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A NO-FAULT AVIATION INSURANCE PLAN

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The presentation of this paper to a group of trial attorneys will probably be about as popular as “catnip in the colosseum.” However, relative popularity must give way to a vital need to solve some serious problems which are facing the safety of the flying public and the survival of the entire aviation industry.

Hopefully, the legal profession will forgive me for the form and style in which this paper is presented—its lack of case references, Latin phrases, and footnote references. You must remember, I do not practice law; I only write laws.

Tragically, one of the weaknesses of our political system stems from the fact that many legislators write laws without having a practical knowledge of the effects and the practical application of the statutes.

The purposes of this paper are to:

- (1) outline certain serious problems which are threatening public safety and the Aviation Industry;
- (2) outline one possible solution; and
- (3) solicit your criticisms, advice, suggestions and assistance in improving this plan or substituting another plan.

From the beginning, it should be clearly understood that I have only one advocacy, the welfare of the traveling public. I am neither pro-plaintiff, pro-defendant nor pro-industry. Furthermore, I would like to remain free, as much as possible, from these competitors which exist within the legal profession.

In this paper, an attempt will be made to define these problems and then to explain a possible solution. I do not suggest that the solution herein is *the* answer. I do contend that is *an* answer. My goal is to find *the best* solution to the stated problems.

Prior to becoming a member of congress, my field of expertise

was aircraft and meteorology. These fields hardly qualify me as a legal technician. Hopefully, with my familiarity with aviation and your expertise in the legal profession, we will be able to find a fair and workable solution to the problems which I will outline. If you do not like the proposed solution which will be offered, I challenge you to produce an alternative which will provide equivalent public protection factors.

I. IDENTIFICATION OF PROBLEMS

The public safety and national welfare are being seriously threatened by the following aviation-related problems:

1. Inadequate safeguards to assure complete, accurate and comprehensive investigations of aviation accidents; hence, the possibility that unsafe aircraft may be in operation now or at a later date.
2. Excessive consumer costs, passed through by the aviation industry, attributable to liability insurance premiums paid by aircraft manufacturers and air carriers.
3. A threat of business termination of major segments in the aviation industry due to single catastrophic aircraft accidents.
4. Retardation of technological advancements and improvements within the aviation manufacturing industry resulting in a threat to this nation's position as the world's leading aircraft manufacturer.

A. *Aircraft Accident Investigation Defects*

The complex technology involved in the manufacturing of today's aircraft presents a monumental task for accident investigators. The National Transportation Safety Board (NTSB) is responsible for investigating all major aviation accidents in this country.

Recently, accidents have been investigated by technical teams provided by the federal government and the aviation industry. In effect, manufacturers of airframes, engines and the various aircraft operational systems are appointed literally to investigate their own products. This situation is necessary because no other person or agency possesses the necessary technological expertise. Government members primarily administer major aviation accident investigations.

In years past, under the old Civil Aeronautics Board's (CAB)

investigations, the accident board and individual team member investigations were confidential. Their work products, notes, reports, etc., could not be used in civil litigation. The original purpose of the accident board was to find causative factors, with no regard for liability or fault.

In recent years, Congress passed the Tort Claims Act and the Freedom of Information Act. These acts now permit the work products of accident investigation boards to be subpoenaed in civil liability litigation. Unfortunately, these acts have brought an end to effective investigations of major aircraft accidents.

The government alone does not have personnel with the necessary technological expertise to conduct investigations of major aviation accidents. Furthermore, under present laws, both industrial and governmental members of accident investigating boards have a definite conflict of interest. Their own survival or welfare may hinge on the results of the investigation.

An example of this conflict would be as follows. Assume that a Boeing 747 is involved in a major accident. Only Boeing has the necessary expertise to examine the ruins of the crash and determine whether or not a defect was present in the air-frame. Yet, if the Boeing accident investigators admit the presence of a defect, the company will be found liable and must pay all damages and related costs of the accident. This situation creates a potential hazard to the public. As these airplanes become older, that potential hazard increases.

It is virtually impossible to eliminate positively and completely all potential defects or "bugs" prior to placing the airplanes into operation because of the complexities of modern day aircraft. Furthermore, "bugs" may not show up until after millions of flying hours. These defects are potential killers.

It is vitally important for public safety that bugs or aircraft defects be discovered and eliminated immediately. In the past, all segments of the aviation industry were eager to find any possible defect and to correct it. Now the situation is different.

The cost of a Boeing 747 accident (total settlement) can be as high as \$100,000,000. Such a figure can virtually wipe out an airline company or aircraft component manufacturer.

It is unreasonable to believe that any industry investigator would voluntarily admit to a defect which would put his company out of

business. Therefore, present NTSB investigations are not working in a manner which will assure public protection. The individual accident investigating team members certainly could be motivated or concerned with "being sure that their own company's skirts are clean," rather than determining the cause of the accident.

B. Excessive Consumer Costs

Civil liability law suits involving aircraft are particularly threatening to the existence of general aviation. Unlike an automobile manufacturer, the maker of an aircraft, in reality, assembles parts from many different manufacturers. Engines come from one maker, instruments come from another, still other manufacturers will make the landing gear, hydraulic system, avionics, etc. The smallest aircraft assembler will use parts and components from more than 100 manufacturers.

Following an accident, plaintiffs will normally sue each of the major component manufacturers. Therefore, each maker must prepare a costly defense, even though their product may have been completely fault-free. More often than not, the plaintiff is "judgment proof;" therefore, the manufacturer has no way of reclaiming his legal defense costs.

Aviation insurance underwriters are becoming reluctant to provide product liability insurance to aviation manufacturers—at any price. Those who are insured must pay extremely high premiums. Obviously, these costs are passed on to the public consumer. Soaring costs are forcing some segments of general aviation out of business.

C. Retardation of Technology Improvements

Aircraft technology and product improvements are being seriously hampered as a result of civil liability law suits. Aviation, being a new technology, has a past history of constant and immediate improvements of its products. This practice has been slowed considerably.

The production of a new high-technology aircraft can amount to a risk which could bankrupt the manufacturer. Therefore, rather than take the chance, he will stay with his "safe" older model, even though the newer one is really the safer one. The manufacturer is fully aware of the extremely difficult task of trying to explain a

complicated technology to a lay jury during a liability law suit, with the bereaved widow and her children sitting in the court room.

Manufacturers are also reluctant to make product improvements or modifications lest the change amount to an admission that the older version was deficient, thereby breeding a rash of law suits.

In the Congress we are receiving a considerable number of complaints which can best be described as a "legal abuse of process." This involves one of the grey areas of our laws which does not constitute a "legal violation" or even an "ethical violation." Yet, in fact, it is an abuse of process and one which is very peculiar to the Aviation Industry. As mentioned previously, even the smallest aircraft will be assembled from the parts of a hundred or more manufacturers. Any one of these parts could be the cause of an accident. According to the complaints we are receiving, some attorneys simply file law suits against all of the component manufacturers. This forces each manufacturer to wage a costly defense. The plaintiff then begins a round of negotiations with each defendant with offers to settle for a sum below the defense cost. With several defendants being involved, the collective settlement amount can be substantial.

II. AVIATION'S SPECIAL CATEGORY

Aviation is unique in so far as public protection is concerned. Other means of mass passenger transportation available to the American public are older than aviation. The airplane was the last development in mass transportation.

Laws governing all modes of mass transportation other than aviation consist of a hodge-podge collection of local, state, federal and international laws or regulations. Only in the case of the airplane do we find positive federal protective laws involving licensing, manufacturing, operation, modifications, maintenance and training. Any "shadetree" mechanic or even totally untrained persons can build, modify, repair, sell or operate an automobile without federal scrutiny. Similar situations exist for boats, trains and buses. The federal government becomes concerned only when interstate factors are involved with these vehicles, and even that involvement is minimal.

The airplane differs from other modes of transportation in another important way. It is a hand-built machine, wherein every single piece has been engineered, tested, and proven to the satis-

faction of the United States government before it is allowed to be placed in operation. Before any airplane can carry a passenger, even without charge, the manufacturers must prove to the Federal Aviation Administration (FAA) that the craft is safe. Before that manufacturer can sell his aircraft or use it to transport paying passengers, he must go through a complex FAA Type Certification program and prove the craft not only to be safe and airworthy, but also to establish safe operating life of all the major components.

No other means of mass transportation has the built-in federally-supervised safety measures found in aviation. Therefore, it is reasonable to conclude that aviation contains public protective factors which are not present in other modes of transportation.

The theory of the common law recovery based on negligence was devised as a public protective measure. In the uncontrolled modes of transportation, this liability law is very important. In aviation the Federal Government adds a protective measure which makes common law recovery unnecessary.

III. RECOMMENDED SOLUTION TO THE STATED PROBLEMS

Since aviation is uniquely different from other forms of transportation, an argument is made that the common law form of recovery based on negligence should be abandoned and replaced with a form of absolute liability with a set amount of recovery. Under this plan, a death caused by an aircraft accident would warrant immediate payment of the maximum recovery. Injuries would be treated in the present manner of personal injury practice up to the maximum allowable. Damaged parties would have no other recourse. Federal law would mandate that all operators of aircraft would be required to carry sufficient insurance to satisfy any passenger or crew claims under the provisions of the absolute liability law. Air carriers would be required to offer or make available the sale of additional trip life insurance for any passenger who deemed his estate to be of greater value than the absolute limits provided by the carrier.

This type of recovery has already been applied to several fields of law. A set amount of recovery in aviation was established for international flights under the Warsaw Agreement and now exists in modifications of that original agreement.

IV. SUMMARY

The entire intent of this paper is to identify certain problems which threaten the safety and welfare of the public.

It is proposed herein to remove aviation from the provisions of common law recovery based on negligence, and to replace it with strict liability, with recovery based on provable damage up to a set amount.

If anyone has a better plan to provide solutions to these problems, it will be most welcome.

