

To: Robert Harding, Deputy Mayor

From: Michelle Goldstein

Re: Legislative Alternatives to Limit the City's Liability relating to 9/11/01

According to the Law Department, there are approximately 35,000 potential plaintiffs as a result of the events of September 11 and it is estimate that 10,000 would file a claim. Currently, the Tort division handles approximately 8,000 lawsuits per year. A major concern is that if these cases make it to court, the judges and juries will be biased in favor of plaintiffs (even though the City seems to have a strong defense) and therefore, award substantial damages to compensate individuals for their loss.

Tort claims against the City cost about \$308 million in FY 2000 (excluding \$152 million for medical malpractice).

The following is a list of some of the types of potential lawsuits against the City:

Direct Effect

- A direct contact by law enforcement and public safety officers directing individuals who relied (to their detriment) on the direction.
- People who ran from the crash and claim they fell on a roadway defect

Aftermath

- Police failed to secure evacuated premises from looters
- Health advisories caused individuals either to return to the area too soon (causing toxic exposure or emotional harm) or too late (causing economic hardship).
- Rescue workers were provided with faulty equipment or no equipment (i.e. respirators).
- Unsafe workplace (OSHA, FEMA, Labor Law)
- Business interruption claims for evacuation that poor communication and confusion delayed access to return.
- Inadequate clean up

Following are legislative options:

Creation of a Congressional Fund for the Victims

One way to limit the City's liability is for Congress to create a congressional fund that mirrors the fund created for the airline industry. Congress, in the Airline bailout, created the "September 11th Victim Compensation Fund of 2001" that will provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001. The

Attorney General, through a Special Master, is charged with administering the compensation program, with no budget limitations. In filing a claim the individual/family does not have to establish fault and waives the right to file a civil action. Individuals who do file a claim are capped in the possible judgment. This fund is quite broad and would allow all injured individuals, not just those in the airplanes, to apply for compensation and to obtain it in a timely manner.

Federal Indemnification

Since the number of lawsuits that will be filed is unknown, as is the actual liability amount the City will incur, the City could request indemnification by the Federal government for all liability claims arising from the events of 9/11/01. This form of relief could also assist the City in the long-term as well by including toxic tort cases that might arise in the next few decades. This proposal would require the City to devote resources to defending these claims and then seek Federal indemnification. This alternative would, therefore, still require the City to devote a tremendous amount of time and resources to these cases.

Background

The airlines succeeded in getting the bailout legislation by convincing Congress that they would "go under" within a matter of days without it. They claimed that the insurance companies would not continue to cover them, and that they would not be able to access the capital market without immediate protection. The Trial Lawyers Association cooperated in creating the fund for payments to victims who waive their rights to sue.

Silverstein and the Port Authority are lobbying for bailout legislation now. Silverstein is arguing that if Congress will bail him out, he will use his insurance money to rebuild. These efforts are meeting resistance.

According to Schumer's office, they are working on technical corrections to the airline bailout bill that will clarify that persons who opt to receive payment from the federal fund must waive all claims including claims against the City (but only the claims that arose on September 11). Apparently, this was the original intent of the bill and Senator Schumer made a statement on the record to this effect. (However, it will be difficult to amend the bailout law. Many members of Congress who voted for it are now having "buyers remorse.")

We have been advised that the City will need to convince Congress that it has a "compelling need" to be bailed out, something in the order of a likelihood of bankruptcy without federal protection. By advocating this we may be inviting litigation.

The City's potential liabilities are less immediate and much harder to quantify than the dangers articulated by the airlines, and may not persuade Congress of the need to provide us protection now. Of the various liability concerns, perhaps the one most worth pursuing in Washington is the demand of the contractors that the City indemnify them above the amounts that will be covered by insurance that we can purchase.