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Terrorism and Mass Toxic Torts: An Examination of the James Zadroga 9/11 Health and Compensation Act

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**TERRORISM AND MASS TOXIC TORTS: AN
EXAMINATION OF THE JAMES ZADROGA 9/11 HEALTH
AND COMPENSATION ACT**

*Julie Isaacson**

INTRODUCTION

The morning of Tuesday, September 11, 2001 defined our nation and altered our collective perspective regarding how our country protects its citizens. In the immediate wake of the most massive single-event disaster in our nation's history, Congress passed the Air Transportation Safety and Stabilization Act¹ which enacted the September 11th Victim Compensation Fund (9/11 Fund).² This program was designed to be a no-fault administrative compensation scheme serving as an alternative to tort litigation.³ Victims who were

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1. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 (2012)).

2. See *Virgilio v. City of New York*, 407 F.3d 105, 109 (2d Cir. 2005), for an explanation of the purpose of the 9/11 Fund.

3. *Can. Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 55 (2d Cir. 2003); see generally James R. Copland, *Tragic*

physically injured and families of victims whose lives were taken as a result of the terrorist attacks on the World Trade Center, the Pentagon, and in Shanksville, Pennsylvania became eligible to receive tax-free awards as compensation for their economic and noneconomic losses.⁴ Those who opted to receive compensation through this means waived their right to sue for damages for injury or death as a result of the terrorist attacks.⁵

This Note concerns the issue of compensation funds and the adequacy of legal responses to terrorism and other similar national emergencies. It focuses primarily on the reopened 9/11 Fund mandated by the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act).⁶ While the original 9/11 Fund only served the victims (or their representatives) who were either killed or injured as a *direct* result of the terrorist attacks on September 11, 2001,⁷ the Zadroga Act renews and expands the 9/11 Fund to compensate victims for injury or death related to the debris removal process conducted in the aftermath of the terrorist attacks and exposure to the toxic air in lower Manhattan and the other attack sites during that time.⁸

The purpose of this Note is to inspire a healthy debate over the strengths and weaknesses of this form of public compensation as a solution to offsetting suffering from life's greatest tragedies. Because this topic cannot be comprehensively studied within the vacuum of its pertinent but limiting legal dimensions, the social, political,

Solutions: The 9/11 Victim Compensation Fund, Historical Antecedents, and Lessons for Tort Reform 2–10 (Manhattan Institute for Pol'y Research, Working Paper, Jan. 13, 2005), *available at* http://www.manhattan-institute.org/pdf/clpwp_01-13-05.pdf (examining the success of the 9/11 Fund as a consideration in the tort reform dialogue).

4. SHEILA BIRNBAUM, FIRST ANNUAL STATUS REPORT: SEPTEMBER 11TH VICTIM COMPENSATION FUND 1 (2012), <http://www.vcf.gov/pdf/VCFStatusReportOct2012.pdf>.

5. *Id.*; *Frequently Asked Questions*, SEPTEMBER 11TH VICTIM COMPENSATION FUND 1, <http://www.vcf.gov/pdf/VCFFAQsFINAL20131210.pdf> (last updated Dec. 10, 2013).

6. James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 111-347, 124 Stat. 3623 (2011) (codified as amended in scattered sections of 26, 42, and 49 U.S.C. (2012)).

7. BIRNBAUM, *supra* note 4.

8. *Id.*

cultural, and economic implications of victim compensation funds will also be examined. Part I will examine how the circumstances surrounding the renewed 9/11 Fund differed from those pertaining to the initiation of its original version. Brief backgrounds on the two versions of the 9/11 Fund will first be provided, followed by an exploration of the causal issues that complicate recovery in toxic exposure cases. As a corollary, Part II will attempt to analyze the effectiveness of the 9/11 Fund as a no-fault administrative compensation scheme substitution for tort litigation generally, and more specifically, for toxic tort litigation.⁹ This analysis will begin to shed light on the reasons why compensation funds are more beneficial in response to certain events than to others.

Part III of this Note will address the inadequacies of this type of compensation fund for the conditions that designed the Zadroga Act. A proposal will ultimately be presented in Part IV for a revised no-fault compensation system that confronts these shortfalls so as to prepare for mass calamities that may potentially befall our nation in the decades to come. What will hopefully follow is future discourse regarding this very relevant and significant topic.

I. BACKGROUND ON THE 9/11 FUND

A. *The 9/11 Fund*

In its original form, the 9/11 Fund served as a compensation scheme intended to replace the need for litigation. A unique trial in American history, it provided extremely substantial awards that were funded by tax-free public money to a relatively narrow group of

9. *See, e.g., Ackerman v. Price Waterhouse*, 683 N.Y.S.2d 179 (App. Div. 1998). The court in *Ackerman* establishes the requirements for a class action in New York when:

- (1) [T]he class is so numerous that joinder of all members is impracticable;
- (2) common questions of law or fact predominate over any questions affecting only individual members;
- (3) the claims of the representative parties are typical of the class as a whole;
- (4) the representative parties will fairly and adequately protect the interests of the class; and
- (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy

Id. at 188.

individuals.¹⁰ While the original fund was active, ninety-seven percent of eligible claimants voluntarily participated in it.¹¹ The average award distributed to families of a deceased victim was more than \$2 million, and the average tax-free award for victims with physical injuries, such as third degree burns, was nearly \$400 million.¹² The total amount of compensation distributed by Special Master of the Fund Kenneth Feinberg during the duration of the Fund was over \$7 billion for 5,560 claims¹³ compensating 5,553 families and victims.¹⁴ It was ultimately closed in 2004 once the available money had been fully distributed.¹⁵

Due to the unprecedented nature of the terrorist attacks on September 11th, the purpose and scope of the 9/11 Fund was unparalleled¹⁶ with no corresponding blueprint in existence with which to guide Congress during the creation process.¹⁷ Because vengeance could not be sought on the nineteen terrorists who took their own lives during their savage assault, those who died on September 11th, as well as the nation as a whole, needed some other method to heal the deep wound.¹⁸

10. Aaron Smith, *The 9/11 Fund: Putting a Price on Life*, CNN MONEY (Sept. 7, 2011, 9:38 AM), http://money.cnn.com/2011/09/06/news/economy/911_compensation_fund/index.htm.

11. KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at 1, 80 (2004), http://www.justice.gov/final_report.pdf.

12. *Id.* at 1.

13. *In re* September 11 Litig., 600 F. Supp. 2d 549, 551 (S.D.N.Y. 2009).

14. Kenneth R. Feinberg, *What Have We Learned About Compensating Victims of Terrorism?*, RAND REV., Summer 2004, at 33, 33, available at <http://www.rand.org/publications/randreview/issues/summer2004/33.html>.

15. BIRNBAUM, *supra* note 4, at 1.

16. Robert Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 145 (2005).

17. Mike Steenson & Joseph Michael Sayler, *The Legacy of the 9/11 Fund and the Minnesota I-35w Bridge-Collapse Fund: Creating A Template for Compensating Victims of Future Mass-Tort Catastrophes*, 35 WM. MITCHELL L. REV. 524, 531 (2009).

18. See Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 357 (2003) (arguing that because the true

In addition to providing a compensation mechanism for individuals who were killed or injured on September 11th, Congress intended the original 9/11 compensation fund to limit the liability of major, deep-pocket corporations, such as the airlines, in the immediate aftermath of the terrorist attacks.¹⁹ This original legislation, however, did not contemplate that thousands of individuals would contract incapacitating illnesses from exposure to the dust and debris that polluted the air at the crash sites for some time as a result of the tragic events.²⁰

B. The James Zadroga 9/11 Health and Compensation Act of 2010

A mixture of noxious toxins was released in lower Manhattan after the attack on and subsequent collapse of the Twin Towers and other surrounding buildings on September 11, 2001. The Twin Towers, all of its contents, and two Boeing 767-200 aircrafts²¹ were incinerated and aerosolized into one toxic brew.²² Immediately after the collapse of the towers and during the subsequent years, first responders, volunteers, and nearby residents were exposed to this toxic cloud that was comprised of, among other things, asbestos fibers, mercury,

perpetrators could not be held responsible for the attacks, the government established a fund).

19. Randall S. Abate, *Corporate Responsibility and Climate Justice: A Proposal for a Polluter-Financed Relocation Fund for Federally Recognized Tribes Imperiled by Climate Change*, 25 FORDHAM ENVTL. L. REV. 10, 34 (2013). The principle theory of liability is founded on negligence, which indicates a defendant has either acted or has failed to act in a way such that the defendant's action or inaction is below the necessary standard for someone participating in the applicable activity. RESTATEMENT (SECOND) OF TORTS § 282 (1965). Because the 9/11 Fund awards provide compensation to eligible claimants on a no-fault basis, "the Special Master shall not consider negligence or any other theory of liability . . . [and he] may not include amounts for punitive damages" Air Transportation Safety and System Stabilization Act § 405(b)(2), (5), 49 U.S.C. § 40101.

20. Jean Macchiaroli Eggen, *Toxic Torts at Ground Zero*, 39 ARIZ. ST. L.J. 383, 384 (2007).

21. John Howard, *The World Trade Center Disaster: Health Effects and Compensation Mechanisms*, 16 J.L. & POL'Y 69, 69 (2007).

22. *Id.* at 71–72.

diesel particles, and volatile and semi-volatile organic compounds.²³ Due to the enormity of such a disaster and the pervasiveness of the toxic cloud, the level of exposure to these airborne toxins is varied and largely unknown.²⁴

For months following the terrorist attacks, a massive cleanup and reconstruction effort took place at Ground Zero, the site of New York City's worst environmental disaster in history.²⁵ Thousands of individuals contributed to the effort while inhaling the harmful dust, smoke, toxic chemicals, and particle remnants of the World Trade Center Towers. Other individuals who either lived or worked in the area were similarly exposed.

In order to address potential lawsuits resulting from this exposure, Congress approved the Zadroga Act on December 22, 2010 and signed it into law on January 2, 2011.²⁶ Named after New York Police Department (NYPD) Detective James Zadroga who worked at Ground Zero and died as a result of inhaling the dust at the scene, the Zadroga Act reactivated the 9/11 Fund²⁷ and expanded the definition of "eligible individuals" who could seek damages.²⁸ Within its compensation scheme, the Zadroga Act includes police officers, firefighters, EMS workers, construction workers, cleanup workers, utility workers, volunteer workers, original survivors, downtown residents, and other individuals who suffered physical harm during or as a result of debris removal and related undertakings at the September 11th crash sites, as long as these victims were present at the sites during the time of the crashes or during cleanup from September 11, 2001 to May 30, 2002.²⁹ In addition to proving that

23. *Lombardi v. Whitman*, 485 F.3d 73, 75 (2d Cir. 2007); *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 526 (S.D.N.Y. 2006), *aff'd in part, appeal dismissed in part*, 521 F.3d 169 (2d Cir. 2008).

24. *See infra* Part III.

25. David M. Newman, *9/11 Environmental Health—Disaster and Response*, 18 *NEW SOLUTIONS* 3, 4 (2008).

26. James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. No. 11-347, 124 Stat. 3623 (codified as amended in scattered sections of 26, 42, and 49 U.S.C. (2012)).

27. *In re World Trade Ctr. Disaster Site Litig.*, 879 F. Supp. 2d 396, 399–400 (S.D.N.Y. 2012).

28. BIRNBAUM, *supra* note 4, at 1.

29. *Frequently Asked Questions*, *supra* note 5, at 4; *see* Kimberly Gordy, *The 9/11 Cancer Conundrum: The Law, Policy, & Politics of the Zadroga Act*, 37

they were present and participated in the post-9/11 cleanup efforts, claimants must also submit a specific medical diagnosis reporting their injury or illness.³⁰

The structure of the Act consists of two parts: (1) The World Trade Center Health Program, which serves to monitor and provide treatment for responders and others affected by the air pollution at Ground Zero³¹—as many as 110,000 responders and survivors may be eligible for this program³²—and (2) the victim compensation fund, which provides funding for wage and economic losses that stem from Ground Zero-related illnesses resulting from exposure to the toxic air and debris.³³ In May 2011, U.S. Attorney General Eric Holder appointed Sheila Birnbaum as the new Special Master of the Fund.³⁴ Her responsibilities include distributing \$875 million of the \$4.3 billion fund within the first five years of the law's existence, deciding the award to each respondent, and writing regulations related to the compensation fund.³⁵

Similar to its first incarnation, the victim compensation portion reopened under the Zadroga Act continues to serve as a substitute for potential lawsuits against entities ranging from the U.S. government and World Trade Center property owners to the Port Authority of New York, New Jersey, and Massachusetts.³⁶ It specifically acts as an alternative to potential class action toxic tort litigation under the premise that it is the more efficient and effective solution for

SETON HALL LEGIS. J. 33 (2012) (providing background on the Zadroga Act); Jamie Guzzardo, *10,000 Claims Over 9/11 Illness, Injuries Settled*, CNN (Mar. 11, 2010, 10:28 PM), <http://www.cnn.com/2010/US/03/11/world.trade.center.suit>.

30. Gordy, *supra* note 29, at 65.

31. James Zadroga 9/11 Health and Compensation Act of 2010 §§ 101, 42 U.S.C. 300mm to 300mm-61.

32. *James L. Zadroga 9/11 Health and Compensation Act*, CITY OF NEW YORK, http://home.nyc.gov/html/doh/wtc/html/health_compensation/health_compensation_act.shtml (last visited Jan. 19, 2014).

33. James Zadroga 9/11 Health and Compensation Act of 2010 § 201, 49 U.S.C. § 40101 note (2011).

34. *General Program Information*, SEPTEMBER 11TH VICTIM COMPENSATION FUND, <http://www.vcf.gov/genProgramInfo.html> (last visited Jan. 19, 2014).

35. *Frequently Asked Questions*, *supra* note 5, at 63; Sheryl Gay Stolberg, *Obama Signs Bill to Help 9/11 Workers*, N.Y. TIMES, Jan. 3, 2011, at A17.

36. *Virgilio v. City of New York*, 407 F.3d 105, 113–14 (2d Cir. 2005).

compensating victims.³⁷ The next section will begin to explain how compensation funds align with the goals of corrective justice and address the obstacles that hinder success for plaintiffs through traditional tort litigation.

II. WHERE TOXIC TORT LITIGATION FALLS SHORT

A. *Governmental Immunity*

A compensation fund is in part designed to relieve the plaintiffs—the victims and their families—of navigating through and possibly failing under the traditional legal system.³⁸ This alternative method for damages recovery has been particularly beneficial to victims of the September 11th terrorist attacks since broad tort liability would have most likely been an unavailable claim for them.³⁹ In general, victims of these types of national calamities traditionally have had no right to recover damages or receive compensation from the government even if the government is at fault.⁴⁰ Public sites, such as bridges, airports, and subway stations, fall under the purview of public safety agencies.⁴¹ Claims for injuries resulting from a security failure at one of these sites would most likely be unsuccessful under

37. Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 178 (2012).

38. See *infra* Part III.

39. Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 779–82 (2003).

40. See *Steitz v. City of Beacon*, 64 N.E.2d 704, 706 (N.Y. 1945) (“An intention to impose upon the city the crushing burden of such an obligation should not be imputed to the Legislature in the absence of language clearly designed to have that effect.”); see generally *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968); *Miller v. State*, 467 N.E.2d 493, 495 (N.Y. 1984) (“Public entities remain immune from negligence claims arising out of the performance of their governmental functions including police protection, unless the injured person establishes a special relationship with the entity, which would create a specific duty to protect that individual, and the individual relied on the performance of that duty.”); *Bass v. City of New York*, 330 N.Y.S.2d 569, 579 (App. Div. 1972) *aff'd*, 300 N.E.2d 154 (N.Y. 1973).

41. Rabin, *supra* note 39, at 777.

tort law because it is not within the realm of judicial review.⁴² The same is true for injuries resulting from an intelligence failure by federal agencies,⁴³ as highly discretionary functions conducted by public agencies remain shielded from liability under the common law principle of governmental immunity.⁴⁴ Even further, any possible negligence on the part of the federal government for failing to prevent the terrorist attacks is arguably offset by the complex nature of the duty of prioritizing the threats that all security agencies constantly receive.⁴⁵

The Federal Tort Claims Act (FTCA) passed in 1946 reduced the government's protection of general immunity from tort actions by granting jurisdiction to federal district courts in civil actions "against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" committed by employees of the government in situations where the United States would be held liable under local law if it were a private individual.⁴⁶ However, the discretionary function provides an exception to this liability.⁴⁷ Soon

42. See, e.g., *Doe v. City of New York*, 890 N.Y.S.2d 548 (App. Div. 2009); Rabin, *supra* note 39, at 778.

43. See, e.g., David Johnston, *Threats and Responses: The Inquiry; Report of 9/11 Panel Cites Lapses by C.I.A. and F.B.I.*, N.Y. TIMES, July 25, 2003, at A1.

44. 28 U.S.C.A. § 2680(a) provides that the FTCA is inapplicable "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."; see *Berkovitz v. United States*, 486 U.S. 531, 535–40 (1988) (providing that the FTCA incorporates an exception for discretionary functions to the waiver of U.S. governmental immunity for acts that are deemed negligent. This protects governmental actions and decisions that are based on a component of judgment and are concerned with public policy); see also, e.g., *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987) (holding according to precedent that a "special relationship" must exist in order to establish a duty of police protection and outlining a series of factors to measure whether such a relationship is in fact present).

45. Eric Lichtblau, *9/11 Report Cites Many Warnings About Hijackings*, N.Y. TIMES, Feb. 10, 2005, available at <http://www.nytimes.com/2005/02/10/politics/10terror.html>.

46. 28 U.S.C.A. § 1346(b)(1) (West 2013); 14 N.Y. PRAC., NEW YORK LAW OF TORTS § 9:21 (West 2013).

47. See *United States v. Kubrick*, 444 U.S. 111, 117–18 (1979), where the Supreme Court found that the FTCA cannot extend or narrow the sovereign

after the implementation of the FTCA, the Supreme Court of the United States found that the discretionary function exception could apply to the initiation of programs and activities, and also to “determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.”⁴⁸ In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, the plaintiff (the owner of an aircraft) and his insurers filed suit against the United States under the FTCA seeking recovery for damages arising from the crash of the aircraft.⁴⁹ The Supreme Court found that the Federal Aviation Administration was not negligent in failing to verify specific items during the certification process of the aircraft for commercial use because the discretionary function exception precluded such tort actions.⁵⁰ In *United States v. Gaubert*, the Supreme Court was largely consistent with its previous decisions but

immunity waiver beyond what Congress has intended. The state of New York also has waived its sovereign immunity in the Court of Claims Act, but exceptions to the waiver of immunity exist, especially where a public entity has provided a public function (like law enforcement) and where the act conducted by the public entity is discretionary instead of ministerial. See also *Smith v. United States*, 507 U.S. 197, 204 (1993), where the Supreme Court found the FTCA’s waiver of sovereign immunity did not apply to a wrongful death action against the United States.

48. *Dalehite v. United States*, 346 U.S. 15, 35–36 (1953). But see *Rayonier Inc. v. United States*, 352 U.S. 315 (1957), where the Supreme Court vacated judgments in order for the district court to reconsider the complaints by examining whether the allegations or other supporting material offered by plaintiffs were appropriately sufficient to impose liability on a private individuals under Washington state laws; see also *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (holding that because the Coast Guard failed to perform duty under its due care requirement, the United States was liable under the FTCA for damages caused to petitioners).

49. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

50. *Id.* See also *Berkovitz v. United States*, 486 U.S. 531 (1988), decided four years later which established a two-part test for determining when discretionary function applies: (1) when a government agent acts in violation of mandatory regulations, discretionary function immunity will not protect the United States against actions arising from such a violation (2) if no mandatory regulations exist and a government agent is acting upon discretion, the court will examine whether the decision made considered issues of public policy and used policy judgment. Only if such considerations were incorporated into the decision-making process can the discretionary function exemption apply.

added that the challenged government action must be the product of policy judgment.⁵¹

Since *Gaubert*, the government's rate of successfully asserting defense from liability under the discretionary function exception has increased to approximately three quarters of attempted cases.⁵² This generally broad application of the discretionary function exception may be one contributory reason for the creation of the victim compensation fund. Such a fund is representative of a perceived moral obligation that the government is satisfying where legal duties fall short.⁵³

B. Immunity Defense Relating to 9/11

The New York State Defense Emergency Act (SDEA) provides tort immunity for government, volunteer agencies, other private entities, or representatives of these groups that, in good faith, conduct civil defense work against claims of death, injury, or property damage resulting from a national attack.⁵⁴ Article Nine explicitly distinguishes this immunity from the rights of victims to collect compensation for their losses under programs such as workers compensation, benefit laws for firefighters and volunteer ambulance workers, and pension law.⁵⁵

The U.S. District Court of the Southern District of New York held in *In re World Trade Center Disaster Site Litigation*⁵⁶ that the scope of preemption under the Air Transportation Safety and System Stabilization Act did not preclude the application of state law

51. *United States v. Gaubert*, 499 U.S. 315, 325 (1991).

52. MARSHALL S. SHAPO, COMPENSATION FOR VICTIMS OF TERRORISM 56 (2005) (“And it seems highly probable that the magnitude of a September 11th type attack would push the present day Court to declare security failures on the part of the Government to be ‘discretionary.’”); Jonathan R. Bruno, Note, *Immunity for “Discretionary” Functions: A Proposal to Amend the Federal Tort Claims Act*, 49 HARV. J. ON LEGIS. 411, 412 (2012).

53. SHAPO, *supra* note 52, at 58.

54. N.Y. UNCONSOL. LAW § 9193 (McKinney 2012).

55. *Id.*

56. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520 (S.D.N.Y. 2006) *aff’d in part, appeal dismissed in part*, 521 F.3d 169 (2d Cir. 2008).

immunity defenses⁵⁷ even though it created a federal cause of action for those directly affected by the events of September 11th.⁵⁸ The court also found that federal immunity doctrines were not contradictory to the purpose of the Air Transportation Safety and System Stabilization Act, and therefore should not be precluded where their application was available.⁵⁹ Even more notably, Judge Hellerstein declined “[t]o infer from the Act that all Plaintiffs [were] entitled to compensation [because such an inference] would run counter to the otherwise clearly expressed intent of Congress.”⁶⁰

This provides another compelling reason why the 9/11 Fund was first established. Congress did not intend to guarantee that compensation would be awarded for victims who declined applying for the 9/11 Fund or for those who were ineligible to receive compensation through it.⁶¹ The 9/11 Fund, therefore, was designed in part to ensure that victims received some sort of compensation, particularly in the event that courts might not find potential defendants liable.⁶² As the next section will demonstrate, however, the original 9/11 Fund did not account for injuries or death caused by indirect consequences of the terrorist attacks on that fateful day, namely exposure to toxic fumes at the crash sites during the cleanup process.

C. Health and Safety Standards

Under the New York Labor Law, adequate protections are required to be provided for workers by the agent and lessee of work sites.⁶³

57. *Id.* at 545 (“Nothing in the Act or its legislative history suggests that defenses against potential lawsuits are prohibited.”).

58. *Id.* at 520 (the Air Transportation Safety and System Stabilization Act “did not preempt otherwise applicable state law immunity defenses.”).

59. *Id.* at 546.

60. *Id.*

61. *Id.* at 545.

62. Senator John McCain expressed this notion during the Congressional debate over the 9/11 Fund: “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 . . . the [Act] also creates a victims’ compensation fund.” 147 Cong. Rec. 17,511 (2001) (statement of Sen. John McCain).

63. N.Y. LAB. LAW § 200(1) (McKinney 2009).

Because they were ordered away from their premises soon after the terrorist attacks, and were therefore unable to exercise the degree of supervision necessary for liability under statute, it was found that lessees at the World Trade Center, the “[m]anaging agent for a lessee of World Trade Center, and [the] utility company maintaining facility under center, had no liability for toxic fumes exposure encountered by workers performing removal and restoration work on site[,]”⁶⁴ protecting them against any claims of negligence in allowing exposure to occur.⁶⁵

Moments after the first tower was hit, New York City took exclusive control over the World Trade Center complex and the properties surrounding the area.⁶⁶ On September 12th, the New York City Department of Design and Construction (DDC) established a command center in lower Manhattan directly next to the World Trade Center and set up strict procedures for accessing the site.⁶⁷ Although the DCC coordinated the cleanup work at Ground Zero, it collaborated with other city entities during the recovery process, including the City Office of Emergency Management (OEM), the Port Authority of New York and New Jersey, and the owner of the World Trade Center site.⁶⁸ Four private contractors, AMEC Construction Management, Bovis Lend Lease, Tully Construction Company, and Turner Construction Company, were soon hired to lead recovery and demolition efforts at Ground Zero.⁶⁹

Only a day after the terrorist attacks, New York City became the primary entity responsible for developing and enforcing standards for health and safety at Ground Zero.⁷⁰ Daily meetings with the Occupational Safety and Health Administration (OSHA), NYPD, New York City Fire Department (FDNY), OEM, and representatives of the four primary contractors were held to ensure compliance with standards and continue the organization of recovery efforts.⁷¹ An essential aspect of the health and safety procedures was the

64. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d. at 522.

65. *Id.*

66. *Id.* at 528.

67. *Id.*

68. *Id.* at 525.

69. *Id.* at 529.

70. *Id.* at 530.

71. *Id.*

development of criteria for the use of personal protective equipment (PPE).⁷² Within hours of the attacks, the FDNY instructed all of its employees to wear respirators at the site.⁷³ The New York City Department of Health and the DDC became the principal entities responsible for health and safety standards related to PPE use, assuming responsibility for FDNY and NYPD personnel, and New York City and contractor personnel, respectively.⁷⁴ By September 20, 2001, the New York City Department of Health announced minimum safety gear standards for any individual working at the site, and by October 2001, an initial version of the Environmental Safety and Health Plan, which addressed all issues related to worker safety at Ground Zero, was distributed.⁷⁵ As a component of the Environmental Safety and Health Plan, the results of safety compliance inspections were documented in frequent reports prepared by the DDC and published during the recovery process.⁷⁶ Throughout these reports, problems with PPE compliance, especially respirator use, were pervasive.⁷⁷

Once the President of the United States, the Federal Emergency Management Agency (FEMA), the Governor of New York, as well as the mayor of New York City all declared states of emergency, local and federal agencies were authorized to take the necessary actions to aid New York City's recovery.⁷⁸ Because President Bush declared a state of emergency,⁷⁹ the Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) was activated, which allows for the federal government to assist state and local governments if resources have been exhausted and the local government requests assistance during a disaster.⁸⁰ After the terrorist

72. *Id.*

73. *Id.*

74. *Id.* at 531.

75. *See id.* at 531 (discussing the September 21, 2001 New York City Department of Health Order).

76. *Id.* at 532.

77. *Id.* at 532–33.

78. *Id.* at 527–28.

79. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

80. See Robert T. Stafford Disaster Relief and Emergency Assistance Act § 101(b), 42 U.S.C. § 5121(b) (2012), which provides “an orderly and continuing means of assistance by the Federal Government to State and local governments in

attacks and at the request of the New York City Department of Health, OSHA, the Environmental Protection Agency (EPA), and the Army Corps of Engineers all contributed technical and physical assistance to New York City pursuant to the Federal Response Plan.⁸¹

OSHA became the primary entity responsible for developing and enforcing respirator requirements at Ground Zero, which included recommending the types of filters that should be used with the respirators, conducting atmospheric monitoring around the site to determine the boundaries within which respirators must be used, and distributing 131,000 respirators while providing fittings and training for proper respirator use.⁸² Its responsibilities did not include, however, ensuring that workers at Ground Zero actually employed respiratory equipment according to the announced safety standards; this responsibility fell on the DDC and the private contractors.⁸³

The EPA, in conjunction with the New York City Department of Environmental Protection, was responsible for managing and overseeing the disposal of hazardous waste at Ground Zero, monitoring ambient air and water, and producing and disseminating reports which incorporated the results of thousands of environmental tests conducted at the site.⁸⁴ Similar to the authority limitations of OSHA, although the EPA observed inconsistent compliance with its safety recommendation, it lacked enforcement capabilities concerning worker health policies for employees other than its own.⁸⁵ Finally, the Army Corps of Engineers acted as the lead entity responsible for implementing and enforcing health and safety standards at Fresh Kills, which was used as a landfill for the debris removed from Ground Zero.⁸⁶

carrying out their responsibilities to alleviate the suffering and damage which result from such disasters.”

81. *Id.*; Eggen, *supra* note 20, at 431.

82. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d at 534.

83. *Id.* at 535.

84. *Id.* at 535–36.

85. *Id.* at 536.

86. Anemona Hartocollis, *Landfill Has 9/11 Remains, Medical Examiner Wrote*, N.Y. TIMES, Mar. 24, 2007, available at <http://www.nytimes.com/2007/03/24/nyregion/24remains.html>.

D. Failure to Warn

A report that was issued by the EPA Office of the Inspector General cited an EPA press release on September 16, 2001 stating that samples of ambient air quality and indoor air qualities in downtown buildings met OSHA standards, asbestos levels found in debris and dust at and around Ground Zero did not pose serious health risks to the general public, and that it was safe for those who worked in the financial district to return to work.⁸⁷ The report referenced other press releases that took place that week which suggested similar messages.⁸⁸ According to the EPA Inspector General, however, over twenty-five percent of the dust samples measured indicated asbestos levels that were a significant health risk;⁸⁹ the EPA did not qualify its dominant positive message regarding health risks with information regarding other harmful substances;⁹⁰ nor was any acknowledgment given to the fact that no adequate long-term health projections could accurately be made regarding the unprecedented condition of the disaster and the inevitable combination of the toxic substances.⁹¹ On the other hand, the press releases also contained cautionary language with a special note about the plan for continued monitoring by the EPA and warnings for the “need to take certain cautionary measures—for instance, to change air conditioning filters, sweep up debris, and wet down buildings covered in debris to avoid it from becoming airborne.”⁹²

In *Lombardi v. Whitman*, workers who suffered from or feared they would suffer from respiratory conditions allegedly as a result of their search, rescue, and cleanup efforts in the aftermath of September 11th filed suit against the EPA and other federal officials claiming, as many others did, that statements made by government representatives misled them into believing that air quality at Ground

87. OFFICE OF THE INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, REPORT NO. 2003-P-00012, EPA’S RESPONSE TO THE WORLD TRADE CENTER COLLAPSE: CHALLENGES, SUCCESSES, AND AREAS FOR IMPROVEMENT 85 (2003), http://www.epa.gov/oig/reports/2003/WTC_report_20030821.pdf.

88. *Lombardi v. Whitman*, 485 F.3d 73, 76–77 (2d Cir. 2007).

89. See OFFICE OF THE INSPECTOR GEN., *supra* note 87, at 14.

90. *Id.* at 9–11.

91. *Id.* at 9–13.

92. *Lombardi*, 485 F.3d at 77.

Zero did not pose any serious health risks.⁹³ Because the Constitution does not explicitly allow for a remedy to violations by federal officials, and sovereign immunity prevents damages from being claimed against the federal government unless a special relationship exists between the government and the victim, the option for redress is only available if a federal agent, who is acting under color of federal authority, has deprived the plaintiff in an individual capacity of a constitutional right.⁹⁴ The court found that the representative agency officials did not violate any substantive due process rights because there was no intent to cause arbitrary harm that would shock the conscience.⁹⁵ In its explanation, the court acknowledged the extremely difficult competing obligations the federal and local government, in addition to its agencies and representatives, faced in the aftermath of the terrorist attacks.⁹⁶

The court in *Lombardi* reasoned that “it is not enough for a plaintiff to allege that a government actor failed to protect an individual from a known danger of bodily harm or failed to warn the individual of that danger.”⁹⁷ The court even found that the causal connection between the government’s optimistic statements about the environment near Ground Zero and the plaintiffs’ exposure to toxic substances was debatable, citing the Supreme Court in *Martinez v. California* which held that a governmental decision that merely impacts the probability that a death will occur as a result of a particular situation cannot be categorized as state action depriving an individual of life simply because it has the potential to instigate events that will ultimately lead to the death of the plaintiff.⁹⁸

93. *Id.* at 75.

94. *Id.* at 78 (this is referred to as a *Bivens* action for damages against a federal agent, named after *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), where the Supreme Court found a federal cause of action for damages because of a federal agent’s violation of the Fourth Amendment).

95. *Id.* at 85.

96. *Id.* at 82–83.

97. *Id.* at 79 (citing *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) (finding an absence of a due process violation when the city allegedly failed to adequately train or warn its sanitation workers of potential and known dangers that resulted in one worker’s death by asphyxiation)).

98. *Id.* at 81 (citing *Martinez v. California*, 444 U.S. 277, 281 (1980)).

Due to this precedent, as well as the protective shield of governmental immunity, it would most likely be difficult for an individual to recover damages for the government's misrepresentation of the air quality at Ground Zero following the terrorist attacks. This again supports the notion that a victim compensation fund fills the gaps that traditional litigation leaves in regards to grievances experienced by those who contributed to the cleanup process. With this analysis it is also important to consider that if traditional tort recovery does not allow victories for these types of plaintiffs, does a compensation fund in fact circumvent the goals of our legal system?

E. Individual Responsibility

During the cleanup process following September 11th, each volunteer at Ground Zero had the choice to wear a lightweight gas mask when entering the smoking, toxic cloud.⁹⁹ Why should a compensation fund account for such a personal misstep?¹⁰⁰ Despite the EPA's allegedly misleading statements regarding the air quality at Ground Zero, significant efforts were in fact made by various public and private parties to encourage emergency responders and cleanup personnel to use respiratory protection equipment.¹⁰¹ Obvious physical evidence, such as the presence of unrelenting fires and a gigantic dust cloud lasting for months after the attacks, also

99. Howard, *supra* note 21, at 77.

100. The dissent in *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.* similarly explores this question by citing *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 F. 298, 304 (6th Cir. 1899) (“Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. *One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it.*”) *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U.S. 1, 19–20 (1907) (Brewer, J., dissenting) (emphasis added).

101. Howard, *supra* note 21, at 77.

should have provided enough reasonable notice of the dangerous air quality.¹⁰²

In addition to actively promoting the use of respirators amongst responders, the World Trade Center contractors and subcontractors, the National Institute for Occupational Safety and Health, the New York State Department of Labor, OSHA, FDNY, NYPD, Port Authority, and other entities even provided respirator fit testing to encourage their use.¹⁰³ One of the problems, however, was that a noteworthy percentage of responders opted to bypass the use of this equipment during the first few weeks following the attacks when environmental toxin levels were at their highest.¹⁰⁴ On the other hand, if personal protective equipment and training practices were not adequate during this period due to a governmental oversight,¹⁰⁵ this certainly should be addressed in preparation for future attacks or other long-duration disasters where such equipment must be available.

F. Assumption of Risk and the Firefighter's Rule

Another rule within the tort legal system that often limits a plaintiff's recovery against a negligent defendant is the "assumption of risk."¹⁰⁶ A plaintiff is said to have assumed the risk of certain harm if he voluntarily consented to take his chances that harm will occur.¹⁰⁷ Traditionally, the plaintiff would have been completely barred from recovery if assumption is indeed shown, but because the doctrine is no longer an absolute defense, it is necessary to consider

102. *Lombardi*, 485 F.3d at 75.

103. Howard, *supra* note 21, at 77.

104. *Id.* at 72, 77.

105. BRIAN A. JACKSON ET AL., PROTECTING EMERGENCY RESPONDERS: LESSONS LEARNED FROM TERRORIST ATTACKS 22–24 (2002), http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2006/CF176.pdf.

106. N.Y. C.P.L.R. 1411 (McKinney 2013); W. E. Shipley, Annotation, *Necessity and Manner of Pleading Assumption of Risk as a Defense*, 59 A.L.R.2d 239 (originally published in 1958).

107. RESTATEMENT (SECOND) OF TORTS § 496A cmt. b, c (1965); *see also* *Turcotte v. Fell*, 502 N.E.2d 964, 968 (N.Y. 1986).

the risks assumed by the plaintiff in context of duty owed to the plaintiff by the defendant.¹⁰⁸

Because firefighters, police officers, and other similar professionals assume the hazards that are known to be present or that can be anticipated by the traditional duties of an emergency responder, the assumption of risk doctrine is said to be the basis for the firefighter's rule.¹⁰⁹ This rule precludes a legal duty of care by a premises owner to emergency responders.¹¹⁰ Under traditional tort law, recovery has been denied to emergency responders seeking tort damages for injuries sustained at the emergency site.¹¹¹

The idea behind this principle is that as compared to the general public, firefighters and other emergency responders have certain skills and are specifically trained to encounter hazards that may arise in the situations that demand their services. In *Madonna v. American Airlines, Inc.*, the Court of Appeals for the Second Circuit held in part that because the officer plaintiff was engaged in a specific duty that increased risk of injury, he was barred from recovery on a negligence claim by New York's firefighter's rule.¹¹² In 1996, New

108. N.Y. C.P.L.R. 1411 (McKinney 2013); *see, e.g.,* Davidoff *ex rel.* Davidoff v. Metro. Baseball Club, Inc., 463 N.E.2d 1219, 1220 (N.Y. 1984).

109. *Neighbarger v. Irwin Indus.*, 882 P.2d 347, 352 (Cal. 1994) (finding that the firefighter's rule is "an example of the proper application of the doctrine of assumption of the risk . . ."); *Seibert Sec. Servs., Inc. v. Superior Court*, 22 Cal. Rptr. 2d 514, 517 n.4 (Cal. App. Dep't Super. Ct. 1993) (finding that the firefighter's rule is an example of assumption of risk (citing *Donohue v. San Francisco Hous. Auth.*, 20 Cal. Rptr. 2d 148 (Cal. Ct. App. 1993)); *see also* *City of Redlands v. Sorensen*, 221 Cal. Rptr. 728 (Cal. Ct. App. 1985); *Terhell v. Am. Commonwealth Assocs.*, 218 Cal. Rptr. 256, 257 (Cal. Ct. App. 1985).

110. *See, e.g.,* *Hawkins v. Sunmark Indus., Inc.*, 727 S.W.2d 397, 399 (Ky. 1986) (citing *Buren v. Midwest Indus., Inc.*, 380 S.W.2d 96, 97-98 (Ky. 1964)).

111. Except in cases where a property owner willfully or knowingly causes the harm. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 61, 429-30 (5th ed. 1984).

112. *Madonna v. Am. Airlines, Inc.*, 82 F.3d 59, 62 (2d Cir. 1996). Further, the court held that New York General Municipal Law section 205-e shall mitigate the firefighter's rule if injuries result from a party's negligence in "failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments." *Id.*; N.Y. GEN. MUN. LAW § 205-e(1) (McKinney 1996). However, a plaintiff can only properly state a claim under section 205-e by identifying "the statute or ordinance with which the defendant failed to comply, describe the manner in which the

York common law¹¹³ was superseded when section 11-106 of the General Obligations Law was enacted allowing police officers and firefighters to bring tort claims against the general public for most injuries that occur in the line of duty.¹¹⁴ It is important to note, however, that section 11-106 still bars tort claims against an employer.¹¹⁵ The determinative factor in deciding whether the firefighter's rule should be applied assesses the link between the illness or injury at issue and the risks which first responders are expected to assume on the job.¹¹⁶ In the case of toxic torts, the "willful and wanton misconduct" exception to the firefighter's rule may allow emergency responders to recover for injury, but only if the defendant handled the toxic chemicals causing injury or illness beyond a level of negligence.¹¹⁷

firefighter [or police officer] was injured, and set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm." *Zanghi v. Niagara Frontier Transp. Comm'n*, 649 N.E.2d 1167, 1173 (N.Y. 1995) (construing section 205-a as including a comparable provision to section 205-e as it pertains to firefighters by providing a statutory cause of action for firefighters and their survivors regarding line-of-duty injuries or death sustained from defendant's negligent noncompliance of any governmental statutes or other regulations).

113. *Santangelo v. State*, 521 N.E.2d 770, 772 (N.Y. 1988) (finding that firefighters and police officers cannot recover for injuries arising from "negligence in the very situations that create the occasion for their services."); *Kenavan v. City of New York*, 517 N.E.2d 872, 874 (N.Y. 1987).

114. *Giuffrida v. Citibank Corp.*, 790 N.E.2d 772, 776 (N.Y. 2003).

115. *Id.*; *Williams v. City of New York*, 811 N.E.2d 1103, 1108 (N.Y. 2004).

116. *Cooper v. City of New York*, 619 N.E.2d 369, 371 (N.Y. 1993).

117. Such an exception was adequately asserted in *Mahoney v. Carus Chem. Co.*, 510 A.2d 4, 12 (N.J. 1986) where the defendant, a manufacturer of a chemical that ultimately caused injury to the plaintiff through exposure, was aware that its product increased the flammability of combustible materials; that it had communicated privately and publicly its conclusion that the danger of spontaneous combustion was so great that the use of fiber containers should cease; and that it nonetheless shipped 100 fiber containers of the chemical to the warehouse where the fire in which the plaintiff was injured occurred. This exception is arguably inapplicable to the circumstances at Ground Zero because of the indefinite defendants, and because it would be difficult to prove that the property owners or other potential defendants acted wantonly in regards to the chemicals that happened to be released and unintentionally fuse in the air as a result of the collapse of multiple skyscraper buildings. Therefore, it can be argued that the firefighter's rule

However, in *Furch v. General Electric Co.*, the court found that the firefighter's rule did not apply where defendant negligently installed materials that released toxic substances during the fire, injuring firefighters responding at the scene.¹¹⁸ The court found that the installation was "sufficiently separate and apart from the negligence which occasioned the emergency for which plaintiffs were summoned," and therefore recovery was not barred.¹¹⁹ In this case, the firefighters had no knowledge that exposure to toxic substances was a risk inherent in the response to this particular emergency.¹²⁰ The court continued by drawing a noteworthy distinction: "To be contrasted is the situation where the emergency itself patently involves the risk of exposure to toxic substances."¹²¹ However, in *Philip Morris, Inc. v. Emerson*, the Supreme Court of Virginia found the firefighter's rule to be inapplicable regarding the recovery of rescue squad members and others who were injured as a result of exposure to ultrahazardous chemicals released during disposal efforts.¹²² This court based its decision on the notions that it is highly unusual for an extremely hazardous chemical to be released into the air by accident and that rescue workers would not be aware of the probability of such an occurrence.¹²³ Because this was considered highly unusual, the risk was unforeseeable and was not included under those inherently involved in a firefighter's occupation. Therefore, the firefighter's rule did not apply.¹²⁴

The situation that gave rise to the reopened 9/11 Fund differs from that in *Philip Morris* for two compelling reasons. First, the toxins at Ground Zero were not necessarily released by any unusual accident. Second, it is arguably obvious that the collapse and destruction of the Twin Towers and other buildings in lower Manhattan, as well as the

can be employed to toxic torts suffered by emergency responders exposed to toxins during the cleanup.

118. *Furch v. Gen. Elec. Co.*, 535 N.Y.S.2d 182 (App. Div. 1988).

119. *Id.* at 184.

120. *Id.*

121. *Id.* (citing *Calvert v. Garvey Elevators, Inc.*, 694 P.2d 433 (Kan. 1985) and *Rowland v. Shell Oil Co.*, 224 Cal. Rptr. 547 (Cal. App. 1986). In *Calvert*, the firefighter's rule barred recovery by firefighters who were exposed to toxic substances while responding to chemical spills and leaks).

122. *Philip Morris, Inc. v. Emerson*, 368 S.E.2d 268, 268 (Va. 1988).

123. *Id.* 281-82.

124. *Id.*

incineration of technology equipment, chemicals, insulation, human flesh, and every other item contained within these buildings would mix together into one toxic brew that would potentially be hazardous to health.¹²⁵ As the court in *Furch* made clear, “risk of exposure to toxic substances is an unfortunate consequence of modern technology.”¹²⁶ The cleanup and recovery scene to which the emergency personnel responded in the aftermath of September 11th was a clear danger, and risk of exposure to harmful toxins was reasonably apparent to those involved in the cleanup.¹²⁷

Some courts have found, however, that even in emergency situations where first responders and other personnel should be aware of the risk, liability for independent negligence that has heightened the risk may exist, especially in cases where the defendant misrepresented the gravity of the hazard.¹²⁸ In fact, most jurisdictions have permitted recovery where the failure to warn resulted in the death or injury of a firefighter or other emergency personnel.¹²⁹

G. Alternative Sources of Compensation for Emergency Responders

One justification for the firefighter’s rule is that firefighters and “police officers receive appropriate compensation from the public which reflects the risk inherent in their work.”¹³⁰ Various federal and state programs are already in place to compensate officers who are killed in the line of duty. The Department of Justice pays \$250,000 to the eligible survivors of police and fire personnel who are killed in

125. For example, “[t]he term ‘World Trade Center cough’ quickly entered the language as referring to a recurrent cough, characteristic among site workers, that sometimes did not resolve, and was followed later in many cases by a diagnosis of a respiratory condition.” *Stephenson v. City of New York*, 812 N.Y.S.2d 802, 803 (Sup. Ct. 2005).

126. *Furch*, 535 N.Y.S.2d at 184.

127. *Lombardi v. Whitman*, 485 F.3d 73, 75 (2d Cir. 2007).

128. *See, e.g., Lipson v. Super. Ct.*, 644 P.2d 822 (Cal. 1982).

129. *Id.* at 828; *see also Aravanis v. Eisenberg*, 206 A.2d 148, 153 (Md. 1965); *Jenkins v. 313–321 W. 37th St. Corp.*, 31 N.E.2d 503, 504 (N.Y. 1940); *Shypulski v. Waldorf Paper Prods. Co.*, 45 N.W.2d 549, 553 (Minn. 1951).

130. *City of Sacramento v. Sup. Ct.*, 182 Cal. Rptr. 443, 446 (Cal. App. 3d Dist. 1982). Rescue workers, such as firefighters and police, arguably have excellent disability and health benefits, *see, e.g., Alan B. Morrison, Lessons to Be Learned: The Victim Compensation Fund*, 53 DEPAUL L. REV. 821, 823 (2003).

the line of duty.¹³¹ The City of New York provides surviving spouses of officers killed in the line of duty a full pension equivalent to the lost salary in addition to a stipend worth the decedent's annual salary and a \$25,000 death benefit.¹³² Full scholarships to New York State universities are also awarded to the decedent's children.¹³³

In the Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, Feinberg wrote that he referenced the amount of compensation found under these existing federal programs in order to determine an appropriate amount for the noneconomic loss award provided to the families of deceased victims under the 9/11 Fund.¹³⁴ It was ultimately decided that the noneconomic loss award would be \$250,000 for victims who died on September 11th, an amount roughly equivalent to that provided for under these federal programs.¹³⁵ The following section explores why these awards are deemed to effectively reflect the goals of corrective justice in the context of a national collective perspective.

III. COMPENSATION FUNDS AS AN ALTERNATIVE TO TOXIC TORT LITIGATION

A. *The National Response to September 11th*

There are three most notable social responses to injuries through the legal system; the first is preemptive, the second is punitive, and

131. Kristine Cordier Karnezis, *Construction and Application of Public Safety Officers' Benefits Act (PSOBA)*, 42 U.S.C.A §§ 3796 to 3796d-7, 23 A.L.R. FED. 2D 129 (originally published in 2007) ("The Public Safety Officers' Benefits Act has most frequently been applied in cases involving firefighters and police officers, often in similar circumstances.").

132. David Barstow & Diana B. Henriques, *A Nation Challenged: The Families; Gifts to Rescuers Divide Survivors*, N.Y. TIMES, Dec. 2, 2001, at A1; Robert Ingrassia, *Police & Fire Widows to Get \$2M WTC Victims' Kin to Share in \$500M*, N.Y. DAILY NEWS, May 16, 2002, at 8.

133. Barstow & Henriques, *supra* note 132.

134. 42 U.S.C. § 3796 (2012); FEINBERG ET AL., *supra* note 11, at 40.

135. See 38 U.S.C. § 1967 (2012) (providing insurance coverage of \$400,000 for members of the uniformed forces who qualify); 42 U.S.C. § 3796 (2013) (providing a \$250,000 benefit for public safety officers who have died as a direct and proximate result of a physical injury sustained in the line of duty); FEINBERG ET AL., *supra* note 11, at 40.

the third is compensatory.¹³⁶ The last type uses a method of loss spreading and consists of a strong social justice component.¹³⁷ This is reflected in compensation funds established by the government for victims of domestic terrorism, and represents a communitarian system of shared benefits.¹³⁸

One justification for originally creating the 9/11 Fund is that those who died as a result of the terrorist attacks were viewed as victims of a national tragedy.¹³⁹ As such, it was our duty as a nation to compensate the loss of these fallen brothers and sisters. Because of this, many scholars, as well as Feinberg himself, have held that the Fund template should only be used in response to unique terrorist events¹⁴⁰ and should not be used to provide relief for victims of naturally occurring events and other such “acts of god.”¹⁴¹ But these events, like September 11th, arguably have had considerable impacts on the national psyche as well.¹⁴²

At a minimum, some suggest that there should be no distinction between the victims of the September 11th terrorist attacks and those of other terrorist attacks, such as the first attack on the World Trade Center in 1993, the Oklahoma City federal office bombing,¹⁴³ the attacks on the USS Cole in Yemen, the embassy bombing in Kenya, or the terrorist attack of the U.S. Embassy in Benghazi. Through this perspective, the 9/11 Fund is inherently unfair to victims of other

136. SHAPO, *supra* note 52, at 89.

137. *Id.* at 47.

138. *Id.*

139. Ackerman, *supra* note 16, at 144; George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 PENN ST. L. REV. 175, 181 (2007).

140. See generally FEINBERG ET AL., *supra* note 11; Kenneth R. Feinberg, *The Building Blocks of Successful Victim Compensation Programs*, 20 OHIO ST. J. ON DISP. RESOL. 273, 276–77 (2005); Robert L. Rabin & Stephen D. Sugarman, *The Case for Specially Compensating the Victims of Terrorist Acts: An Assessment*, 35 HOFSTRA L. REV. 901, 913 (2007).

141. Rabin & Sugarman, *supra* note 140, at 912–14.

142. These events might include Hurricane Katrina, Superstorm Sandy, or other such natural disasters. See *id.* at 914 (suggesting that it is no less difficult to argue compensation for victims of terrorist attack as compared to victims of natural disasters; while the latter may be self-insured for property damage, it is just as likely that traditional tort remedies will be inadequate regarding compensation for their injury or death).

143. *A Nation Challenged: The Victims; Oklahomans Questioning Sept. 11 Aid*, N.Y. TIMES, Dec. 23, 2001, at B8.

terrorist events, either on American soil or abroad, where American citizens and diplomats have been victims. In light of these tragic events, the government played only a minimal role in the compensation of the bereaved and injured.¹⁴⁴ But Feinberg repeatedly reminded the public and legal community that the 9/11 Fund was not intended to be a model for tort reform, nor a template for compensation programs enacted after any future terrorist attacks or other such national tragedies.¹⁴⁵ What, then, makes these terrorist attacks any different from September 11th? Are the lives lost to prior or future attacks any less valuable than those lost on that fateful day in 2001?

It may be possible that the only effective way to narrow the scope of public compensation in the aftermath of these types of incidents is to evaluate the tragedy from the perspective of the *community*, by considering the psychic scars of the nation as a whole.¹⁴⁶ This was not only a mass injury, but also one caused by an act of terrorism, which by its very name, operates to inspire a deep and unexpected fear in the hearts and minds of its casualties.¹⁴⁷ Every American was a casualty in this sense, even though only approximately 3,000 of us

144. *September 11th Compensation: The Impossibility of Making Whole*, *ECONOMIST*, Apr. 12, 2003, at 65.

145. KENNETH R. FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11*, at 178 (2005) (“It would be a mistake for Congress or the public to take the 9/11 fund as . . . a model in the event of future attacks.”) [hereinafter FEINBERG, *WHAT IS LIFE WORTH?*]; Kenneth R. Feinberg, *Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation*, 19 *WASH. U. J.L. & POL’Y* 21, 29 (2005) (“9/11 was unique and gave rise to a unique response. That is the only way, I think, to explain it.”).

146. See generally Joel B. Eisen, *The Trajectory of “Normal” After 9/11: Trauma, Recovery and Post-Traumatic Societal Adaptation*, 14 *FORDHAM ENVTL. L.J.* 499 (2003); Shankar Vedantam, *After Sept. 11, Psychic Wounds Slow to Heal*, *WASH. POST*, Mar. 17, 2002, at A3.

147. N.Y. PENAL LAW § 490.25(1) (McKinney 2013) (an individual is considered “guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense.”).

were actually lost.¹⁴⁸ The intensive media and television coverage correspondingly had an impact on the nation's attitude towards the victims, as well as the influence of prominent politicians on the response of a no-fault fund.¹⁴⁹ If measured only through this perspective, the 9/11 victims deserved public compensation because Congress, the public, and the nation as a whole deemed the magnitude and scope of the terrorist attacks on 9/11 unique and greater than any previous act of terrorism.¹⁵⁰

In the traditional tort system, line drawing often distinguishes victims by granting compensation to some while none to others.¹⁵¹ As is the case across the legal spectrum of litigation, some claimants inevitably walk away from the courthouse empty-handed. So while the compensation fund varies the award amounts depending on the individual, it is better than seeking relief through the traditional tort system because it at least provides *some* form of compensation to *all* eligible individuals who take advantage of the program.¹⁵² For example, public perception may view it an intolerable outcome if

148. See, e.g., *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 526 (S.D.N.Y. 2006) *aff'd in part, appeal dismissed in part*, 521 F.3d 169 (2d Cir. 2008).

149. Morrison, *supra* note 130, at 822.

150. Feinberg, *supra* note 14.

151. See, e.g., *Darden ex rel. Darden v. Watkins*, 845 F.2d 325 (6th Cir. 1988) (stating when resolving a state tort claim, the decision of the case turns on line-drawing); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (finding that because a line must be drawn somewhere, the economic-loss rule is generally applicable and predictable); see also *PPG Industries, Inc. v. Bean Dredging*, 447 So.2d 1058, 1061–62 (La. 1984) (“Because the list of possible victims and the extent of economic damages might be expanded indefinitely, the court necessarily makes a policy decision on the limitation of recovery of damages.”).

152. Although some might claim otherwise, the fact that ninety-seven percent of eligible claimants opted to apply for the fund does not necessarily prove that compensation funds are a better alternative to tort litigation. Maybe many chose the fund simply because a *large sum of money* was essentially *guaranteed* to each eligible claimant, not because the results are an accurate representation of those attained through the traditional tort system. See, e.g., Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315, 1319 (2004) (stating “it is sobering to realize that every World Trade Center claimant could have chosen the tort litigation system but that [at least] 95% did not.”).

only the victims in the planes were able to recover through the tort system and not the victims on the ground or the occupants within the buildings.¹⁵³ The special character of the events surrounding the deaths on September 11th creates public sensitivity to a whole community of victims.¹⁵⁴ As mentioned above, however, this national collective perspective that fueled the creation of the original 9/11 Fund did not contemplate the devastating health consequences that would result from exposure to toxins during the cleanup process. It can be argued that a different standard should have guided the reopened 9/11 Fund under the Zadroga Act for reasons elaborated upon below.

B. Toxins at Ground Zero

It can sometimes take decades to understand the medical consequences and diseases that will develop as a result of an environmental event.¹⁵⁵ There is currently no hard scientific evidence linking certain diseases with exposure to the toxic cloud at Ground Zero, and it is difficult to determine whether cancers and other similar illnesses are causally related to exposure to the toxins, or just temporally related.¹⁵⁶

With any toxic tort action, there are many controversial and complex proximity and causation issues that must be resolved.¹⁵⁷ In fact, one of the reasons the Agent Orange Settlement Fund was enacted was to avoid settlement and potentially unfair compensation awards since it was determined to be extremely difficult for individual veterans to prove that an injury or illness was directly linked to exposure to the chemicals.¹⁵⁸ While the U.S. Court of Appeals for the Second Circuit found that Vietnam veteran plaintiffs

153. Rabin, *supra* note 39, at 777.

154. *Id.*

155. See Jean Macchiaroli Eggen, *Toxic Torts, Causation, and Scientific Evidence After Daubert*, 55 U. PITT. L. REV. 889, 895–903 (1994).

156. Howard, *supra* note 21, at 89–90.

157. See generally Amy D. Paul, *Rethinking Oil Spill Compensation Schemes: The Causation Inquiry*, 9 LOY. MAR. L.J. 137 (2011).

158. KENNETH R. FEINBERG, WHO GETS WHAT?: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL xiii (2012); see also *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145, 172 (2d Cir. 1987) (finding “[t]he problems of proving causation [were] substantial.”).

did actually suffer and that many deserved help from the government, it also found that these plaintiffs simply could not obtain aid through suit against private corporations primarily because credible evidence did not exist to establish causation between exposure to Agent Orange and the various illnesses and injuries from which they allegedly suffered.¹⁵⁹ Similarly, it is difficult to verify with certainty that the health conditions of claimants under the renewed 9/11 Fund were caused directly by the air pollution and debris removal following the terrorist attack on September 11, 2001.

Of those who were exposed to the volatile organic compounds and inhaled particulate chemicals from the toxic mixture that was generated on September 11, 2001, some may have had a predisposition that either accelerated or directly and singularly caused the particular cancer or respiratory disease. Forty-two percent of registry enrollees for compensation under the renewed 9/11 Fund were reported to have been smokers prior to or at the time of their enrollment, which may have had an effect on their health—especially as it pertains to respiratory illnesses and cancer—regardless of exposure to the air at Ground Zero.¹⁶⁰ Additionally, some claimants may have been more prone to developing such diseases than others due to different genetic or biological makeup, and individual lifestyles could have also contributed to the cause, especially because cancer is a relatively common disease and cause of death in the United States. In an interesting twist of events, it has even been suggested that the death of the man whose name inspired the Zadroga Act was not directly linked to the environmental issues at the site.¹⁶¹

159. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 172.

160. Mark Farfel et al., *An Overview of 9/11 Experiences and Respiratory and Mental Health Conditions among World Trade Center Health Registry Enrollees*, 85 J. URB. HEALTH 880, 891 (2008).

161. See generally William M. Sage, *Brand New Law! The Need to Market Health Care Reform*, 159 U. PA. L. REV. 2121 (2011); Anthony DePalma, *City Says Prescription Misuse Caused Death of Detective Who Worked at 9/11 Site*, N.Y. TIMES, Oct. 26, 2007, at B3 (suggesting that James Zadroga's death was caused by prescription drugs and not exposure to toxins at Ground Zero); Paul H. B. Shin, *WTC Death-Link Doubt: Health Chief Is Skeptical on Hero's Ills*, DAILY NEWS (N.Y.), Apr. 15, 2006, at 6; Raymond Hernandez, *House Passes 9/11 Health Care Bill*, N.Y. TIMES CITY ROOM (Sept. 29, 2010, 3:46 PM), <http://cityroom.blogs.nytimes.com/2010/09/29/911-health-care-bill-passes> (indicating

In fact, it was first determined that the link between Ground Zero's toxic cloud and the cancers contracted by individuals who sacrificed their time to rebuild lower Manhattan was too indefinite.¹⁶² Because no formal medical proof could substantiate this connection, those suffering from cancer were not originally included under the Zadroga Act.¹⁶³ Nevertheless, after receiving recommendation from the National Institute for Occupational Safety and Health and from an advisory committee comprised of union officials, doctors, and experts, the Zadroga Act was ultimately expanded to include cancer on the list of ailments covered by the \$4.3 billion program.¹⁶⁴

Even the most recent studies, however, are determining that there is no clear link between exposure to the toxic air at Ground Zero and the cancers allegedly contracted as a result.¹⁶⁵ One particular study was conducted by Jiehui Li of the New York City Department of Health and Mental Hygiene involving the largest group of individuals to date (over 55,700 people, including recovery workers at Ground Zero, and students, workers, and residents present in lower

that the name given to the legislation is "deceptive" since Zadroga's death was not "directly related to the 9/11 attacks.").

162. The National Institute for Occupational Health study that was made public a day before Shelia Birnbaum held the first of a series of three "town hall meetings" stated that no evidence was found linking cancer and exposure to toxins at Ground Zero. *See, e.g.,* Sydney Ember, *Study Suggests Higher Cancer Risk for 9/11 Firefighters*, N.Y. TIMES, Sept. 2, 2011, at A17.

163. *Frequently Asked Questions*, *supra* note 5, at 29.

164. *Federal Health Officials Propose Free Cancer Care for 9/11 First Responders*, CBS NEWS (June 8, 2012, 5:32 PM), http://www.cbsnews.com/8301-504763_162-57449857-10391704/federal-health-officials-propose-free-cancer-care-for-9-11-first-responders.

165. *See* Anemona Hartocollis, *City Study Finds No Clear Link between 9/11 Debris and Cancer*, N.Y. TIMES, Dec. 12, 2012, at A1 (quoting Dr. Alfred I. Neugut, an oncologist and professor of epidemiology at the Mailman School of Public Health at Columbia University, who "said he sympathized with people who had cancer they attributed to the disaster," but "that their emotional response was not necessarily valid scientifically." He continued by saying that "[t]he 9/11 attack was a terrible thing, but it doesn't cause everything in the world," and that "[c]ancer is a very specific outcome, and in most exposures, you have to be exposed for an extended time before you get the cancer."); *see generally* Jiehui Li et al., *Association between World Trade Center Exposure and Excess Cancer Risk*, 308 JAMA 2479 (2012).

Manhattan during the recovery process).¹⁶⁶ The study did not find a significant increase of cancer rates among the population exposed to the toxins as compared to the general population, and the incidence of cancer among those who were exposed at a more intense rate was not any higher than among those who were exposed to a lesser degree.¹⁶⁷ Although this Note cannot fully address the issue of causation of injuries through exposure to toxic air, it is important to briefly consider how to factor this causation ambiguity into the application of compensation funds.

C. *The Issue of Causation in Tort Cases*

In order to demonstrate a defendant's liability in tort actions, a plaintiff must prove both actual and proximate causation.¹⁶⁸ Risk of harm resulting from the defendant's tortious action must have been foreseeable, and independent intervening forces must not have been present.¹⁶⁹ The defendant is usually not liable, however, for consequences that are very unforeseeable.¹⁷⁰

In this way, it can be argued that inadequate screening at airports or unsecure flight decks led to the airline hijackings, and thus negligence liability was present on September 11th.¹⁷¹ The airlines and even the building owners, however, might have a foreseeability defense against potential claims brought by survivors of those who

166. See generally Li et al., *supra* note 165.

167. *Id.*

168. See DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 12:2 (3d ed. 2000) (describing the “but-for” test and “substantial-factor” test to establish actual causation).

169. Gordon v. E. Ry. Supply, Inc., 626 N.E.2d 912, 916 (N.Y. 1993) (“Defendants are liable for all normal and foreseeable consequences of their acts.” In order “[t]o establish a prima facie case plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants’ conduct was foreseeable.”); W. PAGE KEETON ET AL., *supra* note 111, § 42, at 273, 281–82, 297.

170. See Lapidus v. State, 866 N.Y.S.2d 711, 722 (App. Div. 2008) (finding when an event is “so improbable and unforeseeable as to constitute a superseding event breaking the causal connection between the alleged negligence” and the harm, “defendant’s alleged negligence as the legal cause of the accident” is replaced).

171. Rabin, *supra* note 39, at 773.

perished in the buildings or at the crash sights. In other words, while it is foreseeable that passengers may die from an airplane hijacking resulting from inadequate safety measures, it is more difficult to successfully argue in court that it is foreseeable that a hijacked airplane may crash into occupied buildings killing those inside, or even further, that the hijacked plane would crash into buildings causing them to *collapse* resulting in death and major devastation on the ground.¹⁷² Even more removed from this foreseeability and proximate cause principle is the idea that those who worked and volunteered in the cleanup process would potentially be exposed to harmful toxins resulting in injury or death.

On the other hand, in an action brought by survivors of victims and victims of 9/11 against the airlines, airport security companies, manufacturer of the aircrafts, and owners and operators of the buildings that were destroyed, the District Court of the Southern District of New York applied the common law of New York and found that defendants had a duty to specific injured persons (as opposed to the general public) to protect them against harm resulting from the acts of third-party terrorists.¹⁷³ The court articulated that in order to find duty, multiple factors are balanced “including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.”¹⁷⁴ “This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another.”¹⁷⁵ The court reasoned that the need for a determinate pool of plaintiffs stems from an effort to avoid a proliferation of claims.¹⁷⁶

172. *Id.* at 774.

173. *See generally In re September 11 Litig.*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003). Here, the court also reasoned that in New York, establishing a duty is a legal and policy based assertion reserved for judges. *Id.* at 290 (citing *Palka v. Servicemaster Mgmt. Servs. Corp.*, 634 N.E.2d 189, 192 (N.Y. 1994)).

174. *Id.* at 290.

175. *Id.*

176. *Id.*

New York common law has always connected duty with foreseeability.¹⁷⁷ However, foreseeability of the exact manner of harm is not required of the defendant in order for negligence to still exist; only foreseeability of the general nature of harm is required.¹⁷⁸ The District Court for the Southern District of New York found that the airplane crashes amounted to a general nature of harm that should have been foreseeable to the aviation defendants.¹⁷⁹ While it may not have been foreseeable that nineteen terrorists would hijack four airplanes and drive them into the World Trade Center, the Pentagon, and a field in Pennsylvania, it should have been foreseeable on a more general level that ground victims may be injured due to the crash of a hijacked airplane.¹⁸⁰

The issue of Ground Zero toxic exposure makes a departure from this foreseeability argument for several reasons. First, plaintiffs in the litigated toxic tort cases did not name the airlines as defendants, but instead focused mainly on the World Trade Center property and government entities as liable parties.¹⁸¹ Additionally, government ineptitude and inadequate protective equipment were asserted as the cause of action (events that occurred after the terrorist attack) as opposed to actions that enabled terrorist acts, and because these were toxic tort cases, the principal issue centered on acts or omissions perpetrated by the defendants who failed to protect the safety and ensure the well-being of the plaintiffs.¹⁸² Even further, the scope of damage was indeterminate, making the amount of future claims unknown, especially when considering injuries that could be dormant for years.¹⁸³ By way of example, in 2004 the Eastern District of New York followed the appellate court decisions¹⁸⁴ when it held that

177. *See generally* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

178. *See generally* Derdarian v. Felix Contracting Corp., 414 N.E.2d 666 (N.Y. 1980) (finding that a foreseeable intervening cause does not relieve the original actor of liability for negligence).

179. *In re September 11 Litig.*, 280 F. Supp. 2d at 296.

180. *Id.*

181. Eggen, *supra* note 20, at 445.

182. *Id.*

183. *Id.* at 385, 445.

184. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 249 (2d Cir. 2001), *aff'd in part, vacated in part*, 539 U.S. 111 (2003) (finding that “(2) veterans could collaterally attack prior class action to test application of res judicata to individuals whose injuries did not manifest themselves until settlement funds were exhausted;

plaintiffs who “discovered what they believe[d] to be their Agent Orange-related diseases after the Agent Orange Fund was fully expended” were not in fact bound by the settlement that created the Fund in response to the class action.¹⁸⁵ Finally, the causal connection between the toxins at Ground Zero and claimant’s injuries cannot be scientifically proven.¹⁸⁶ Because of these differences, this reopened 9/11 Fund compels a different level of scrutiny. While it is untimely to address these concerns in the context of the Zadroga Act, this next section will begin to carve out an alternative compensation plan for victims of future terrorist attacks and other similar national calamities.

IV. PRESENTING A PROPOSAL

When a commercial airline crash occurs, the tort system typically addresses the issues of liability of the airline and compensation for the victims in a reasonably efficient manner, and no serious effort has been made to replace this mechanism with a no-fault recovery.¹⁸⁷ The crashes on September 11th differ from the typical commercial airline crash, however, because of the number of people killed both on the planes and on ground, the destruction caused at the crash sites, the national and individual grief and trauma that ensued,¹⁸⁸ and the subsequent effects on individuals exposed to the toxic cloud at Ground Zero. This situation further contrasts from an ordinary mass

(3) veterans were not adequately represented in prior class action, such that it was not [a] bar to their claims.”).

185. *In re “Agent Orange” Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 409 (E.D.N.Y. 2004), *aff’d*, 517 F.3d 76 (2d Cir. 2008).

186. But see *Mattis v. Carlon Elec. Prods.*, 295 F.3d 856, 857 (8th Cir. 2002), where the court outlines a different standard of proof for causation (“To prove causation in a toxic tort case, a plaintiff must show both that the alleged toxin is capable of causing injuries like that suffered by the plaintiff in human beings subjected to the same level of exposure as the plaintiff, and that the toxin was the cause of the plaintiff’s injury, however, to prove exposure, a plaintiff need not produce a mathematically precise table equating levels of exposure with levels of harm; rather, a plaintiff need only make a threshold showing that he or she was exposed to toxic levels known to cause the type of injuries he or she suffered.”).

187. Rabin, *supra* note 39, at 774.

188. Elizabeth M. Schneider, *Grief, Procedure, and Justice: The September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 457, 465–66 (2003).

tort case not only because most of the initial victims died, but also because of the indeterminate defendants who were exposed to the toxic cloud, and the potentially indefinite plaintiffs.¹⁸⁹ The imposition of culpability on a tortfeasor for such harms could create “a liability in an indeterminate amount for an indeterminate time to an indeterminate class.”¹⁹⁰

Those issues aside, the 9/11 Fund was created not only as a source to console the community of victims, but in large part as a response to a perceived need for an airline bailout and a plea to Congress by the airlines for such assistance.¹⁹¹ Insolvency of the potential defendants was arguably the single greatest issue attributed to the speed at which Congress enacted the Fund.¹⁹² So, while tort law is founded on the concept of a deserving victim and a transgressing defendant, a no-fault compensation fund adopts a social welfare perspective that reimburses victims for their harms caused by a defined activity or event while spreading the losses.¹⁹³

In speedily pushing through a no-fault compensation scheme, however, Congress did not adequately contemplate the consequences of the Fund on future tort claimants or its applicability in the aftermath of future terrorist attacks or similar national calamities.¹⁹⁴ While it may be inappropriate to construct an exact plan for

189. This may be exemplified by the specifications of the Gulf Coast Claims Facility where “[a]ny individual in Louisiana that can demonstrate a defined financial loss around the time of the Deepwater Horizon disaster can make a claim, and ‘essentially any kind of business at all.’” Richard Thompson, *BP Settlement Administrator Urges Those Affected by Oil Spill to File Claims*, THE TIMES-PICAYUNE (New Orleans), Nov. 1, 2012, http://www.nola.com/business/index.ssf/2012/11/opt-out_deadline_in_bp_oil_spi.html.

190. *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

191. Morrison, *supra* note 130, at 821.

192. Rabin, *supra* note 39, at 771. It is common for this factor to be the main concern regarding successfully establishing liability in light of mass tort-provoked bankruptcies, as experienced by the asbestos industry. *Id.* Additionally, because Congress did not have to rationalize each component of the fund to the public, unlike the process courts endure when arriving at a legal decision, the legislation was passed quickly. *See* Morrison, *supra* note 130, at 823.

193. Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 733 (2003); Rabin, *supra* note 39, at 782.

194. Rabin, *supra* note 39, at 769.

compensating victims of future attacks,¹⁹⁵ opening a dialogue now may be a useful first step in preparing for another event like September 11th.¹⁹⁶ It is difficult to plan for the future, however, because of the multitude of possible terrorist attacks that we may face as a nation, all varying in degree of destruction. The detonation of a dirty bomb, for example, may emit radiation that can contaminate its surrounding area for scores of years, revealing new injuries only as the years pass.¹⁹⁷ If this event were to occur in a major city, how can all victims be properly compensated in the wake of such persisting devastation? What if the death toll of the next terrorist attack reaches tens of thousands of individuals? We must even consider the likelihood of future events of such magnitude with respect to the 9/11 Fund as “[t]here is now mounting evidence that the toxic collateral effects of the World Trade Center attacks have the potential for creating a legal—as well as human—cataclysm well into the future.”¹⁹⁸

A. *An Alternative Template for a Standard of Response*

The first step in designing a response template is to evaluate the need for compensation of a national catastrophe based on a community perspective as opposed to an individualistic perspective.¹⁹⁹ While we cannot exactly measure the totality of public sentiment until the act of terrorism or disaster occurs, we can formulate in advance of future attacks a basic template that can then be applied and adjusted when the circumstances necessitate such a response. This leads to a central question of this Note: if someone

195. Morrison, *supra* note 130, at 826.

196. Congress may opt to avoid passing any such laws unless compelled to under the pressure of immediate circumstances. *Id.*

197. See, e.g., Glen Martin, *Diablo Canyon Power Plant a Prime Terror Target; Attack on Spent Fuel Rods Could Lead to Huge Radiation Release*, S.F. CHRON., Mar. 17, 2003, at A1 (describing how a terrorist attack on a nuclear power plant has the potential to result in devastating damages and incalculable costs arising from the discharge of large amounts of radiation).

198. Eggen, *supra* note 20, at 384.

199. As mentioned above, Congress deemed the scale and scope of 9/11 to be exceptional. It was greater than any prior act of terrorism and the community response to it was strong and unified. The national psychic scars were deep and remain so today.

(namely the government and its taxpayers) should be held responsible for compensating victims of terrorist attacks and other similar catastrophes through compensation funds due to the nature of the national trauma, what is the best method of doing so?²⁰⁰ The following section will briefly outline a proposal by considering only who should be compensated, the standard for determining the amount of compensation, and how funding should be raised to accommodate such a reparation scheme.

B. Who Should Be Compensated?

Hundreds of the city's bravest made the ultimate sacrifice on September 11th and as a result of the following cleanup.²⁰¹ These were heroic individuals who ran into the buildings while others ran out, and later rummaged through the horrific crime scene at Ground Zero to uncover remains of those we lost, and began to repair New York City and our nation as a whole. But what makes a firefighter's life lost on September 11th in the collapsed buildings any more valuable or compensable than the firefighter who lost his life in an ordinary burning building on September 10th? Why should the family of a police officer, who was trapped under the debris of the World Trade Center and subsequently died from suffocation, receive compensation for his death when the family of an officer who was shot the week before in the line of duty may not find relief from a publicly funded compensation scheme? If the reason is simply because of the collective consciousness and national psychic scars inflicted upon us as a result of this terrorist attack, surely this is not a fair justification. In this way, the 9/11 Fund, especially its renewed version, regresses the goals of a just legal system and actively redefines our common law tort principles. This issue, as well as the goals of traditional tort law in regards to emergency personnel

200. See Anthony J. Sebok, *What's Law Got to Do With It? Designing Compensation Schemes in the Shadow of the Tort System*, 53 DEPAUL L. REV. 501, 517 (2003).

201. See, e.g., *New York Times Co. v. City of New York Fire Dept.*, 754 N.Y.S.2d 517, 519 (Sup. Ct. 2003) (stating that thousands of firefighters were sent into the World Trade Center after terrorists attacked the buildings on September 11, 2001, but 343 firefighters did not make it out alive).

mentioned above, must be considered when determining which victims will receive compensation in the future.

C. What Compensation Should Each Individual Receive?

Because the first 9/11 Fund was an attempt to reflect traditional private tort law where the victim is made whole, each award was calculated by incorporating economic damages (loss of future earnings) and noneconomic damages (loss of enjoyment of life) limited only by the discretion of the fund's administrator.²⁰² While its first version was active, however, the wide variation in payments to eligible claimants caused a predictable outcry. Regarding economic loss in particular, the disparity between amounts received was difficult to justify for many individuals.²⁰³ With families of deceased firefighters and police officers receiving less than those of individuals who worked in the financial sector, these variations were viewed as a valuation on the worth of the victims' lives.²⁰⁴ While this presumably was not the intention behind the 9/11 Fund, it did provide that all eligible claimants would receive different awards determined by the victim's economic "worth" at the time of death in addition to his or her future economic losses.²⁰⁵ This is a tort-based approach, a calculation inserted into decisions in courtrooms every day outside of the public eye.²⁰⁶

This approach may not be as appropriate, however, in the calculation of compensation for victims of national emergencies through publicly financed funds. A flat payment approach for losses would minimize the disparity between individual allocations²⁰⁷ while adequately satisfying the national demand to heal a collective wound and providing more equality in reparations.²⁰⁸ This is exemplified in

202. Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 *YALE L. & POL'Y REV.* 1, 10 (2006).

203. Morrison, *supra* note 130, at 824.

204. *September 11th Compensation: The Impossibility of Making Whole*, *supra* note 144.

205. Feinberg, *supra* note 14.

206. *Id.*

207. *Id.*

208. "The widow living in the \$450,000 home should not necessarily receive ten times more than the widow living in the \$45,000 mobile home, as she may have

the calculation of noneconomic loss and pre-death pain and suffering used for the 9/11 Fund. As previously mentioned, families of victims who died as a direct result of the planes crashing on September 11th, or who subsequently died as a result of debris removal, have been eligible to collect a flat payment of \$250,000 as well as an additional \$100,000 for the victim's spouse and each one of his or her dependents as compensation for pain and suffering.²⁰⁹ This method was employed once it was determined that calculating pain and suffering in the moments before death would have been extremely traumatic, inefficient, and arguably impossible to quantify.²¹⁰

At the very least, a cap should be placed on possible collections by eligible parties. This cap must be carefully considered and reevaluated after each national tragedy. The 9/11 Fund has spent, and will continue to spend, many millions of dollars specifically on medical-type expenses to alleviate the grief, stress, and trauma associated with the terrorist attacks.²¹¹ While these services are beneficial for recipients, the continued expenditures to finance them can become increasingly difficult to justify as the years pass, especially if that money can be spent on more immediate disaster recovery.

D. *How Should the Compensation Be Funded?*

While the Zadroga Act was passed quickly with wide support, the adoption of a last minute amendment concerning the means with which to compensate the fund has proven contentious.²¹² Because the project requires \$4.3 billion dollars, Amendment 4923, proposed by Senator Kristen Gillibrand, introduced two different taxes designed

more post-9/11 financial resources to draw upon in terms of savings, real and personal property, life insurance payouts, pensions, etc." Robert A. Katz, *A Pig in A Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251, 294 (2003).

209. *Frequently Asked Questions*, *supra* note 5, at 53; Morrison, *supra* note 130, at 824.

210. FEINBERG ET AL., *supra* note 11, at 40.

211. Stephanie Strom, *Finding Cure for Hearts Broken: Sept. 11 Is as Difficult as Explaining the Cost*, N.Y. TIMES, July 22, 2002, at B1.

212. Nicole R. Best, *The Revenue Impact of the Two Percent Excise Tax: The Congressional Budget Office Estimates Relating to the James Zadroga 9/11 Health and Compensation Act*, 41 PUB. CONT. L.J. 367, 368 (2012).

to cover the costs.²¹³ The first was a renewal of fees for employers dependent on visas.²¹⁴ The second tax was a two percent excise tax on payments received by foreign persons from countries without procurement agreements (including any foreign business entity) for the sale of goods or services to the U.S. government.²¹⁵ According to a report completed by the Joint Committee on Taxation and released by the Congressional Budget Office, these proposed taxes were presumed to produce enough revenue to provide for the costs of the Zadroga Act.²¹⁶

Criticism of these new taxes focused on possible issues pertaining to international trade agreements and concern over whether sufficient revenue would actually be garnered to pay for the Zadroga Act.²¹⁷ Even though the Zadroga Act became effective in January 2011, data indicated that the government did not raise any of the projected \$305 million of revenue during fiscal year 2011.²¹⁸ One possible explanation for this shortfall is the fact that the Internal Revenue Service did not initially promulgate regulations with which to direct the tax implementation. As a result, agencies were unable to impose the tax.²¹⁹ Further, the Joint Committee on Taxation report calculated the anticipated revenue without properly understanding the international procurement agreements with which the United States must comply, possibly causing serious international repercussions.²²⁰ While the idea of a two percent tax on foreign entities or other similar sources may be the most efficient method to fund the compensation program, Congress must take the necessary steps to ensure that such a source is legally sound and economically achievable.

One way to guarantee this is to include charitable donations as a collateral source offset in the computation of compensation received

213. *Id.*

214. James Zadroga 9/11 Health and Compensation Act of 2010 § 302, 8 U.S.C. § 1101 note (2011).

215. James Zadroga 9/11 Health and Compensation Act of 2010 § 301, I.R.C. § 5000C (2012).

216. Best, *supra* note 212, at 368–69.

217. *Id.* at 369.

218. *Id.*

219. *Id.*

220. *Id.* at 370–71.

by each eligible claimant. Both versions of the 9/11 Fund contain a provision for offsetting awards by incorporating certain collateral sources into the computation, including life insurance, pension funds, and death benefit programs.²²¹ The 9/11 Fund's collateral source offset excludes charity, compensation from various State Victim of Crime Boards funded with federal funds, portions of monetary compensation received by victim's families through the pensions and life insurance of the deceased that they have paid for themselves, and workers' compensation benefits as long as they have not already been paid.²²² Therefore, it would be more cost effective to partially, if not completely, fund compensation through charity and donations.

In the immediate wake of September 11th, over 300 charities collected for victims and their survivors, with thirty-five charities alone raising over \$2.7 billion.²²³ One survey estimated that nearly two-thirds of households in America gave donations in response to the terrorist attacks.²²⁴ Many donations were made specifically to support firefighters and other first responders, and their families. The Twin Towers Fund collected approximately \$440,640 for every one of the 438 uniformed and other official personnel who lost their lives at the World Trade Center,²²⁵ and \$418,000 was raised for every one of the 343 deceased firefighters through The New York Firefighters 9/11 Disaster Relief Fund.²²⁶ In fact, these types of charities

221. Feinberg, *supra* note 14; *Frequently Asked Questions*, *supra* note 5, at 53–54; Morrison, *supra* note 130, at 826–27.

222. *Frequently Asked Questions*, *supra* note 5, at 44, 54–55.

223. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-259, SEPTEMBER 11: MORE EFFECTIVE COLLABORATION COULD ENHANCE CHARITABLE ORGANIZATIONS' CONTRIBUTIONS IN DISASTERS 7–8 (2002); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-1037, SEPTEMBER 11: INTERIM REPORT ON THE RESPONSE OF CHARITIES 2 (2002).

224. Kathryn S. Steinberg & Patrick M. Rooney, *America Gives: Survey of Americans' Generosity After September 11*, 34 NONPROFIT AND VOLUNTARY SECTOR Q. 110, 118 (2005) (a telephone survey revealed that 65.6% of 1304 adults or their households contributed money for victims of the terrorist attacks on September 11th).

225. Katz, *supra* note 208, at 254.

226. TOM SEESSEL, FORD FOUND., THE PHILANTHROPIC RESPONSE TO 9/11, at 42 (2002), http://www.fordfoundation.org/pdfs/library/philanthropic_response.pdf.

ultimately raised more than \$500 million—approximately \$1.25 million per firefighter family.²²⁷

In addition to these donations, the first 9/11 Fund made an average payment of \$1.5 million to the surviving beneficiaries of 9/11 victims. Because the United States does not have the unlimited resources of past eras, and we could face serious fiscal decline if we do not curtail government spending, it may be time to restructure our approach to compensation for victims of national tragedies.²²⁸ Whether these calamities are terrorist attacks, natural disasters, or epidemics, Congress and the American public should, on a case-by-case basis, make determinations regarding the general disbursement of funds and the establishment of compensation funds in light of the ideas presented throughout this Note.²²⁹

In the meantime, the federal government and state governments should set up reserve and emergency funds out of revenues and other small taxes to begin preparing for the future. Then, in the aftermath of a national tragedy, the federal government and state governments should, to the extent that they can, provide for food, shelter, medical services, psychological assistance, and compensation for losses in conjunction with the relief provided by certain organizations, such as private charities. Finally, we as a nation must examine what is appropriate beyond this to determine what can further recovery and continued growth.

227. See generally Ingrassia, *supra* note 132.

228. Congress should:

[S]trike a balance between the passion and impulse to support the 9/11 victims and the need to be prudent in creating a responsible compensation structure. While in a typical mass-tort settlement this would be done by defendants and plaintiffs reaching a mutually beneficial agreement through a negotiation process, the Fund was forced to do so artificially and quickly.

Stenson & Saylor, *supra* note 17, at 533; see also FEINBERG, WHAT IS LIFE WORTH?, *supra* note 145, at 28.

229. See generally *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 439 (1997) (finding that although the law must be interpreted to account for harms suffered by the sympathetic plaintiff, “the consequences and effects of a *rule of law*” created to permit recovery must also be considered) (emphasis in original).

V. CONCLUSION

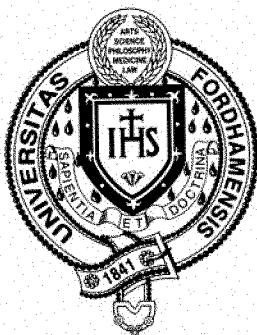
There are many advantages to a victim compensation fund as a legal response to terrorist attacks and other similar national calamities. Such programs provide a guaranteed system of compensation for those who suffer life's greatest tragedies, and offer comfort for our deep national scars while holding our government accountable for any possible oversight or miscalculation in the protection of our safety. These benefits, however, must also be weighed against the shortcomings of such compensation funds. There are five notable issues of concern with the 9/11 Fund under the Zadroga Act. First, the lack of equal treatment regarding victims of other terrorist attacks needs to be addressed. Second, the varying amounts of compensation that the victims of September 11th and their families received have led even Feinberg himself to strongly lean in the direction of a flat payment approach for all claimants under future compensation funds enacted due to a terrorist attack.²³⁰ Given the possibility that a future attack may be of even greater magnitude, such payment should be economically reasonable. Third, due to the outpouring of public aid after September 11th, charitable donations should be considered a collateral offset when calculating future award for eligible claimants.²³¹ Fourth, the inclusion of firefighters and other emergency responders under such a compensation fund who die or are injured on duty in the aftermath of an attack must be reevaluated in light of the goals of our legal system. This is strictly a contractual argument that reflects the assumption of inherent risks associated with these professions. Finally, the problematic issues of causation, indeterminable allocation of responsibility, and indefinite plaintiffs may prove difficult to overcome when crating compensation funds for mass toxic torts as suitable legal alternatives to tort litigation arising from national catastrophes.

230. *See supra* note 207.

231. *Frequently Asked Questions, supra* note 5, at 44. During the first 9/11 Fund, because life insurance, pension funds, and other such programs have been included as collateral offsets to the awards distributed to claimants, cost to the Treasury was reduced by more than \$2.9 billion. *See* SHAPO, *supra* note 52, at 121.

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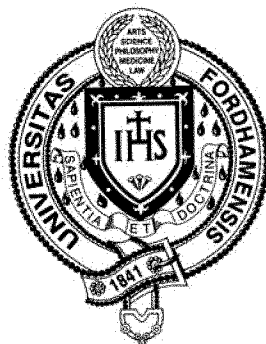
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