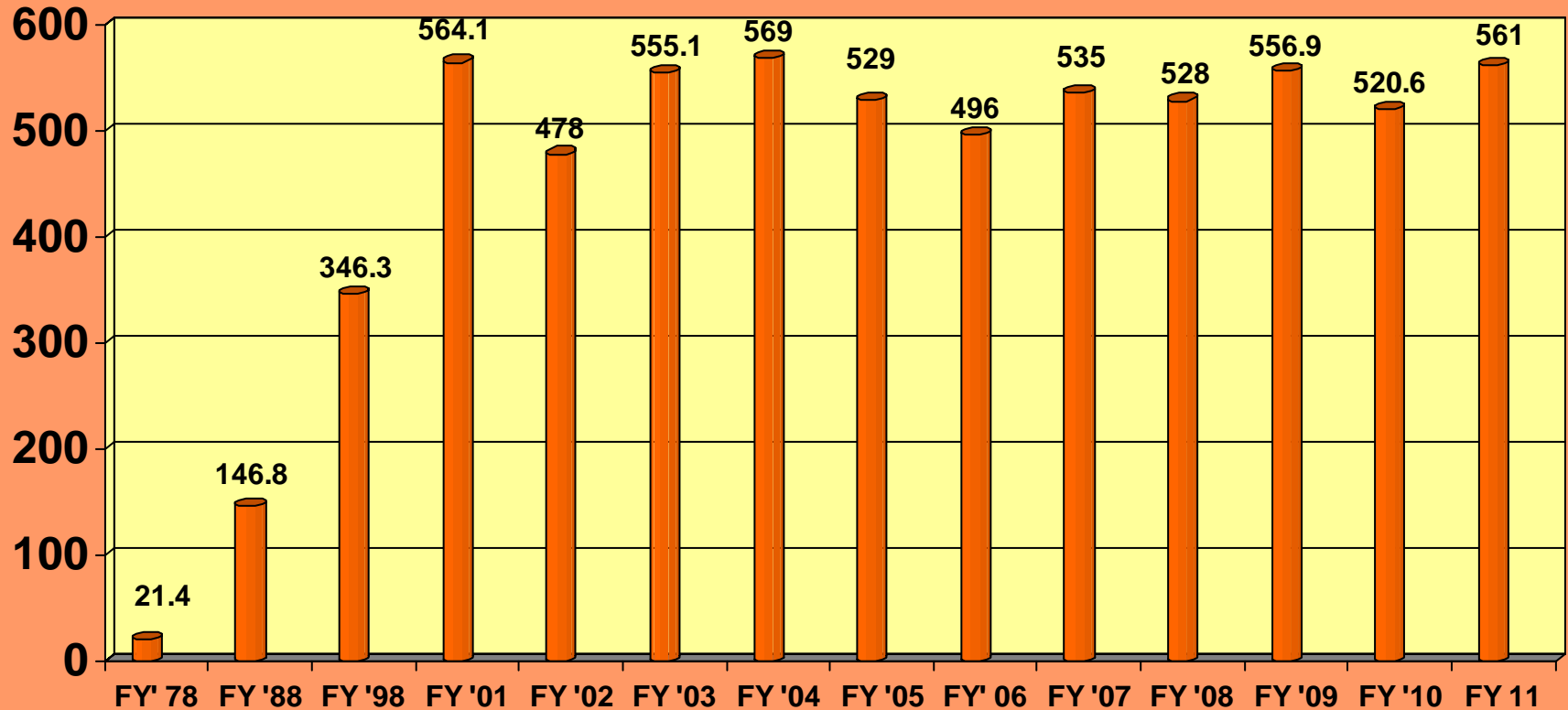
**Michael A. Cardozo**  
**Corporation Counsel**  
**City of New York**



# Total Judgment & Claims

(Citywide Personal Injury & Property Damage payouts)

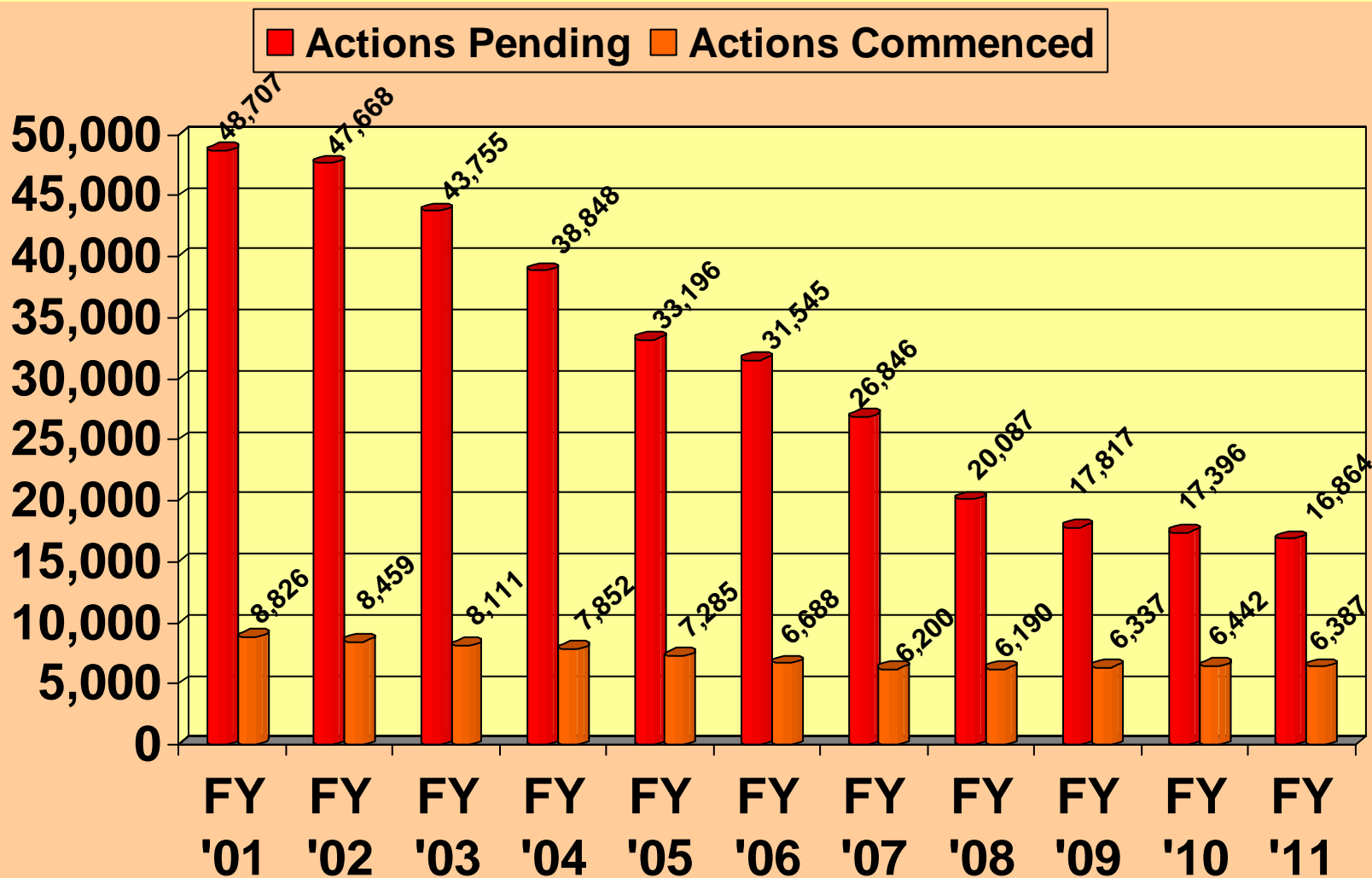
## FY 2001-2011



The Comptroller's Office maintains the City's J&C Claims data on OAISIS. J&C data is not static because of the time lag between the dates settlements occur and the dates settlements and other updates are entered into the system. Thus, the data derived on a particular date may not include all claims against the City that ultimately will be attributed to a particular fiscal year. **Numbers are in millions.**

Includes appropriate case types from Tort, Special Fed and Labor & Employment Divisions of the Law Department, Medical Malpractice matters and Comptroller's Office pre-litigation settlements.

# NYC Law Department Tort Division



# Sidewalk Payouts in Millions

FY '99- FY'11

