

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

**Before
The House Committee on the Judiciary
Subcommittee on Immigration, Citizenship, Refugees, Border
Security, and International Law
And
Subcommittee on the Constitution, Civil Rights, and Civil
Liberties**

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

March 31, 2009

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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.