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Failing to Prevent the Tragedy, but Facing the Trauma: The Aviation Disaster Family Assistance Act of 1996 and the Air Transportation Safety and System Stabilization Act of 2001

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**FAILING TO PREVENT THE TRAGEDY, BUT FACING
THE TRAUMA: THE AVIATION DISASTER FAMILY
ASSISTANCE ACT OF 1996 AND THE AIR
TRANSPORTATION SAFETY AND SYSTEM
STABILIZATION ACT OF 2001**

KRISTIN BUJA SCHROEDER*

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I. INTRODUCTION

A. AVOIDING DISASTER VS. ANSWERING DISASTER

Prior to the September 11, 2001, terrorist attack, airborne travelers might have suggested what they wanted most out of their chosen airline was more leg room, better in-flight movies, additional cocktails, or saltier peanuts. But after our nation viewed, in person or on television, the twin towers of the World Trade Center implode, the Pentagon smolder, and the wreckage of United Airlines Flight 93 in rural Pennsylvania, airplane passengers clamor for one thing—safety. Yet, even amidst the ratcheting-up of airport security, the addition of the Office of Homeland Security, and the strengthening of national security, safety is not guaranteed.

Prior to September 11th, few lawmakers, authorities, journalists, or citizens focused on preventing American airliners from slamming into skyscrapers and government buildings. Prior to these acts of terror, the aviation industry buzzed about mergers, air rage, e-tickets, or strikes. Americans must concede, as well as lawmakers, pundits, and aviation professionals, that the laws, regulations, and administrative agencies were not adequately prepared or proportionate to prevent this massive terrorist attack. Our current legal framework did not support the necessary security, safety, and prevention mechanisms.

While the United States was not prepared for this terrorist attack and unable to prevent it, our law was able to deal with the aftermath of this aviation disaster because of the 1996 enactment of the Aviation Disaster Family Assistance Act (“ADFAA”)¹ and the expedited enactment of the Air Transportation Safety

¹ See Pub. L. No. 104-264, 110 Stat. 3213 (codified as amended in scattered sections of 49 U.S.C.) [hereinafter *Aviation Disaster Act*]. For a current NTSB report on aviation disaster family assistance, see <http://www.nts.gov/publictn/>

and System Stabilization Act of 2001 ("ATSSSA").² The ADFAA portioned out responsibilities in an integrated and systematic fashion: (1) it granted the airlines primary responsibility for notifying and supporting families after a disaster;³ (2) it called upon air carriers to provide support services such as counseling, emotional care, health care, child care, and food and shelter;⁴ (3) it required that the airline funnel accurate and timely information to the survivors and the victims' families;⁵ and (4) it prohibited unsolicited communication by an attorney or potential party to the litigation for forty-five days following the date of the accident.⁶ The legal community may feel that the solicitation moratorium is the pivotal provision, but the airline industry, the carriers, the NTSB, and the families who lobbied for the Act believed that the entire 1996 enactment was a necessary and triumphant victory.⁷ No one contemplated that the ADFAA would aid the United States in responding to the unprecedented September 11, 2001 terror attacks on American soil. The ATSSSA supplies the economic ying to the ADFAA's sympathetic yang and attempts to sustain the aviation industry.

B. OVERVIEW OF THE ARTICLE

The following section of this article, Section Two, will follow the historical development of the ADFAA. It will also focus on the facts and circumstances catalyzing the government's decision to enact this statutory scheme. Section Three will trace both the statutory and regulatory authority girding the Act, as well as the statutory and regulatory development before and after the 1996 version of the ADFAA.

2000/spc0001.htm> and download the August, 1, 2000 Federal Family Assistance Plan for Aviation Disasters.

² See Pub. L. No. 107-42, 115 Stat. 230 (codified as amended in scattered sections of 49 U.S.C.) [hereinafter *System Stabilization Act*].

³ *Id.* §§ 1136(a)(1)-(2), (e)(1)-(2), 41113(b)(1)-(3).

⁴ *Id.* §§ 1136(a)(2), (c)(1)-(5), 41113(a)(4), (10).

⁵ *Id.* §§ 1136(c)(1)-(2); 41113(b)(1), (2), (8), (14).

⁶ *Id.* § 1136(g)(2).

⁷ See, e.g., 142 CONG. REC. H10534-40 (daily ed. Sept. 18, 1996) (statement of Rep. Shuster). Shuster, a Pennsylvania Representative, moved to pass the Aviation Disaster Family Assistance Act requiring the NTSB to take actions in support of families involved in aircraft accidents. During the floor discussion, speakers mentioned several names and entities who lobbied for the Act such as the families from the ValuJet, TWA, and Pan AM 103 crashes, the president of the National Air Disaster Alliance, the Association of Trial Lawyers of America, Vice President Gore's White House Commission on Aviation Security, and the Red Cross.

Section Four details each provision contained in the Act and parses the statutory language. Section Four addresses in turn, the parties to the ADFAA (the air carriers, the NTSB, the independent nonprofit, the attorneys, and the victims) and discusses each party's responsibility and potential liability under the Act, including the application of the facts of September 11th to the Act's provisions. Next, Section Five contains a look at the amendments made to the ADFAA, both before and after September 11th, as well as the regulations written in the five years since its passage. In addition, Section Five contains a discussion of the ATSSSA passed on September 22, 2001.

Possible future amendments are set forth in Section Six and involve concerns of attorneys, air carriers, and support teams. Finally, Section Seven discusses the Red Cross's involvement in its pairing with the air carriers under the ADFAA, and Section Eight examines the role played by medical examiners in post-disaster response. In conclusion, the ADFAA and its corollary, the Foreign Air Carrier Family Support Act ("FACFSA"), are laudatory laws that have served our nation well in the aftermath of September 11th. It remains to be seen if Congress will strengthen these laws in response to the terrorist attacks, or whether Congress will lessen the Act's demands in light of the new knowledge that the ADFAA can deplete the airlines' economic resources when the air carrier is already suffering from internal costs, razor-thin margins, and decreased public trust. The September 11th disaster catalyzed fast-track subsidy legislation.⁸

II. HISTORY AND OVERVIEW OF THE ACT

In March 2000, the House of Representatives discussed the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.⁹ The reform act contained several changes to the 1996 Aviation Disaster Family Assistance Act. Representative Reynolds, introducing the 2000 bill, explained that the ADFAA was originally created in the wake of ValuJet and other crashes

⁸ On September 22, 2001, Congress enacted the Air Transportation Safety and System Stabilization Act, *supra* note 2. The Act aims to "preserve the continued viability of the United States air transportation system," and to "compensate air carriers for losses incurred by the air carriers as a result of the terrorist attacks on the United States that occurred on September 11, 2001."

⁹ 146 CONG. REC. H1002 (daily ed. Mar. 15, 2000); *see also* Pub. L. No. 106-181, 114 Stat. 61 [hereinafter *Wendell H. Ford Act*]. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century is colloquially called "Air 21."

because families did not receive accurate or timely information.¹⁰

From the outset, the victims' family groups were a strong, vocal, and determined force in pushing the legislation through both the House and Senate. In fact, during the genesis of the 1996 Act, family members affected by each crash testified before the House following the tragedies.¹¹ For example, one victim's sister did not receive any information, help, personal effects, remains, or counseling from ValuJet after the crash.¹² And even eight years after the Pan Am Flight 103 terrorist bombing over Lockerbie, Scotland, the president of the Victims of Pan Am Flight 103 came to testify about the "heart-wrenching stories of callous behavior toward our family members."¹³

These families' demands convinced Jim Hall, then Chairman of the National Transportation Safety Board, to convey to the House that he was "ready to work with [Congress], with family members, and with the industry to find a solution."¹⁴ Chairman Hall stated that the family members of loved ones killed in USAir Flight 427 on September 8, 1994 were the first organized group to demand that the NTSB recognize them as such.¹⁵ This phenomenon reminded Chairman Hall that "[t]he family members of that accident and every tragic transportation accident are taxpayers. They pay my salary, and they pay for the investigative work of the NTSB. Within reason and within the resources available to us, I believe we must be responsive. . . . We rely on the public's support of our recommendations to improve safety."¹⁶

While the USAir accident and the subsequent congressional hearing incited this legislative movement, the two major 1996

¹⁰ 146 CONG. REC. H1002 (daily ed. Mar. 15, 2000) (statement of Rep. Reynolds).

¹¹ See, e.g., *Treatment of Families After Airline Accidents: Testimony Before the House Subcomm. on Aviation*, 104th Cong. (1996), available at 1996 WL 338310 (F.D.C.H.) (statement of Richard P. Kessler, Jr., husband of passenger on ValuJet Flight 592).

¹² *Id.*

¹³ *Aid for Families of Air Crash Victims: Hearing on H.R. 3923, The Aviation Disaster Family Assistance Act of 1996 Before the House Comm. on Transp. & Infrastructure Subcomm. on Aviation*, 104th Cong. (1996), available at 1996 WL 502058 (F.D.C.H.) (statement of George H. Williams, President of Victims of Pan Am Flight 103).

¹⁴ *Treatment of Families After Airline Accidents: Testimony Before the House Comm. on Transp. & Infrastructure Subcomm. on Aviation*, 104th Cong. (1996), available at 1996 WL 338306 (F.D.C.H.) (statement of Jim Hall, Chairman of NTSB).

¹⁵ *Id.*

¹⁶ *Id.*

disasters—ValuJet's crash in the Florida Everglades and TWA's New York takeoff crash—stoked the coals and created a sense of urgency.¹⁷ Congress passed the legislation within that year.

President William J. Clinton posited support shortly before the bill passed through the House. The President issued a memorandum on the subject of "Assistance to Families Affected by Aviation and other Transportation Disasters."¹⁸ He asked the NTSB to take the lead position in investigating transportation disasters by providing timely and accurate information to the families of victims, ensuring family members' ability to travel to the disaster site, and by cooperating with relief organizations like the Red Cross to provide "some small measure of comfort to families that have suffered grievous loss."¹⁹ So, on September 18, 1996, the House of Representatives passed the bill with 401 "yeas," 28 "not voting," and only 4 "nays."²⁰ On October 9, 1996, President Clinton signed the Federal Aviation Reauthorization Act, containing the Aviation Disaster Family Assistance Act, into law.²¹

Due to the positive inception and reception of the ADFAA, Congress expanded the scope of the assistance program to reach families of passengers involved in foreign air carrier accidents occurring within the United States.²² The Foreign Air Carrier Family Support Act was signed into law in December of 1997, only four months after the Korean Air crash southwest of Guam.²³ Only 29 of the 254 passengers survived the accident. The victims' families reported massive notification delays caused by Korean Air's lack of notification procedures and passenger manifest information.²⁴ Korean Air's post-accident problems prompted the speedy enactment of FACFSA.

¹⁷ See Ricardo Alonso-Zaldivar, *Little-Known Law Helps Loved Ones of Air Crash Victims Cope*, L.A. TIMES, Dec. 12, 2000, at A5, available at 2000 WL25926708.

¹⁸ President's Memorandum for Secretary of State, Defense, Health and Human Services, Transportation, the Attorney General, the Director of the Federal Emergency Management Agency, and the Chairman of the NTSB, Concerning the Assistance to Families Affected by Aviation and Other Transportation Disasters, 32 WEEKLY COMP. PRES. DOC. 1686 (Sept. 16, 1996).

¹⁹ *Id.*

²⁰ 142 CONG. REC. H10552 (daily ed. Sept. 18, 1996).

²¹ See *Aviation Disaster Act*, *supra* note 1.

²² See 49 U.S.C. § 41313 (1997).

²³ See DOT Rules and Regulations, 63 Fed. Reg. 8258, 8261-2 (Feb. 18, 1998) (to be codified at 14 C.F.R. pt. 243).

²⁴ *Id.*

The Foreign Air Carrier Family Support Act is similar in scope and substance to its precursor. But due to foreign law conflicts, the FACFSA allows foreign air carriers to make substitutionary provisions in order to be consistent with international obligations.²⁵ Following the 1996 enactment of the ADFAA and the 1997 additional legislation contained in the FACFSA, the NTSB next urged the International Civil Aviation Organization (“ICAO”) to implement a program to support victims and families in international aviation accidents.²⁶ The NTSB submitted *Working Paper 31*, containing resolutions concerning ICAO’s need to develop guidance for States in dealing with families following aviation disasters.²⁷ Following this 1998 Convention speech, the ICAO began to draft such standards. Currently, standards have not been released, but reports substantiate the ICAO’s continued efforts to write guidelines for member States.²⁸

Before terrorists hijacked American Airlines Flights 11 and 77 and United Airlines Flights 93 and 175 on September 11th, the ADFAA/FACFSA responded on four prior occasions—Alaska Airlines flight 261 (January 31, 2000), American Airlines flight 1420 (June 1, 1999), EgyptAir flight 990 (Oct. 31, 1999), and Swissair flight 111 (September 2, 1998). Following September 11th, the crash of American Airlines Flight 587 most recently triggered the ADFAA.

III. STATUTORY/REGULATORY DEVELOPMENT AND AUTHORITY

The 1996 ValuJet tragedy motivated a strong push from a public constituency and pushed the ADFAA through during the Clinton Administration; however, the Act’s scaffolding was built during President George H.W. Bush’s tenancy in the White House.²⁹ Following the 1988 Pan Am terrorist attack over Lockerbie, Scotland, the United States had widespread problems

²⁵ 49 U.S.C. § 41313.

²⁶ See Transcript of *Introduction of Family Assistance Paper by Jim Hall, Chairman National Transportation Safety Board Before the International Civil Aviation Organization Assembly*, 32nd Sess., Montreal, Quebec, Canada, Sept. 25, 1998.

²⁷ The working paper can be downloaded from the DOT’s website. To retrieve the paper, see <<http://www.itsasafety.org/Speeches/jh980925.htm>>.

²⁸ See Alonso-Zaldivar, *supra* note 17.

²⁹ See Exec. Order No. 12,686, 54 Fed. Reg. 32,629 (Aug. 4, 1989) (President’s Commission on Aviation Security and Terrorism). President Bush’s executive order established the President’s Commission on Aviation Security and Terrorism to study the prevention of aviation terrorism and to “investigate practices,

identifying passengers and informing families.³⁰ Moreover, the lack of response procedures forced the Department of State to wait more than seven hours to receive accurate Pan Am passenger manifest information.³¹ Thus, and after the Pan Am terrorist bombing, Congress passed the Aviation Security Improvement Act.³² This legislation, called "ASIA 90," amended the Federal Aviation Act.³³

The focus of ASIA 90 concerned domestic aviation disasters occurring outside the United States.³⁴ The 1990 Act did not apply the security mandates to domestic flights within the United States; the provisions only applied to flights outside of the United States.³⁵ Regulations adopted pursuant to the 1990 Act³⁶ were designed to make family notification possible by requiring airlines to maintain a list of passenger names (and passport number, contact name, and contact telephone number, if possible). Airlines use these passenger lists to notify families in the event of a crash.

The 1990 Act requires that if a crash involving a domestic airline occurs outside the United States, the air carrier must provide the Secretary of State with the flight's passenger manifest within one hour of notification of the disaster.³⁷ Even if the one-hour deadline is not reasonably feasible, the air carrier must inform the State Department as "expeditiously as possible" within a three-hour outer time limit.³⁸ The Secretary of Transportation requires that the passenger manifest include: each passenger's full name, a contact name and telephone number for each passenger, and if applicable, the passenger's passport number.³⁹ During the period of the Act's enactment, the Secretary of Transportation asked two additional questions: (1) whether air carriers should be required to collect this manifest

policies, and laws with respect to the treatment of families of victims of terrorist acts." *Id.*

³⁰ 62 Fed. Reg. 11,789-97 (Mar. 13, 1997). This document can also be found online at <http://www.epic.org/privacy/faa/passenger_manifest_397>.

³¹ 63 Fed. Reg. 8258 (Feb. 18, 1998).

³² Pub. L. No. 101-604, § 203(a), 104 Stat. 3066 (1990) (codified at 49 U.S.C. §§ 44901) [hereinafter ASIA 90].

³³ Pub. L. No. 85-726 § 410, 72 Stat. 769 (1958).

³⁴ ASIA 90, *supra* note 32, § 203.

³⁵ 62 Fed. Reg. 11,789-97 (Mar. 13, 1997).

³⁶ 14 C.F.R. pt. 243.

³⁷ 49 U.S.C. § 44909(a)(1)(A).

³⁸ *Id.* § 44909(a)(1)(B).

³⁹ *Id.* § 44909(a)(1)(B)(2).

information as a precondition to boarding the plane; and (2) whether foreign air carriers should be held to the same notification timeline and manifest collection procedures.⁴⁰ Neither of these options has been put into force.

After passage of ASIA 90, during President Bush's "Regulatory Moratorium and Review,"⁴¹ the Department of Transportation ("DOT") sent out several Advanced Notices of Proposed Rulemaking ("ANPRM"), requesting input on how to efficiently implement both the new statutory requirements as well as further comments on passenger-manifest information collection.⁴² Most airlines responded by stating that new and more thorough manifest information collection would substantially, and potentially prohibitively, increase costs and administrative difficulties.⁴³

Regarding these air carrier comments, as well as considering the low frequency of aviation disasters, the DOT did not immediately write any companion regulations. The airlines commented that while aviation disasters are public and tragic, the U.S. air carriers' fatal accident rate is approximately two per ten million departures.⁴⁴ Nevertheless, in the few years following the 1990 ANPRM, several events conspired to move the DOT to pen some regulatory provisions.⁴⁵

In 1998, the DOT enacted federal regulations covering the relationships between air carriers, air taxis, charter flights, foreign air carriers, foreign relations, reporting and record-keeping requirements, security, and passenger manifests.⁴⁶ The

⁴⁰ *Id.* § 44909(b).

⁴¹ See 63 Fed. Reg. 8258, 8258-59 (Feb. 18, 1998). The "Regulatory Moratorium and Review" is a period following a presidential election during which federal agencies are to focus on pressing concerns of health and public safety. The federal agencies are instructed to issue only rules that are necessary to implement public health and safety solutions.

⁴² See, e.g., 56 Fed. Reg. 3810 (Jan. 31, 1991); 61 Fed. Reg. 10706 (Mar. 15, 1996); 61 Fed. Reg. 47692 (Sept. 10, 1996).

⁴³ See 62 Fed. Reg. 11,789-97 (Mar. 13, 1997).

⁴⁴ Alonso-Zaldivar, *supra* note 17.

⁴⁵ The catalyzing events included a December 20, 1995, American Airlines crash near Cali, Columbia, where the carrier significantly delayed transmitting a complete passenger manifest to the State Department. Also, a DOT-sponsored public meeting drew eighty participants who agreed to further investigate the manifest issues. Next, Vice President Al Gore's White House Commission on Aviation Safety and Security strongly supported speedy implementation of the 1990 Aviation Security Improvement Act, as well as adding the manifest collection requirements to domestic flights.

⁴⁶ 14 C.F.R. pt. 243.

DOT used the power inherent to the Secretary of Transportation's broad regulatory authority to ensure air carriers' "safe and adequate interstate air transportation."⁴⁷ Furthermore, the Secretary has rulemaking powers through 49 U.S.C. § 40113 to provide necessary "regulations, standards, . . . procedures, and . . . orders."⁴⁸ And to force air carrier cooperation, the Secretary can hold carriers accountable through criminal and civil penalties for carriers' failures or refusals to comply.⁴⁹

Related historical provisions previously required large certified air carriers to log passenger names for each charter or scheduled flight.⁵⁰ History reveals, however, that air carriers collected nothing more than a surname and first initial. Even though seventy-five percent of flight reservations were made through a travel agent who did not pass on identification information to the air carrier, the carrier did not ask for more identifying information.⁵¹

Thus, the 1998 regulations promulgated by the DOT proposed to ensure "prompt and adequate information in case of an aviation disaster on covered flight segments."⁵² The covered flight segments are passenger-carrying flights to or from the United States (i.e. either the departure or arrival point is within U.S. territory).⁵³ Flights where both take-off and arrival are within the United States are *not* covered flight segments under these regulations. The regulation further narrows its scope by defining "aviation disaster" as an occurrence involving death or serious injury caused by a "crash, fire, collision, sabotage or accident . . . missing aircraft; or [a]n act of air piracy."⁵⁴

⁴⁷ 49 U.S.C. § 41702.

⁴⁸ *Id.* § 40113(a). The DOT also based its permission to regulate on the Secretary's broad power to require certain reports and records. *See id.* §§ 41708, 41709, 41711 (allowing the Secretary to require periodic or reoccurring reporting; the Secretary can also determine the form of the records and reports; the Secretary can inspect an air carrier's records; the Secretary can also make management and/or business probes; and the Secretary can basically decide to get any information determined reasonably necessary "to carry out the inquiry."); *id.* § 41711.

⁴⁹ *Id.* §§ 46301, 46310, 46316. For a general discussion of sources of air law authority, see also David T. Norton, *Crisis Management Planning for Small Air Carriers, Aircraft Parts Manufacturers, Installers or Maintainers, and Other Aviation Industry Participants*, 66 J. AIR L. & COM. 505 (2001).

⁵⁰ *See* 14 C.F.R. § 121.693(e).

⁵¹ 62 Fed. Reg. 11,789-97 (Mar. 13, 1997).

⁵² 14 C.F.R. § 243.1.

⁵³ *Id.* § 243.3.

⁵⁴ *Id.*

In the event of an aviation disaster, this regulatory scheme requires an air carrier to inform the Department of State, the Managing Director of Overseas Citizen Services, and the Bureau of Consular Affairs within three hours after learning of the disaster.⁵⁵ And upon the NTSB's request, the air carrier must submit the information to the NTSB-appointed Director of Family Support Services.⁵⁶ Subpart (c) of section 243.11 aids the NTSB in coordinating its support services required by the ADFAA.

Additionally, the 1998 regulations contain a choice-of-law provision.⁵⁷ If an airline petitions the DOT, claiming the foreign countries that the carrier serves will not allow the required information to be collected, solicited, or transmitted, the airline can obtain a waiver.⁵⁸ Such waiver does not negate all the information requirements; the waiver will only work to the extent that the regulation conflicts with foreign law.⁵⁹ Conflicts with foreign law will be listed and kept up to date by the DOT in OST Docket 98-3305.⁶⁰

Finally, the regulations warn air carriers that the DOT will be able to bring enforcement actions against non-complying airlines.⁶¹ To ensure both compliance and effectiveness, the DOT can request, at any time, the airline's passenger manifest or emergency contact list.⁶² If the DOT determines an airline's collection system to be sub-par, the DOT can require that improvements be made within a certain timeframe.⁶³ The 1998 regulations help buttress the 1996 Aviation Disaster Family Assistance Act. The regulations detail nuts-and-bolts issues such as information collection, reporting, and transmission, yet the regulations conspicuously exclude information collection for purely domestic flights.

The 1998 DOT information collection requirements were not daring or progressive. While the DOT requires an air carrier to collect the full names of U.S. citizens before a passenger is allowed to board, the DOT only requires a solicitation (not a collection) of an emergency contact.⁶⁴ Even though these

⁵⁵ *Id.* § 243.11.

⁵⁶ *Id.* § 243.11(c).

⁵⁷ 14 C.F.R. § 243.15.

⁵⁸ *Id.* § 243.15(a)-(b).

⁵⁹ *Id.* § 243.15(a).

⁶⁰ *Id.* § 243.15(d).

⁶¹ 14 C.F.R. § 243.17.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* § 243.7.

regulations were not groundbreaking, the DOT did include privacy protections. The collected information is regarded as private. The passengers' contact information is kept confidential and released only to the DOT, the Department of State, or to the NTSB upon NTSB request.⁶⁵ Furthermore, the regulation states that the collected information is to be used only for notification of families after an aviation disaster.⁶⁶ These privacy requirements prevent commercial airlines from using the lists for future advertising, business generation, or marketing. In short, confidentiality is mandated, and commercial use is specifically prohibited.

The case *Wallman v. Tower Air*,⁶⁷ filed in the northern district of California, illustrates the potential conflicts ripe in such confidentiality protection. While 14 C.F.R. part 243 seems to require absolute confidentiality and limit release to specifically named governmental aviation authorities, the court found that the aviation regulation could be pierced by rule 26 of the Federal Rules of Civil Procedure.⁶⁸ The issue was presented before the magistrate judge on a discovery matter after the district judge bifurcated the action.⁶⁹ The split created initial focus on discovery before certifying the class for a class action suit.

The plaintiff was a passenger on Tower Air and allegedly experienced mental anguish and personal injury when—after a bright red flash was emitted from near the plane's left engine—the aircraft lurched violently to the left, but then landed safely.⁷⁰ Immediately after the lurch, the flight attendants shouted “hysterically” and asked the passengers to prepare for an emergency landing. Plaintiff claimed that the flight crew made no attempt to calm, console, or reassure the passengers. After the hurried landing, the upset passengers started a near-riot, and New York police were called to the scene.

After the district court bifurcated the action, the plaintiff filed his discovery plan requesting Tower Air's passenger list. The plaintiff argued that the list was necessary to identify potential members of the class, as well as to determine if the class would meet Federal Rule of Civil Procedure 26 requirements of numerosity and typicality. Defendant moved to block discovery

⁶⁵ *Id.* § 243.9(c).

⁶⁶ 14 C.F.R. § 243.9(d).

⁶⁷ 189 F.R.D. 566 (N.D. Cal. 1999).

⁶⁸ *Id.* at 569.

⁶⁹ *Id.* at 567.

⁷⁰ *Id.*

of the passenger list, arguing that the passenger list was confidential and would violate passengers' privacy rights.⁷¹

The magistrate concluded that the 1990 Aviation Security Improvement Act⁷² and the companion regulations⁷³ did not place the passenger list in an impenetrable position and that the rules of civil procedure granted any needed protection.⁷⁴ The magistrate did not read into the aviation law any special privilege that would trump the relevancy of the passenger list. The judge did discuss the confidentiality provisions in 14 C.F.R. parts 243.9(b) and (d), but found that the plaintiff needed the list to contact potential witnesses and plaintiffs with potentially relevant information regarding the incident.⁷⁵

The court compared the plaintiff's request to cases where parties desire to discover information protected under the Privacy Act.⁷⁶ The court found no statutory basis to replace the discovery standards of Federal Rules of Civil Procedure 26 and 45(b)⁷⁷ with stricter criteria.⁷⁸ Thus, the court held that the discovery request did not turn on a privilege analysis, but rather depended on discovery and protective order standards.⁷⁹ The magistrate did find good cause for issuing a protective order, namely to limit access to the passengers' names and phone numbers to the plaintiff, his counsel, counsel's staff, and the court. The magistrate also ordered that following the litigation, the list should either be returned to Tower Air or destroyed.⁸⁰ While the magistrate used a discovery analysis to allow discovery under protective order, the judge noted:

[t]he purpose of collecting the passenger list and contact list is to enable the State Department and the [NTSB] to reach family

⁷¹ *Id.* at 567-68.

⁷² See Pub. L. No. 101-604, § 203(a), 104 Stat. 3066 (1990).

⁷³ 14 C.F.R. pt. 243.

⁷⁴ See *Wallman v. Tower Air*, 189 F.R.D. 566, 569 (N.D. Cal. 1999).

⁷⁵ *Id.* at 568.

⁷⁶ 5 U.S.C. § 552(a) (1982); *Lohrenz v. Donnelly*, 187 F.R.D. 1 (D.D.C. 1999); *Laxalt v. McClatchy*, 809 F.2d 885 (D.C. Cir. 1987).

⁷⁷ The Federal Rules of Civil Procedure require each party to submit names of people "likely to have discoverable information relevant to the disputed facts. . . ." Fed. R. Civ. P. 26(a)(1)(A). While 26(b)(1) limits a party's discovery of privileged information, rule 26(c) allows the court to issue a protective order limiting access and use of the protected information. Rule 45(c)(3) allows the court to "quash or modify" a subpoena if it requires disclosure of "privileged or other protected matter."

⁷⁸ *Wallman*, 189 F.R.D. at 569.

⁷⁹ *Id.* at 569.

⁸⁰ *Id.* at 569-70.

members of passengers who have been seriously injured or killed in a plane crash. The presumption is that the passengers are incapacitated and cannot contact their families themselves.⁸¹

The magistrate also noted that the Tower Air incident was not a crash, no passengers were killed, and the incident may not meet the definition of "aviation disaster."⁸² While this decision points out a hole in the regulation's privacy protection, this decision does not render the confidentiality provision ineffective, for the court determined that even if the manifest information was discoverable, a protective order was necessary to protect the passengers' privacy. *Wallman v. Tower Air* represents the only published case citing the ADFAA.

IV. THE AVIATION DISASTER FAMILY ASSISTANCE ACT OF 1996

A. AIR CARRIER RESPONSIBILITIES

1. *Submission of Assistance Plans*

To begin with, the ADFAA requires all air carriers holding certificates of public convenience and necessity to submit "a plan for addressing the needs of the families of passengers involved in any aircraft accident involving an aircraft of the air carrier and resulting in a major loss of life."⁸³ The air carriers' plans were due to the Secretary and Chairman of the NTSB six months after this provision's enactment⁸⁴ and, after this six-month window, all carriers are required to submit the plan as part of the air carrier's application for a certificate of public convenience and necessity.⁸⁵ Therefore, at the present time, all operating commercial air carriers and charter carriers with certificates of public convenience and necessity have submitted their plans to address families' needs in the case of an aviation disaster. It remains to be seen, after September 11th, if the NTSB or possible amendments to the ADFAA will require revisions to the air carriers' plans or refinements of the statute's use of the phrases "major loss of life" and "aircraft accident."

It is undeniable that the September 11th aviation disasters illustrated a "major loss of life,"⁸⁶ yet the planned violence of Sep-

⁸¹ *Id.* at 568.

⁸² *Id.*

⁸³ 49 U.S.C. § 41113(a).

⁸⁴ *Id.*

⁸⁵ *Id.* § 41113(c).

⁸⁶ *Id.* § 41113(a).

tember 11th was not an accident. The ADFAA uses the term, "aircraft accident,"⁸⁷ and such language, on its face, seems to exclude premeditated air terrorism; however, §1136(h)(1) includes "any aviation disaster regardless of its cause or suspected cause."⁸⁸ In contrast, the statute does not specify how many deaths constitute a "major loss of life." For example, must a carrier put the plan in action if only two people are killed? Most likely, the phrase "major loss of life" would not be construed in a limited fashion, and the plan's procedures would be conducted on a more restricted scale.

2. *A Plan's Minimum Requirements*

The provision that delineates what procedures the carriers must put into the plan states that the listed items are minimum requirements.⁸⁹ It must be noted, however, that subsection (f), which was added in 1998, states that nothing in the requirements may be construed as limiting the air carrier's actions and obligations in providing assistance.⁹⁰ This addition will work to prevent airlines from finding statutory loopholes or circumventing their duties. In addition, the carrier's plan must contain an assurance that it "will commit sufficient resources to carry out the plan."⁹¹ In short, the air carrier cannot make empty promises; each airline must submit an affirmative declaration that it will support and follow the Act. The carrier must, through a good faith attempt, allocate adequate resources and manpower to create, maintain, and execute the plan. Because of duties created by the ADFAA and promises made in the carriers' plans, both United Airlines and American Airlines may have to expend large amounts of financial and human resources in supporting the families of the September 11th attacks regardless of potential limits on tort liability and federal bailouts.

Besides the promise of resource commitment, the carrier's plan must also contain other assurances, such as to notify, to provide passenger lists, to update information, to provide remains and personal possessions, to consult the families about memorials and monuments, and to cooperate with the support service. For instance, the carrier must provide an assurance that

⁸⁷ *Id.*

⁸⁸ 49 U.S.C. § 1136(h)(1).

⁸⁹ *See id.* § 41113(b).

⁹⁰ *Id.* § 41113(f).

⁹¹ *Id.* § 41113(b)(13).

as soon as the air carrier confirms that a certain passenger was aboard the aircraft, the carrier must notify the family before public notice, and if practicable, in person.⁹² Thus, United Airlines and American Airlines made assurances that before the public knew that Captain Jason Dahl and first officer Leroy Homer piloted United Flight 93 or that Todd Beamer was the passenger whose pregnant wife and two children were left behind, the airlines would make a best-efforts attempt to contact their families prior to releasing the information to the swarm of inquiring journalists. In sum, these required assurances lay out what services the carrier must provide and within what bounds these services will be performed.

3. *Performance of the Assistance Plan*

a. *Information Responsibilities*

Once an "accident" occurs, the air carrier becomes responsible for several related post-accident responses. First, the carrier will have to set up, publicize, and staff a toll-free telephone line that passengers' families can call for information.⁹³ For instance, the assistance plans required the airlines to publish the multitude of contact and information telephone numbers displayed on every major television station. Secondly, an airline, before making any passenger names public, must first notify the families through a "suitably trained individual. . . ."⁹⁴ The preferred notification method is in person, but face-to-face communication is only mandated "to the extent practicable."⁹⁵ The carrier must periodically update this information as the names of passengers are verified.⁹⁶ A sad disparity to note is that, following the September 11th disaster, the families of the airplane passengers were the only ones guaranteed to be notified of the deaths of their loved ones. The families of workers in the Pentagon and World Trade Center were unaided by any statutory notification requirements.

b. *Personal and Privacy Responsibilities*

After performing its notification duties, the carrier must continue to assist the affected families. The carrier must cooperate

⁹² *Id.* § 41113(b)(2)-(3).

⁹³ 49 U.S.C. § 41113(b)(1).

⁹⁴ *Id.* § 41113(b)(2)-(3).

⁹⁵ *Id.* § 41113(b)(3).

⁹⁶ *Id.* § 41113(b)(4).

with the independent, NTSB-appointed non-profit, (i.e., the Red Cross), to provide an appropriate level of aid and support.⁹⁷ The carrier must “assist” the passenger’s family in traveling to the crash site, as well as provide for their physical needs while at the accident location.⁹⁸ Presumably, this means that the air carrier must purchase plane, bus, or boat passes, provide for a rental car, and pay for the family’s lodging and food. Yet, the use of the word “assist” leaves room for argument as to what type of provisions meet the mandatory floor. For example, are American Airlines and United Airlines required to fly in all family members from around the globe? And, who will calculate what constitutes adequate support and assistance? The recovery time required by the September 11th terrorist attack is currently immeasurable—how are the airlines to measure their sufficiency?

Additionally, an air carrier must also respect a family’s wishes for burial, memorial, or religious ceremony. The carrier must first consult with the family before disposing of the remains or any of the passenger’s personal possessions,⁹⁹ and any unclaimed possessions must be retained by the carrier for a minimum of eighteen months.¹⁰⁰ If needed for an investigation, however, the carrier can retain either remains or personal effects.¹⁰¹ It is uncertain whether any remains or effects of the airline passengers will be recovered from Ground Zero, the Pentagon, or Pennsylvania following the disaster-site excavation and government investigation.

Finally, the air carrier must get the families’ input for any monument erected in memory of the passengers.¹⁰² This obligation is complicated by the multifaceted nature of the September 11th disaster. Families and friends of non-passengers—indeed, people across the Nation and around the globe—may desire to participate in the creation of a memorial. A strict construction of this provision would impose a Herculean task on United and American.

B. AIR CARRIER LIABILITY

While the ADFAA focuses on providing support to victims of aviation disasters, an air carrier could incur liability under 49

⁹⁷ *Id.* § 41113(b)(10).

⁹⁸ 49 U.S.C. § 41113(b)(12).

⁹⁹ *Id.* § 41113(b)(5).

¹⁰⁰ *Id.* § 41113(b)(7).

¹⁰¹ *Id.* § 41113(b)(6).

¹⁰² *Id.* § 41113(b)(8).

U.S.C. § 41113 if the airline commits intentional misconduct or is grossly negligent in providing the required passenger list.¹⁰³ If the air carrier does not exhibit this level of scienter, however, the carrier is protected by limited liability if it provides the passenger list pursuant to their disaster assistance plan.¹⁰⁴ This limit on liability protects the air carrier from having to pay damages for incorrectly, but innocently, naming a passenger on the victims' list or failing to correctly name a fallen passenger. Nevertheless, this narrow protection from exposure appears insufficient to protect the airlines from mass tort liability following the September 11th attacks; both American Airlines and United Airlines lobbied for a ceiling on the potential litigation exposure coupled with the creation of a streamlined compensation system for disaster victims.¹⁰⁵ The resulting legislative fix, the Air Transportation Safety and System Stabilization Act,¹⁰⁶ reconciles these competing interests by authorizing payments to claimants¹⁰⁷ who waive their right to file civil actions for damages sustained as a result of September 11th. This legislative salve also relieves the airlines of punitive damages and general damages in excess of \$100,000,000 if third parties file claims based on acts of terrorism committed within the 180-day period following September 22, 2001—the date of enactment. The ATSSSA will be discussed in full in Section V, Part B.

The air carrier might also be exposed to liability under 49 U.S.C. § 1136 if the carrier hinders support services or the support providers.¹⁰⁸ The carrier is prohibited from impeding the NTSB or the non-profit organization from carrying out their responsibilities.¹⁰⁹ Furthermore, the airline cannot encumber or block contact and communication between the families of passengers involved in the accident.¹¹⁰

In a related manner, the carrier might be liable for not providing enough financial support to the support-service provider.¹¹¹ The carrier must, to the fullest extent possible,

¹⁰³ 49 U.S.C. § 41113(d).

¹⁰⁴ *Id.*

¹⁰⁵ Bob Van Voris, *Litigation on Hold; Terrorists Did the Deeds, But Others Could Face Suits*, NAT'L L.J., Oct. 1, 2001, at 1.

¹⁰⁶ *System Stabilization Act*, *supra* note 2.

¹⁰⁷ *See id.* "Claimant" is a defined term. For a full discussion of this legislation, see *infra* Part V.B.

¹⁰⁸ *See* 49 U.S.C. § 1136(g)(1).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* § 1136(f).

cooperate and coordinate with the service provider so that the carrier's resources can be used to carry out the organization's responsibilities of care, counseling, support, and communication.¹¹² With the corollary promise by the carrier to allocate sufficient funds to the execution of their family assistance plan, there is an expectation of meeting a certain level of funding and participation. Even though it is yet to be drawn, the carriers' financial and resource expenditures following the September 11th attacks may sketch out a line in the sand that a carrier must cross in order to be protected from liability for failure to fund or cooperate. If the expectations are sky-high, the results may be bankrupt airlines and disable the national aviation transportation system.

Finally, the airline might be exposed to liability under 49 U.S.C. § 1136(g)(3). This provision prohibits individual States and political subdivisions from preventing the carrier's furnishing of emotional support, counseling and mental-health assistance.¹¹³ While the statute's language does not include the air carrier, it seems to hint at the underlying policy that no entity can impede or hinder the process of servicing the disaster victims. It remains to be seen whether air carriers are exposed to liability under this provision.

Furthermore, controversy surrounds an airline's use of caregivers. The problem arises from the fact that most passengers are not aware of the ADFAA. Moreover, the vast majority of passengers do not have knowledge of the complex system of agencies, regulations, requirements, and responsibilities regarding airline safety, security, and service. After an accident, a passenger is not likely to know what a "caregiver" is, who provides the caregiver, and what underlying loyalties motivate the caregiver. As Paige Stockley, the surviving daughter of parents killed in Alaska Airlines Flight 261, stated, "you don't know what the Family Assistance Act is; you don't know what a care team member is. . . . There is this person from [the airline] telling you they are there for you and they are going to see you through."¹¹⁴ Stockley also noted that "you are not angry with [the airline] at this point. You are in shock. They are making the reservations. They are making cash available."¹¹⁵ Shockley

¹¹² *Id.*

¹¹³ 49 U.S.C. § 1136(g)(3).

¹¹⁴ Alonso-Zaldivar, *supra* note 17.

¹¹⁵ *Id.*

concluded that airline employees are not suited for the job, yet the ADFAA and regulations do not inform us as to who can serve as a caregiver. Can it be an airline employee? How much conflict of interest will be tolerated?

C. NTSB RESPONSIBILITIES

The NTSB is the agency that collects the plans for addressing the needs of families of passengers involved in an aviation disaster.¹¹⁶ Following the enactment of the ADFAA, the NTSB also had the task of denying certificates of public convenience and necessity to air carriers not filing a family assistance plan.¹¹⁷

The NTSB's role in an aviation disaster is central and sweeping.¹¹⁸ Under the ADFAA, the NTSB serves as the federal government's primary force in recovering fatally injured passengers and identifying the passengers killed in the airplane accident. This duty applies when any air carrier, whether foreign or domestic, crashes within U.S. territory.¹¹⁹

Whether or not the NTSB has begun the investigation, the Board must take action "as soon as practicable" after being notified of an aircraft accident resulting in a major loss of life.¹²⁰ Following this notification, the NTSB must put together a team of support personnel.¹²¹ The Board must appoint an NTSB employee to serve as the "director of family support services."¹²² The family support services director is the "point" person between the families and the federal government, as well as the liaison between the families and the air carrier. As an NTSB employee, the designee can broker information sharing between the parties with the benefit of federal backing and clout and without the partiality of being employed by the airline. The ADFAA does not specify whether the family support services director needs to have special training or certification. It is also not clear whether the director must be a current employee or can be brought in as an independent contractor. The statutory language reads "shall be an employee," but either scenario would most likely qualify under this phrase.¹²³

¹¹⁶ See 49 U.S.C. § 41113(a).

¹¹⁷ See *id.* § 41113(c).

¹¹⁸ See Federal Aviation Act, 49 U.S.C. §§ 40101 *et seq.*

¹¹⁹ See 49 U.S.C. § 1136(a)-(b).

¹²⁰ *Id.* § 1136(a).

¹²¹ *Id.* § 1136(a)(1)-(2).

¹²² *Id.* § 1136(a)(1).

¹²³ *Id.*

Through the NTSB-appointed family services director, the NTSB will obtain passenger lists with which to notify affected families.¹²⁴ The director of family support services is responsible for requesting from the foreign or domestic air carrier “the names of the passengers that were aboard the aircraft involved in the accident.”¹²⁵ The air carrier and family services director are indirectly in charge of making sure that the list is based on the best information available when the director makes the request.¹²⁶ Because the request is to be made “as soon as practicable,”¹²⁷ the first list most likely will not be complete. But the passenger lists are of utmost importance because they determine which countries, jurisdictions, federal agencies, and third parties will become involved.¹²⁸ As a caveat, the statute reminds both the family services director and the appointed organization that the list may not be released to anyone unless the person is a family member of the passenger and the director or organization considers the release appropriate.¹²⁹ The ADFAA does not define who qualifies as a family member. There is little guidance as to which family members are close enough to get the list and which family members are too far removed. Furthermore, the ADFAA does not suggest what the NTSB should do if no family steps forward or if certain family members demand information and may not be privy to it. For example, what if a passenger was estranged from or disowned by his family, or the ex-wife wants to know if her ex-husband was on the plane? What if a passenger is part of a nontraditional family unit? It seems that these questions are left to the discretion of the family services director.

The NTSB has a continuing responsibility to ensure that the families of passengers are individually informed about public hearings and NTSB meetings concerning the accident.¹³⁰ Also, if appropriate, the families must be allowed access to the hearing or meeting.¹³¹ Furthermore, the NTSB has a greater duty to inform the families first—before any public briefing concerning

¹²⁴ 49 U.S.C. § 1136(d)(1)(A).

¹²⁵ *Id.*

¹²⁶ *See id.*

¹²⁷ *Id.*

¹²⁸ *See generally* Aaron Schildhaus et al., *Aviation and Aerospace Law*, 32 INT'L LAW 437 (1998).

¹²⁹ 49 U.S.C. § 1136(d)(2) (Supp. 2001).

¹³⁰ *See id.* § 1136(e)(1)–(2).

¹³¹ *Id.* § 1136(e)(2).

the accident's cause, the investigation's findings, or any other pertinent information.¹³² In light of the enormity of the September 11th attacks, the boundaries on access to certain information are difficult to draw. How much information will be passed on to the families? How much media sensitivity is required?

The NTSB must also "designate an independent nonprofit organization, with experience in disasters and post-trauma communication with families" to be primarily responsible for "coordinating the emotional care and support of the families of passengers involved in the accident."¹³³ The ADFFA does mandate air carrier cooperation in allowing and facilitating the organization,¹³⁴ as well as providing adequate funding¹³⁵ and reasonable compensation,¹³⁶ but the organization still has the primary role in providing support services.

D. INDEPENDENT NONPROFIT ORGANIZATION'S RESPONSIBILITIES

Currently, the American Red Cross is the flagship independent nonprofit.¹³⁷ But the statute does not name the Red Cross as the only possible appointee.¹³⁸ Groups such as volunteer airline caregivers, cross-airline teams, retirees, or family members from previous crashes might also qualify under the ADFAA. For example, in response to the "largest disaster ever to strike the United States," the American Red Cross enlisted the partnership of the Veterans Administration to staff grief counselors, mental health workers, spiritual care advisors, and chaplains at the Family Assistance Centers in New York City and the Pentagon, as well as the crash site in rural Pennsylvania.¹³⁹

¹³² See *id.* § 1136(e)(1).

¹³³ *Id.* § 1136(a)(2).

¹³⁴ 49 U.S.C. § 41113(b)(10) (Supp. 2001).

¹³⁵ *Id.* § 41113(b)(13).

¹³⁶ *Id.* § 41113(b)(11).

¹³⁷ The American Red Cross accepted the NTSB's invitation to provide its services as the "independent nonprofit organization" required by the ADFAA. See Michele Turk, *Red Cross, NTSB Ink Deal to Help Aviation Victims' Families*, Disaster-Relief.org, at <http://www.disasterrelief.org/Disasters/980928NTSB/> (Sept. 28, 1998).

¹³⁸ 49 U.S.C. § 1136(a)(1).

¹³⁹ See VA's Ability to Respond to DOD Contingencies and National Emergencies: Weapons of Mass Destruction Hearing, 2001 WL 26187102 (2001) [hereinafter *Congressional Testimony*] (Congressional testimony of James Krueger, Executive Vice President, American Red Cross).

The qualifications required for status as an "independent nonprofit" under the ADFAA have yet to be tested. Some controversy, however, is building about the impartiality of team members connected to the airline.¹⁴⁰ The classic conflict-of-interest problem surrounds this issue. Airline volunteers are employees of the airline and necessarily agents of the airline acting on behalf of the air carrier's best interests. Yet the airline's goals of warding off negative publicity, controlling costs, and reducing potential litigation conflicts with the victims' interest in immediate access to information, full compensation, and complete disclosure.

Nevertheless, the designated organization bears the primary responsibility in accomplishing the goals of the ADFAA. The organization's primary allegiance is to the families of the passengers.¹⁴¹ While the air carrier will probably have a disaster response team, the NTSB-appointed organization is the primary entity charged with providing "mental health and counseling services."¹⁴² The organization is also charged with making contact and facilitating communication. The organization must contact families who have traveled to the accident site and families who are unable to get to the site.¹⁴³ The organization must educate the families as to the differing and specific roles of the parties involved in the accident and post-accident activities, such as the appointed organization, the government agencies, and the air carrier.¹⁴⁴ The organization also has a continuing responsibility to keep the communication flowing to *all* affected families until either the organization or the family services director determines that the support is no longer warranted.¹⁴⁵

The designated organization is also charged with consulting the family in arranging a suitable memorial service, if needed.¹⁴⁶ While consulting with the families, the organization must provide an environment where families are free, comfortable, and protected, so that they may grieve in private.¹⁴⁷ The Red Cross and Veterans Administration's response to the September 11th disaster illustrates this last provision. In addition to providing

¹⁴⁰ See generally Alonso-Zaldivar, *supra* note 17.

¹⁴¹ See 49 U.S.C. § 1136(c).

¹⁴² *Id.* § 1136(c)(1).

¹⁴³ *Id.* § 1136(c)(3).

¹⁴⁴ *Id.* § 1136(c)(4).

¹⁴⁵ *Id.* § 1136(c)(3).

¹⁴⁶ 49 U.S.C. § 1136(c)(5).

¹⁴⁷ *Id.* § 1136(c)(2).

counseling services, the Red Cross and VA collaboration provided "respite centers," "service centers," "shelters," and "medical facilities" where counselors could "listen to help rescue workers," help "children through the trauma of losing their home," and "help workers face their fears of returning to high rise office buildings."¹⁴⁸

E. NONPROFIT ORGANIZATION'S LIABILITIES

Before airlines were aware of the families' lobbying efforts or were forced to take action by the enactment of the ADFAA, television provided the only source of information for families whose loved ones were involved in an airline accident.¹⁴⁹ Before the ADFAA, airlines often waited two to three days before notifying a family member of a loved one's death. Then, after the agony of waiting over 48 hours, the sites were restricted and families were not allowed access or permission to visit or view.¹⁵⁰ While a few days' wait may not appear substantial, it confuses and torments the families as they attempt to make funeral plans, work out details for a death certificate, execute the will, and file claims for life insurance.¹⁵¹ For example, some of the Alaska Airlines Flight 261 families were forced to hold vigil at an airport hotel, listening to an overhead reminder of their personal tragedy.¹⁵² The smell of jet fuel and roar of the passing planes was too much of a visceral reminder for them. They renamed their lodging place, "Heartbreak Hotel."¹⁵³

Before the ADFAA, the focus of the NTSB and the airlines was singular. The focus was on the airplane. Now that the airlines are charged with notifying the families and providing the needed logistical support, the focus is on both the airplane and the people affected by the airplane accident. Now the airlines must not only pick up the pieces of the fuselage, they must also help to pick up the emotional pieces during the "shock time" following an accident. But what is the standard for emotional

¹⁴⁸ *Congressional Testimony*, *supra* note 139.

¹⁴⁹ Leon Drouin Keith, *Improvement Cited in Crash Response*, AP ONLINE, Feb. 7, 2000, available at 2000 WL 12388916.

¹⁵⁰ *Id.*

¹⁵¹ See *Crash of Alaska Airlines Flight 261; Families Press for Recover of Bodies in Crash*, SAN DIEGO UNION-TRIB., Feb. 7, 2000, available at 2000 WL 13946661.

¹⁵² Stevenson Swanson, *Crash Victims' Families Make Concerns Heard Since the TWA Disaster, Airlines and Agencies Have Worked to Better Aid Grief-Riven Relatives*, CHI. TRIB., Nov. 7, 1999, available at 1999 WL 2929854.

¹⁵³ *Id.*

support? What is enough? What is too little, too much, too nosy, too distant?

The statute's language is fuzzy: "suitable memorial service," "mental health and counseling services," "an environment where families can grieve in private." These concepts can be defined in a multitude of ways. What constitutes a suitable memorial service? Does it mean that the airline must spend a certain amount of money or fly in a certain number of family members? What is a mental health service? Does it include medication? What type of counseling shall be provided? Will the counselor have to be licensed or a specialist in disaster or trauma? What if the spiritual advisors engage in proselytizing?

The statute does not answer these questions, and the legislative history does not shed much light on the specific concepts or services desired. Regardless of this vacuum, the airlines are vulnerable to these spaces in the statutory language. If the families do not view the service providers as trustworthy or impartial or independent, the distrust and suspicion could grow into a lawsuit or attach to a pending or yet-to-be filed wrongful death or personal injury suit. Could the airline attempt to use the counselors to broker settlements or dissuade families from filing suit? The outcome of the new legislation contained in the Air Transportation Safety and Stabilization Act, as well as the standards set by the NTSB and the Red Cross following the September 11th attacks may serve to set either a floor or a ceiling on the current statutory expectations.

F. ATTORNEY LIABILITY

The ADFAA places a moratorium on airplane chasing. For forty-five days following an air-carrier accident, no attorney, associate, agent, employee, or representative of an attorney can make an unsolicited communication to a passenger or a passenger's relative.¹⁵⁴ Federal law does not grant an independent cause of action under the ADFAA, but attorneys will be held accountable under state bar proceedings. For example, in *Sterns v. Lundberg*,¹⁵⁵ where two attorneys filed a declaratory judgment action in federal district court seeking to enjoin the Indiana Supreme Court from proceeding with disciplinary proceedings against the attorneys, the state disciplinary rules imposed duties

¹⁵⁴ 49 U.S.C. § 1136(g)(2). In the original act, the moratorium was 30 days, but the 2000 amendments increased it to 45 days.

¹⁵⁵ 922 F. Supp. 164 (S.D. Ind. 1996).

not contained in federal legislation. Following the 1992 crash of a Kentucky Air National Guard cargo plane in Indiana, the attorneys mailed client solicitation materials to the victims' families. Neither attorney was licensed to practice in Indiana.¹⁵⁶

Soon after the solicitation came to light, the Indiana Supreme Court publicly criticized the lawyers' conduct and initiated an investigation. Following the investigation, the investigation's Executive Secretary, Lundberg, filed a grievance in order to begin the official disciplinary proceedings against the attorneys. Sterns and Murgatroyd, the lawyers who contacted the victims' families, filed for declaratory and injunctive relief alleging that the Indiana Supreme Court had neither subject matter nor personal jurisdiction and to allow the disciplinary proceedings to continue would violate the Fourteenth Amendment's Due Process Clause.¹⁵⁷ The district court, however, refrained from interfering with the state disciplinary proceedings, reasoning that the regulation of attorneys' conduct is fundamentally an important state interest, thus requiring a federal court to abstain pursuant to the *Younger* doctrine.¹⁵⁸

Following the September 11th attacks, attorneys, both as professionals and as citizens, struggle with the appropriate response to the issues and liabilities involved. Corporately, the Association of Trial Lawyers of America ("ATLA") called for the plaintiffs' bar to eschew lawsuit filing, at least temporarily.¹⁵⁹ Nevertheless, because of families contacting lawyers, some retainer agreements have already been signed.¹⁶⁰ ATLA is also calling for lawyers to make this pledge, "We pledge to provide free legal services to the terrorist attack victims who are eligible and choose to make claims under the federal September 11th Victim Compensation Fund."¹⁶¹

V. AMENDMENTS

A. AMENDMENTS PRIOR TO SEPTEMBER 11, 2001

Because the ADFAA is only five years old, not many legislative changes have occurred since its enactment. In 1996, Section

¹⁵⁶ *Id.* at 164, 166.

¹⁵⁷ *Id.* at 164, 167.

¹⁵⁸ *Id.* at 167-68; *see also* *Younger v. Harris*, 401 U.S. 37 (1971).

¹⁵⁹ *See* <http://www.atla.org/homepage/tragedy.htm>.

¹⁶⁰ Van Voris, *supra* note 105.

¹⁶¹ *See* <http://www.monttla.com/graphics/ATLA/trial%20lawyers%20care%20index.html>.

704 of Public Law 104-264 provided for the establishment of a task force.¹⁶² The team was to comprise the Secretary of Transportation, the NTSB, the Federal Emergency Management Agency (FEMA), the American Red Cross, air carriers, airline employee representatives, and family representatives chosen from families involved in aircraft accidents.¹⁶³ The purpose of the task force was to transmit a report to Congress within one year. The report was to contain several recommendations amalgamated into a model plan.¹⁶⁴ Section 704 required that the report contain air-carrier guidelines for accident response.¹⁶⁵ The statute also requested that the task force analyze the current notification timeline and submit suggestions for a more timely system, as well as offer suggestions for the steps needed to present an accurate passenger list within one hour of the accident,¹⁶⁶ the possible additional costs of such speedy reporting,¹⁶⁷ and the personal privacy implications of such fast notification.¹⁶⁸ The task force also was to offer recommendations concerning the protection of families from privacy intrusions by attorneys and the media,¹⁶⁹ proper assistance to foreign families of involved passengers,¹⁷⁰ approval of out-of-state mental health workers in assisting the support team,¹⁷¹ and use of military personnel and facilities to identify remains.¹⁷²

The task force report contained sixty-one recommendations, which were almost all unanimously approved.¹⁷³ Each recommendation was written to serve as a "blueprint for the proper treatment of families." Some of the more controversial recommendations dealt with the use of DNA to identify victims' bodies, the availability of cockpit voice recorders, and the return of victims' personal possessions.¹⁷⁴ The task force document will be discussed in more detail in Section VI of this article.

¹⁶² See *Aviation Disaster Act*, *supra* note 1, § 704.

¹⁶³ *Id.* § 704(a).

¹⁶⁴ *Id.* § 704(c).

¹⁶⁵ *Id.* § 704(b)(1).

¹⁶⁶ *Id.* § 704(b)(6)(A).

¹⁶⁷ *Aviation Disaster Act*, *supra* note 1, § 704(b)(6)(B).

¹⁶⁸ *Id.* § 704(b)(6)(D).

¹⁶⁹ *Id.* § 704(b)(2).

¹⁷⁰ *Id.* § 704(b)(3).

¹⁷¹ *Id.* § 704(b)(4).

¹⁷² *Aviation Disaster Act*, *supra* note 1, § 704(b)(5).

¹⁷³ *Meeting the Airport Security Challenge: Report of the Secretary's Rapid Response Team on Airport Security*, Department of Transportation, at <http://www.dot.gov/affairs/airportsec.htm> (Oct. 1, 2001).

¹⁷⁴ *Id.*

Since 1996, no additional changes to the ADFAA occurred until the year 2000. Public Law 106-259, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, was approved in August 2000.¹⁷⁵ "Air 21," as it is commonly called, amends and reauthorizes a vast array of aviation legislation in Title 49.¹⁷⁶ For instance, Air 21 changes the dollar figures for airport and airway improvement appropriations.¹⁷⁷ The Air 21 legislation also creates changes within the Death on the High Seas Act.¹⁷⁸ While these amendments modify these statutory systems, the modifications to the ADFAA are noteworthy but not earth shattering.

First, Air 21 broadened the Act's reach to include not just domestic carrier accidents, but also aviation accidents involving foreign air carriers that take place within the United States.¹⁷⁹ Another broadening amendment extended the prohibition against unsolicited communications. The new provision not only prohibits unrequested contact from attorneys for possible personal injury or wrongful death actions but also bars contact by "any associate, agent, employee, or other representative of the attorney."¹⁸⁰ Furthermore, the 2000 statute forbids unsolicited communication until the forty-fifth day after the accident, thus adding fifteen days to the original waiting period.¹⁸¹

The 2000 changes add language that includes air-carrier employees in the definition of passenger.¹⁸² This seemingly small addition is nevertheless important, for the new facet of who qualifies as a passenger means that employees' families, as well as persons aboard the flight who neither paid, held a reservation, nor occupied an actual seat will be considered as "passengers."¹⁸³ Thus, the NTSB family services director and the appointed support organization (Red Cross) must include and provide support services to the families of employees, non-paying patrons, "stow-aways," and stand-by passengers. This does place a greater burden on the air carrier to verify and communicate to the families of the actual persons aboard the flight.

¹⁷⁵ *Wendell H. Ford Act*, *supra* note 9.

¹⁷⁶ *See id.*

¹⁷⁷ *Id.* §§ 101-03.

¹⁷⁸ *See id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Wendell H. Ford Act*, *supra* note 9, §§ 101-03.

¹⁸¹ *Id.*

¹⁸² 49 U.S.C. § 1136(h)(2).

¹⁸³ *Id.* § 1136(h)(2)(A)-(B).

These amendments also added required content to the air-carrier disaster plans. The plan now must provide an assurance that the airline will let a family know, upon request, whether their loved one was listed on the flight's preliminary passenger manifest.¹⁸⁴ One significant change places a higher duty on the air carriers to provide disaster training to their employees.¹⁸⁵ The new statutory language mandates that the training be "adequate . . . to meet the needs of survivors and family members following an accident."¹⁸⁶ On top of this new responsibility, the 2000 ADFAA requires an assurance from air carriers that they will volunteer personnel to assist U.S. citizens in the event of an accident outside the United States if the accident involves a "major loss of life."¹⁸⁷ The families must be within the United States, and the air carrier must first consult the NTSB and the Department of State in providing the assistance.¹⁸⁸

B. AMENDMENTS SUBSEQUENT TO SEPTEMBER 11, 2001.

Following the September 11th attacks, Congress enacted the Air Transportation Safety and System Stabilization Act.¹⁸⁹ The purpose of the Act is "to preserve the continued viability of the United States Air Transportation System." The Act supplies structure and relief by compensating air carriers for losses incurred as a result of the terrorist attacks,¹⁹⁰ establishing the Air Transportation Stabilization Board to review and decide on applications for federal aid,¹⁹¹ setting a maximum total amount of compensation available for an air carrier and its highly paid employees,¹⁹² authorizing the Secretary of Transportation to ensure that communities receive adequate or essential air transportation service,¹⁹³ providing reimbursement to air carriers for increased insurance costs,¹⁹⁴ limiting air carrier liability for the September 11th terrorist acts and any occurring in the 180-day period following September 22, 2001,¹⁹⁵ providing com-

¹⁸⁴ 49 U.S.C. § 41113(b)(14).

¹⁸⁵ *See id.* § 41113(b)(15).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* § 41113(b)(16).

¹⁸⁸ *Id.*

¹⁸⁹ *See System Stabilization Act, supra* note 2.

¹⁹⁰ *Id.* § 101.

¹⁹¹ *Id.* § 102.

¹⁹² *Id.* § 103.

¹⁹³ *Id.* § 104.

¹⁹⁴ *System Stabilization Act, supra* note 2, § 201.

¹⁹⁵ *Id.* §§ 201, 408.

pensation to any individual, or relatives of a deceased individual, who was physically injured or killed as a result of the September 11th attacks,¹⁹⁶ granting the United States a right of subrogation for any claim paid under the Act,¹⁹⁷ and authorizing President George W. Bush's \$3 billion spending commitment for airline safety and security to "restore public confidence in the airline industry."¹⁹⁸ The Act also contains a "Congressional Commitment" whereby Congress states that it "is committed to act expeditiously . . . to strengthen airport security and take further measures to enhance the security of air travel."¹⁹⁹

Concerning federal subsidization of the aviation industry, the Act mandates that the President compensate air carriers for direct losses incurred as a result of any Federal ground-stoppage order issued by the Secretary of Transportation following the September 11th terrorist attacks, as well as any incremental losses incurred between September 11 and December 31, 2001 as a "direct result of such attacks."²⁰⁰ The air carrier may not receive compensation in excess of the amount demonstrated to the satisfaction of the President through "sworn financial statements or other appropriate data." Such information may be audited by the Secretary of Transportation and the Comptroller General of the United States, who can also request additional documentation.²⁰¹ Compensation, paid in one or more payments, may not exceed the lesser of the Section 102(a)(2) amount or a formula-determined amount if the air carrier runs passenger-only, cargo-only, or combined passenger and cargo flights.²⁰² In addition, the carrier must enter into a "legally binding agreement" that it will not use the subsidy to pay an officer or employee who made over \$300,000 in 2000 compensation in excess of the 2000 amount.²⁰³ The air carrier cannot use bonuses, stock, or other financial benefits to circumvent this limitation.²⁰⁴

Concerning the limit on air carrier liability, the Act transfers liability for any third party losses in excess of \$100 million aggre-

¹⁹⁶ *Id.* § 403.

¹⁹⁷ *Id.* § 408.

¹⁹⁸ *Id.* § 501.

¹⁹⁹ *System Stabilization Act*, *supra* note 2, § 502.

²⁰⁰ *Id.* § 101(a)(2)(A)-(B).

²⁰¹ *Id.* § 103(a).

²⁰² *Id.* § 103(b).

²⁰³ *Id.* § 104(a).

²⁰⁴ *System Stabilization Act*, *supra* note 2, § 104(b).

gate to the Government once the Secretary of Transportation certifies that the air carrier was a victim of an act of terrorism.²⁰⁵ Moreover, the Act denies punitive damages if the disaster is certified as an act of terrorism.²⁰⁶ Secondly, the Act sets up a waiver system, whereby any claimant must waive the right to file a civil action in any court, or continue prosecution of any civil action, for damages sustained as a result of September 11th terrorism if the claimant accepts payment under the Act.²⁰⁷ Even though the Act exacts a waiver for payment eligibility, it also reserves rights for claimants under the Act. Any claimant under review for payment reserves: (1) the right to be represented by an attorney; (2) the right to present evidence, including the presentation of witnesses and documents; and (3) any other due process rights determined appropriate by the Special Master.²⁰⁸

To receive payment under the Act, claimants must qualify as an "eligible individual"²⁰⁹ who submits a single claim and waives or withdraws from civil litigation. An "eligible individual" is one who was present at the World Trade Center, Pentagon, or the crash site at Shanksville, Pennsylvania, "at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001" and "suffered physical harm or death as a result of such an air crash."²¹⁰ Eligible individuals are also those passengers and flight crewmembers on American Airlines flight 11 or 77 or United Airlines flight 93 or 175 (exclusive of participants and conspirators in the terrorism) or the personal representative of the decedent.²¹¹ The eligible individual's claim must be on the authorized form²¹² and state the physical harm suffered or, in the case of a decedent's representative, the possible economic and noneconomic losses suffered, as well as information regarding collateral sources of compensation received.²¹³ Any claim must be filed within two years of 90 days after September 22, 2001.²¹⁴

²⁰⁵ *Id.* § 201(b)(2).

²⁰⁶ *Id.* § 201(b)(2).

²⁰⁷ *Id.* § 405(c)(3)(B).

²⁰⁸ *Id.* § 405(b)(4).

²⁰⁹ *System Stabilization Act*, *supra* note 2, § 405(c).

²¹⁰ *Id.* § 405(b)(4).

²¹¹ *Id.* § 405(c)(2).

²¹² *Id.* § 405(2). The Special Master shall develop a claim form and ensure that it can be filed electronically.

²¹³ *Id.* § 405(a)(2).

²¹⁴ *System Stabilization Act*, *supra* note 2, §§ 405(a)(3), 407.

If the ATSSSA is successful in achieving its goals, Congress may act to amend the ADFAA/FACFSA and engraft successful provisions to provide more effective relief in future aviation disasters.

VI. POSSIBLE FUTURE AMENDMENTS

The Task Force on Assistance to Families in Aviation Disasters supplies one source of potential amendments to the Aviation Disaster Family Assistance Act.²¹⁵ The 1996 version of the ADFAA established the Task Force and gave the Secretary of Transportation the authority to name representatives to the force.²¹⁶ The statute mandated that the Secretary of Transportation cooperate with other federal agencies, as well as air carriers and families affected by previous aviation accidents.²¹⁷ So, airlines' representatives, victims groups' designees, the NTSB, the Federal Emergency Management Agency, and the American Red Cross nominated participants. The result was a twenty-seven-member panel consisting of top-ranking officials from several federal agencies (NTSB, DOT, Department of Health and Human Services, American Red Cross, Department of State, FEMA, Department of Defense), general counsel for the various federal agencies, aviation attorneys, representatives of trade/service organizations (National Air Disaster Alliance and Foundation, Regional Airline Association, Families of TWA Flight 800 Association, Air Transport Association of America, Air Line Pilots Association, Association of Flight Attendants), and various victims of aviation disasters.²¹⁸

Doug Smith represented the National Air Disaster Alliance and the families of American Eagle 4184 crash victims. He was

²¹⁵ The Task Force was brought together by the Secretary of Transportation and Vice President Al Gore, who chaired the White House Commission on Aviation Safety and Security. Both a list of the Task Force members and the Task Force's report can be found on the Department of Transportation's website. See U.S. Dep't of Transp., Assistance to Families of Aviation Disasters, at <http://www.dot.gov/affairs/taskforce> [hereinafter *Task Force*].

²¹⁶ 49 U.S.C. §§ 1136, 41113.

²¹⁷ *Id.*

²¹⁸ See U.S. Dep't of Transp., Report from the Task Force on Assistance to Families of Aviation Disasters, Appendix B (1997), at <http://www.dot.gov/affairs/.htm> [hereinafter *Task Force Report*]. The DOT's website is an excellent tracking device. The Task Force continues to exist, meet, make recommendations, and report on the status of its recommendations. Currently, the Task Force is developing plans for responding to aviation disasters involving civilians on government aircraft. One problematic issue concerning government crashes is to which sources the government will look to provide compensation to the families.

named by Rodney Slater, U.S. Secretary of Transportation, to serve on the task force. Smith saw the ADFAA's goal as "creating change for the future in how we as a nation and industry come together in the unfortunate tragedies to make the path of other families as free of unnecessary burdens as possible."²¹⁹ Similarly, the Task Force's motto reads, "Working Together—We Can Make Things Better."²²⁰

The ADFAA assigned to the force the task of developing recommendations and guidelines for the air carriers and their designated care assistance teams. The Task Force submitted its report, model plan, and recommendations to Congress one year after the enactment of the 1996 Act.²²¹ The Task Force's product consisted of sixty-one recommendations, which were almost all agreed upon unanimously, cover a broad range of issues such as notification of families, the process of accident investigation, the treatment of affected families, the role of federal agencies, and the release of information.²²² While the report reaches a broad range of issues, the specifics are confined to the statute's compulsory focus—the treatment of families.²²³

Several themes underscore the Task Force's report. First, the goal of timely *and* sensitive notification is a vexing problem. Second, some governmental action is required through legislation and/or regulations, but most of the Force's suggestions can be achieved without government action. Third, an airline has the freedom to provide its own post-disaster support services, but the Task Force suggests asking an independent third-party to interact with the family members.²²⁴

The report has fifteen sections with two main concentrations—families' needs immediately following the disaster and the role of assisting parties interacting with the families.²²⁵ Noting the suggestive but not mandatory thrust of recommendations, the Task Force posits stronger language in several places by using "Congress should amend . . . review . . . examine" lan-

²¹⁹ News Release, U.S. Dep't of Transp., Transportation Establishes Task Force to Assist Families in Aviation Disasters, (Mar. 5, 1997), *available at* 1997 WL 92308 (D.O.T.).

²²⁰ *Task Force Report*, *supra* note 218, at Introduction. This website also publishes the Task Force's reports, such as the anniversary report. *See Task Force*, *supra* note 215.

²²¹ *See* 49 U.S.C. § 1136.

²²² *Task Force Report*, *supra* note 218, at Introduction.

²²³ *See id.*

²²⁴ *Id.*

²²⁵ *Id.*

guage.²²⁶ These statements require close attention for legislation and policy watchers, for one of the Task Force's stronger suggestions has already been grafted into the ADFAA. The report recommended that Congress amend the ADFAA and increase the attorney-solicitation prohibition from thirty to forty-five days.²²⁷ Congress heeded the advice and increased the waiting period in 2000 to the recommended forty-five days.²²⁸

A. POSSIBLE AMENDMENTS CONCERNING ATTORNEYS

Attorneys, especially the aviation bar, should carefully monitor this issue for the Task Force also recommends that Congress enact protective legislation to deter wrongful solicitation. As a corollary, the recommendation suggests that the Department of Justice fully prosecute wrongful solicitors.²²⁹ Even further, the Task Force suggests adding a provision to the ADFAA allowing families to revoke legal representation and settlement contracts. As to future legislation, the report asks Congress to determine whether victims' post-disaster statements can be admitted in federal courts by opposing parties' attorneys and whether contingency-fee arrangements encourage misconduct and frivolous lawsuits.²³⁰

B. POSSIBLE AMENDMENTS CONCERNING CASH OFFERINGS

Another hot issue centers on money, specifically cash compensation given to families by air carriers. Following the Singapore Airlines crash in Taiwan, the airline paid \$25,000 to families of passengers who were killed, \$5,000 to injured passengers, and then an additional \$400,000 to the victims' families.²³¹ This cash offering is surprising because the treaty covering international air travel, the Warsaw Convention, limits the airline's per passenger liability to \$75,000.²³² The \$75,000 ceiling is

²²⁶ See, e.g., *id.* §§ 1.4.1, 7.2, 7.3.

²²⁷ *Task Force Report*, *supra* note 218, § 7.2.

²²⁸ *Wendell H. Ford Act*, *supra* note 9, § 401(a)(1).

²²⁹ *Task Force Report*, *supra* note 218, §§ 7.2.2.1, 7.2.2.2.

²³⁰ *Id.* §§ 7.5, 7.6.

²³¹ William Foreman, *Singapore Air Kin Offered \$400,000*, ASSOC. PRESS, Nov. 4, 2000 (on file with the Journal of Air Law and Commerce).

²³² Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40105 (1994). According to the DOT Task Force, reports that the European Union Council proposed a requirement that its member airlines compensate families within fifteen days after passenger identification and not be less than \$ 20,500. (This calculation is 15,000 European Currency Units [ecu], Special

lifted, however, if the air carrier engaged in willful misconduct. Several factors could motivate such large cash gifts: an admission of guilt, an attempt to limit potential litigation liability, a goodwill offering, and/or monetary assistance for affected families.

Similarly, U.S. domestic carriers have offered financial assistance. After the Alaska Airlines crash off the coast of California, the airline did offer cash to relatives, but the payments were for hotel rooms, food, and flights.²³³ In 1999, after the June American Airlines accident at Little Rock National Airport, American gave \$25,000 to both survivors and family members of killed passengers. In an official company letter, American classified the money as assistance to cover any expenses associated with the incident.²³⁴ And, most notably, following the September 11th terrorist attacks, United Airlines advanced \$25,000 to the families of victims aboard Flights 93 and 175,²³⁵ and American Airlines offered "AA Helps" fares, special fares ranging in price from \$75 to \$150 each way, to transport families of victims, Red Cross employees, clergy, police, and firemen traveling to assist in New York City.²³⁶

C. POSSIBLE AMENDMENTS CONCERNING ASSISTANCE TEAMS

The ADFAA prohibits any State or political subdivision from preventing the assistance organization's agents from offering counseling services.²³⁷ The Task Force suggests uniform licensing waivers for out-of-state mental health workers to "practice" in the State where the aviation disaster occurred.²³⁸ Interestingly, this poses a federalism question for Congress because

Drawing Rights, times the dollar equivalency – 1 SDR = 1.3664 U.S. dollars. The precise dollar equivalency is \$ 20,496). U.S. Dep't of Transp., Implementation of Task Force Recommendations sec. 1.3 (1998), at <http://www.dot.gov/affairs/taskforce/annivreport> [hereinafter *Anniversary Report*].

²³³ Stacy Burns, *Tragedy of Flight 261: Airline Focuses on the Grieving*, MORNING NEWS TRIB. (Tacoma, Wash.), Feb. 2, 2000, at A7, available at 2000 WL 5325744.

²³⁴ *Id.* The DOT Task Force, in its anniversary report, characterizes these cash offerings as necessary financial assistance. See *Anniversary Report*, *supra* note 232, § 1.3.

²³⁵ Press Release, United Airlines, United Airlines Confirms Initial Payments to Victims of Tragedies Involving United Flights 93 and 175, available at www.ual.com.

²³⁶ Press Release, American Airlines, American Airlines Offers Special Fares to Families of NYC Victims, Sept. 22, 2001, available at http://biz.yahoo.com/prnews/010922/hssa008_1.html.

²³⁷ 49 U.S.C. § 1136(g)(3).

²³⁸ *Task Force Report*, *supra* note 218, § 6.2.

mental health workers' licensing procedures are reserved to the States under the Tenth Amendment.²³⁹ Considering the Supreme Court's recent shift concerning the scope of the Commerce Clause in *United States v. Lopez*²⁴⁰ and *United States v. Morrison*,²⁴¹ it is doubtful that a federally enacted uniform licensing waiver companion statute to the ADFAA be sustained under Congress' power to regulate commerce; however, the shift in national ideology following the September 11th attacks may increase the possibility of a waiver statute.

D. POSSIBLE AIR CARRIER OPERATIONAL CHANGES

In 1997, the Department of Transportation took action through an "Advanced Notice of Proposed Rulemaking" or ANPRM.²⁴² The action was issued pursuant to the ADFAA and the White House Commission on Aviation Safety and Security.²⁴³ The ANPRM requested that each U.S. air carrier research and report on both the operational and cost concerns related to collecting domestic air-transportation passenger-manifest information. The DOT will use the information in considering possible regulatory action to speed up the notification of families of victims in domestic aviation disasters. Currently, certified operators collect only passenger names for each scheduled flight and are not required to collect any contact information.²⁴⁴

Following the submission of the air carriers' response, the DOT may initiate regulations requiring more complete information gathering. Possible changes may include requiring passengers to give a full name, the name of an emergency contact, the phone number of an emergency contact, proof of identification.²⁴⁵ While these auxiliary morsels of information seem small, the DOT estimated that the cost to obtain them could be anywhere between \$75.5 and \$158.2 million. The costs would be borne by air carriers, travel agents, and passengers (for the value of lost time in providing the extra information).²⁴⁶ Plus, the DOT estimated that it might be necessary to compile 10.8

²³⁹ U.S. CONST. amend. X.

²⁴⁰ 514 U.S. 549 (1995).

²⁴¹ 529 U.S. 598 (2000).

²⁴² Domestic Passenger Manifest Information, 62 Fed. Reg. 11,789-97 (proposed Mar. 13, 1997) (to be codified at 14 C.F.R. pt. 243).

²⁴³ *Id.*

²⁴⁴ See 14 C.F.R. § 121.693(e) (2000).

²⁴⁵ 62 Fed. Reg. 11,789-97 (Mar. 13, 1997).

²⁴⁶ *Id.*

million manifests annually.²⁴⁷ The DOT also requested estimates of how e-ticketing procedures would increase or decrease time and costs.²⁴⁸

VII. THE RED CROSS

The American Red Cross is the named nonprofit organization responsible for meeting needs of victims and families following disasters. While the Red Cross gets involved after natural disasters, it also enters the fray after major transportation disasters, and specifically aviation disasters. Federally chartered corporations, such as the Red Cross, are congressionally created to take care of governmental functions. While these organizations take care of social services mandated by the U.S. government, Congress rarely grants these nonprofits with full-shield sovereign immunity.²⁴⁹

Without sovereign immunity, these federally chartered corporations are vulnerable to lawsuits filed by private citizens, especially after the Supreme Court held that the American Red Cross could be sued in federal court.²⁵⁰ The Court interpreted the American Red Cross's charter as containing an implied grant of federal jurisdiction through federal question jurisdiction.²⁵¹ Both federal appellate and district courts have allowed a private litigant to bring a negligence action against the Red Cross.²⁵² While most of the cases where the Red Cross is the named defendant involve blood transfusions, the ADFAA exposes a new soft spot for the Red Cross. If the Red Cross can be sued for providing tainted blood to disaster victims, they could also be sued for providing negligent support services to victims of aviation disasters.

No cases yet report this type of civil claim, but the ADFAA is relatively new and untested in the civil court system. While it might seem improbable for a disaster victim or family member to sue the government or the Red Cross for negligence in providing support services, the subjective nature of the ADFAA's

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 11,795.

²⁴⁹ There are other federally chartered corporations without sovereign immunity, such as National Banks chartered by the government and American Indian Organizations.

²⁵⁰ *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 274 (1992).

²⁵¹ *Id.*

²⁵² See e.g., *Marcella v. Brandywine Hosp.*, 47 F.3d 618 (3d Cir. 1995); *Rozak v. Am. Red Cross Blood Servs.*, 945 F. Supp. 1183 (N.D. Ind. 1996).

provisions and the ideology involved in assessing what is effective "support" create potential potholes for support providers.

The ADFAA gives the NTSB primary responsibility for identifying fatally injured passengers,²⁵³ yet the ADFAA grants the independent organization (i.e., the Red Cross) with other serious statutory duties: providing therapy, setting up a quiet, private environment in which to grieve, arranging memorial services, and communicating information in an efficient and compassionate way.²⁵⁴ The ADFAA does not specify what level of misconduct creates a claim, but a plaintiff could base a civil action on the ADFAA, the companion regulations, and other aviation statutes to create a new cause of action. Thus, a potential plaintiff could "find" an implied right²⁵⁵ to such measures as effective counseling, privacy, timely receipt of information, approved memorial service, and quite possibly to "heal" from the tragedy. Many of these possible claims will be reigned in by limits on suits against mental health professionals,²⁵⁶ yet a plaintiff may be able to establish liability if non-licensed, volunteer, or untrained counselors are used in the post-disaster support.

In the last two years, the Red Cross has been working on a Statement of Understanding with chaplain organizations.²⁵⁷ The Red Cross's objective is to increase successful coordination efforts following aviation accidents. Because chaplains would focus on spiritual needs and guidance, as well as issues of religion, spirituality, and the afterlife, the Red Cross is in a better position than the federal government to coordinate personnel. Thus, in the future, the ADFAA might have a spiritual needs component as well as a focus on physical needs and offering comfort. This partnership with the Association of Professional Chaplains illustrates the Red Cross's efforts to react to aviation tragedies in a quick, caring, compassionate, respectful and spiritual manner. One potential problem might arise under the FACFSA, for an

²⁵³ 49 U.S.C. § 1136(b) .

²⁵⁴ *Id.* § 1136(c).

²⁵⁵ See C.O. Miller, *Battles in the War to Prevent Aviation Accidents*, 12 AIR & SPACE LAW 1, 18 (1998).

²⁵⁶ See e.g., *Dolihite v. Maughon By & Through Videon*, 74 F.3d 1027 (11th Cir. 1996) (Psychiatrists and psychologist did not follow accepted standards, but did not depart egregiously from reasonable professional standards. The court held that the district court should have granted the defendants' summary judgment.); *Pardue v. Fromm*, 94 F.3d 254 (7th Cir. 1996) (Erroneous judgment is different than deliberate mistreatment and deliberate indifference may only be inferred when the departure from accepted standards is substantial.).

²⁵⁷ See <http://www.itsasafety.org/Family/speeches/chaplain>.

American chaplains' group will be more focused on a westernized system of religion and may have difficulty responding to the spiritual needs of passengers and families from different religious traditions.

VIII. MEDICAL EXAMINERS

The ADFAA also impacts medical examiners.²⁵⁸ Because the ADFAA gives the NTSB primary responsibility for aiding families following the accident, the NTSB must also coordinate all the effective organizations and resources.²⁵⁹ For example, the NTSB has to mobilize and direct the aviation-related federal agencies, the state and local authorities at the accident's location, as well as its own personnel and experts.

The NTSB is also responsible for making sure that all of the accident victims are positively identified. Thus, the NTSB must rely on the local medical examiner ("ME"), as well as quickly coordinate resources, standards, and communications. The local ME reciprocally relies on the NTSB to take over the coordination efforts, so the ME can focus on accident scene investigation.²⁶⁰

As the party responsible for identifying bodies, the ME can rely on several federal counterparts to aid the scientific work. First, the ME can utilize the FBI's Disaster Squad for identification through fingerprints. Second, the National Disaster Mortuary Team can send experienced assistants to help identify victims. Third, the ME may be able to utilize DNA testing supported by the Department of Defense. Finally, the United States Department of Health and Human Services could lend its mobile morgue.

Now that the NTSB, FBI, and related agencies face the gargantuan task of identifying the thousands of people slain in the September 11th attacks, the MEs and the NTSB should look to develop regulations to guide post-disaster identification in expeditious and efficient ways. For example, the agencies need to consider issues such as: collecting antemortem information, getting antemortem instructions from families, handling ambigu-

²⁵⁸ See Gary Abe, *The Impact of the Aviation Disaster Family Assistance Act of 1996 on Medical Examiners*, 6 N.A.M.E. News (1998), available at www.ntsb.gov/family/speeches/abe_impact.htm.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

ous identifications, handling disbursal of personal effects, and dealing with unidentified remains.

IX. CONCLUSION

Congress rarely attempts to legislate compassion, yet the ADFAA and the FACFSA attempt to motivate the aviation industry to “lend a helping hand” and provide “a shoulder to cry on.” These Acts, a rare instance of the government’s involvement in citizens’ emotional care, endeavor to make the chaotic and painful aftermath of a crash more humane. As described by a newspaper reporter, “[f]or those left behind, the death of a loved one in an airline crash is a free fall into a living hell.”²⁶¹ The ADFAA and the FACFSA console where tragedy has dealt cruel shock.

While some view this legislation as a social welfare measure, others, such as attorney Frank Carven, point out the business necessity, “It’s not only compassion . . . Whoever is running these airlines understands the bottom line. An accident can put you out of business overnight. Or you can take a bad situation and treat people fairly and that will only add to those who use your service.”²⁶²

It remains to be seen if there are latent flaws in these acts. While some passengers and victims’ family members have begun to speak out about their concerns, no one as of yet has litigated under these federal statutes. The potential remains, however, for a victimized party to allege conflicts –of interest, settlement coercion, negligently trained care teams, and federalism issues. Moreover, the forty-five-day solicitation ban might not deter eager attorneys. Moreover, the statute is unclear as to whether the ADFAA applies to crashes outside the territorial land or waters of the United States. This creates a dangerous loophole for aggressive plaintiffs’ attorneys. Neither the ADFAA nor the FACFSA provides a private cause of action, so it also remains to be seen if lawyers will be sued for statutory violations and/or legal malpractice.

Despite these potential pitfalls, the ADFAA did reach the goal set forth by the victims’ family groups—“to make things bet-

²⁶¹ *Crash Victims’ Families Question Using Airline Employees as Caregivers*, DALLAS MORNING NEWS, Dec. 13, 2000, at 15A, available at 2000 WL 30815613.

²⁶² Alonso-Zaldivar, *supra*, note 17.

ter.”²⁶³ Enabling the victims and their families to confirm the terrible news, collect a loved one’s belongings, receive a free flight to the crash site, take advantage of grief counseling, or arrange a memorial service does soothe the shock, pain, anger, and pain. In the aftermath of September 11th, it is clear that neither the airline industry nor our government will ever be completely immune to accidents and terrorism. We did not avert disaster, but the ADFAA answered the attacks and provided the first line of support in the midst of turmoil.

²⁶³ *Anniversary Report*, *supra* note 232. This report contains a discussion of which of the Task Force’s recommendations have been implemented, as well as the process and effect of the implementations. For example, the Task Force discusses several outcomes: (1) Carriers using a broad definition of “family member;” (2) Carriers notifying families of individual identifications, rather than waiting to complete the entire passenger manifest; (3) Carriers using the internet and third parties to post and communicate current information; (4) Carriers implementing and improving training for care teams – for example, Continental Airlines trains several regimens: emergency volunteers, reservations personnel, airline personnel, station managers, and communication vendors, Northwest Airlines trains “Assist Members,” and American Airlines uses survivors and family members to help train future personnel in sensitivity and preparedness; (5) Carriers brokering out for service providers to return personal effects; and (6) the NTSBs continued work and research to better its disaster response.



Articles

