

Action
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Office of Legislative Liaison
Routing Slip

TO:	ACTION	INFO
1. D/OLL		X
2. DD/OLL [redacted]		X
3. Admin Officer		
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5. Legislation	X	
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SUSPENSE		18 Apr 86 Date

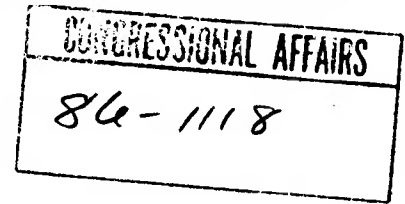
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RECEIPT # RECORD



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 7, 1986

LEGISLATIVE REFERRAL MEMORANDUM

SPECIAL

SPECIAL

TO: SEE ATTACHED DISTRIBUTION LIST

SUBJECT: Three (3) Department of Justice draft bills concerning tort reform: (1) the Government Contractor Liability Reform Act; (2) the Product Liability Reform Act and (3) the Federal Tort Claims Reform Act.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than Friday, April 18, 1986.

(Note -- The deadline for responses, as indicated above, is firm. The Department of Justice and OMB may convene an interagency meeting (prior to 4/18) to answer any questions concerning these bills. Details of the meeting will be provided by OMB at a later date.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: Paul Wallison	Tom Palmieri	Susan Jacobs	Boyden Gray	Bill Roper
Jack Carley	Ron Peterson	Phil Hanna	Dave Gibbons	Tony Blankley
Naomi Sweeney	Jeff Struthers	Barry Clendenin	Penny Jacobs	Alex Dimitrief

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Federal Trade Commission
General Services Administration
Office of Personnel Management
U.S. Postal Service
Nuclear Regulatory Commission

A BILL

To place limitations on the civil liability of government contractors to ensure that such liability does not impede the ability of the United States to procure necessary goods and services.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SEC. 1. This Act may be cited as the Government Contractor Liability Reform Act of 1986.

FINDINGS AND PURPOSES

SEC. 2. (a) The Congress finds and declares that --

(1) the United States has a compelling interest in ensuring that its contractors are held to fair and reasonable standards of tort liability;

(2) in recent years government contractors have encountered a rapid expansion in their tort liability which seriously interferes with their ability to provide many of the goods and services required by the United States;

(3) as a result of these difficulties, many agencies have encountered growing difficulties in obtaining goods and services essential to their programmatic responsibilities;

(4) where such goods and services are available to the United States, they often are only available at a far higher cost to the United States;

(5) among the programs most seriously affected are programs designed to protect public health and safety, and programs involving the national security;

(6) where liability of government contractors is not based on fault or wrongdoing, such liability often serves to punish and deter contractors from providing goods and services which the United States has determined to be in the public interest;

(7) the increasing unpredictability of tort law has made it difficult for government contractors to assess their liability risks, and has made many contractors particularly reluctant to undertake activities that pose unlimited or indeterminable liability;

(8) the high transaction costs of the civil justice system, in which almost twice as much money goes to lawyers as to compensate victims, is an intolerable burden on the American taxpayer to whom much of these costs are ultimately passed; and

(9) these and other excesses in the civil justice system can and should be remedied through appropriate limitations on contractor liability.

(b) It is the purpose of this Act to place reasonable limitations on the civil liability of government contractors to ensure that the United States is able to obtain the goods and services necessary to further the public welfare; to protect the American taxpayer from inordinate and unreasonable costs; and to limit many of the serious excesses of the civil justice system which subject contractors of the United States to unacceptable and unreasonable liability risks.

DEFINITIONS

SEC. 3. As used in this Act --

(1) "action" means a contractor product liability action, a contractor service action, or a combination of such actions;

(2) "concerted action" or "acting in concert" means the conscious acting together in a common scheme or plan of two or more persons in committing a tortious act;

(3) "contingency fee" means any fee for professional legal services which is in whole or in part contingent upon the recovery of any amount of damages, whether through judgment or settlement;

(4) "contractor" means any person who has contracted with an agency or instrumentality of the United States to supply a product or service;

(5) "contractor product liability action" means any action or claim, including a wrongful death action, involving the design, production, distribution or sale of a product, filed in Federal or State court seeking damages from a contractor for a personal injury or death attributable to the product;

(6) "contractor service action" means any action or claim, including a wrongful death action, filed in Federal or State court seeking damages from a contractor for a personal injury or death attributable to the provision of a service;

(7) "economic loss" means past and future (A) expenses of health or other care, (B) expenses of rehabilitation, (C) loss of earnings, (D) loss of homemaker services, and (E) burial expenses;

(8) "non-economic damages" means all damages other than damages for economic loss, and includes punitive or exemplary damages;

(9) "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity;

(10) "product" means any object, substance, mixture or raw material, whether an assembled whole, a component part or an ingredient, which is intended for sale or lease to an agency or instrumentality of the United States;

(11) "service" means any work by a contractor performed for or on behalf of an agency or instrumentality of the United States, but does not include the design, production, distribution or sale of a product;

(12) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territories of the Pacific Islands, and any other territory or possession of the United States, or any political subdivision thereof.

SCOPE

SEC. 4. (a) The provisions of this Act shall apply to all actions filed in Federal or State court on or after the date of enactment of this Act.

(b) The provisions of this Act shall preempt and supersede any State law to the extent such law is inconsistent with the limitations on liability contained in such provisions.

(c) Nothing in this Act shall be construed to create or vest jurisdiction in the district courts of the United States over actions subject to this Act.

FAULT-BASED LIABILITY

SEC. 5. (a) A contractor may not be found liable for damages in a contractor product liability action subject to this Act to the extent such liability is inconsistent with the following limitations.

(1) Such contractor may not be found liable for any injury unless either (A) the contractor was negligent in the design, production, distribution or sale of such product, or (B) the product was defective, and such defect rendered the product unreasonably dangerous. Besides any other applicable standard or rule of State law, a defective product may not be found unreasonably dangerous if the defect is the

subject of an adequate warning, is apparent to a reasonable person, or is a matter of common knowledge.

(2) Such contractor may not be found liable for any injury related to an unreasonable or unforeseeable use or alteration of the product. Besides any other applicable standard or rule of State law, any alteration of the product which is specifically prohibited or warned against, and any use of the product which fails to apply required safeguards or maintenance, shall be deemed unreasonable.

(3) Such contractor may not be found liable for any injury related to the failure to provide an adequate warning or instruction as to any danger associated with the use of the product if the danger is apparent to a reasonable person, or the danger is a matter of common knowledge. Nor may such contractor be found liable for any injury related to the failure to provide an adequate warning or instruction as to any danger associated with the use of the product if the use is unreasonable or unforeseeable.

(4) Such contractor may not be found liable for any injury related to a defect in the design of the product, or to a failure to provide an adequate warning or instruction as to any danger associated with the use of the product, unless at the time the product was produced the scientific or technical knowledge necessary to eliminate the defect or to warn or instruct of the danger was available to and capable of use in an economically feasible manner by the contractor.

(b) A contractor may not be found liable for damages in a contractor service action subject to this Act unless the contractor is found to have been negligent in the provision of the service.

JOINT AND SEVERAL LIABILITY

SEC. 6. (a) Joint and several liability may not be applied to any action subject to this Act. A contractor found liable for damages in any such action may be found liable only for those damages directly attributable to the contractor's pro-rata share of fault or responsibility for the injury, and may

not be found liable for damages attributable to the pro-rata share of fault or responsibility of any other person (whether or not that person is a party to the action) for the injury, including any person bringing the action.

(b) This Section shall not apply as between persons acting in concert where the concerted action proximately caused the injury for which one or more of such persons are found liable for damages.

LIMITATION ON NON-ECONOMIC DAMAGES

SEC. 7. (a) No non-economic damages may be awarded in excess of \$100,000 in any action subject to this Act.

(b) For purposes of this Section, "any action" includes all actions (including multiple actions) for damages, and includes all plaintiffs and all defendants in such actions, which arise out of or were caused by the same personal injury or death.

PERIODIC PAYMENT OF JUDGMENTS

SEC. 8. (a) In any action subject to this Act, no contractor may be required to pay damages for future economic

loss in a single, lump-sum payment, but shall be permitted to make such payments periodically based on when the damages are found likely to occur.

(b) The court may require such contractor to purchase an annuity making such periodic payments if the court finds a reasonable basis for concluding that the contractor may not make the periodic payments.

(c) The judgment of the court awarding such periodic payments may not be reopened at any time to contest, amend, or modify the schedule or amount of the payments in the absence of fraud.

(d) This Section does not apply to any action subject to this Act in which the damages for future economic loss are less than \$100,000. Nor shall this Section be construed to preclude a settlement providing for a single, lump-sum payment.

COLLATERAL SOURCES OF COMPENSATION

SEC. 9. (a) Any award of damages to a person in an action subject to this Act shall be reduced by the amount of any past or future payment or benefit covered by this Section which the person has received or for which the person is eligible on account of the same personal injury or death for which such damages are awarded.

(b) The payments or benefits covered by this
Section are --

(1) any payment or benefit by or paid for in whole or in part by any agency or instrumentality of the United States, a State or a local government; and

(2) any payment or benefit by a workers' compensation system or a health insurance program funded in whole or in part by an employer, except to the extent that such payment or benefit is the subject of a proper claim of subrogation, reimbursement or lien.

(c) This Section shall not preempt or supersede any State law which provides that damage awards may be reduced by payments or benefits other than those covered by this Section, or which reduces such damage awards by payments or benefits by a workers' compensation system or a health insurance program even when such payments or benefits are the subject of a proper claim of subrogation, reimbursement or lien.

ATTORNEY CONTINGENCY FEE AGREEMENTS

SEC. 10. (a) No attorney representing on a contingency fee basis a person bringing an action subject to this Act may charge, demand, receive or collect for services rendered in excess of 25 per centum of the first \$100,000 or portion thereof recovered, plus 20 per centum of the next \$100,000 or portion thereof recovered, plus 15 per centum of the next \$100,000 or portion thereof recovered, plus 10 per centum of any amount in excess of \$300,000 recovered by judgment or settlement in such action.

(b) In the event that such judgment or settlement includes periodic or future payments of damages, the amount recovered for purposes of computing the limitation on the attorney contingency fee shall be based on the cost of the annuity or trust established to make the payments, or where such an annuity or trust is not established, the present value of the payments.

ALTERNATIVE DISPUTE RESOLUTION

SEC. 11. (a) It is the policy of the United States to encourage the creation, adoption, and use of alternative dispute resolution techniques to achieve the efficient, cost effective

and expeditious disposition of civil disputes. It further is the policy of the United States to encourage the modification of procedural and evidentiary rules to the extent feasible to accommodate such alternative dispute resolution techniques.

(b) The Attorney General of the United States is directed to provide to the Congress within one year of the date of enactment of this Act recommendations which would implement the foregoing policies with regard to civil disputes filed in Federal court.

SEVERABILITY

SEC. 12. If any provision of this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected by such invalidation.

EFFECTIVE DATE

SEC. 13. This Act shall become effective on its date of enactment.

THE GOVERNMENT CONTRACTOR LIABILITY REFORM ACT OF 1986

SECTION-BY-SECTION ANALYSIS

Section 1 sets out the short title of the Act as the Government Contractor Liability Reform Act of 1986.

Section 2 sets out congressional findings that the United States has a compelling interest in ensuring that its contractors are held to fair and reasonable standards of liability, and that recent expansions of tort liability seriously threaten the government's ability to obtain the goods and services needed to provide for the public health and safety.

Paragraph (b) of Section 2 states that the purpose of the Act is to place reasonable limits on the civil liability of government contractors, so that the United States can obtain the goods and services necessary to further the public welfare while protecting taxpayers from inordinate and unreasonable costs, and to limit the serious excesses of the civil justice system which subject government contractors to unacceptable and unreasonable risks.

Section 3 sets out certain definitions to be used in the Act. Among the terms defined are: "concerted action," "contingency fee," "contractor," "noneconomic loss," "product," and "service".

Section 4 establishes the scope of the legislation. The Act will apply to all contractor product or service liability actions filed in federal or state courts. The provisions of the Act would supersede only those portions of state law which are inconsistent with the limitations imposed by the Act. The section further provides that the Act does not create federal jurisdiction over product liability cases not otherwise in federal court.

Section 5, paragraph (a)(1) limits the liability of a contractor in a contractor product liability action to those cases where a contractor was either (1) negligent in the design, production, distribution or sale of a product, or (2) the product was defective, and that defect rendered the product unreasonably dangerous.

Paragraph (a)(1) also specifies that a product cannot be found to be unreasonably dangerous if the defect is the subject of an adequate warning, is apparent to a reasonable person, or is a matter of common knowledge.

Paragraph (a)(2) provides that a contractor will not be liable where the injury caused by the product resulted from an unreasonable or unforeseeable use or alteration of the product. Any alteration of a product which is prohibited or

warned against, or any use of the product without the required safeguards, would be considered unreasonable under the provisions of this Act.

Paragraph (a)(3) would preclude liability for an injury on the theory that the contractor did not provide an adequate warning or instruction about a defective product when the danger of the product is apparent to a reasonable person or is common knowledge. This paragraph also prohibits liability based on the contractor's failure to warn or instruct against the danger associated with the unreasonable or unforeseeable use of the product.

Paragraph (a)(4) of this section precludes contractor liability for a defect in design or for a failure to warn of a danger associated with a product, unless at the time the product was manufactured, there was the scientific or technical knowledge necessary to correct the design or properly warn of the danger and the knowledge was available and economically feasible to use.

Paragraph (b) of Section 5 provides that a contractor is not liable for damages arising from a service performed for the government unless the contractor was negligent in providing the service.

Section 6 bars the application of joint and several liability in and contractor product liability or service action,

except in those cases where the injury was proximately caused by two or more persons acting in concert. Instead, a contractor may be found liable only for that portion of the damages directly attributable to the contractor's proportionate share of fault in the injury.

Section 7, paragraph (a) imposes a \$100,000 cap on all noneconomic damages, including pain and suffering and emotional distress. The limitation also includes punitive or exemplary damages. This Act imposes no limitation on the amount of economic damages, such as medical expenses and lost wages.

Paragraph (b) specifies that the \$100,000 cap applies to all actions for damages which arise out of the same personal injury or death.

Section 8 provides that no contractor shall be required to pay damages for future economic loss in a single, lump-sum payment. Instead, payments may be made in installments over the time period in which the loss is likely to occur.

If the court has reason to believe the contractor required to pay the award may not make the payments, paragraph (b) authorizes the court to require the contractor to purchase an annuity to make the periodic payments.

The remaining paragraphs of the section provide that court ordered periodic payments are final and may not be reopened, and

that the periodic payment provisions of the section are intended to apply only when product liability awards for future economic loss are for \$100,000 or more.

Section 9, paragraph (a), requires that any award of damages under this Act shall be reduced by the amount of compensation received from certain collateral sources of income received for the same injury or death.

Paragraph (b) specifies the types of collateral sources which may be considered in reducing damage awards under this Act. They are: (1) any payment or benefit provided by any federal, state or local agency or instrumentality; and (2) any payment or benefit under a workers' compensation system or employer-funded health insurance program. Damages awarded subject to this Act will not be reduced by collateral sources of compensation where the provider of the collateral benefits pursues a right to subrogation.

Paragraph (c) makes clear that this section is not intended to preempt or supersede any existing state law which allows for the reduction of damage awards for collateral sources other than those specified in this section, or which allows for reductions even where a right of subrogation exists.

Section 10, paragraph (a) establishes a schedule for the size of a contingency fee an attorney may charge under this

Act. The amount of the contingency fee that may be charged decreases on a "sliding scale" as the size of the damage award increases. Under the section, no attorney may receive in excess of 25% of the first \$100,000 recovered, plus 20% of the next \$100,000, plus 15% of the third 100,000, plus 10% of any amount in excess of \$300,000.

Paragraph (b) provides that where a contingency fee is based on an award of damages to be paid in future periodic payments, the fee shall be based on the present value of those payments. In those cases where an annuity is purchased, the contingency fee will be based on the cost of the annuity.

Section 11 states that it is the policy of the United States to encourage the use of alternative dispute resolution techniques to reduce transaction costs and prevent delay in the civil justice system. The section also provides that it is the policy of the United States to encourage the modification of rules of evidence and the rules of civil procedure to promote alternative dispute resolution.

The second paragraph of the section directs the Attorney General to provide Congress with recommendations, within a year of enactment of this Act, to implement these policies for those cases filed in federal court.

Section 12 is a severability clause which would preserve the balance of the Act if any portion of it is held to be invalid.

Section 13 provides that the Act shall become effective on the day of enactment.

A BILL

To place limitations on State product liability laws to ensure that such laws do not impede the free flow of products in interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SEC. 1. This Act may be cited as the Product Liability Reform Act of 1986.

FINDINGS AND PURPOSES

SEC. 2. (a) The Congress finds and declares that --

(1) in recent years product liability law has become an increasingly serious impediment to the free flow of products in interstate commerce;

(2) consumers in particular have been adversely affected by this growing liability burden on commerce through the withdrawal of products and producers from the national market, and from excessive liability costs passed on to them through higher prices;

(3) the unpredictability of product liability awards and doctrines is inequitable to both plaintiffs and defendants, and has added considerably to the high cost of product liability insurance by making it difficult for producers and insurers to project their liability with any degree of confidence;

(4) where product liability is not based on fault or wrongdoing by the defendant, it often operates to punish and deter conduct and activities which are beneficial and promote the public welfare;

(5) the recent explosive growth in product liability lawsuits and awards is jeopardizing the financial well-being of many key industries, and is a particular threat to the viability of many of the Nation's small businesses;

(6) the extraordinary costs of the product liability system undermine the ability of American industry to compete internationally, and is causing the loss of jobs and productive capital;

(7) the unacceptably high transaction costs of the product liability system, in which almost twice as much money goes to lawyers as to compensate victims, is a burden on the consumer and American industry which can no longer be tolerated; and

(8) because most product liability defendants are out-of-State, while most plaintiffs reside in the State in which they file their lawsuit, State legislators and judges often are reluctant to institute appropriate and necessary product liability reforms.

(b) It is the purpose of this Act to place reasonable limitations upon the most serious excesses of product liability law, to ensure that product liability law operates to compensate persons injured by the wrongdoing of others, to reduce the unacceptable transaction costs and delays which harm

both plaintiffs and defendants, to establish greater predictability, to promote the interests of the American consumer, and to protect the free flow of goods in commerce.

DEFINITIONS

SEC. 3. As used in this Act --

(1) "concerted action" or "acting in concert" means the conscious acting together in a common scheme or plan of two or more persons in committing a tortious act;

(2) "contingency fee" means any fee for professional legal services which is in whole or in part contingent upon the recovery of any amount of damages, whether through judgment or settlement.

(3) "economic loss" means past and future (A) expenses of health or other care, (B) expenses of rehabilitation, (C) loss of earnings, (D) loss of homemaker services, and (E) burial expenses.

(4) "non-economic damages" means all damages other than damages for economic loss, and includes punitive or exemplary damages;

(5) "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity;

(6) "product" means any object, substance, mixture or raw material, whether an assembled whole, a component part or an ingredient, which is produced for introduction into trade or commerce;

(7) "product liability action" or "action" means any action or claim, including a wrongful death action, involving the design, production, distribution or sale of a product, filed in Federal or State court seeking damages for a personal injury or death attributable to the product;

(8) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territories of the Pacific Islands, and any other territory or possession of the United States, or any political subdivision thereof.

SCOPE

SEC. 4. (a) The provisions of this Act shall apply to all product liability actions filed in Federal or State court on or after the date of enactment of this Act.

(b) The provisions of this Act shall preempt and supersede any State law to the extent such law is inconsistent with the limitations on liability contained in such provisions.

(c) Nothing in this Act shall be construed to create or vest jurisdiction in the district courts of the United States over product liability actions subject to this Act.

FAULT-BASED LIABILITY

SEC. 5. A person may not be found liable for damages in a product liability action subject to this Act to the extent such liability is inconsistent with the following limitations.

(1) Such person may not be found liable for any injury unless either (A) the person was

negligent in the design, production, distribution or sale of such product, or (B) the product was defective, and such defect rendered the product unreasonably dangerous. Besides any other applicable standard or rule of State law, a defective product may not be found unreasonably dangerous if the defect is the subject of an adequate warning, is apparent to a reasonable person, or is a matter of common knowledge.

(2) Such person may not be found liable for any injury related to an unreasonable or unforeseeable use or alteration of the product. Besides any other applicable standard or rule of State law, any alteration of the product which is specifically prohibited or warned against, and any use of the product which fails to apply required safeguards or maintenance, shall be deemed unreasonable.

(3) Such person may not be found liable for any injury related to the failure to provide an adequate warning or instruction

as to any danger associated with the use of the product if the danger is apparent to a reasonable person, or the danger is a matter of common knowledge. Nor may such person be found liable for any injury related to the failure to provide an adequate warning or instruction as to any danger associated with the use of the product if the use is unreasonable or unforeseeable.

(4) Such person may not be found liable for any injury related to a defect in the design of the product, or to a failure to provide an adequate warning or instruction as to any danger associated with the use of the product, unless at the time the product was produced the scientific or technical knowledge necessary to eliminate the defect or to warn or instruct of the danger was available to and capable of use in an economically feasible manner by the person.

JOINT AND SEVERAL LIABILITY

SEC. 6. (a) Joint and several liability may not be applied to any product liability action subject to this Act. A person found liable for damages in any such action may be found liable only for those damages directly attributable to the person's pro-rata share of fault or responsibility for the injury, and may not be found liable for damages attributable to the pro-rata share of fault or responsibility of any other person (whether or not that person is a party to the action) for the injury, including any person bringing the action.

(b) This Section shall not apply as between persons acting in concert where the concerted action proximately caused the injury for which one or more of such persons are found liable for damages.

LIMITATION ON NON-ECONOMIC DAMAGES

SEC. 7. (a) No non-economic damages may be awarded in excess of \$100,000 in any product liability action subject to this Act.

(b) For purposes of this Section, "any product liability action" includes all product liability actions (including multiple actions) for damages, and includes all plaintiffs and all defendants in such actions, which arise out of or were caused by the same personal injury or death.

PERIODIC PAYMENT OF JUDGMENTS

SEC. 8. (a) In any product liability action subject to this Act, no person may be required to pay damages for future economic loss in a single, lump-sum payment, but shall be permitted to make such payments periodically based on when the damages are found likely to occur.

(b) The court may require such person to purchase an annuity making such periodic payments if the court finds a reasonable basis for concluding that the person may not make the periodic payments.

(c) The judgment of the court awarding such periodic payments may not be reopened at any time to contest, amend, or modify the schedule or amount of the payments in the absence of fraud.

(d) This Section does not apply to any product liability action subject to this Act in which the damages for future economic loss are less than \$100,000. Nor shall this Section be construed to preclude a settlement providing for a single, lump-sum payment.

COLLATERAL SOURCES OF COMPENSATION

SEC. 9. (a) Any award of damages to a person in a product liability action subject to this Act shall be reduced by the amount of any past or future payment or benefit covered by this Section which the person has received or for which the person is eligible on account of the same personal injury or death for which such damages are awarded.

(b) The payments or benefits covered by this Section are --

(1) any payment or benefit by or paid for in whole or in part by any agency or instrumentality of the United States, a State or a local government; and

(2) any payment or benefit by a workers' compensation system or a health insurance

program funded in whole or in part by an employer, except to the extent that such payment or benefit is the subject of a proper claim of subrogation, reimbursement or lien.

(c) This Section shall not preempt or supersede any State law which provides that damage awards may be reduced by payments or benefits other than those covered by this Section, or which reduces such damage awards by payments or benefits by a workers' compensation system or a health insurance program even when such payments or benefits are the subject of a proper claim of subrogation, reimbursement or lien.

ATTORNEY CONTINGENCY FEE AGREEMENTS

SEC. 10. (a) No attorney representing on a contingency fee basis a person bringing a product liability action subject to this Act may charge, demand, receive or collect for services rendered in excess of 25 per centum of the first \$100,000 or portion thereof recovered, plus 20 per centum of the next \$100,000 or portion thereof recovered, plus 15 per centum of the next \$100,000 or portion thereof recovered, plus 10 per centum of any amount in excess of \$300,000 recovered by judgment or settlement in such action.

(b) In the event that such judgment or settlement includes periodic or future payments of damages, the amount recovered for purposes of computing the limitation on the attorney contingency fee shall be based on the cost of the annuity or trust established to make the payments, or where such annuity or trust is not established, the present value of the payments.

ALTERNATIVE DISPUTE RESOLUTION

SEC. 11. (a) It is the policy of the United States to encourage the creation, adoption, and use of alternative dispute resolution techniques to achieve the efficient, cost effective and expeditious disposition of civil disputes. It further is the policy of the United States to encourage the modification of procedural and evidentiary rules to the extent feasible to accommodate such alternative dispute resolution techniques.

(b) The Attorney General of the United States is directed to provide to the Congress within one year of the date of enactment of this Act recommendations which would implement the foregoing policies with regard to civil disputes filed in Federal court.

SEVERABILITY

SEC. 12. If any provision of this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected by such invalidation.

EFFECTIVE DATE

SEC. 13. This Act shall become effective on its date of enactment.

THE PRODUCT LIABILITY REFORM ACT OF 1986

SECTION-BY-SECTION ANALYSIS

Section 1 sets out the short title of the Act as the Product Liability Reform Act of 1986.

Section 2 sets out congressional findings that product liability law has become an increasingly serious impediment to the flow of interstate commerce, and is adversely affecting consumers by reducing the availability of products on the market and by increasing product costs.

Paragraph (b) of Section 2 states that the purpose of the Act is to place reasonable limits on the excesses of product liability law, so that product liability law will serve to compensate those who are injured as a result of a producer's wrongful activity, while protecting the consumers' interests by reducing transaction costs and delays, as well as by protecting the free flow of goods in commerce.

Section 3 sets out certain definitions to be used in the Act. Among the terms defined are: "concerted action," "economic loss," "noneconomic loss," and "product".

Section 4 establishes the scope of the legislation. The Act will apply to all product liability actions filed in federal or state courts. The provisions of the Act would supersede only

those portions of state law which are inconsistent with the limitations imposed by the Act. The section further provides that the Act does not create federal jurisdiction over product liability cases not otherwise in federal court.

Section 5, paragraph (a)(1) limits the liability of a person in a product liability action to those cases where a person is either (1) negligent in the design, production, distribution or sale of a product, or (2) the product was defective, and that defect rendered the product unreasonably dangerous.

Paragraph (a)(1) also specifies that a product cannot be found to be unreasonably dangerous if the defect is the subject of an adequate warning, is apparent to a reasonable person, or is a matter of common knowledge.

Paragraph (a)(2) provides that a person will not be liable where the injury caused by the product resulted from an unreasonable or unforeseeable use or alteration of the product. Any alteration of a product which is prohibited or warned against, or any use of the product without the required safeguards, would be considered unreasonable under the provisions of this Act.

Paragraph (a)(3) would preclude liability for an injury on the theory that the person did not provide an adequate warning

or instruction about a defective product when the danger of the product is apparent to a reasonable person or is common knowledge. This paragraph also prohibits liability based on a person's failure to warn or instruct against the danger associated with the unreasonable or unforeseeable use of the product.

Under the last paragraph of this section, a person would not be liable for a defect in design or for a failure to warn of a danger associated with a product, unless at the time the product was manufactured, there was the scientific or technical knowledge necessary to correct the design or properly warn of the danger and the knowledge was available and economically feasible to use.

Section 6 bars the application of joint and several liability in product liability actions, except in those cases where the injury was proximately caused by two or more persons acting in concert. Instead, a person may be found liable only for that portion of the damages directly attributable to that person's proportionate share of fault in the injury.

Section 7, paragraph (a) imposes a \$100,000 cap on all noneconomic damages, including pain and suffering and emotional distress. The limitation also includes punitive or exemplary damages. This Act imposes no limitation on the amount of

economic damages, such as medical expenses and lost wages.

Paragraph (b) specifies that the \$100,000 cap applies to all product liability actions for damages which arise out of the same personal injury or death.

Section 8 provides that no person shall be required to pay damages for future economic loss in a single, lump-sum payment. Instead, payments may be made in installments over the time period in which the loss is likely to occur.

If the court has reason to believe the person required to pay the award may not make the payments, paragraph (b) authorizes the court to require that person to purchase an annuity to make the periodic payments.

The remaining paragraphs of the section provide that court ordered periodic payments are final and may not be reopened, and that the periodic payment provisions of the section are intended to apply only when product liability awards for future economic loss are for \$100,000 or more.

Section 9, paragraph (a), requires that any award of damages under this Act shall be reduced by the amount of compensation received from certain collateral sources of income received for the same injury or death.

Paragraph (b) specifies the types of collateral sources which may be considered in reducing product liability damage

awards under this Act. They are: (1) any payment or benefit provided by any federal, state or local agency or instrumentality; and (2) any payment or benefit under a workers' compensation system or employer-funded health insurance program. Damages awarded subject to this Act will not be reduced by collateral sources of compensation where the provider of the collateral benefits pursues a right to subrogation.

Paragraph (c) makes clear that this section is not intended to preempt or supersede any existing state law which allows for the reduction of damage awards for collateral sources other than those specified in this section, or which allows for reductions even where a right of subrogation exists.

Section 10, paragraph (a) establishes a schedule for the size of a contingency fee an attorney may charge under this Act. The amount of the contingency fee that may be charged decreases on a "sliding scale" as the size of the damage award increases. Under the section, no attorney may receive in excess of 25% of the first \$100,000 recovered, plus 20% of the next \$100,000, plus 15% of the third 100,000, plus 10% of any amount in excess of \$300,000.

Paragraph (b) provides that where a contingency fee is based on an award of damages to be paid in future periodic payments, the fee shall be based on the present value of those payments.

In those cases where an annuity is purchased, the contingency fee will be based on the cost of the annuity.

Section 11 states that it is the policy of the United States to encourage the use of alternative dispute resolution techniques to reduce transaction costs and prevent delay in the civil justice system. The section also provides that it is the policy of the United States to encourage the modification of rules of evidence and the rules of civil procedure to promote alternative dispute resolution.

The second paragraph of the section directs the Attorney General to provide Congress with recommendations, within a year of enactment of this Act, to implement these policies for those cases filed in federal court.

Section 12 is a severability clause which would preserve the balance of the Act if any portion of it is held to be invalid.

Section 13 provides that the Act shall become effective on the day of enactment.

A BILL

To amend the Federal Tort Claims Act to include reasonable limitations on the tort liability of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SEC. 1. This Act may be cited as the Federal Tort Claims Reform Act of 1986.

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds and declares that --

(1) in recent years tort liability awards against the United States have become increasingly unreasonable and unfair;

(2) a reason for this development is the "deep pocket" of the United States, which often results in the United States being found liable for damages attributable to the fault or responsibility of others, as well as in awards which frequently are excessive and unreasonable;

(3) the sharply varying damage awards under the Federal Tort Claims Act for similar injuries are arbitrary and fundamentally unfair to both the United States and to persons compensated under the Act;

(4) persons compensated under the Federal Tort Claims Act should not obtain double recovery for the same injury from both the government and collateral sources of compensation;

(5) it is in the public interest to ensure that damages paid by the United States to compensate for future economic loss be paid periodically to ensure that such money is not depleted before it is needed;

(6) plaintiffs' attorneys should receive reasonable compensation from their clients, but should not be permitted to reap a windfall at the expense of their clients and the American taxpayer from high awards or settlements paid by the United States; and

(7) the liability of the United States for claims filed in Admiralty should be determined under the same standards and procedures established by the Federal Tort Claims Act to ensure that all persons seeking tort damages against the United States are treated uniformly.

(b) It is the purpose of this Act to place reasonable limitations on the tort liability of the United States to ensure that damages awarded against the United States remain within reasonable bounds, to prevent the United States from being held liable for the wrongdoing of others, to prohibit double recovery of benefits at the expense of the United States, to ensure that compensation for future economic losses is not prematurely depleted, to limit the windfall of plaintiffs' attorneys from high damage awards or settlements, and to make the standards and procedures for determining the liability of the United States in Admiralty uniform with the standards and procedures of the Federal Tort Claims Act.

LIMITATIONS ON LIABILITY

SEC. 3. Section 2674 of Title 28, United States Code, is amended by inserting "(a)" at the beginning of the Section, and by adding at the end of the Section the following new Subsections --

"(b) (1) The United States shall not be found jointly and severally liable, but shall be liable only for those damages directly attributable to its pro-rata share of fault or responsibility for the injury, and not for damages attributable to the pro-rata share of fault or responsibility of any other person (whether or not that person is a party to the action) for the injury, including any person bringing the action.

"(2) This subsection shall not apply as between the United States and any person with which it is acting in concert where the concerted action proximately caused the injury for which either the United States or that person is found liable.

"(3) For the purposes of this subsection, "concerted action" and "acting in concert" mean the conscious acting together in a common scheme or plan of two or more persons in committing a tortious act.

"(c) (1) Any award of damages to a person shall be reduced by the amount of any past or future payment or benefit covered by this subsection which such person has received or for which such person is eligible on account of the same personal injury or death for which such damages are awarded.

"(2) The payments or benefits covered by this subsection are --

"(A) any payment or benefit by or paid for in whole or in part by any agency or instrumentality of the United States, a State or a local government; and

"(B) any payment or benefit by a workers' compensation system or a health insurance program funded in whole or in part by an employer, except to the extent that such payment is the subject of a proper claim of subrogation, reimbursement or lien.

"(3) This subsection shall not affect the application under this chapter or section 1346(b) of this title of any State law which provides that damage awards shall be reduced by payments or benefits other than those covered by this subsection, or which reduces such damage awards by payments or benefits by a workers' compensation system or health insurance program even when such payments or benefits are the subject of a proper claim of subrogation, reimbursement or lien.

"(d) (1) No damages, other than damages for economic loss, shall be awarded in any action for damages against the United States in excess of \$100,000.

"(2) For the purposes of this subsection, "any action for damages" includes all actions or claims (including multiple actions or claims) for damages, and includes all plaintiffs and all defendants in such actions or claims, which arise out of or were caused by the same personal injury or death.

"(3) For the purposes of this chapter, "economic loss" means damages for past and future (A) expenses of health or other care; (B) expenses of rehabilitation; (C) loss of earnings; (D) loss of homemaker services; and (E) burial expenses."

PERIODIC PAYMENTS OF JUDGMENTS

SEC. 4. (a) Chapter 171 of Title 28, United States Code, is amended by adding the following new Section 2681 --

"§ 2681. Periodic payment of judgments

"In any action subject to this chapter where the judgment equals or exceeds \$100,000 in damages for future economic loss, the court shall, at the request of the United States, enter an order providing that money damages for future economic loss be paid in whole or in part by periodic payments based on when the

damages are found likely to occur rather than by a single lump-sum payment. The court shall make findings of fact as to the dollar amount of plaintiff's future economic loss, and the amount, frequency and duration of the periodic payments. The United States at its discretion may pay the judgment periodically or purchase an annuity for the same purpose. The judgment of the court shall be final, and shall not be reopened at any time to contest, amend, or modify the schedule or amount of such payments in the absence of fraud."

(b) The table of sections of Chapter 171 of Title 28, United States Code, is amended by adding at the end thereof the following new item --

"§ 2681. Periodic payments of judgments."

ATTORNEY FEES

SEC. 5. Section 2678 of Title 28, United States Code, is amended --

(a) by inserting in the first paragraph of the current Section after "25 per centum" the following --

"of the first \$100,000 or portion thereof recovered, plus 20 per centum of the next \$100,000 or portion thereof recovered,

plus 15 per centum of the next \$100,000 or portion thereof recovered, plus 10 per centum of any amount in excess of \$300,000";

(b) by inserting in the first paragraph of the current Section after "20 per centum" the following --

"of the first \$100,000 or portion thereof recovered, plus 15 per centum of the next \$100,000 or portion thereof recovered, plus 10 per centum of any amount in excess of \$200,000";

(c) by adding, as a new sentence at the end of the first paragraph of the Section, the following --

"In the event that the settlement or award of damages include periodic payments, the amount recovered attributable to such periodic payments means the cost of the annuity or other monetary cost to the United States of the settlement or award, or, if the monetary cost cannot be determined, the present value of the periodic payments."

LIABILITY IN ADMIRALTY

SEC. 6 (a) Chapter 171 of Title 28, United States Code, is amended by adding the following new Section 2682 --

"§ 2682. Liability in Admiralty

"The provisions of this chapter, including the administrative claims procedures, the exceptions and all conditions on the liability of the United States, shall apply to and be controlling over any claim or suit against the United States filed under the provisions of the Suits in Admiralty Act, 46 U.S.C. §§ 741 - 750, the Public Vessels Act, 46 U.S.C. §§ 781 - 790, and the Admiralty Extension Act, 46 U.S.C. § 740."

(b) The table of sections of Chapter 171 of Title 28, United States Code, is amended by adding at the end thereof the following new item --

"§ 2682. Liability in Admiralty."

SEVERABILITY

SEC. 7. If any provision of this Act or the amendments made by this Act or the application of the provision to any person or

circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

APPLICABILITY OF AMENDMENTS

SEC. 8. The amendments made by this Act shall apply to all actions filed on or after, and all administrative claims pending on or filed on or after, the date of enactment of this Act.

EFFECTIVE DATE

SEC. 9. This Act shall become effective on its date of enactment.

THE FEDERAL TORT CLAIMS REFORM ACT OF 1986

SECTION-BY-SECTION ANALYSIS

Section 1 sets out the title of the Act as the Federal Tort Claims Reform Act of 1986.

Section 2(a) sets out the findings that in recent years tort liability awards against the United States have become increasingly unreasonable and unfair, and that this increased liability has resulted from the United States being found liable for damages attributable to the fault or responsibility of others and that awards are frequently excessive and unreasonable.

Section 2(b) states that the purpose of the Act is to place reasonable limits on the tort liability of the United States so that damage awards against the United States remain within reasonable bounds.

Section 3 of the Act amends Title 28 of the United States Code by adding a new Subsection to Section 2674. The new Section states that the United States shall not be found jointly and severally liable. Rather, the United States may be found liable only for that portion of the damages directly attributable to the United States' proportionate share of fault for the injury.

Subparagraph (2) of the new section would allow joint and several liability of the United States, but only in those cases

where the United States and another person were acting in concert and where that concerted action was the proximate cause of the injury for which the United States or the other person was found liable.

New subparagraph (3) defines "concerted action" and "acting in concert".

A new subsection (c) allows any award for damages under the Federal Tort Claims Act to be reduced by the amount of past or future compensation which the person has received, or is eligible to receive, from certain collateral sources. The subsection specifies the types of collateral sources covered by the section to be: (1) any benefit or payment provided by any agency or instrumentality of the United States, a state or local government; and (2) any payment or benefit by a workers' compensation system or an employer-funded health insurance program, except to the extent that the provider of such payments pursues a right to subrogation.

Subparagraph (c)(3) makes it clear that this new subsection is not intended to affect any state law which allows for the reduction of damage awards for collateral sources other than those specified in the subsection, or which allows for reductions even where a right of subrogation exists.

A new subsection (d)(1) places a cap of \$100,000 on the amount of noneconomic damages that can be awarded against the

United States. The subsection provides that the cap applies to all actions and claims which arise out of or were caused by the same personal injury or death. The subsection defines "economic loss" to mean past and future health care or other expenses, the cost of rehabilitation, lost earnings, loss of homemaker services, and burial expenses.

Section 4 amends the United States Code by adding a new section on periodic payments.

The new section provides that where a judgment against the United States equals or exceeds \$100,000 in future damages, the United States may pay the future damages in periodic payments over the period of time the damage was likely to have occurred. The court would make the determination as to the amount, frequency and duration of the payments, and the United States could then make the payments periodically or purchase an annuity to make the payments. The judgment would be final and could not be reopened or modified without a showing of fraud.

Section 5 of the Act would amend Section 2678 of Title 28 to establish a "sliding scale" for the attorneys' fees paid out of awards under the Federal Tort Claims Act. The percentage of the award paid out in attorneys' fees would decrease as the amount of the award increase.

Section 5 would also add a new sentence to Section 2678 which provides that where damages are to be paid in periodic payments, the limitation on the attorneys' fees shall be based on the cost of the annuity or the monetary cost of the payments to the United States or, where the monetary cost cannot be determined, on the present value of the periodic payments.

Section 6 of the Act amends Title 28 of the Code by adding a new Section 2682 to Chapter 171. The new section makes the provisions of that Chapter, as amended by this Act, applicable to all claims and suits filed against the United States under the following Admiralty laws: the Suits in Admiralty Act, the Public Vessels Act and the Admiralty Extension Act.

Section 7 is a severability clause which preserves the balance of the Act if any portion of it is held to be invalid.

Section 8 explains that the Act is intended to apply to all actions filed on or after, and all administrative claims pending on or after, the enactment of the Act.

Section 9 provides that the Act will become effective on the date of enactment.