

COMMENTS

REMEMBERING THOSE STILL WITH US: PROTECTING SEPTEMBER ELEVENTH SURVIVORS FROM THEIR FUTURE

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INTRODUCTION

Eleven days after the terrorist attacks of September 11, 2001, Congress passed the Air Transportation Safety and System Stabilization Act (ATSSSA).¹ Title IV of the Act created the September 11th Victim Compensation Fund of 2001 (the “Fund”), an administrative compensation scheme for those victimized by the attacks.² The Act presents the purpose of the Fund with great simplicity: “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.”³ This Comment questions the effectiveness of the legislation in achieving its stated purpose, examines the source of its failure, and offers a proposal to remedy the situation.

The Fund’s failures stem from restrictive eligibility guidelines and unconstitutional limitations imposed on those deemed ineligible for the Fund. The definition of eligible individuals in the rules promulgated to administer the Fund limited the pool of people eligible for compensation to those who died or sustained physical injury during or immediately following the planes crashing into the World Trade Cen-

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¹ Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. §40101 (Supp. I 2001)).

² Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 237-41 (2001).

³ *Id.* § 403, 115 Stat. 230, 237.

ter (“WTC” or “towers”) and the towers collapsing.⁴ Additionally, driven by the broader purpose of the ATSSSA—protecting the airlines involved in the 9/11 attacks—Congress capped the liability of the airlines at the limits of their insurance coverage.⁵ This cap limited the airlines’ liability to approximately six billion dollars, a pool from which all parties not eligible for the Fund must seek compensation.⁷ In contrast, the legislation placed no cap on the amount eligible claimants could recover from the Fund.⁸

In combination, the restrictive definition of eligible individuals and the airlines’ limited liability created a class of victims, those injured by the 9/11 attacks but ineligible for the Fund, whose recovery—if any—will be limited to the airlines’ insurance coverage.⁹ This class notably includes the estimated 300,000 people exposed to the toxic plume released into lower Manhattan after the collapse of the World Trade Center towers,¹⁰ as well as the rescue and recovery workers who arrived at the site more than ninety-six hours after the attacks.¹¹ This Comment asserts that Congress had no authority to cap

⁴ September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.2 (2004).

⁵ See ATSSSA § 101(a), 115 Stat. 230, 230 (authorizing executive action “to compensate air carriers for losses incurred by the air carriers as a result of the terrorist attacks on the United States that occurred on September 11, 2001”). The legislative history of the ATSSSA is almost exclusively devoted to discussion of the airlines. 147 CONG. REC. S9589-604, H5884-919 (daily ed. Sept. 21, 2001).

⁶ September 11th Victim Compensation Fund of 2001 § 408(a), 115 Stat. 230, 240. Subsequent amendments also capped the liability of aircraft manufacturers, property owners in the World Trade Center, airport owners, and governmental entities. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 201(b)(2), 115 Stat. 597, 645-46 (2001). Throughout this Comment, any reference to maximum airline liability or the available six billion dollars is a reference to all money available from those parties with legislatively limited liability with respect to 9/11.

⁷ See Steven Brill, *A Tragic Calculus*, NEWSWEEK, Dec. 31, 2001/Jan. 7, 2002, at 28, 29 (estimating six billion dollars in available insurance money).

⁸ See September 11th Victim Compensation Fund of 2001 § 404(b), 115 Stat. 230, 240-41 (“There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Special Master in carrying out this title.”).

⁹ See Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831, 1856 (2002) (noting that there is “no apparent argument” for these classifications “[w]ithin the community of victims”).

¹⁰ Thomas R. Frieden, Henry Falk & Timothy S. Carey, Remarks Announcing the Launch of the World Trade Center Health Registry 13 (Sept. 5, 2003) (transcript available at <http://www.nyc.gov/html/doh/html/wtc/transcript-0905.pdf>).

¹¹ See September 11th Victim Compensation Fund of 2001 § 405(c)(2)(B)-(C), 115 Stat. 230, 239 (stating that an eligible individual must have been present at the site at the time of the airplane crashes or “in the immediate aftermath”); 28 C.F.R. § 102.3

the liability of the airlines with respect to those victims ineligible for the Fund. It discusses the grounds on which the limited liability provision of the legislation should be held unconstitutional and proposes that an alternative compensation scheme to anticipate and resolve the claims of exposure-only injury victims should be created.

I. THE PROBLEM

A. *The Purpose of the Victim Compensation Fund*

The Fund is the largest single-incident social welfare program in the history of the United States.¹² Viewed in the light most generous to Congress, it was the product of a compelling desire to assist those most deeply and immediately impacted by the tragedy of 9/11.¹³ Congress passed the ATSSSA only hours after it was drafted,¹⁴ producing minimal legislative history to indicate its intent.¹⁵ However, the few references to the Fund in the debate over the ATSSSA made congressional intent clear:

To ensure that the victims and families of victims who were physically injured or killed on September 11th are compensated even if courts determine that the airlines and any other potential corporate defendants are not liable for the harm; if insurance monies are exhausted; or are consumed by massive punitive damage awards or attorneys' fees, the bill also creates a victims' compensation fund. These victims and their families may, but are not required to, seek compensation from the Federal fund instead of through the litigation system.

- Sen. John McCain¹⁶

The heart of every American aches for those who died or have been injured because of the tragic terrorist attacks in New York, Virginia, and

(2004) (limiting "immediate aftermath" to within 96 hours after the crashes for rescue workers, and to within 12 hours after the crashes for all other claimants).

¹² See Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine), at 92 (noting that the U.S. government has never made such payments to victims of attacks, natural disasters, or epidemics).

¹³ Although the overall legislation was to protect the airlines, the Fund was unquestionably a generous social welfare package intended to alleviate the suffering of those most personally harmed on 9/11.

¹⁴ Belkin, *supra* note 12, at 92.

¹⁵ The legislative history of the ATSSSA is brief and almost entirely focused on protecting the airlines. 147 CONG. REC. S9589-9604, H5884-5919 (daily ed. Sept. 21, 2001). The sparse references to the Fund are excerpted in text accompanying notes 16-20.

¹⁶ 147 CONG. REC. S9594 (statement of Sen. McCain).

Pennsylvania on September 11th. Our first priority should be ensuring that their needs are met and that they receive compensation.

- Sen. Patrick Leahy¹⁷

The Treasury of the United States has been opened by the Members of this Congress to ensure that every family will receive just recovery.

- Rep. Jim Turner¹⁸

It is paradoxical to fully support the airlines while reducing support for survivors who need to resume their lives.

- Rep. Stephanie Tubbs Jones¹⁹

Don't we want to ensure that all legitimate plaintiffs receive compensation?

- Sen. Orrin Hatch²⁰

The statements of the Special Master of the Fund, Kenneth Feinberg,²¹ also point to the purpose of the Fund:

The Fund provides an alternative to the significant risk, expense, and delay inherent in civil litigation by offering victims and their families an opportunity to receive swift, inexpensive, and predictable resolution of claims. The Fund provides an *unprecedented* level of federal financial assistance for surviving victims and the families of deceased victims.²²

Despite the admirable purpose expressed by those associated with the Fund, the eligibility requirements of the Fund were insurmountable for many. The Special Master's definition of eligibility,²³ although a practical response to the challenge presented to him, gave rise to the problem of precluded recovery for those victims not meeting his strict definition.

B. *Defining Eligibility*

Title IV defines eligible claimants as those individuals who were present at the World Trade Center, Pentagon, or crash site at Shanks-

¹⁷ 147 CONG. REC. S9599 (statement of Sen. Leahy).

¹⁸ 147 CONG. REC. H5906 (statement of Rep. Turner).

¹⁹ 147 CONG. REC. H5905 (statement of Rep. Jones).

²⁰ 147 CONG. REC. S9595 (statement of Sen. Hatch).

²¹ The Special Master was appointed by the Attorney General and empowered to, inter alia, "promulgate all procedural and substantive rules for the administration of [the Fund]." September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, § 404(a)(2), 115 Stat. 230, 238.

²² 67 Fed. Reg. 11,233, 11,233 (Mar. 13, 2003).

²³ 66 Fed. Reg. 66,274, 66,276-80 (Dec. 21, 2001).

ville, Pennsylvania “at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and suffered physical harm or death as a result of such an air crash.”²⁴ This language raises the question: who suffered “physical harm” in “the immediate aftermath” of 9/11?

C. *Defining Physical Harm*

1. Physical Harm Compensable by the Fund

The Final Rule defines the physical harm necessary to be eligible for the Fund as:

[A] physical injury to the body that was treated by a medical professional within 24 hours of the injury having been sustained, or within 24 hours of rescue, or within 72 hours of injury or rescue for those victims who were unable to realize immediately the extent of their injuries or for whom treatment by a medical professional was not available on September 11²⁵

Although Title IV grants the Special Master the power to define harm as necessary to the adjudication of the Fund,²⁶ the Fund’s definition of harm is different from the definition of physical harm developed by modern tort law. Despite recognition of exposure-only injuries as a class of injury in recent mass toxic tort decisions,²⁷ the Final Rule specifically excludes exposure-only injuries from eligibility.²⁸ These are victims who were exposed to carcinogens and toxins released into the air when the WTC towers collapsed and who may not manifest symptoms of disease for many years. The Special Master presented an administrative justification for excluding exposure-only victims from the Fund: victims who never manifest an injury would be overcompensated if they were compensated today; victims who manifest severe injuries might be undercompensated if they receive an estimated com-

²⁴ September 11th Victim Compensation Fund of 2001 § 405(c)(2)(A), 115 Stat. 230, 239 (2001).

²⁵ September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.2(c)(1) (2004).

²⁶ September 11th Victim Compensation Fund of 2001 § 404(a), 115 Stat. 230, 237-38.

²⁷ See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 853 (1999) (recognizing the “divergent interests of the presently injured and future claimants”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (recognizing “the interest of the exposure-only plaintiffs”).

²⁸ See September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.2(a)-(e) (2004) (establishing eligibility definitions and requirements).

pensation today.²⁹ The Special Master went on to say that “[w]hile Congress might later consider whether an administrative program for latent harm caused by the September 11, 2001 terrorist-related aircraft crashes may be appropriate, the language of the statute that created this Fund does not contemplate awards for that purpose.”³⁰ This recognition of the possibility of latent injuries is one of the few acknowledgments that a congressional response may be necessary. Without a congressional response, the members of *this recognized class of victims will never recover for their injuries*.

2. Physical Harm Compensable at Common Law

Under the Fund legislation, any litigation relating to the events of the 9/11 attacks, including lawsuits for personal injuries, must be brought as a federal cause of action in the Southern District of New York and will be controlled by the law “of the State in which the crash occurred.”³¹ Professor Robert Rabin has surveyed the potential causes of action available to exposure-only 9/11 victims:³² emotional distress over prospective future physical harm (“cancerphobia”),³³ medical monitoring,³⁴ and present probabilistic recovery for future harm.³⁵ Applying New York’s case law to potential claims of exposure-only victims of 9/11,³⁶ Rabin concluded that cancerphobia claims are unlikely

²⁹ September 11th Victim Compensation Fund of 2001: Interim Final Rule, 66 Fed. Reg. 66,274, 66,276 (Dec. 21, 2001) (Statement by the Special Master).

³⁰ *Id.*

³¹ September 11th Victim Compensation Fund of 2001 § 408(b)(2), 115 Stat. 230, 241. This Comment does not discuss the exposure-only victims from the Pentagon. The collapse of the towers created a massive class of victims in New York that does not exist in Virginia. Should studies indicate that the damage caused to the Pentagon created a sufficiently dangerous environment, those exposed to that environment should be eligible for compensation with the New York exposure-only victims.

³² Rabin, *supra* note 9, at 1861-65.

³³ A cancerphobia claim is for compensation of the victim for the fear of developing cancer independent of whether cancer ever develops. *See, e.g., Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1206 n.24 (6th Cir. 1988) (citing cases dealing with “cancerphobia” claims).

³⁴ A medical monitoring claim is for the ongoing payment of any medical costs incurred for proactive or preventative medical treatment. DOMINICK VETRI ET AL., TORT LAW AND PRACTICE 381 (2d ed. 2002).

³⁵ A present probabilistic recovery for future harm claim is for the immediate compensation of a potential injury whose monetary value is determined by the probability of that injury manifesting and the probable severity of that manifested injury. RICHARD A. EPSTEIN, CASES AND MATERIAL ON TORTS 459-61 (7th ed. 2000).

³⁶ Rabin, *supra* note 9, at 1861-65.

to succeed.³⁷ Medical monitoring claims, on the other hand, would be “fairly strong,”³⁸ while present probabilistic recovery is an “open question in New York.”³⁹ Ultimately, Rabin concluded that “uncertainty is the byword for the exposure only claimant in both the liability and the health spheres.”⁴⁰ Although he reached no definitive conclusion, Rabin’s article indicated that exposure-only victims do have common law rights and their injuries cannot be dismissed as collateral damage.

While Rabin asserted that the exposure-only victims may have a valid legal claim, whether those claims have any hope of success is an entirely different question. The Special Master has, on multiple occasions, dismissed the chances of success of any lawsuits stemming from the events of 9/11.⁴¹ In an effort to encourage potential claimants to opt into the Fund, he speculatively compared the experience of litigating a tort claim with the experience of filing a claim with the Fund:

[The alternative] is the idea of litigating . . . for seven or eight or nine years, hopefully getting a verdict, hopefully having it sustained on appeal, then paying your lawyer 40 percent of a fee, and then netting something at the end of the day while dragging through *constantly remembering the horror of September 11*, this is an alternative program, an alternative.⁴²

The Special Master was referring to the families of people killed on 9/11. Unlike exposure-only victims, these parties would not face the burden of proving causation in court. Among other hurdles, victims who manifest cancer in fifteen years caused by the toxins inhaled on September 11 will be required by a court to prove that their cancer must have been caused by the September 11 plume. Although expo-

³⁷ *Id.* at 1862-63.

³⁸ *Id.* at 1863-64.

³⁹ *Id.* at 1864-65. Professor Rabin compares *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996) (holding, under the “two-disease rule” that claimants can sue for emotional distress and probabilistic recovery only for whatever disease they are suffering from at the time they sue) and *Mauro v. Raymark Industries*, 561 A.2d 257 (N.J. 1989) (holding that if a reasonable medical probability that the disease will develop can be established, present recovery for that disease will be permitted).

⁴⁰ Rabin, *supra* note 9, at 1865.

⁴¹ See Robert S. Kelner & Gail S. Kelner, *Victim Compensation Fund: An Update*, N.Y.L.J., May 28, 2002, at 3 (“Mr. Feinberg has described the Victim Compensation Fund on numerous occasions as ‘the only game in town.’”); *Newsnight with Aaron Brown* (CNN television broadcast, Feb. 4, 2002) (reporting on the Special Master’s statement that “suing the airlines is a dead end”), available at <http://transcripts.cnn.com/TRANSCRIPTS/0202/04/asb.00.html>.

⁴² *Newsnight with Aaron Brown*, *supra* note 41 (emphasis added).

sure-only victims have a justiciable claim, the obstacles to prevailing on such a claim could very well be insurmountable.

3. Likelihood of Manifestation of Latent Injuries⁴³

It is possible that no serious injuries will ever manifest in those individuals exposed to the 9/11 plume. However, reflecting on the dicta of courts imploring the legislature to implement an extra-judicial solution to resolve the litigation problems arising from mass toxic torts,⁴⁴ it would still be wise to implement a solution now and hope there is never reason to use it. Although opponents will argue that this is a wasteful strategy, the scientific evidence indicates that there is a likelihood that this problem will arise.

The earliest evaluations of the air quality following the collapse of the WTC towers were on September 17, 2001—six days after the toxic plume covered lower Manhattan.⁴⁵ The delay leaves uncertain the accuracy of studies determining actual levels of toxicity in the plume and the effects of direct exposure to the plume.⁴⁶ Studies attempting

⁴³ Needless to say, the scientific community has undertaken countless studies of the medical and environmental effects of the 9/11 plume. For lack of a better place to start, the reports and data discussed here are taken exclusively from the report of the New York Fire Department medical staff and studies conducted by the government agencies charged with monitoring the effects of 9/11 on human health. Bear in mind that subsequent analyses have charged the government with being overly optimistic about the danger posed by the plume. *See generally* SUZANNE MATTEI, SIERRA CLUB, POLLUTION AND DECEPTION AT GROUND ZERO: HOW THE BUSH ADMINISTRATION'S RECKLESS DISREGARD OF 9/11 TOXIC HAZARDS POSES LONG-TERM THREATS FOR NEW YORK CITY AND THE NATION (2004), at <http://www.sierraclub.com/groundzero/report.pdf>.

⁴⁴ *See* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (“[T]his litigation defies customary judicial administration and calls for national legislation.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997) (“The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration.”).

⁴⁵ *See* Ctr. for Disease Control, Dep’t of Health & Human Servs., *Occupational Exposures to Air Contaminants at the World Trade Center Disaster Site—New York, September-October 2001*, 51 MORBIDITY & MORTALITY WKLY. REP. 453 (2002) (reporting that environmental sampling took place between September 18 and October 4); David J. Prezant et al., *Cough and Bronchial Responsiveness in Firefighters at the World Trade Center Site*, 347 NEW ENG. J. MED. 806 (2002) (“[M]ost samples were obtained after September 17, 2001, when substantial settling of dust had already occurred.”).

⁴⁶ *See* Nat’l Ctr. for Env’tl. Assessment, EPA, *Exposure and Human Health Evaluation of Airborne Pollution from the World Trade Center Disaster* (External Review Draft) 122 (2002), at <http://cfpub.epa.gov/ncea/cfm/recorddisplay.cfm?deid=54667> [hereinafter *Exposure Evaluation*] (“[V]ery little data are available to quantify exposures which could have occurred in the hours and days following the collapse of the WTC towers.”); Paul D. Scanlon, *World Trade Center Cough—A Lingering Legacy and a*

to report on air quality immediately following the collapse of the buildings are markedly pessimistic as compared to government studies based on the quality of air one week after the event.⁴⁷ The validity of some of the government conclusions has been questioned, and even the Environmental Protection Agency (EPA) has admitted that it may have misled the public regarding the air quality at the WTC site.⁴⁸ The one thing on which all the studies agree is that it is not possible to rule out the possibility of long-term injury to the exposure-only victims of 9/11.

a. *Harm to Firefighters*

Dr. David Prezant, the Chief Medical Officer for the New York City Fire Department, studied the post-9/11 respiratory health of New York City firefighters.⁴⁹ Ninety percent of all firefighters complained of “severe respiratory-related cough and symptomatology” after exposure to the site.⁵⁰ Prezant noted “there was clinically significant respi-

Cautionary Tale, 347 NEW ENG. J. MED. 840, 841-42 (2002) (“Although the Centers for Disease Control and Prevention did not identify harmful levels in air samples, the sampling was undertaken after most airway injury had already occurred.”). This information is presented not as an indictment of the EPA or any other agency but to remind the reader that we are acting with imperfect information and have no way of knowing how severe the initial exposure was. “[A] major uncertainty for the evaluations presented in this report is the lack of information on exposures which could have occurred within that first critical week after September 11.” Exposure Evaluation, *supra*, at 123.

⁴⁷ See Jane Key, *Ground Zero Air Was “Brutal” for Months*, S.F. CHRON., Sept. 10, 2003, at A1 (reporting on a study by Dr. Thomas Cahill finding that the immediate impact of the 9/11 plume was significantly more severe than later tests of air quality indicated).

⁴⁸ See EPA Inspector General Admits to Problems Following Sept. 11, NATION’S HEALTH, Nov. 1, 2003, at 7 (“The Environmental Protection Agency may have misled the public about air quality following the collapse of the World Trade Center towers in New York City in 2001, according to a report from the agency’s inspector general.”); EPA’s Fog over Lower Manhattan, N.Y. DAILY NEWS, Sept. 15, 2003, at 32 (“[T]he EPA inspector general said last month that the White House Council on Environmental Quality pushed the agency to issue reassuring statements and delete cautionary ones about the air quality downtown.”); Kirk Johnson & Jennifer 8. Lee, *When Breathing Is Believing: New Yorkers Doubt E.P.A. Credibility on Air Safety, but Truth Is Complex*, N.Y. TIMES, Nov. 30, 2003, at 40 (reporting Congressman Jerrold Nadler’s belief that “people would die because of what he saw as collusion between the E.P.A. and the White House”).

⁴⁹ See generally Prezant et al., *supra* note 45 (examining data from fire fighters who had been exposed to inhaled materials during and after the 9/11 attacks on the World Trade Center).

⁵⁰ CDC Telebriefing Transcript: *9-11-02 Special Issue Examines Health Effects Related to World Trade Center Terrorist Attacks* (Sept. 9, 2002), at <http://www.cdc.gov/od/oc/media/transcripts/t020909.htm>.

ratory exposure” among firefighters exposed to the plume but who were asymptomatic of “World Trade Center cough.”⁵¹ He concluded that “[w]hether symptoms and hyperreactivity in firefighters who worked at the World Trade Center site will prove persistent, resulting in reactive airways dysfunction syndrome or airway remodeling, requires long-term study.”⁵² In extrapolating his findings to the population of workers and residents of lower Manhattan, Prezant speculated about two alternatives: the negative health effects will be comparatively lower in the non-firefighter population because of the lower levels of exposure or the negative health effects will be comparatively higher because of the superior respiratory health of firefighters.⁵³ Other studies favor the latter speculation, noting the presence of several high-risk groups (e.g., children, smokers) among the general population.⁵⁴

b. *Harm to the General Population*

Two months after the attack, eighty-two percent of residents of lower Manhattan surveyed by the New York City Department of Health and Mental Hygiene (NYCDOHMH) and the Center for Disease Control (CDC) reported continued or increased nose or throat

⁵¹ Prezant et al., *supra* note 45, at 813. *See id.* at 806 (“World Trade Center cough” was defined as a persistent cough that developed in a firefighter after exposure to the site and that was accompanied by respiratory symptoms severe enough to require medical leave for at least four weeks.”). Eight percent of the firefighters present at the time the buildings collapsed developed WTC cough. *Id.* at 807 fig.1. Of those present at the site between September 11 and September 13, over three percent developed WTC cough. *Id.*

⁵² *Id.* at 814. Other studies have similarly called for long-term observation of the respiratory health of exposed firefighters and have made varying predictions about the long-term effects of exposure. *See* Ctr. for Disease Control, Dep’t of Health & Human Servs., *Injuries and Illnesses Among New York City Fire Department Rescue Workers After Responding to the World Trade Center Attacks*, 51 MORBIDITY & MORTALITY WKLY. REP. (SPECIAL ISSUE) 5 (2002) (“[A]n estimated 500 FDNY firefighters (4% of the 11,336 total FDNY firefighter workforce) might eventually qualify for disability retirement because of persistent respiratory conditions.”).

⁵³ Prezant et al., *supra* note 45, at 814. Because any respiratory disease, including asthma, prevents firefighters from working at the scene of a fire, the respiratory health of the general population will be more susceptible to hazardous exposures. *Id.*

⁵⁴ N.Y. CITY DEP’T OF HEALTH & MENTAL HYGIENE & AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, WORLD TRADE CTR. ENVTL. ASSESSMENT WORKING GROUP, FINAL REP. OF THE PUB. HEALTH INVESTIGATION TO ASSESS POTENTIAL EXPOSURES TO AIRBORNE AND SETTLED SURFACE DUST IN RESIDENTIAL AREAS OF LOWER MANHATTAN 31 (2002) [hereinafter FINAL TECHNICAL REPORT] (noting the populations of people who are more sensitive to exposure to dangerous material).

irritation, eye irritation or infection, or cough.⁵⁵ Of residents of lower Manhattan with previously diagnosed asthma, twenty-seven percent identified worsening symptoms after 9/11.⁵⁶ In the *Final Report of the Public Health Investigation to Assess Potential Exposures to Airborne and Settled Surface Dust in Residential Areas of Lower Manhattan*, the NYCDOHMH and Agency for Toxic Substances and Disease Registry (ATSDR), a division of the Department of Health and Human Services, took samples from lower Manhattan between November 4, 2001 and December 11, 2001.⁵⁷ Basing their analysis on these samples, taken two months after the toxic event, the study was unable to rule out long-term negative health consequences of continued exposure to the area.⁵⁸ Without giving any consideration to the impact of direct plume inhalation, the study considered lung cancer,⁵⁹ mesothelioma,⁶⁰ and silicosis⁶¹ to be potential long-term hazards to individuals exposed to the site.

A study conducted by the CDC National Institute for Occupational Safety and Health (CDC NIOSH) found that twenty to thirty percent of surveyed workers at a high school and college near the WTC site reported symptoms of eye irritation, nose/throat irritation, cough, and shortness of breath four to six months after the attacks.⁶² Reporting on the study, Dr. Bruce Bernard of the CDC NIOSH noted the striking “similarity between the prevalence of symptoms and the types of symptoms”⁶³ at the different sites surveyed. The study called for “further assessment to describe the nature and extent of illness in specific working groups as well as individual medical follow-up . . . to address workers’ occupational health needs.”⁶⁴ Even the most optimistic of these studies called for continued attention to the health of

⁵⁵ Ctr. for Disease Control, Dep’t of Health & Human Servs., *Community Needs Assessment of Lower Manhattan Residents Following the World Trade Center Attacks—Manhattan, New York City, 2001*, 51 MORBIDITY & MORTALITY WKLY. REP. (SPECIAL ISSUE) 10-11 (2002).

⁵⁶ Ctr. for Disease Control, Dep’t of Health & Human Servs., *Self-Reported Increase in Asthma Severity After the September 11 Attacks on the World Trade Center—Manhattan, New York, 2001*, 51 MORBIDITY & MORTALITY WKLY. REP. 781 (2002).

⁵⁷ FINAL TECHNICAL REPORT, *supra* note 54, at 41.

⁵⁸ *Id.* at 42.

⁵⁹ *Id.* at 35-36, 39-40.

⁶⁰ *Id.* at 39-40. Mesothelioma is a lung disease caused by exposure to asbestos particles.

⁶¹ *Id.* at 34-35. Silicosis is lung damage caused by silica deposits in the lung.

⁶² CDC Telebriefing Transcript, *supra* note 50.

⁶³ *Id.*

⁶⁴ *Id.*

those exposed to the WTC site. These studies recognized that there is a class of September 11 victims who have or will have medical needs and that not only have they not been positively addressed by Congress, but Congress has made it more difficult for these victims to receive the compensation to which they are entitled.

II. LIMITED LIABILITY RESULTS IN LIMITED RECOVERY

Section 408 of Title IV states: “[L]iability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.”⁶⁵ This provision limits the amount available to all plaintiffs with claims arising out of September 11 to approximately six billion dollars, a figure dwarfed by estimates of eighty-five billion dollars in property damage alone.⁶⁶ Accordingly, it is unlikely that any of the six billion dollars will be available beyond the initial claims for property damage.⁶⁷ With this in mind, and in conjunction with the potential problem of exposure-only victims, it is reasonable to conclude that Congress has precluded individuals who will eventually manifest injuries caused by exposure to the 9/11 plume from ever recovering from the airlines.⁶⁸

Thus, the question arises: does Congress have the authority to limit the recovery of these potential plaintiffs? Statutory limitations of liability are permissible as economic regulations under the Commerce Clause when the regulation bears a “rational relationship” to a con-

⁶⁵ September 11th Victim Compensation Fund of 2001, Pub. L. 107-42, § 408(a), 115 Stat. 230, 240 (2001).

⁶⁶ Brill, *supra* note 7, at 29 (estimating one hundred billion dollars in claims against the approximately six billion dollars available under Title IV); Adam Miller, *Seething, Grieving on WTC* §§, N.Y. POST, Dec. 22, 2001, at 7 (quoting an attorney who predicted approximately eighty-five billion dollars in property damage claims and fifteen billion dollars in death claims against approximately six billion dollars in available insurance money).

⁶⁷ One attorney commented that the six billion dollars would “probably be enough to handle” the claims of the thirty-eight passengers killed on United Airlines Flight 93, which crashed in Pennsylvania. Miller, *supra* note 66, at 7. Although the survivors of those thirty-eight passengers are eligible for the Fund, this statement provides an estimate of potential jury awards.

⁶⁸ See Rabin, *supra* note 9, at 1858-59 (discussing the depletion of available insurance funds prior to the manifestation of injuries in exposure-only victims).

gressional concern.⁶⁹ Here, there is no rational relationship between exposure-only victims and the airlines' limited liability. Making the exposure-only victims bear the burden of protecting the financial interests of the airlines is an unconstitutional extension of congressional power. Under *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,⁷⁰ there is an insufficient relationship between the exposure-only victims and the airlines' limited liability to justify the legislation under the Commerce Clause.

A. Authority to Limit Liability

In *Duke Power*, the Supreme Court held that the liability limitations of the Price-Anderson Act⁷¹ did not render Price-Anderson an unconstitutional violation of due process or equal protection.⁷² The Price-Anderson Act provides indemnification to private parties participating in the construction or operation of nuclear power facilities and limits their liability on the condition that they obtain the maximum private insurance available and waive most affirmative defenses.⁷³ Should a nuclear disaster occur and a party's liability exceed the limitation, section 2210(e) provides that Congress will "take whatever action is de-

⁶⁹ *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 83-84 (1978). If the limiting clause is determined to be constitutional as an economic regulation, it raises the question of whether by precluding recovery for a valid cause of action, this clause constitutes a taking. The Ninth Circuit has held that "[t]here is no question that claims for compensation are property interests that cannot be taken for public use without compensation." *In re Aircrash in Bali, Indon.* on April 22, 1974, 684 F.2d 1301, 1312 (9th Cir. 1982). A resolution of this question is immaterial to the argument presented here except to fortify the notion that if Congress does not provide a solution to this problem, the litigation necessary to determine liability and damages will be further compounded by takings litigation against the government. Extended and painful litigation for 9/11 victims is precisely what Congress should work to avoid.

⁷⁰ 438 U.S. at 83-84.

⁷¹ 42 U.S.C. § 2210 (2000).

⁷² *See Duke Power Co.*, 438 U.S. at 84, 93-94 (holding that the Price-Anderson Act "passes constitutional muster" and finding no equal protection violation because the Act's liability limitations were "general[ly] rational[.]").

⁷³ 42 U.S.C. § 2210(a)-(e), (n) (2000). Specifically, the defenses that must be waived are:

- (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof.

Id. § 2210(n)(1); *see also Duke Power Co.*, 438 U.S. at 65 & n.5 (explaining the waiver provision of the Price-Anderson Act).

terminated to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.”⁷⁴ The Court put tremendous emphasis on this provision in its opinion.⁷⁵

The district court in *Duke Power* struck down the Price-Anderson Act on the grounds that “[t]he amount of recovery is not rationally related to the potential losses” and “[t]here is no *quid pro quo*” for the liability limitations.⁷⁶ The court also found an equal protection violation because the Act “placed the cost of [nuclear power] on an arbitrarily chosen segment of society, those injured by nuclear catastrophe.”⁷⁷ The Supreme Court reversed, holding that Price-Anderson provided for constitutional economic regulation.⁷⁸ The grounds for reversal in *Duke Power* do not exist in the case of 9/11 exposure-only victims.

1. Arbitrary and Irrational

There is a “presumption of constitutionality generally accorded economic regulations and [those regulations are] upheld absent proof of arbitrariness or irrationality on the part of Congress.”⁷⁹ However, under the standards of arbitrariness and irrationality set forth in *Duke Power*, the liability limitation of Title IV of the ATSSA is unconstitutional.

In *Duke Power*, the appellees challenged the amount at which liability was capped on the grounds that it was an arbitrary figure.⁸⁰ The Court upheld the limitation:

The reasonableness of the statute’s assumed ceiling on liability was predicated on two corollary considerations—expert appraisals of the exceedingly small risk of a nuclear incident involving claims in excess of

⁷⁴ 42 U.S.C. § 2210(e) (2).

⁷⁵ See *Duke Power Co.*, 438 U.S. at 65-67 (discussing the legislative history and intent of the limited liability provision).

⁷⁶ *Carolina Env’tl. Study Group, Inc. v. U.S. Atomic Energy Comm’n*, 431 F. Supp. 203, 222-23 (W.D.N.C. 1977), *rev’d sub nom. Duke Power Co. v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. 59 (1977).

⁷⁷ *Id.* at 225. The equal protection claim was not made to the Supreme Court in *Duke Power*. 438 U.S. at 93.

⁷⁸ See *Duke Power Co.*, 438 U.S. at 83 (describing the limited liability provision as “a classic example of economic regulation” and thus presumed constitutional unless proven to be arbitrary or irrational).

⁷⁹ *Id.*

⁸⁰ *Id.* at 84.

\$560 million, and the recognition that in the event of such an incident, Congress would likely enact extraordinary relief provisions to provide additional relief, in accord with prior practice.⁸¹

Neither of these predicates exists for Title IV.

In the case of 9/11, the relevant event has already occurred. A potential event is not a concern, and the estimates of actual damage far exceed the six billion dollar limitation of liability.⁸² The “additional relief” from Congress anticipated by the Court in *Duke Power* is in fact the legislation that limited the amount recoverable by victims. The Court in *Duke Power* pointed to the legislative history of the Price-Anderson Act, specifically a statement that “[t]he limitation of liability serves primarily as a device for facilitating further congressional review of such a situation, rather than as an ultimate bar to further relief of the public.”⁸³ The Price-Anderson limitation created a starting point; the Title IV limitation is the end point. Title IV is intended to constitute the entirety of congressional assistance to the victims of 9/11, but in the case of exposure-only victims, it is an arbitrary and irrational bar to recovery.

2. Quid Pro Quo

The Court in *Duke Power* declined to resolve the question of whether quid pro quo is required for the abrogation of the common-law right of recovery because the Price-Anderson Act provides a sufficient substitute for the right.⁸⁴ The Court discussed at length the adequacy of the substituted right,⁸⁵ raising the question: if the Court was not inclined to require quid pro quo, why did it provide such a thorough analysis of the requirement? One might infer that despite the

⁸¹ *Id.* at 85.

⁸² See *supra* note 66 (noting one commentator’s estimate that there are approximately one hundred billion dollars in potential Title IV claims).

⁸³ *Duke Power Co.*, 438 U.S. at 86 (quoting H.R. REP. NO. 89-883, at 7 (1965)).

⁸⁴ *Id.* at 87-88; see also *Fein v. Permanente Med. Group*, 474 U.S. 892, 894-95 (1985) (denial of certiorari) (White, J., dissenting) (“Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court.”).

⁸⁵ See *Duke Power Co.*, 438 U.S. at 87-93 (discussing the remedy mechanism under the Price-Anderson Act).

Court's declining to affirmatively resolve the question, this lengthy analysis indicates the Court's valuation of the requirement.⁸⁶

Should the Court decide *quid pro quo* is mandated by the Due Process Clause, the ATSSSA offers no substitute to individuals with latent injuries for terminating their right to recover. The legislative history of the Price-Anderson Act relied on by the Court predicted exactly the situation created by Title IV:

It should be emphasized, moreover, that it is collecting a judgment, not filing a lawsuit, that counts. Even if defenses are waived under state law, a defendant with theoretically "unlimited" liability may be unable to pay a judgment once obtained. When the defendant's assets are exhausted by earlier judgments, subsequent claimants would be left with uncollectable awards. The prospect of inequitable distribution would produce a race to the courthouse door in contrast to the present system of assured orderly and equitable compensation.⁸⁷

In *Duke Power*, the Court found that the \$560 million fund, supplemented by Congress' assurance that all additional damages would be compensated, was a "reasonable substitute" for the opportunity to recover damages through litigation.⁸⁸ The Court also endorsed an amended distribution scheme under the Price-Anderson Act that took into account the possibility of latent injuries.⁸⁹ The Court noted the value of an administrative fund in lieu of litigation for adjudicating the rights of individuals with latent injuries: "[t]he statutory scheme insures the equitable distribution of benefits to all who suffer injury—both immediate and latent."⁹⁰ The Court further observed that "under the common-law route, the proverbial race to the courthouse would . . . determine who had 'first crack' at the diminishing re-

⁸⁶ See John Vail, *A Common Lawyer Looks at State Constitutions*, 32 RUTGERS L.J. 977, 988 (2001) (describing *Duke Power* as "suggesting strongly that the *quid pro quo* doctrine was a federal constitutional mandate").

⁸⁷ See *Duke Power Co.*, 438 U.S. at 89-90 (quoting Possible Modification or Extension of the Price-Anderson Insurance and Indemnity Act of 1957: *Hearings on H.R. 8631 Before the Joint Comm. on Atomic Energy*, 94th Cong., 1st Sess., 69 (1975) (statement of William A. Anders, Chairman, U.S. Nuclear Regulatory Comm'n)).

⁸⁸ *Id.* at 91.

⁸⁹ According to the *Duke Power* Court:

The claim-administration procedures under the Act provide that in the event of an accident with potential liability exceeding the \$560 million ceiling, no more than 15% of the limit can be distributed pending court approval of a plan of distribution taking into account the need to assure compensation for "possible latent injury claims which may not be discovered until a later time."

Id. at 92.

⁹⁰ *Id.*

sources of the tortfeasor, and fairness could well be sacrificed in the process.”⁹¹ Although one hesitates to ask that the tort system be fair, it does not seem too much to ask that a fundamental unfairness be eradicated.

Title IV caps the liability of parties liable for injuries stemming from 9/11 but provides no substitute to a potentially huge class of exposure-only plaintiffs. Adequate compensation to members of the manifested-injury class is not a sufficient justification to deprive members of the exposure-only class of their rights.⁹² No matter how strong the justification of Congress in limiting the liability of the 9/11 parties, it does not satisfy even rational basis scrutiny with respect to the exposure-only plaintiffs. The limitation clause expressly violates the stated purpose of Title IV.⁹³ While economic legislation is permissible under rational scrutiny, the courts cannot accept that a narrow group of people—here the exposure-only victims—bears the burden of economically sustaining the airlines. If Congress wishes to provide economic support to the airlines, as it clearly does, it should do so by providing compensation to all victims who could sue the airlines, not just to those with the easiest cases.

III. A PROPOSAL

This Comment proposes a fund designed to track and compensate those exposure-only victims of September 11 who manifest disease connected to their exposure to the 9/11 plume. Called the Latent Injury Fund, this fund should be loosely based on the existing Victim Compensation Fund and can rely on the existing World Trade Center Health Registry to identify applicants.

A. *The Registry*

The fundamental mechanism necessary to track those individuals potentially suffering latent injuries from exposure to the 9/11 plume is already in place. On September 5, 2003, the NYCDHMH, ATSDR, and the CDC National Center for Environmental Health (CDC NCEH) announced the formation of the World Trade Center Health

⁹¹ *Id.*

⁹² See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (recognizing “the interest of exposure-only plaintiffs”).

⁹³ See *supra* text accompanying note 3 (citing the Act’s legislative intent to compensate any individual injured on September 11).

Registry (the “Registry”).⁹⁴ The Registry is a “comprehensive and confidential health survey of those most directly exposed to the events of 9/11” designed to track the physical and mental health of those surveyed.⁹⁵ The Registry tracks:

- People who were in a building, on the street, or on the subway south of Chambers Street on 9/11/01.
- People involved in rescue, recovery, or clean up, or other activities at the WTC site and/or WTC Recovery Operations on Staten Island any time between 9/11/01 and 6/30/02.
- Students and staff in schools (pre-K through 12) or day care centers south of Canal Street on 9/11/01.
- People who were living south of Canal Street on 9/11/01.⁹⁶

In establishing its purpose, the Registry’s materials note that “[t]he full impact of this unprecedented event on health may not be known for years. We do not know if there are any long-term health effects among those who lived or worked near the WTC site on 9/11.”⁹⁷ In turn, the Registry’s purpose is to “understand the possible health consequences related to 9/11.”⁹⁸

⁹⁴ Press Release, New York City Department of Health and Mental Hygiene, World Trade Center Health Registry Created to Track and Evaluate Any Long-Term Health Effects of 9/11 (Sept. 5, 2003), available at <http://www.nyc.gov/html/doh/html/public/press03/pr119-0905.html>. The Registry operates in cooperation with the U.S. Centers for Disease Control and Prevention (CDC), Columbia University, Fire Department of New York City, John Hopkins Bloomberg School of Public Health, Mount Sinai Medical Center, New York University, New York School System, New Jersey Department of Health, and Hunter College. World Trade Center Health Registry, *About the World Trade Center (WTC) Health Registry*, at <http://www.nyc.gov/html/doh/html/wtc/about.html> (last visited Feb. 15, 2004).

⁹⁵ WORLD TRADE CTR. HEALTH REGISTRY, N.Y. CITY DEP’T OF HEALTH & MENTAL HYGIENE, HOW TO ENROLL IN THE WORLD TRADE CENTER HEALTH REGISTRY (2003) [hereinafter HOW TO ENROLL], available at <http://www.nyc.gov/html/doh/html/wtc/Brochure.pdf>.

⁹⁶ *Id.*

⁹⁷ *Id.* In a direct appeal to the target population, the Registry expresses the same sentiment:

Even if you have been healthy since 9/11, it is important for you to sign up. In order to have a full and accurate picture of any long-term health effects related to 9/11, both people who have been healthy and people who have been ill are strongly encouraged to enroll in the WTC Health Registry.

HOW TO ENROLL, *supra* note 95, at 2.

⁹⁸ *Id.* at 1.

Registry organizers believe that registration of even 20,000 of the 300,000 eligible participants would provide a sufficient base to conduct valuable research.⁹⁹ As of September 30, 2003, only twenty-five days after opening registration, 12,902 people had already pre-enrolled in the Registry and the Registry had obtained contact information for 27,140 additional targeted individuals.¹⁰⁰ As of September 10, 2004, 61,087 people had been registered and interviewed by the Registry.¹⁰¹ The Registry was advertised extensively in the New York City subway system and PATH¹⁰² and publicized by the news media¹⁰³ indicating there will be sufficient participation to ensure accurate results. Should these results indicate long-term health consequences to the exposure-only victims, there must be an assistance scheme already in place. Although in the Final Report,¹⁰⁴ the Special Master did not recommend prospective legislation establishing a victim compensation fund for future catastrophic events,¹⁰⁵ these victims can be distinguished. They are not potential victims. They are identifiable individuals with the potential to manifest disease. Both the events causing the harm and their resulting injuries have already occurred. In fact, a small group of victims filed claims with the Fund but were rejected be-

⁹⁹ Frieden, *supra* note 10, at 17-18, 23.

¹⁰⁰ N.Y. City Dep't of Health & Mental Hygiene, *Initial Information from the World Trade Center Health Registry—Data Through September 30, 2003*, DATA SNAPSHOT: UNDERSTANDING THE HEALTH IMPACT OF 9/11, at 1 (Oct. 2003), available at <http://www.nyc.gov/html/doh/pdf/wtc/wtc-report200310.pdf>.

¹⁰¹ N.Y. City Dep't of Health & Mental Hygiene, *The WTCHR Quarterly Enrollment Update Data Through Friday, September 10, 2004*, DATA SNAPSHOT: UNDERSTANDING THE HEALTH IMPACT OF 9/11, at 1, Nov. 2004, available at <http://www.nyc.gov/html/doh/pdf/wtc/wtc-report2004-1112.pdf>.

¹⁰² Press Release, New York City Department of Health and Mental Hygiene, City Health Department Launches Subway Campaign Promoting Enrollment in the World Trade Center Health Registry (Oct. 8, 2003), available at <http://www.nyc.gov/html/doh/html/public/press03/pr136-1008.html>; see also World Trade Ctr. Health Registry, *Press Room*, at <http://www.nyc.gov/html/doh/html/wtc/ads.html> (advertising the Registry).

¹⁰³ See Laurie Garrett, *Huge Study of Health Impact; 20-Year Survey to Track Thousands*, NEWSDAY, Sept. 6, 2003, at A2 (announcing the launch of the Registry in a Long Island daily newspaper); Kirk Johnson, *Inquiry Opens Into Effects of 9/11 Dust*, N.Y. TIMES, Sept. 6, 2003, at B1 (announcing the launch of the Registry in a New York City daily newspaper); Rock Positano, *9-11 Registry Tracks Health*, N.Y. DAILY NEWS, Dec. 7, 2003, at 34 (same); Sam Smith, *Feds Launch Long-Term Studies*, N.Y. POST, Aug. 10, 2003, at 17 (same).

¹⁰⁴ I KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (2004), available at http://www.usdoj.gov/final_report.pdf.

¹⁰⁵ *Id.*, at 83-84.

cause they did not meet the strict eligibility requirements.¹⁰⁶ If New York City and the federal government feel a need to track those exposed to the 9/11 plume,¹⁰⁷ it seems intuitive that there should be a solution in place if members of the observed population develop related illnesses.¹⁰⁸

B. *A New Fund*

Mass toxic tort litigation is a nightmare. With the possible exception of the Agent Orange litigation,¹⁰⁹ events leading to toxic exposure have never been as traumatic as the events of 9/11. Although not a singular driving force, protecting 9/11 victims from being forced to undertake litigation was certainly an objective of the Victim Compensation Fund.¹¹⁰ One need only glance at the litigation surrounding Agent Orange exposure to get a measure of the pain caused by extended litigation,¹¹¹ or at asbestos litigation to see the damage and ex-

¹⁰⁶ *Many Sept. 11 Injury Claims Rejected*, N.Y. NEWSDAY, May 1, 2004.

¹⁰⁷ The first two years of the Registry are funded at twenty million dollars through the Federal Emergency Management Agency (FEMA). Frieden, *supra* note 10, at 16. Additionally, a five year study of seven thousand Ground Zero workers being conducted by Mount Sinai hospital has been federally funded at ninety million dollars. Paul H.B. Shin, *Ground Zero Workers Still Suffering*, N.Y. DAILY NEWS, Oct. 29, 2003, at 8.

¹⁰⁸ See Garrett, *supra* note 103, at A2 (citing a New York Environmental Law and Justice Project attorney describing the Registry as “too little, too late”); Maggie Haberman, *Unions Rip WTC Health Registry*, N.Y. DAILY NEWS, Oct. 27, 2003, at 28 (reporting on unions dismissing the Registry because it does not provide any referrals for or increased access to health care).

¹⁰⁹ See *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145, 148 (2d Cir. 1987). The court stated:

The correspondence to the court . . . amply demonstrate[s] that this litigation is viewed by many as something more than an action for damages for personal injuries. To some, it is a method of public protest at perceived national indifference to Vietnam veterans; to others, an organizational rallying point for those veterans. Thus, although the precise legal claim is one for damages for personal injuries, the district court accurately noted that the plaintiffs were also seeking ‘larger remedies and emotional compensation’ that were beyond its power to award.

Id. (internally quoting the district court’s opinion, 597 F. Supp. 740, 747 (E.D.N.Y. 1984)).

¹¹⁰ See *supra* text accompanying note 16.

¹¹¹ See *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 747 (E.D.N.Y. 1984) *aff’d*, 818 F.2d 145 (2d Cir. 1987) (noting that the settlement “gives the class more than it would likely achieve by attempting to litigate to the death”). The district court also commented on its inability to heal all the plaintiffs’ pain:

The court has been deeply moved by its contact with members of the plaintiffs’ class from all over the nation and abroad. Many do deserve better of their country. Had this court the power to rectify past wrongs—actual or per-

pense caused by protracted litigation.¹¹² The Special Master said: “[Title IV] is written in such a way that if [claimants] decide to litigate, the likelihood of success, the likelihood of receiving a substantial award in court, is substantially diminished.”¹¹³ Although the Special Master justified the limited nature of the Fund by characterizing the Fund’s true purpose as a cathartic act necessary to the recovery of the Nation, not the victims,¹¹⁴ this characterization is incongruous with the stated purpose of the Fund.¹¹⁵ Additionally, it was the Special Master who acted as the town crier with respect to the horrors of the justice system that awaited potential litigants. With this background in mind, it seems irresponsible to force those who eventually manifest diseases caused by WTC exposure to resort to litigation with little hope of recovering compensation for their injuries.¹¹⁶ Once the original Fund has soothed the pain of the Nation, are we to leave all other victims to suffer in silence?

ceived—it would do so. But no single litigation can lift all of plaintiffs’ burdens. The legislative and executive branches of government—state and federal—and the Veterans Administration, as well as our many private and quasi-public medical and social agencies, are far more capable than this court of shaping the larger remedies and emotional compensation plaintiffs seek.

Id.

¹¹² Edwin Chen, *Bush Backs Asbestos Tort Fund*, L.A. TIMES, Jan. 8, 2005, at A19 (“President Bush . . . threw his weight behind a congressional effort to create an industry-financed trust fund to compensate tens of thousands of victims of asbestos-caused diseases, an effort to resolve the longest-running mass tort litigation in U.S. history.”). Professor Rabin has similarly noted this effect of asbestos litigation:

[C]onsider that the continuing deluge of asbestos litigation has bankrupted an industry . . . disrupted the judicial system far beyond any other mass tort episode in history, and created dramatic disparities in reparation among injury victims—all with no end in sight and over a twenty-five-year period—with no response from Congress.

Rabin, *supra* note 9, at 1831.

¹¹³ Joan Bernott Maginnis, *The 9/11 Victim Compensation Fund: Overview and Comment*, at <http://www.fed-soc.org/Publications/Terrorism/VictimFund.PDF>; *see also* Rabin, *supra* note 9, at 1838 (“Even though tort remains an option, the Fund can implicitly be viewed as a statement of the perceived inadequacies of the tort remedy in meeting the call for an immediate response to the needs of the September 11 victims.”).

¹¹⁴ FEINBERG ET AL., *supra* note 104, at 80 (“It is not the victims that justify the Fund, but rather the response of the entire nation the tragedy.”).

¹¹⁵ *See supra* Part I.A.

¹¹⁶ *See supra* note 67 (discussing the disparity between the anticipated claims and available insurance money); Rabin, *supra* note 9, at 1859-65 (discussing the challenges of recovering in tort facing exposure-only victims); Kenneth G. Kubes, “*United We Stand*”: *Managing Choice-of-Law Problems in September-11-Based Toxic Torts Through Federal Substantive Mass-Tort Law*, 77 IND. L.J. 825 (2002) (analyzing the choice of law problem among the potential latent injuries from 9/11).

In structuring a fund for latent injuries, the obvious models are the existing Victim Compensation Fund and the Agent Orange Settlement Fund.¹¹⁷ Also designed by Special Master Feinberg,¹¹⁸ the Agent Orange Settlement Fund is an appropriate model of an administrative compensation scheme for latent injuries. Drawing from the Agent Orange Settlement Fund and the Victim Compensation Fund, one might loosely sketch a fund that will meet the changing needs of the exposure-only victims of 9/11.

1. Financing, Administration, and Claims Processing

Like the Victim Compensation Fund, the Latent Injury Fund should be funded without limitation by Congress,¹¹⁹ and it should not have a scheduled termination date. Because the Agent Orange Fund was a finite program, individuals manifesting injuries after the fund closed were precluded from recovering from the fund and filed suit against the original tortfeasors.¹²⁰ That litigation continues to be unresolved.¹²¹ The Latent Injury Fund must be inclusive of all who are eligible and must be structured to maximize its accessibility to eligible individuals.

Other than the medical research conducted independent of the fund, the administration of the Latent Injury Fund should be consolidated within the Department of Justice. Like the Victim Compensation Fund, the decisions of the Latent Injury Fund should not be subject to judicial oversight and parties should be required to relinquish their rights to litigate prior to opting into the fund. Without this *quid pro quo*, Congress has no incentive to implement a new fund.

¹¹⁷ See generally *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396 (E.D.N.Y. 1985), *aff'd in part*, 818 F.2d 179 (2d Cir. 1987).

¹¹⁸ *Id.* at 1400.

¹¹⁹ See September 11th Victim Compensation Fund of 2001, Pub. L. 107-42, § 404(b), 115 Stat. 230, 241 (2001) ("There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Special Master in carrying out this title."); *Id.* § 406(b), 115 Stat. 230, 240 ("This title constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title.").

¹²⁰ *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part, vacated in part*, 539 U.S. 111 (2003).

¹²¹ See *Stephenson v. Dow Chem. Co.*, 346 F.3d 19 (2d Cir. 2003) (vacating and remanding the case to the district court).

2. Eligibility

a. *Pre-Registration for the Latent Injury Fund*

The question of eligibility is the most difficult one because of the opportunity for fraud. However, the risk of fraud is an inadequate reason to not create an assistance program. Additionally, fraudulent applications to the Victim Compensation Fund were negligible.¹²² The sooner the Latent Injury Fund is implemented, the sooner work can begin to identify fraudulent cases. Registration for the WTC Health Registry should be the first step in claiming eligibility. This has two purposes: first, maximizing registration will expand the ability of the medical community to collect information about the effects of exposure to the 9/11 plume; second, registration has no immediate benefit. Although there will undoubtedly be forward-looking fraud, no benefits accrue at the time of registration and therefore there is less incentive to register fraudulently. The Latent Injury Fund should rely on the same fraud prevention guidelines as the Victim Compensation Fund.¹²³

To avoid the *Amchem* problems of notice and concerns about imposing a requirement of action on the part of otherwise healthy, exposure-only injuries,¹²⁴ individuals should be permitted to opt into the Latent Injury Fund despite not pre-registering. However, there should be an increased level of scrutiny for proof of exposure for those that did not pre-register for the fund via the Registry.

b. *Eligibility for Compensation from the Latent Injury Fund*

To borrow from the eligibility requirements for the Agent Orange Fund, to be eligible for the Latent Injury Fund, one should be required to meet the following requirements: (1) the claimant was exposed to toxins on or near the WTC site on 9/11,¹²⁵ (2) the claimant

¹²² FEINBERG ET AL., *supra* note 104, at 69 (“By any measure, the Fund proved remarkably free from fraud and other criminal activity.”).

¹²³ See September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.71 (2004) (establishing oversight procedures for fraud detection, prevention, and quality control).

¹²⁴ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) (“[T]hose without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.”).

¹²⁵ The period of time after 9/11 in which harmful exposure may have occurred will be determined pursuant to the findings of the WTC Registry.

suffers from a long-term total disability or has died,¹²⁶ and (3) the death or disability arose principally from causes attributable to 9/11 exposure.¹²⁷ Like the Victim Compensation Fund, the Latent Injury Fund should not compensate claims for emotional distress without injury. Comprehensive medical studies through the Registry will need to provide guidelines about what sort of injuries are likely attributable to the exposure. These guidelines will require some initial flexibility regarding eligible injuries. Like Agent Orange, exposure consultants will need an objective methodology for evaluating the exposure of claimants.¹²⁸

3. Award Determination

I will not comment on whether the much-debated features of the Victim Compensation Fund should be replicated in any proposed fund for latent injuries. The value of these features (collateral off-sets, uniform awards for emotional harm, flexible awards for economic harm) has been much discussed in the legal community¹²⁹ and public forums.¹³⁰ Although the individually tailored awards “mirror[ed] the civil justice system,”¹³¹ the Special Master’s Final Report seems to advocate a uniform award for all claimants.¹³² While the administrative

¹²⁶ Like the Agent Orange Fund, the Latent Fund should appropriate the Social Security Act’s definitions of disability and death. See Social Security Act, 42 U.S.C. § 423(d)(1)(A) (2000) (defining disability).

¹²⁷ The third requirement for the Agent Orange Fund was that “the death or disability arose principally from causes other than trauma, accident, or self-inflicted injury.” Harvey P. Berman, *The Agent Orange Veteran Payment Program*, LAW & CONTEMP. PROBS., Autumn 1990, at 49, 54 (1990). The Latent Fund should make payments for death or disability caused by diseases determined to be related to 9/11 exposure by the studies conducted with the Registry.

¹²⁸ *Id.* at 54.

¹²⁹ See generally Richard P. Campbell, *Implementing the 9/11 Victim Compensation Fund: Two Steps Forward, One Step Back*, 69 DEF. COUNS. J. 409 (2002); Wendy Floering, *The September 11th Victim Compensation Fund of 2001: A Better Alternative to Litigation?*, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 195 (2002); Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 153 (2002); Rabin, *supra* note 9; Georgene Vairo, *Remedies for Victims of Terrorism*, 35 LOY. L.A. L. REV. 1265 (2002).

¹³⁰ Belkin, *supra* note 12, at 92 (discussing the role of fairness in setting awards from the Victim Compensation Fund); David W. Chen, *Worst-Hit Firm Faults Fairness of Sept. 11 Aid*, N.Y. TIMES, Sept. 17, 2002, at A1 (reporting on Cantor Fitzgerald’s criticisms of the Fund).

¹³¹ FEINBERG ET AL., *supra* note 104, at 80.

¹³² *Id.* at 82 (“A better approach might be to provide the same amount for all eligible claimants.”).

ease of a uniform award may trump all other considerations, it is important to remember that granting a uniform award does not track the civil justice system, which is an important aspect of the Fund. Although a catastrophe of this magnitude heavily burdens our litigation system, the parallels between the Fund and a civil suit recognize the benefits of the justice system. As noted in the Final Report, a flat award may not be sufficient consideration to force applicants to relinquish those benefits.¹³³

CONCLUSION

The American judicial system is ill-equipped to resolve mass toxic torts. And the toxic plume released by the collapse of the World Trade Center created a situation as unmanageable as any casebook mass tort, but with a twist. The government simultaneously excluded the potential 300,000 exposure-only victims from the Victim Compensation Fund and precluded those same victims from ever recovering through the tort system.

The limited liability provision of the ATSSSA is unconstitutional. Congress cannot protect the airline industry at the expense of the industry's victims. If Congress wishes to maintain the liability cap in Title IV, it must provide an alternative compensation scheme to those injured on 9/11. Whether the compensation scheme bears any resemblance to that set out here is of no consequence. We must protect these victims at any cost.

¹³³ See *id.* at 83 (arguing that the "flat award" approach "has much to recommend it").