

...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE &
DEMOCRACY
NEWS

Dear Friends,

I know. With November right around the corner, it's mighty difficult to focus on much these days. And while CJ&D is a tax-exempt organization (i.e., all donations to CJ&D are tax-deductible), which means we are prohibited from becoming involved in elections, we certainly know that some candidates are continuing to talk about medical malpractice in the context of health care discussions.

That's one reason we just published a brand new statistical briefing book called "Medical Malpractice: By the Numbers," which you can download from our web site <http://centerjd.org>. This new 70-page resource covers litigation, cost and safety issues in a consolidated format that should answer any question you might have about "tort reform" and health care.

We've also just revamped our Americans for Insurance Reform website, which houses groundbreaking reports and information about the property/casualty insurance industry. Don't forget to check out our new AIR fact sheet on insurance executive salaries. (AIR, by the way, is a project of the Center for Justice & Democracy - the only group like it in the nation!

And on page 4 of this newsletter, you'll find more information about our CJ&D Medals of Justice, honoring inspiring clients from around the country.

Our next newsletter will be after November. Until then, fingers crossed!

Sincerely,
Joanne Doroshow
Executive Director

IN THIS ISSUE: 9/11'S AFTERMATH

GROWING HEALTH CLAIMS FOR 9/11 VICTIMS

In the wake of the 9/11 terrorist attacks, Congress established the September 11th Victim Compensation Fund (VCF) to compensate victims and their families for death and physical injury arising directly from the attacks. This no-fault program had a narrow definition of eligibility, leaving no recourse for thousands of men and women exposed to toxic elements while working on the massive rescue, recovery and clean-up effort at the World Trade Center (WTC) site or living in the surrounding area. Many of these victims later died, are now sick or may become sick in the future.

Ongoing medical studies show that the health effects of performing WTC work or residing near the site have lasted far beyond the initial exposure. For example, after reviewing more than 300 studies published from 2001-2011, the WTC Medical Working Group said in its 2011 Annual



Report on 9/11 Health, "Dozens of studies indicated that respiratory symptoms, sinus problems, asthma, and loss of lung function were diagnosed in or reported by many who were exposed to WTC dust, including nearly 60,000 rescue and recovery workers, residents and office workers who have enrolled in 9/11 health programs. For many, these conditions have persisted for nearly a decade."

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THE TERRORISM INSURANCE SWINDLE

After September 11, 2001, the scenario was clear – reinsurance companies planned to stop covering losses from future terrorism risks after December 31, 2001, when about 70 percent of reinsurance contracts were set to expire. Primary insurers exclaimed that they could no longer cover losses due to terrorism, banks would stop lending money, construction would stop, businesses would collapse and the economy would fall apart. Once again, the insurance industry had lawmakers up against a wall. A major economic crisis was on the horizon, they said, and the federal government had better respond exactly as instructed. Insurers wanted a severe liability cap in the event of future terrorist attacks and government guarantees to replace lost reinsurance coverage, a plan that would place the

burden of terrorist-related losses directly on taxpayers. They made this clear in no uncertain terms.

Anti-government lobbyists like Tom Donohue, President and Chief Executive Officer of the United States Chamber of Commerce, went before Congress to beg for government help, testifying: "[w]ithout some sort of appropriate partnership between the insurance industry and the federal government, the looming constriction in the insurance and reinsurance market threatens to inflict serious injury to the U.S. economy. It is critical that the business community, the Administration and Congress come together before the end of this year's Congressional session to devel-

(continued on back page)

“These men and women risked their lives and their health to support their fellow Americans after the devastation of 9/11,” said Dr. Philip Landrigan, Principal Investigator of Mount Sinai’s WTC Program’s Data and Coordination Center and the study’s co-author, in a September 1, 2011 press release. “Now, many of them are riddled with multiple health problems. Our study shows that these diseases may persist for years to come.”

Death, illness or fears of developing illness, coupled with widespread government failures to provide health care and other vital support, prompted many Ground Zero workers and their families to turn to the civil justice system for help. For example, in November 2010, over 10,000 rescue and cleanup workers approved a settlement for between \$625 million and \$712.5 million with New York City. Firefighters, police officers and other workers had alleged that their illnesses and injuries were caused by the city’s failure to provide safety equipment and supervision that would have protected them as they responded to the catastrophe and removed debris.

In January 2011, President Obama signed into law the James Zadroga 9/11 Health and Compensation Act, which offers injured workers and their survivors another path to compensation. The Act created a \$4.3 billion fund to compensate and treat people exposed to toxic dust and debris from the attacks.

The law reopened the September 11th Victim Compensation Fund to compensate sickened emergency responders and recovery and cleanup workers, as well as area residents, who suffered WTC-related death and physical injury after the original Fund closed in 2003. The new Fund, which opened on October 3, 2011 and totals \$2.775 billion, is being administered by Special Master Sheila Birnbaum. The VCF will accept claims for five years and complete the payment process during 2016-17. According to the U.S. Department of Justice, since Congress determined that only \$875 million be paid out in the first five years of the program, “claimants will receive only a portion of the compensation allowed under the rules of the VCF. Depending on the number and type of claims, and in order to ensure that all eligible claimants receive an award, the Zadroga Act’s cap on funding means that it is possible that claimants’ awards will be pro-rated.” Moreover, like the initial VCF, acceptance of payment from the new Fund waives a claimant’s right to pursue future litigation for 9/11-related injury or death. In addition, victims who have received settlements in civil suits for injury or death arising from the September 11th attacks are still eligible for the new Fund but any settlement money will be subtracted from the Fund award.

The Zadroga Act also created the World Trade Center Health Program – operated by the National Institute for Occupational Safety and Health (NIOSH)

– which was established to monitor and treat injuries stemming from exposure to toxins in the Trade Center ruins. In October 2012, a new rule goes into effect that adds 50 different types of cancers to the list of illnesses covered by the \$4.3 billion fund. Before then, all cancers had been excluded from the list of diseases recognized as caused by the World Trade Center attack. As reported in the June 9, 2012 *New York Times*, the decision “will allow not only rescue workers but also volunteers, residents, schoolchildren and passers-by to apply for compensation and treatment for cancers developed in the aftermath of the attack.” Survivors of patients who have died may also apply. Moreover, according to the *NYT*, “The new rules would apply to Pentagon and Shanksville, Pa., responders as well, and it allows those cancer patients to tap into a treatment fund to pay for medical costs not covered by insurance.”

Now it’s up to Congress to significantly increase the VCF budget, so all victims receive fair compensation.



CORPORATE IMMUNITY, TERROR-STYLE

In the aftermath of September 11th, Congress acted quickly to immunize companies from any liability connected to a terrorist event. Among the many business protections signed into law by then-President George W. Bush was the SAFETY Act of 2002, a provision of the Homeland Security Act, which shields manufacturers, sellers and distributors of qualified anti-terrorism technologies, products, advice or services, as well their corporate customers, from civil accountability in the event that the product, ser-

vice or technology is involved in an act of terrorism that causes physical and/or financial harm.

More specifically, since 2004, the Department of Homeland Security (DHS) has been approving products and services as a “qualified anti-terrorism technology” or “QATT,” meaning that business entities which design, make, market, supply or use the QATT automatically receive unprecedented tort protections in the event of a terrorist attack, namely: fed-

eral court jurisdiction for all related suits; a cap on liability to the amount of liability insurance coverage DHS requires for the specific QATT; a complete bar on punitive damages; no recovery of non-economic damages unless the victim suffered physical harm; elimination of joint and several liability for non-economic damages; a ban on prejudgment interest; and reduction in damages by the amount the victim receives or could later receive from outside sources.

CORPORATE IMMUNITY, TERROR-STYLE continued...

And if a company receives additional DHS certification for that QATT – which often happens at the same time a QATT designation is conferred by DHS – the company is also entitled to the “government contractor defense” in product liability and other cases. In other words, extra DHS certification means that negligent corporations whose products or services are DHS-certified will be fully immunized from liability for harm unless clear and convincing evidence shows fraud or willful misconduct when applying for Safety Act protection.

In June 2012, Yankee Stadium became the first sports venue to be designated and certified by DHS under the SAFETY Act, meaning that the Yankees will not

have to pay claims from victims injured by a terrorist attack at the ballpark. “It’s the mother of all liability waivers,” George Washington University Law Professor Ellen Zavian told NBCNews.com’s August 21, 2012 *Red Tape Chronicles Blog*. “There’s waivers on ticket stubs...but I haven’t seen any waivers that state, ‘Oh by the way...we can waive (liability) for terrorism attacks,’” Zavian said, adding, “How did this get under the radar? Are people really supportive of that? I think attendees should know what they are waiving when they enter a facility, and I don’t think they do.”

The Yankees join the NFL, Super Bowl venues, the New York Stock Exchange,



Boeing, defense companies and a host of other corporations that are exempt from future liability, a disturbing trend that not only undermines the legal rights of all Americans but also sets a dangerous precedent for industries who seek other types of immunity from Congress.

THE TERRORISM INSURANCE SWINDLE continued...

op and implement an appropriate federal financial backstop for terrorism exposure. If such a backstop is not created, our nation’s economic recovery will be seriously jeopardized.”

In November 2002, President Bush signed the Terrorism Risk Insurance Act (TRIA) into law, a federal terrorism insurance “backstop” that would shield the industry from paying billions of dollars in another attack. The Act created a three-year program with the federal government picking up 90 percent of the costs of future terrorist incidents (up to \$100 billion a year) after individual insurance companies paid an initial deductible. TRIA required insurers to offer terrorism coverage but repay very little or none of the federal assistance they received. Though the measure was set to expire December 31, 2005, Congress renewed it twice, with the expiration date now set for December 31, 2014.

As J. Robert Hunter, Director of Insurance for the Consumer Federation of

America, former Texas Insurance Commissioner and Federal Insurance Administrator, told the U.S. Senate Committee on Banking, Housing and Urban Affairs in April 2005 before the Act’s first extension: TRIA “put taxpayers on the hook for billions of dollars in terrorism losses that the insurance industry could otherwise afford, while thwarting the development of a vibrant private market



for terrorism insurance and reducing incentives for businesses to undertake mitigation efforts.” Heartland Institute Vice President Eli Lehrer agreed with Hunter’s assessment in an August 10, 2009 policy document, arguing that TRIA was created as “a post-9/11 stopgap” but “insurance companies have shown almost no interest in replacing it. Often fractious industry groups representing brokers, insurers, reinsurers, and commercial insurance consumers have lined up in support of the program.” Lehrer concluded, “Replacing TRIA with a private system won’t be easy. But leaving TRIA in place sticks the American taxpayer with nearly limitless liability for the coverage of private property.”



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Havlish v. bin Laden

In July 2012, a U.S. Magistrate Judge ordered al Qaeda, Iran and the Taliban to pay more than \$6 billion to the families of 59 victims killed in the September 11th terrorist attacks. As Ellen Saracini – whose husband Victor was captain aboard the hijacked United Airlines plane that hit the World Trade Center – explained, the lawsuit was about accountability. “It just didn’t seem like our government was moving forward in trying to determine who was responsible for these attacks,” Saracini told *The Intelligencer* after the decision. “If we can get this money or seize these assets, then perhaps we could save some other person who might fall victim to terrorism.”

Bavis v. United Airlines

In September 2011, Mark Bavis’s family settled the last of 95 wrongful death suits related to the 9/11 terrorist attacks. Bavis, 31, had been a passenger on United Airlines Flight 175, one of two planes that struck the World Trade Center. The lawsuit accused United and Huntleigh USA – the company responsible for the security checkpoint at Boston’s Logan International Airport where Bavis boarded – of security failures.

As reported in the September 20, 2011 *New York Times*, “Family members had long resisted a settlement in the case, which was filed in 2002, saying they wanted to hold the defendants publicly accountable at trial for what the family and its lawyers contended was gross negligence that allowed five terrorists to board Flight 175.” Bavis’s survivors only agreed to the settlement after their lawyers were permitted

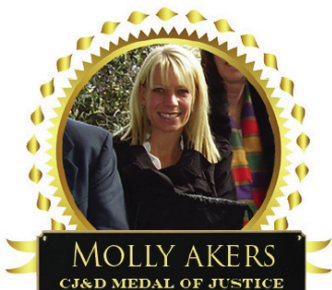
to file extensive evidence, revealing “an important story as to why this happened,” explained Bavis’s twin brother, Michael. “We hope it’s information that will make a difference.” Among the documents made public: evidence that the five terrorists on Bavis’s flight had gone through a security checkpoint where some Huntleigh screeners could not speak or understand English, did not know who Osama bin Laden or Al Qaeda were, and, in one case, could not identify what Mace was.

Ashcroft v. al-Kidd

In May 2011, the U.S. Supreme Court shielded former Attorney General John Ashcroft from liability for his role in a post-9/11 material-witness policy that resulted in the arrest and detention of Abdullah al-Kidd, a Muslim U.S. citizen. FBI agents had taken the former University of Idaho football star into custody as he checked in for a flight to Saudi Arabia, where he planned to study on a scholarship. As reported in a March 2, 2011 *NPR* broadcast: “Over the next 15 days, he was held in three high-security prisons, housed with murderers, repeatedly strip-searched and forced to sit naked while other prisoners around him were clothed. He was held in cells with 24-hour lighting and interrogated, he says, primarily about himself.” Al-Kidd was later released, provided that he, among other things, surrender his passport, travel to only four states, have regular meetings with a probation officer and agree to home visits. Al-Kidd lived under these conditions for more than a year; he was ultimately released having never been called to testify as a material witness for the government.

CJ&D MEDAL OF JUSTICE

**Recognizing the inspirational stories
of injury victims...
and the attorneys who work
hard for their clients.**



People who are wrongfully injured – and the families of those who have died – are the forgotten faces in the debate over the civil justice system.

Each month, the Center for Justice & Democracy is recognizing a new injury victim, as well as the attorney who represents them, with the “CJ&D Medal of Justice.”

Please contact us to learn more about CJ&D’s Medal of Justice, and how we can recognize one of your special clients.

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