World Trade Center In-Depth Series (Part 3): Peeling a Sour Apple

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It is a tortuous and bitter challenge to figure out who will have to pay for the health effects that World Trade Center rescue, recovery and cleanup workers have experienced since the Sept. 11 attacks.

At the insistence of Mayor Rudolph Giuliani, the city of New York controlled the ground-zero site. His Department of Design and Construction was in charge of clearing operations and worker safety. The city assumed, therefore, the lead role in orchestrating legal defense and arrangements for insurance cover.

It was evident at the outset that the city's financial exposure ran into billions of dollars. While too early to know exactly how the city might be made liable, it was already apparent that many people did and would suffer from related health maladies and that a gigantic debris-removal job was about to start.

Within a few weeks after the attack, the city obtained at least two estimates of liabilities that could land on its doorstep. The City Comptroller issued a report on Oct. 4, 2001, which estimated that several billions of dollars would be needed to take care of people whose health suffered due to the collapse, including recovery workers.

Also in October, Ernst & Young estimated the city's "probable maximum-medium losses" for general liability, environmental, professional and marine exposures at about $1.5 billion. By May 2002, the firm had raised its high range estimate to $4.2 billion.

The city very shortly thereafter bought $79 million in insurance. It was the only private-market insurance the city was to buy.

The more than 100 private contractors engaged in debris removal had their own covers. Certainly, all had policies in force at the moment the city engaged them for debris removal. Many may have taken out additional coverage on their own. Public court records do not disclose information about these measures, which remain missing links to resolving the question of who pays and how much.

Yet court records track the city's labors to devise a liability management strategy that was favorable to itself and its contractors.

The city had in its hand two cards that, over the next six years, it would try to play to its

best advantage, cards the private contractors did not hold. Foremost, the city has tried from the outset to induce Washington to pay for all of costs of the health effects of workers.

This bailout scenario is plausible given not only existing federal disaster relief law, stemming from the 1974 Stafford Act, but also the White House's and Congress' commitment from the start to treat Sept. 11 as a national security disaster.

President George W. Bush said on Sept. 13, 2001, to Mayor Giuliani and New York Gov. George Pataki, "I told (Federal Emergency Management Agency Director Joe) Allbaugh, anything--anything it takes to help New York."

On the same day, the Congress passed a $20 billion supplemental appropriation to pay for, among other Sept. 11-related projects, "the costs of federal, state and local preparedness for mitigating and responding to the attacks." FEMA normally recognizes insurance as a cost of business. (It has spent through spring 2007 $8.8 billion dollars on all three Sept. 11 sites--ground zero, the Pentagon and Pennsylvania.)

The city's strategy has been largely successful. Mayor Michael Bloomberg's administration wrung from the federal government $1 billion to fuel a captive insurance program. It has induced Washington to grant funds for medical surveillance and care. Washington has reimbursed the city $260 million for disability pensions of fire and police personnel. And it paid for a huge wrap-up workers' comp policy for ground-zero contractors.

The second prong of the city's strategy has been to leverage pre-existing laws and inspire new legislation to lower its exposure to litigation. It has attempted to invoke federal and state immunity provisions available to governmental bodies and, by inference, to its contractors.

The city appears, from its statements and court tactics, to be trying to play the immunity card with the primary objective of maneuvering worker claims away from a federal court, and the risk of a generous jury, over to a special master. This is what appears to be behind an effort by the city to induce Washington to reopen the Victim Compensation Fund.

Congress created the Victim's Compensation Fund on Sept. 22, 2001. The fund was not designed for workers who toiled at rescue and recovery days and months after. Most of the $7,049,416 paid out by the fund went to those killed, which included 343 New York City firefighters and 23 police officers, and another $1 billion was paid out to 2,600 persons injured in or near the site of the attack.

Reconstituted, however, it could funnel federal grants, eliminating draws on city and corporate treasuries. And the city could also sidestep the mammoth litigation that has been piling up for several years.

Sometime in late 2001 or early 2002, the political leadership of New York City decided

that it was time to ask that $1 billion of Congress' $20 billion supplemental appropriation be set aside to pay liability claims. During 2002 and early 2003, the city, state insurance regulators and FEMA hammered out an agreement whereby FEMA was to grant a new captive insurance company that amount of money.

On March 21, 2003, Gov. George Pataki and Mayor Bloomberg announced a plan to form the captive as a mechanism to pay liability claims. Special state legislation was drafted to expedite the creation of an in-state domiciled captive.

Bloomberg said in a press release at the time that he and others have "fought long and hard for federally paid insurance to protect the city and its contractors for claims arising from the massive debris removal work done in the World Trade Center. This legislation is necessary for the city to expedite the payment of claims relating to this effort."

A particularly attractive part of the plan was that federal funds went into a payment vehicle controlled by the city. The bylaws of the captive give the mayor power to select the board members.

THE CAPTIVE EMERGES

The captive went into existence in November 2004, and immediately received an infusion of $1 billion from FEMA. To date, that is the only money it has received from Washington. A General Accounting Office report of August 2003 notes that $1 billion "is a projected cost. But the actual cost may not be known for years."

The sole policy issued by the WTC Captive, on Dec, 3, 2004, was an occurrence-based plan with the city as the first named insured and 144 additional named insureds. It went into effect when debris removal commenced on Sept. 11, 2001, and expired on Aug. 30, 2002. GAB Robins was the claims administrator and Marsh the captive manager.

The captive was, according to its policy language, to "pay on behalf of insureds all sums insureds become legally obligated to pay as damages because of claims arising from or relative to debris removal" provided "the claim falls within the scope of general liability, marine liability, environmental liability or professional liability."

It listed as underlying policies the Liberty Mutual workers' comp and employer liability wrap-up policy, the $79 million in insurance written by the city and a few other policies.

There are several twists to the deal that worked particularly well for the city, alone among all insureds.

First, FEMA made a concession by acknowledging that the captive could use its largess to, in part, compensate city fire and police personnel who filed negligence claims. A General Accounting Office audit of federal aid relating to Sept. 11 commented that "FEMA has never reimbursed for insurance to cover a city for suits brought by its own employees."

The concession was especially noteworthy because some of the claimants were firefighters and police officers who had gone out on disability pensions, for which FEMA was reimbursing the City Treasurer. Some FEMA officials most likely have thought that these individuals were double-dipping entirely at Washington's expense.

The language of the policy also gave special status to the city, in that claims payments to the city's uniformed service personnel--fire and police--were not to exceed $350 million. This figure matches a figure set by Congress limiting the city's liability to that amount in insurance costs or direct payment.

Congress had by that act created a legal liability limit, independent of private contractors. The constitutionality of an act by Congress to grant immunity to a local government has not yet been challenged.

The captive policy also contains complicated provisions to ensure that, regardless of the total dollar value of claims--which could well exceed $1 billion--350 million is kept aside to pay the city's liabilities. The policy has two "sublimits": $1 billion for all but city uniformed services claimants, and $350 million for this class of claimants.

As of March 2007, the captive had received 8,520 claims. It had paid just $40,000 in losses and $55,987,308 in defense and cost-containment expenses. These expenses include about $20 million in legal expenses and $8 million to GAB Robins.

As of August, the captive has paid out $300,000 in six claims, none of which are part of the consolidated mass-tort case. Responding to an inquiry, the captive's public relations firm said, "These claims involve allegations of orthopedic injury; they do not allege exposure to hazardous substances at ground zero. They have much simpler facts, an example being a case in which a worker cut his co-worker's leg with a chain saw."

The mass-tort case is being waged by Worby Groner Edelman & Napoli Bern. Paul J. Napoli and Marc Jay Bern are the lead lawyers. According to Bern, not a single worker's claim he and colleagues have pursued has been paid, nor, he alleges, has the captive accepted any medical evidence for his clients.

In July 2007, Bern filed a suit to have a court compel the captive to begin processing claims. His says that the historical record behind the creation of the captive clearly states that all involved--city, state and federal parties--were committed to having the captive honor claims from workers.

But the captive has been arguing in court that it need not pay any claims because of immunity provisions available in federal and state statutes. It has argued its case before Judge Alvin Hellerstein, the federal judge in the Southern District of New York, where Congress legislated that all Sept. 11-related litigation be concentrated.

On Oct. 16, 2006, Hellerstein denied motions to dismiss the case because of these

immunity provisions. The defendants appealed, and an appellate court is hearing the case this fall.

The captive's legal approach appears to be one step in that plan by the Bloomberg administration to shift the liability cases into the Victim's Compensation Fund or a similar mechanism far removed from jury trial.

Kenneth Feinberg, master of the fund, wrote in the New York Times in December 2006 that $500 million of that additional $1 billion went to "more than 1,300 recovery workers and others suffering from the same respiratory injuries."

The fund did not expressly discriminate against workers who arrived after the collapse, but it effectively cut off the vast majority of them. To be accepted by the fund, the condition had to have been acquired within 72 hours of the attack--meaning through the morning of Sept. 14, 2001. The would-be victim had to have been in the immediate vicinity of the World Trade Center. And a claim, with medical records, had to be filed by Dec. 22, 2003.

Feinberg suggested that the liability claims of workers could be resolved using a mechanism like the fund, which encouraged people to resolve their claims without going to litigation. "There is a better way: Use the principles of the Sept. 11 fund as a blueprint to resolve the current litigation and get money into the hands of recovery workers and others quickly."

He estimated that in addition to the $1 billion in the captive, another $500 million may be available from contractors and city charities--"more than sufficient to pay all eligible claims, as well as lawyers' fees and costs."

Feinberg would take into account money some claimants, especially fire and police personnel, have received.

The chief use of the funds, he proposed, would be for medical monitoring and healthcare. Feinberg suggested, as others did in 2007, that funding for medical programs be separated from disability awards, without suggesting another source of funding.

This might lead to a plan to pay claimants a formula-driven sum for nonmedical compensation, thereby avoiding making individually set awards for disability.

Meanwhile, with no worker claims being paid and thousands of workers and residents suffering from medical problems, members of the New York City congressional delegation have offered their own proposals for financial relief.

U.S. Representives Carolyn B. Maloney and Vito Fossella have introduced legislation, H.1638, that would open up the Victims Compensation Fund for workers and volunteers who became engaged in rescue and recovery after the 72-hour cutoff date written into the original act.

Besides having the Victims Compensation Fund pay for disability and medical care, H.1638 would also fund medical monitoring of all persons affected by the collapse.

Another proposal exists to cover medical care for these workers, as well as other affected individuals. Jerrold Nadler, another New York City congressman, submitted in 2006 H. 6046, also known as the Sept. 11 Comprehensive Health Benefits Act. It would enable anyone without health insurance to become enrolled in Medicare for the purpose of care relating to the World Trade Center aftermath. Those with health insurance could obtain a supplemental Medicare policy for the same purpose. These policies would be free, even down to eliminating co-payments.

With the liability suit in legal gridlock, Mayor Bloomberg has been proposing that the captive--which he controls--be stripped of its FEMA-granted funds, and for those funds to be used in medical monitoring and healthcare for workers and residents.

To which Bern had this to say: "Major Bloomberg has decided in his singular wisdom that the congressional intent was not valid. Besides being an outrage that he has interfered with the orderly distribution of these funds to the workers, it would (be) a horrible practice for states and the federal governments to have their intent frustrated by a local politician."

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