

## **SUMMARY OF LIABILITY PROVISIONS OF THE HOMELAND SECURITY BILL (H.R. 5710)**

### **Minority Staff Committee on Government Reform U.S. House of Representatives**

Buried in the homeland security bill (H.R. 5710) are numerous special-interest provisions that limit the liability of drug companies, airline carriers, airline security companies, and other manufacturers. This fact sheet summarizes these provisions.

#### **I. LIABILITY PROVISIONS FOR “ANTI-TERRORISM” TECHNOLOGIES**

Subtitle G of the bill (sections 861–865) provides legal immunity to sellers of “qualified anti-terrorism technologies” designated by the Secretary of Homeland Security. Qualified technologies can include a vast array of products, ranging from detection devices to medical products. Even “services” such as security services can be considered qualified technologies.

Subtitle G establishes a three-tiered scheme of protection to sellers of any product or service which is designed or adapted to prevent, detect, identify, deter, or limit the harm of terrorism. The first tier of protection gives “government contractor” immunity to corporations selling anti-terrorism technologies for claims arising from an act of terrorism. To be eligible for this immunity, a seller must submit its product design for approval by the Secretary, who is exclusively responsible for determining whether the product will perform as intended, conforms to the seller’s specifications, and is safe for use as intended. Once a product is approved and placed on an “Approved Product List for Homeland Security,” the seller enjoys a nearly absolute presumption of immunity. This presumption can only be overcome if a plaintiff shows that the seller acted fraudulently or with willful misconduct in submitting information to the Secretary prior to its approval. This immunity applies not only to goods and services sold to the government, but also to those sold to the general public.

Sellers of anti-terrorism technologies who are not totally protected by the government contractor defense — presumably because they acted fraudulently or with willful misconduct in submitting information to the Secretary — enjoy a second tier of protection from lawsuits. Sellers of qualified anti-terrorism technologies cannot be held liable for punitive damages under any circumstances, even in instances of willful misconduct. They also cannot be sued in state courts.

The third tier of protection for corporations that supply anti-terrorism technologies caps their total liability at the amount of liability insurance held by the corporation. Moreover, the subtitle also limits the amount of liability insurance that these corporations must obtain to a level that is “reasonably available from private sources” on such terms as will not “unreasonably distort the sales price” of the product.

The net effect of Subtitle G is to effectively eliminate the ability of Americans to obtain compensation for harm caused by “anti-terrorism technologies,” even in cases of willful misconduct.

## **II. LIABILITY PROVISIONS RELATED TO THE SMALLPOX VACCINE**

Section 304 of the bill contains special-interest provisions that protect smallpox vaccine manufacturers (as well as health care facilities) from liability for injuries that result from the smallpox vaccine. At the same time, section 304 undercuts the legal rights of Americans injured by the vaccine without establishing any other mechanism of compensation. The contrast between new protections for the manufacturers and less protection for those vaccinated does not make any sense in light of the known risks of the vaccine.

According to the CDC, about one of every one million people vaccinated against smallpox will die, and several others will suffer serious medical complications, including brain damage, blindness, and significant scarring. Serious injury can occur even among people who have never been vaccinated but who catch the vaccine virus (called “vaccinia”) from individuals who were recently vaccinated.

Under current law, individuals who are injured by the smallpox vaccine can bring actions in state court to recover damages under state law through a variety of legal theories, such as product liability claims. The federal government, if it wants to provide protection to a vaccine manufacturer, can enter into an agreement to indemnify the manufacturer from liability. The indemnification approach protects the manufacturer by ensuring that the government will reimburse it for any losses, but does not take away any legal rights of victims.

Under section 304, however, all of the rights that persons injured by the smallpox vaccine currently have to seek compensation are eliminated. In place of the ability to bring product liability and other claims against vaccine manufacturers in state court, injured individuals are allowed to bring claims only against the federal government, in federal court, under the Federal Tort Claims Act. These actions will be difficult to sustain because of the many restrictions on government liability under the Federal Tort Claims Act. At the same time that section 304 sharply curtails the right of victims to seek compensation, it virtually exempts manufacturers from any liability. No legal action can be brought against a manufacturer by any injured person. The only circumstance in which a manufacturer could be required to make any payment for any vaccine-related injury would be if the government lost the litigation under the Federal Torts Claims Act and sought reimbursement from the vaccine manufacturer on the grounds that the manufacturer was “grossly negligent.”

Moreover, section 304 extends these barriers to compensation even to persons who do not take the smallpox vaccine themselves, but are injured as a result of exposure to someone who did take the vaccine.

Section 304 was inserted into the bill at the last moment with no opportunity for debate or amendment. A far better approach than section 304 would be a no-fault compensation program modeled on the program we currently have for childhood vaccines. This approach would facilitate — not block — compensation, while at the same time it would also provide appropriate safeguards for vaccine manufacturers in order to assure a stable vaccine supply.

### **III. LIABILITY PROVISIONS FOR THE AIRLINE INDUSTRY**

Several liability protections in the bill limit the ability of Americans to recover fair compensation from the airline industry — even in the face of gross neglect or misconduct.

Section 890 broadens a provision from the Air Transportation Safety and Stabilization Act that limited the liability of airlines for the acts of September 11 to the amount of their insurance coverage. Section 890 would expand this protection to “persons engaged in the business of providing air transportation security and their affiliates.” As a result, even companies that may have been grossly negligent in providing airline security cannot face any additional liability beyond their insurance coverage for claims relating to September 11.

Section 1201 of the bill extends a provision from the Air Transportation Safety and Stabilization Act that temporarily capped the liability of airline carriers for a terrorist act at \$100 million and barred punitive damages. Under the Air Transportation Safety and Stabilization Act, these special liability limitations terminated in February 2002, six months after enactment. Section 1201, however, renews the liability limitations and extends them to December 31, 2003. This cap on liability applies at the discretion of the Administration, with no statutory exceptions. As a result, even an airline carrier that grossly neglects its safety responsibilities, contributing directly to a deadly terrorist act, still cannot face punitive damages for the injury and loss of life that results.

Section 1402 of the bill limits the liability of pilots authorized to carry firearms as “federal flight deck officers.” This section protects a federal flight deck officer from all personal liability, except in cases of gross negligence, arising from the officer’s defense of an aircraft from criminal violence or air piracy. This provision renders the federal flight deck officer an employee of the federal government and provides that claims be subject to the procedures and limitations of Federal Tort Claims Act. In addition, this section of the bill gives total immunity from liability to air carriers for harm caused by a federal flight deck officer’s decision to use or not to use a firearm.

### **IV. LIABILITY PROVISIONS RELATED TO THIMEROSAL**

Sections 714–716 of the bill include new provisions that would change the current childhood vaccine injury compensation program in a way that benefits Eli Lilly and other manufacturers of a vaccine preservative called thimerosal.

Under current law, families seeking compensation for vaccine-related injuries must go through an administrative compensation program funded by an excise tax on vaccines. To receive compensation under this system, families only have to prove that the vaccine caused the injury; they do not have to prove negligence by the manufacturer or other fault. Only if the family is dissatisfied with the outcome of this government-run compensation program is the family allowed to bring a legal action in state court for compensation. Because the administrative compensation program has worked well, very few families ever take this step.

Recently, some families that believe that a mercury-based preservative called thimerosal has injured their children have sought to short-circuit the vaccine injury compensation program. They have gone directly to state court, bypassing the government-run compensation program, by arguing that thimerosal is a “contaminant” in vaccines. The defendants in these cases include the thimerosal manufacturers such as Eli Lilly.

Sections 714–716 would block these thimerosal cases from proceeding. Under these provisions, the families seeking compensation for thimerosal-related injuries would be required to go through the vaccine injury compensation program like other families seeking compensation for vaccine-related injuries. The provisions accomplish this result by clarifying that the definition of “vaccine” includes FDA-approved preservatives like thimerosal and that the definition of “vaccine manufacturer” includes companies like Eli Lilly that manufacture the preservatives.

The litigation on thimerosal rests upon an uncertain scientific foundation. The Institute of Medicine reviewed all available evidence in 2001 and found no evidence of harm from thimerosal. Subsequent controlled studies have found no significant problems, and additional studies are underway. Moreover, as a matter of policy, the change in the law made by sections 714–716 has been recommended by the independent HHS advisory committee that oversees the vaccine injury compensation program.

Nonetheless, the homeland security bill is not the appropriate vehicle to make this change to the vaccine injury compensation program on behalf of one interest group. The provisions in the bill do not address concerns about the program that have been raised by families; nor do they address many of the other concerns raised by the advisory committee that oversees the program. Revisions to the vaccine injury compensation program should address all legitimate concerns, not just those of Eli Lilly and other manufacturers of thimerosal.