



May 8, 2008

Andres Jiminez
Subcommittee on Immigration, Citizenship,
Border Security, and International Law
United States Congress
Cannon House Office Building
Washington, DC 20515

Dear Mr. Jiminez,

I hereby submit responses to questions submitted by Representative Sheila Jackson-Lee dated April 23, 2008.

1) Who were the original intended beneficiaries of the Victim Fund?

I do not claim to be able to divine legislative intent. Some legislators may have voted for the Air Transportation Safety and Stabilization Act to benefit the thousands of people killed and injured on September 11; others may have agreed to the Victim Compensation Fund as a legislative compromise to ensure that airlines would not be unfairly bankrupted by the economic and litigation aftermath of the September 11 attack. Section 403 of the Stabilization Act states that “It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.” Section 405 of the Stabilization Act restricts compensation to those present at the crash sites at the time or in the “immediate aftermath” of the September 11 aircraft crashes. It is arguable that the execution of the original Victim Compensation Fund expanded compensation beyond what Congress originally intended by defining “immediate aftermath” to be four days.

2) Why should the Fund be the exclusive remedy to the first responders?

I don't believe a federal Fund should be a remedy for the first responders. New York state workers' compensation laws (including the Zadroga bill, A. 4697, passed by the New York State Assembly in 2007) already provide a substantial remedy.

I do believe that Congress should take steps to shut down the unjust litigation brought against contractors and subcontractors who volunteered to help in an emergency situation, and are being sued as deep-pocketed bystanders, because of the message it sends to Americans that, should they volunteer to help a city recover from a terrorist attack, they will be targeted for litigation by unscrupulous plaintiffs' attorneys.

I also argue that, if the Victim Compensation Fund is to be expanded to include remedies for first responders, then the Victim Compensation Fund will not be successful unless litigation remedies are limited or eliminated. As I state in my written testimony,

[C]laimants 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; 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. 3543 already risks being too permissive to claims and thus open to substantial abuse. Congress needs to limit 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.

3) Why should the Fund exclude recovery of those suffering from psychological injury?

As I state in my written testimony,

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. ...

If it is surprisingly easy to manufacture fake claims of lung ailment through mass screenings, it is easier still to manufacture claims of "psychological injury," where self-reporting is the only possible verification, diagnostic criteria are malleable, and falsification is all but impossible for many common psychological injuries within the scope of the definition of "presumed WTC-related injuries." Awarding compensation for minor psychological injuries while avoiding fraud will be impossible unless Congress or the Special Master caps damages at trivial amounts and insists on independent medical evaluations.

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, H.R. 3543's Fund and the government fisc will be subject to substantial fraud and abuse.

Moreover, as I extensively demonstrate in my written testimony, the definitions in the bill are overbroad, and could be easily interpreted to entitle every New York resident to compensation.

4) Why is it not appropriate that someone that suffered injuries from being a first responder be compensated under the Fund?

I note that New York state law already provides compensation to those who suffer injuries from being a first responder, so the question is whether Congress should provide additional compensation above and beyond the amount that New York state law provides.

The Victim Compensation Fund was unusually, and perhaps overly, generous. Such generosity is problematic enough as a one-time special occasion. There is a fundamental unfairness in distinguishing between victims of this terrorist attack and victims of the 1993 World Trade Center bombing, or the Oklahoma City bombing, or the attack on the U.S.S. Cole or American embassies in Africa. Expanding the Fund to larger and larger populations multiplies the unfairness. About 250 firefighters and police officers a year are killed and thousands more injured in the line of duty without being entitled to millions of dollars of federal funding.

In addition, as I note in my written testimony, there is a distinctive difference between the deaths and injuries from the plane crash and collapse of the towers and the deaths and injuries allegedly caused from exposure to toxins at the World Trade Center site. In the first instance, there is no dispute of causation, and little opportunity for fraud and abuse. In the second case, proving causation is difficult, if not impossible, and any administrative compensation mechanism will either undercompensate victims because of the need for strict medical criteria or be so lenient that taxpayers will be victimized by fraud and abuse. The law firm behind many of the thousands of pending lawsuits already has a track record of manufacturing questionable medical diagnoses for litigation purposes, and the danger of a multi-billion dollar fraud is large.

5) You indicate in your statement that companies should not be driven out of business because of fear of expensive lawsuits, what do you think can reasonably and fairly be done to mitigate damages?

The defendants in the World Trade Center litigation are mostly innocent bystanders who had no say over air quality or safety. The companies being unfairly sued could not have done anything to mitigate damages except refuse to volunteer to help in the recovery and cleanup efforts. The danger is that, in responding to future terrorist attacks, other contractors will be deterred from responding to a crisis because they fear unlimited and potentially bankrupting liability. Unless Congress steps in to limit or eliminate these lawsuits, the only way that such contractors can "mitigate damages" is to refuse to volunteer to help in a crisis. The lawsuits make America worse off.

6) Although the contractors were paid \$1 billion dollars, neither the City nor the contractors have been willing to work with 9/11 workers injured in the WTC cleanup to settle their claims and provide a comprehensive solution. How much liability insurance do these multi-billion dollar companies have to supplement the \$1 billion already contributed by the federal government to pay the claims of injured workers?

I dispute several of the spoken and unspoken premises of the question: *first*, the vast majority of the contractor defendants being sued are not “multi-billion dollar companies”; *second*, contractors have not been paid “\$1 billion dollars”; *third*, it takes two sides to settle, and the plaintiffs are as much to blame for a lack of settlement for failing to make reasonable demands that are related to medical causation and legal liability; *fourth*, it is impossible for the City and contractors to provide a “comprehensive solution” without Congressional intervention to limit or eliminate liability because of the constitutional limitations on the ability of parties to settle alleged mass torts with alleged latent injuries under the Supreme Court cases of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1996) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *fifth*, the vast majority of the defendants being sued have no legal liability, and it is therefore unjust to insist that their innocent liability insurers cover the tab of the litigation; and *sixth*, it is almost certainly the case that a large number of the thousands of plaintiffs in the September 11 litigation have not been “injured in the WTC cleanup.” I discuss these last two issues in my written testimony.

There are dozens of defendants in the WTC cleanup litigation, and I do not know how much liability insurance they have. The question fails to address the underlying problem: even if one were to stick contractors’ existing liability insurers with the tab, one has to consider the *ex ante* effect in responding to future terrorist attacks. Liability insurers will simply refuse to permit their insured contractors to volunteer in clean-up efforts if they know they will be unfairly forced by Congress to compensate responders whose injuries had nothing to do with the insureds’ conduct. Congress needs to provide prospective immunity to prevent this problem, and retrospective immunity to fix the problem of the unfairness to the September 11 volunteers and their innocent insurers.

Sincerely,

A handwritten signature in black ink, appearing to read "Theodore H. Frank". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Theodore H. Frank
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