1980

Significant Legislative Developments in 1979 in the Field of Aviation Law

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BECAUSE OF ITS importance to aviation law, this article first addresses current legislative developments in product liability law. Thereafter follows discussion of enacted and proposed federal aviation legislation.

I. PRODUCT LIABILITY LEGISLATION

The United States Department of Commerce's Draft Uniform Product Liability Law (Draft Law), published for comment in the Federal Register on January 12, 1979,\(^1\) caused the introduction of a number of bills in Congress, the enactment of which would do everything from creating a national product liability law\(^9\) to establishing standards for state product liability laws.\(^8\) The subsequent publication by the Department of Commerce on October 31, 1979, in the Federal Register of the Model Uniform Product Liability Act\(^4\) (Model Act) caused the introduction of additional bills in Congress relating to the same subject, modified to reflect the differences between the Draft Law and the Model Act.

It is anticipated that no federal legislation relating to product liability will be enacted in the near future for two reasons: (1)

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\(^1\) **DRAFT UNIFORM PRODUCT LIABILITY LAW, 44 Fed. Reg. 2995 (1979)** [hereinafter cited as **DRAFT LAW**].


\(^4\) **MODEL UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714 (1979)** [hereinafter cited as **MODEL ACT**]. The Model Act is discussed at notes 8-73 infra, and accompanying text.

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substantively, most tort litigation is inherently non-federal; and (2) the drafters intended that the Model Act be enacted by state legislatures, not Congress, in the manner that the Uniform Commercial Code (UCC) became law in forty-nine of the fifty states, as well as the District of Columbia. Nevertheless, federal legislation in the area of uniform state product liability law does merit serious consideration by Congress for several reasons. The enactment of any uniform code, like the UCC, on a state by state basis is extremely time-consuming. The UCC, however, probably did not engender nearly as much disagreement in the commercial arena as exists between plaintiffs' and defendants' bars over the proposal of a uniform state law. In addition, special interest groups capable of effective lobbying at the state level are much more prevalent and powerful today than they were when the drafters of the UCC sought its enactment. Therefore, the likelihood of obtaining uniform and universal state enactment of all provisions of the Model Act is much less than that of the UCC, which varies from state to state only in minor provisions. If product liability, like aviation, is in fact an area in which Congress can comprehensively and preemptively legislate, then it would appear that the establishment of uniform law in the area of product liability can be most effectively and economically achieved through act of Congress, not through the state legislatures.

In order to bring current developments toward uniformity in the area of product liability into sharper focus, the Model Uniform Product Liability Act will be discussed in detail. Proposed federal and enacted state legislation concerning product liability will also be examined. Thereafter, significant federal legislation that has been proposed or enacted in aviation-related areas outside of product liability will be reviewed.

A. Model Uniform Product Liability Act

1. Background

On October 31, 1979, the United States Department of Com-
merce published its Model Uniform Product Liability Act. This Model Act is the result of an eighteen-month interagency study by the Department of Commerce on the topic of product liability, the results of which were published in the Department’s final report on November 1, 1977. The study had been commissioned as a result of the insurance dilemma facing American manufacturers and insurers regarding product liability. Among the suggested causes of this dilemma were liability insurance rate-making procedures, manufacturing practices and uncertainties in the tort litigation system. The study found that the third factor, uncertainties in the tort litigation system, was the principal cause of the products liability problem. Representatives of the Office of Management and Budget and the Domestic Policy Staff of the White House requested that the Department of Commerce prepare an options paper regarding what action, if any, the federal government should take to address the product liability problem. The Department of Commerce published an options paper addressing the problem in the Federal Register on April 6, 1978. One of that paper’s recommendations was that a uniform product liability law be prepared. Thereafter, the Carter Administration announced its intention to address the product liability problem and, on January 12, 1979, the Department of Commerce published its Draft Uniform Product Liability Law for public comment. After receiving approximately 1500 pages of comments in 240 separate communications, working with the Department of Commerce’s Director of Consumer Affairs and the Office of the Special Assistant to the President for Consumer Affairs, conducting consumer forums in Washington, D.C., Detroit, Los Angeles and Atlanta, and meeting with consumer groups, the Department of Commerce published the Model Uniform Product Liability Act. The

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10 Id. at xxxix-lvi.
13 Id.
Model Act differs in some respects from the Draft Law,\textsuperscript{16} but to avoid confusion the evolution of the Model Act from the Draft Law will not be discussed.\textsuperscript{17}

2. The Text

The Model Act would replace and preempt all existing laws governing matters within its coverage, including the Uniform Commercial Code, but would not prevent recovery under the UCC or similar laws of direct or consequential economic losses.\textsuperscript{18} Failure of the claimant to purchase a product from, or enter into a contractual relationship with the seller of a product will not bar a claim.\textsuperscript{19} The Model Act makes reference to other sources of law where the Act does not provide a rule of decision, but mandates that the utilization of such other sources must conform to the intent and spirit of the Act.\textsuperscript{20}

The Model Act specifically sets forth basic standards of responsibility for manufacturers. The manufacturer of a product would be liable to a claimant who proves by a preponderance of the evidence that his injury was proximately caused because the product was defective.\textsuperscript{21} Under the Model Act, a product may be proven defective only if it was unreasonably unsafe in construction or design, because adequate warnings or instructions were not provided, or because the product did not conform to the seller’s express warranty.\textsuperscript{22} Defects in construction and breach of express warranty are judged by a strict liability standard; defects in design and failure to warn are judged by a fault standard.\textsuperscript{23}

A product would be unreasonably unsafe in construction if, at the time it left the control of the manufacturer, it differed in some material way from the manufacturer’s design specifications or performance standards, or from otherwise identical units of the

\textsuperscript{16} \textit{Draft Law, supra} note 1, 44 Fed. Reg. at 2995 (1979).
\textsuperscript{17} For a description of the Draft Law, see Dubuc, \textit{Significant Legislative Developments in the Field of Aviation Law, 45 J. AIR L. \& COM.} 1 (1979).
\textsuperscript{18} \textit{Model Act, supra} note 4, § 103(A), 44 Fed. Reg. at 62,720 (1979).
\textsuperscript{19} \textit{Id.} § 103(B).
\textsuperscript{20} \textit{Id.} § 103(C).
\textsuperscript{21} \textit{Id.} § 104, 44 Fed. Reg. at 62,721.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.}
same product line. A product would be unreasonably unsafe in design if the trier of fact found: (1) at the time of manufacture it was likely that the product would cause the harm suffered by the claimant or similar harm; and (2) the seriousness of those harms outweighed both the burden on the manufacturer to design a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product. The Model Act provides specific examples of evidence that would be especially probative in evaluating whether a product is unreasonably unsafe in design.

To show a breach of the duty to warn the user of a product's potential danger, the Model Act requires the claimant to prove that: (1) at the time of manufacture, there was the likelihood that the product would cause the claimant's harm; (2) the seriousness of those harms renders the manufacturer's instructions or warnings inadequate; and (3) the manufacturer should and could have provided adequate instructions or warnings. The Model Act also contains examples of evidence that would be highly probative in applying this formula.

For products that do not conform to an express warranty, as well as products that are unreasonably unsafe in construction, the Model Act applies the standard of strict liability. In order to impose liability, the trier of fact must find that the claimant, or one acting on his behalf, relied on the express warranty, that it proved to be untrue, and that the claimant's reliance on the warranty caused the injury. The express warranty must relate to specific characteristics or qualities of the product, not to general opinions about or praise of the product.

The Model Act requires sellers other than manufacturers to exercise reasonable care in their handling of products. A seller who is not a manufacturer would not be liable for failure to inspect for design defects that an ordinary prudent seller would

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25 Id. § 104(A).
26 Id. § 104(B)(1).
27 Id. § 104(B)(2).
28 Id. § 104(C)(1).
29 Id. § 104(C)(2).
30 Id. § 104(D).
31 Id. § 105, 44 Fed. Reg. at 62,726.
not discover. The seller would be responsible for conveying the manufacturer’s warnings or instructions to the product user and would be liable for breach of its own express warranties.\textsuperscript{31}

The Model Act protects all product sellers from liability for defective design of products that are incapable of being made safe at the time of manufacture. The product seller, however, would have an obligation to warn of those dangers that would be reasonably discoverable.\textsuperscript{32} Also, the manufacturer might be subject to liability if it acted unreasonably in selling the product at all, or if it expressly warranted that the product was free from risk.\textsuperscript{33}

Under the Model Act, evidence is generally not admissible to show that a product is defective because of changes in any of the following occurring after the product was manufactured: a product’s design; warnings or instructions concerning the product; technological feasibility; “state of the art”; or the custom of the seller’s industry or business.\textsuperscript{34} Such evidence, however, may be admitted for other highly relevant purposes if alternative sources of proof are unavailable.\textsuperscript{35} Evidence of custom in the industry at the time of, or prior to, manufacture or the seller’s compliance with a then existing non-governmental safety or performance standard is admissible into evidence, but would be given no special evidentiary weight.\textsuperscript{36} An affirmative defense would be available to the seller of a product who can prove that it was not practical or technologically feasible to make the product safer with respect to design, warnings or instruction at the time of manufacture.\textsuperscript{37} Nevertheless, a seller is required not to sell an unreasonably dangerous product and to warn of a danger in the product after its manufacture.\textsuperscript{38} The Model Act would place great importance on legislative or administrative regulatory standards and mandatory government specifications. If the injury-causing product was in compliance with the legislative enactment or administrative regulation relating

\textsuperscript{31} Id.
\textsuperscript{32} Id. § 106, 44 Fed. Reg. at 62,727.
\textsuperscript{33} Id.
\textsuperscript{34} Id. § 107, 44 Fed. Reg. at 62,728.
\textsuperscript{35} Id.
\textsuperscript{36} Id. § 107(C).
\textsuperscript{37} Id. § 107(E), 44 Fed. Reg. at 62,728-29.
\textsuperscript{38} Id.
to its design or performance, it would not be deemed defective unless the claimant proved that a reasonably prudent product seller would and could have taken additional precautions. On the other hand, if the product was not in compliance with such a standard, the product would be deemed defective unless the product seller could prove its failure to comply was a reasonably prudent course of conduct under the circumstances. Compliance with mandatory government contract specifications is a defense. Conversely, when a failure to comply causes the harm, liability would be imposed.

Under the Model Act, attorneys who anticipate filing product liability claims are required to give notice to known sellers of the product against whom the claim is likely to be made. Such notice is to be given by the attorney within six months of the date of entering into an attorney/client relationship with the claimant. If the claimant's attorney, at the time the notice of claim is given, requests names and addresses of each person in the chain of manufacture and distribution of the product, however, the seller of the product must promptly furnish such information that he has and may be subject to liability for failure to do so. Although failure to comply with the notification requirement does not affect the validity of any claim or defense under the Model Act, if any party to the claim, or any attorney representing such party, suffers monetary loss associated with the litigation of the claim because of failure by a party or his representative to comply with the notice and information provision of the Act, the other party or his attorney may be subject to pecuniary damages, costs and reasonable attorney's fees.

Notwithstanding the statute of repose contained in the Model Act, a seller would not be subject to liability for harm that occurs

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29 Id. § 108(A), 44 Fed. Reg. at 62,730.
30 Id. § 108(B).
31 Id. § 108(C).
32 Id. § 108(D).
33 Id. § 109(A), 44 Fed. Reg. at 62,731.
34 Id. § 109(B).
35 Id. § 109(C).
36 Id. § 109(E).
37 Id. § 110(B), 44 Fed. Reg. at 62,732.
after the product’s “useful safe life” has expired.54 “Useful safe life” begins at the time of delivery to a purchaser who is not engaged in the business of selling such product and extends through the time in which the product would “normally be likely to perform or be stored in a safe manner.”55 A product seller, however, may be held liable for harm caused by a product that is used beyond its “useful safe life” to the extent that the seller of the product has expressly warranted the product for a longer period.56

The statute of repose in the Model Act provides that for claims involving harm caused greater than ten years after time of delivery, a presumption arises that the harm was caused after the “useful safe life” had expired. Only clear and convincing evidence may rebut this presumption.57 If the seller expressly warrants the “useful safe life” for a period longer than ten years, the presumption is extended accordingly.58 The ten-year period of repose does not apply in the instance of intentional misrepresentation, fraudulent concealment of information, or cases in which the harm was caused by prolonged exposure to a defective product.59 If the injury-causing aspect of the product existed at the time of delivery but was not discoverable by an ordinary reasonably prudent person until more than ten years after time of delivery or was not manifested until more than ten years after the time of delivery, the period of repose does not apply.60 Moreover, the statute of repose does not affect the right of any person found liable under the Model Act to seek and obtain contribution or indemnity from any other person responsible for harm under the Act.61 The Model Act also provides for a two-year statute of limitations.62

Comparative responsibility governs all claims under the Model Act.63 Responsibility of the claimant for the injury will not bar

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54 Id. § 110(A)(1).
55 Id.
56 Id. § 110(A)(2).
57 Id. § 110(A)(2)(a).
58 Id. § 110(B)(1).
59 Id. § 110(B)(2)(b).
60 Id. § 110(B)(2)(d).
61 Id. § 110(B)(2)(c).
62 Id. § 110(C).
63 Id. § 111(A), 44 Fed. Reg. at 62,734.
his recovery but will proportionately diminish his damages. In order to determine the percentages of responsibility, the trier of fact is to consider the conduct of each person or entity responsible and the extent of the proximate causal connection between the conduct and the damages claimed. If a certain party is responsible for a distinguishable harm or if there is some other reasonable basis for apportioning that party’s responsibility for that harm, the damages are to be apportioned severally. Otherwise, judgment shall be entered against each party on the basis of the rules of joint and several liability. The Model Act also provides for a reallocation of responsibility in the event of the uncollectibility of a joint tortfeasor’s share one year after judgment is entered. Failure to discover a defective condition that would be apparent without inspection, use of a product with a known defective condition, misuse of a product, or alterations or modification of a product not expected of an ordinary and reasonably prudent person would subject the claimant to reduction of damages. A right of contribution also exists under the Model Act among two or more persons who are jointly and severally liable, regardless of whether judgment has been recovered against any or all of those persons.

Neither the employer nor his worker compensation carrier shall have a right to subrogation against the seller of the product. A judgment rendered against a seller shall be reduced by the amount of the worker compensation benefits for the same injury, plus the present value of all future worker compensation benefits payable under the worker compensation statute. The Model Act, however, does not affect the traditional protection enjoyed by a worker compensation employer from a right of contribution against him by the seller. The Commerce Department recognized that the present system dulls an employer’s incentive to maintain the safety

58 Id.
59 Id. § 111(B)(3), 44 Fed. Reg. at 62,735.
60 Id. § 111(B)(5).
61 Id.
62 Id. § 111(B)(6).
63 Id. § 112, 44 Fed. Reg. at 62,736.
64 Id. § 113, 44 Fed. Reg. at 62,739.
65 Id. § 114(A), 44 Fed. Reg. at 62,740.
of products in the workplace and that worker compensation recovery against an employer may not reflect the full value of that employer's responsibility for payment of a recovery. The Department, however, did not want to undermine a central concept behind worker compensation, *i.e.*, that the employer and employee receive the benefits of a guaranteed, fixed-schedule, no-fault recovery system, which constitutes the exclusive underlying liability of the employer.\(^{66}\)

In the event of frivolous claims, the Model Act provides for reimbursement for reasonable attorney's fees and other costs on a showing by clear and convincing evidence.\(^{67}\) The Model Act also provides for arbitration in the event of a dispute involving less than $50,000, while allowing a party who is dissatisfied with the arbitration to demand a full trial.\(^{68}\)

The Model Act further provides for pretrial screening of experts to prevent unqualified experts from testifying at trial\(^{69}\) and codification of a court's power to review pain and suffering and other non-pecuniary damage awards for excessiveness.\(^{70}\) Under the Model Act, product liability awards would be reduced by compensation received from a "public source," which denotes a fund more than half of which is derived from general tax revenue.\(^{71}\) Punitive damages would be recoverable under the Model Act only if the claimant shows by clear and convincing evidence that the harm resulted from the seller's reckless disregard for the safety of the product user.\(^{72}\) Although the trier of fact would determine whether punitive damages should be awarded, the court would determine the amount of damages by taking into consideration the following factors: the likelihood that serious harm would arise from the seller's misconduct; the degree of the seller's awareness of that likelihood; the profitability of misconduct to the seller of the product; the duration of the misconduct and any concealment of it by the product seller; the attitude and conduct of the product

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\(^{66}\) *Id.* § 114 analysis, 44 Fed. Reg. at 62,740-41.

\(^{67}\) *Id.* § 115, 44 Fed. Reg. at 62,741.

\(^{68}\) *Id.* § 116(A), (I), 44 Fed. Reg. at 62,742-43.

\(^{69}\) *Id.* § 117(E), 44 Fed. Reg. at 62,745.

\(^{70}\) *Id.* § 118, 44 Fed. Reg. at 62,746.

\(^{71}\) *Id.* § 119, 44 Fed. Reg. at 62,747.

\(^{72}\) *Id.* § 120(A), 44 Fed. Reg. at 62,748.
seller upon discovery of the misconduct and whether the conduct has been terminated; the financial condition of the product seller; the total effect of other punishment imposed or likely to be imposed upon the seller, including punitive damage awards to those other than the claimant and the severity of criminal penalties to which the seller has been or may be subject; and, whether the harm suffered by the claimant was also the result of the claimant's own reckless disregard for personal safety."

B. Proposed Federal Product Liability Legislation

The Final Report of the Interagency Task Force on Product Liability, issued in November of 1977, continued to generate fallout in the form of proposed federal legislation throughout the first session of the Ninety-sixth Congress. There were no less than twenty-nine bills introduced in the second session of the Ninety-fifth Congress to provide for some form of relief from product liability losses by amendments to the Internal Revenue Code. In addition to tax relief, one of those bills, H.R. 11788, contained a title captioned "Standards for State Product Liability Tort Litigation Act," which was digested in last year's report to the Air Law Symposium. The first session of the Ninety-sixth Congress saw that title reintroduced as an independent bill, H.R. 1675, followed by seven bills directed toward removing the uncertainty engendered by the diversity of state substantive laws dealing with product liability claims.

73 Id. § 120(B).
75 See Dubuc, supra note 17, at 1.
76 Id. at 9.
78 Id. tit. II.
79 For a discussion of the bill, see Dubuc, supra note 17, at 9.
Factors common to these various proposals were the articulation of federal standards for state laws concerning product liability and warranty; two- or three-year statutes of limitation; rebuttable presumptions against product defects following ten years of use; state-of-the-art defenses, including inadmissibility of post-accident changes; specific provisions for court-appointed experts and/or masters; comparative fault, apportionment of damages, contribution and indemnity provisions; and accommodation of the worker compensation system. Variations among these proposals included a review of state product liability schemes by a five-member panel within the Department of Commerce, the arbitration of cases where the monetary damages were below stated thresholds, and a suggestion that the threshold amount for federal jurisdiction, diversity or otherwise, be increased to $100,000.

Public hearings have been held on all but one of these bills, but further action has been precluded by the priority given to H.R. 6152, the Risk Retention Bill. This bill provides relief to small business from the increasing burden of product liability insurance by allowing groupings for the purpose of self-insurance. No further hearings or markups are now scheduled on the tort litigation bills or the Risk Retention Bill, which has been reported out by the subcommittee and is now scheduled for markup by the full Committee on Interstate and Foreign Commerce. Similarly, there has been no action on S. 542, H.R. 3252 or numerous similar bills, which would allow tax deductions and/or ex-

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83 See note 81 supra.
89 Id.
emptions for contributions made to a reserve or trust set up to provide for product liability losses and expenses.

C. Enacted State Product Liability Related Legislation

Alabama

Under legislation enacted in Alabama in 1979, a product liability action in that state, whether under negligence, warranty or the manufacturer's extended liability doctrine, must be filed, unless otherwise waived, within one year of the injury or damage. If the injury is latent, the action must be filed within one year from the date the injury or damage should reasonably have been discovered. No action may be brought against the original seller more than ten years after the product was put in use by the purchaser. Where the original seller breaches a duty to alter, repair, or inspect a product, or fails to make appropriate warnings, an action may be commenced within a year of the injury.

Arkansas

Under laws approved March 21, 1979, and effective July 20, 1979, Arkansas has enacted legislation defining products liability actions and establishing certain defenses, presumptions, and standards of admissibility of evidence. A products liability action in Arkansas is one which is brought for, or on account of, personal injury, death or property damage caused by the manufacture, design, assembly, testing, warnings, packaging or labeling of any product. Under the new law, the use of a product beyond its anticipated life may be considered as evidence of fault on the part of the consumer. If a product is not unreasonably dangerous when it leaves the seller's control, subsequent and unforeseen changes in the product that render it unreasonably dangerous may be attributed to the consumer. A product may be presumed not

90 Id.
94 Id.
96 Id.
97 Id.
98 Id.
to be unreasonably dangerous if there is evidence that the manufacturer or supplier complied with state or federal laws at the time the product was made.\textsuperscript{99}

\textit{Colorado}

Colorado has amended its wrongful death statute to require all actions for wrongful death to be filed within two years of the commission of the allegedly negligent act which resulted in death, or within one year after the death, whichever is later.\textsuperscript{100}

\textit{Connecticut}

Connecticut has expanded its products liability law to include all products actions against manufacturers, retailers, bailors and lessors, whatever the theory, including strict liability, breach of warranty, and negligence.\textsuperscript{101} Such actions are in lieu of all other claims against sellers.\textsuperscript{102} Under Connecticut law a seller will not be liable for harm caused by an alteration or modification of the product after sale unless the alteration was in accordance with the seller's instructions, with the consent of the seller, or was reasonably foreseeable by the seller.\textsuperscript{103} Comparative responsibility of the claimant in causing the injury may be considered and any award may be reduced proportionately.\textsuperscript{104} The statute of limitations for such actions is three years from the injury, death or property damage, but no action may be filed against a party more than ten years after the product left that party's possession and control. These limitations may be avoided if there is fraud, misrepresentation or if a longer express warranty is given by the seller.\textsuperscript{105} Punitive damages not in excess of twice the amount of other damages may be awarded in cases of a seller's reckless disregard for the safety of consumers.\textsuperscript{106}

\textsuperscript{99} Id.
\textsuperscript{100} Colo. H.B. 1439 (1979).
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
Georgia

As of March 5, 1979, Georgia has required that insurers report product liability claims made against insureds.\textsuperscript{107}

Illinois

Under a law effective in Illinois on January 1, 1979, a product liability action based upon strict liability must be commenced, unless the product is otherwise warranted, within twelve years after the initial sale, lease, or delivery by the seller, or within ten years after the first sale, lease, or delivery to the consumer, whichever occurs first.\textsuperscript{108} This limitation is not applicable to claims that result from subsequent alterations, modifications, or changes in the product, if the action is brought within ten years against those responsible for the changes, unless otherwise warranted, and if the defect did not exist prior to the changes.\textsuperscript{109} If the injury occurs within the limitations period, however, suit may be brought within two years after the injury should have been discovered.\textsuperscript{110} In no event may the strict liability action be brought more than eight years after the occurrence of the injury.\textsuperscript{111}

Under an Illinois law effective September 24, 1979, a strict product liability defendant other than a manufacturer may file an affidavit certifying the name of the manufacturer of the allegedly defective product, and, after the claimant has filed a complaint against the named manufacturer, the action against the certifying defendant may be dismissed.\textsuperscript{112} An action will not be dismissed if the defendant has knowledge of the defect in the product, has exercised significant control over the design or manufacture of the product, or has provided warnings to the manufacturer, or actually has created the defect in the product.\textsuperscript{113} A claimant may vacate the dismissal order by showing any one of the following: that an action against the manufacturer is time-barred; that the identity of the manufacturer provided by the defendant is incorrect;

\textsuperscript{108} Ill. P.A. 80-1367 (1979).
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Ill. P.A. 81-1056 (1979).
that the manufacturer cannot be found or served; or that the manufacturer is unable to satisfy a judgment or reasonable settlement.\textsuperscript{114} Another measure effective January 1, 1980, provides that the state statute of limitations with regard to products liability does not create a cause of action nor does it affect one's right to indemnity or contribution.\textsuperscript{115}

\textit{Montana}

Each product liability insurer in Montana is to file a report by April 1 of each year with the state department of insurance, covering the previous calendar year. The report must specify the amount of products liability insurance collected; the amounts allocable to the state and to the United States; allocated amounts of carried premiums, losses, and reserves for both reported and unreported incurred losses; reserves for other products liability losses; and data about judgments or settlements made during the year in products cases.\textsuperscript{116}

\textit{Nevada}

Nevada's wrongful death law, effective July 1, 1979, now specifies that the decedent's representative may recover special damages and reimbursement for penalties the decedent would have been paid had he lived, but may not recover for decedent's pain and suffering.\textsuperscript{117}

\textit{North Carolina}

North Carolina adopted a comprehensive product liability law, effective October 1, 1979, which includes all but breach of warranty actions.\textsuperscript{118} Under this new law, no action may be maintained against the seller if the product is sold in a sealed container or if the seller had no reasonable opportunity to discover the defect.\textsuperscript{119} These provisions, however, will not apply if the manufacturer is insolvent or not within the court's jurisdiction.\textsuperscript{120} In cases in which

\begin{footnotesize}
\textsuperscript{114} Id.
\textsuperscript{115} Ill. P.A. 81-1054 (1979).
\textsuperscript{116} Mont. S.B. 284 (1979).
\textsuperscript{117} NEV. REV. STAT. § 41.085(5) (1979).
\textsuperscript{118} N.C. Ch. 654 (1979).
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\end{footnotesize}
a third party alters a product after it leaves the control of the manufacturer or seller, and such alteration is contrary to the manufacturer's instructions or consent, the manufacturer or seller will not be liable for a defect in the product. A claimant also cannot recover if he is aware of the danger in the product or if he does not use the product with reasonable care. This law has a six-year statute of limitations from the date of initial purchase of the product.

**North Dakota**

Effective July 1, 1979, North Dakota has established a products liability law defining a defective product as one in which there is a defective condition which renders the product unreasonably dangerous to the user or consumer at the time the product is sold. No product-related injury action may be filed more than ten years beyond the date of initial purchase for use or consumption of the product, or eleven years after the date of manufacture, except where the manufacturer or seller subsequently modifies the product or fails to warn a user about a defect of which it was aware. In cases of manufacturing or design defect, or failure to properly warn or instruct in use of the product, a manufacturer or seller may not be held liable if the product is significantly altered or modified after sale and the modification or alteration contributes to the injury. Conformity with government standards at the time of design or manufacture establishes a rebuttable presumption that a product is free from actionable defects.

Also, effective July 1, 1979, North Dakota provides for indemnification of the seller by the manufacturer and assumption by the manufacturer of the seller's attorney's fees in products liability actions under certain circumstances. To be indemnified, the seller may not have substantially altered the product. The

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121 Id.
122 Id.
123 Id.
125 Id.
126 Id.
127 Id.
seller is not considered a manufacturer for strict liability purposes unless it significantly controlled the manufacturing process.\textsuperscript{129} North Dakota also requires every insurance company providing products coverage to file with the Commissioner of Insurance an annual report of business and products liability claims made against its insureds.\textsuperscript{120}

\textbf{Oregon}

Oregon, effective October 3, 1979, adopted by statute\textsuperscript{121} the text and comments to section 402A of the Restatement (Second) of Torts.\textsuperscript{122} This statutory provision extends to leases as well as sales.\textsuperscript{133} Punitive damages are recoverable in instances of wanton disregard of the safety of others.\textsuperscript{134} Also, all products liability insurers in Oregon must submit annual reports to the state, including information on product defect claims against an insured and settlements on judgments as to such claims.\textsuperscript{135}

\textbf{South Dakota}

South Dakota has created strict liability defenses for manufacturers and sellers of products by statute, effective July 1, 1979.\textsuperscript{136} These defenses do not apply to negligence or breach of warranty claims.\textsuperscript{137} No strict liability action may be maintained against a manufacturer, assembler, or seller of a product in South Dakota if an alteration of the product occurred after the product was manufactured, assembled or sold, if the alteration changed the intended use or design of the product, and if the change was not reasonably foreseeable by the manufacturer, assembler or seller.\textsuperscript{138} No strict liability action may be maintained against a retailer, distributor, wholesaler or other dealer of a product with an unreara

\textsuperscript{129} Id.
\textsuperscript{120} N.D. H.B. 1076 (1979).
\textsuperscript{131} 1979 Or. Laws, ch. 866.
\textsuperscript{121} This section states a rule of strict liability applicable to sellers of products.
\textsuperscript{122} RESTATEMENT (SECOND) OF TORTS § 402A (1965).
\textsuperscript{133} 1979 Or. Laws, ch. 866.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{124} S.D. S.B. 67 (1979).
\textsuperscript{137} Id.
\textsuperscript{138} Id.
reasonably dangerous latent defect unless such seller also manufactured or assembled the product or a component part, or, in the exercise of due care, should have known of the defect.\textsuperscript{129}

II. OTHER AVIATION-RELATED FEDERAL LEGISLATION

A. Federal Legislation Enacted in 1979

Only five significant aviation bills passed Congress in 1979. None of these bills, however, rise to the level of importance of the Airline Deregulation Act of 1978 (ADA)\textsuperscript{140} or of the federal legislation concerning aircraft noise,\textsuperscript{141} international aviation,\textsuperscript{142} or airport development.\textsuperscript{143}

On July 26, 1979, the President approved the Trade Agreements Act of 1979,\textsuperscript{144} implementing agreements resulting from the Tokyo Round of Multilateral Trade Negotiations. This Act eliminated import tariffs and duties on all civilian aircraft, parts and avionics equipment as of January 1, 1980.\textsuperscript{145} The Act also eliminated a fifty percent duty on repairs of United States civil aircraft performed in foreign countries.\textsuperscript{146} The nine members of the European Economic Community, together with Sweden, Canada, Norway and Switzerland, joined in the elimination of those tariffs. Although Japan signed the agreement, it cannot put its provisions into effect until ratified by the Japanese Diet.\textsuperscript{147}

The Export Administration Act of 1979,\textsuperscript{148} which became law on September 29, 1979, imposed export controls on certain tech-

\textsuperscript{129} Id.
\textsuperscript{145} Id. § 601(a)(3)(b)(2).
\textsuperscript{146} Id. § 601(a)(3)(f).
\textsuperscript{147} See AV. WEEK & SPACE TECH., Jan. 7, 1980, at 17.
nology and goods "which could make a significant contribution to the military potential of any country or combination of countries which would be detrimental to the national security of the United States." Authority under the Act is to be exercised by the Secretary of Commerce, in consultation with the Secretary of Defense with respect to militarily critical technologies, by the establishment of a Commodity Control List. In the area of export controls, this Act preempts any other provision of law with respect to any product which is standard equipment in civil aircraft, which is certified by the Federal Aviation Administration, which is an integral part of such aircraft, and which is to be exported to a country other than a controlled country. One effect of the Act is to remove large air transport aircraft equipped with inertial navigation systems from under the Arms Exports Control Act administered by the State Department and to place their export license issuance rules under the Export Administration Act, which is overseen by the Commerce Department. The Defense Department fought the move to ease restrictions on exports of aircraft equipped with inertial navigation systems because of their applications in strategic missile navigation. The Defense Department is included, however, in the Commerce Department's license application review process.

On December 18, 1979, the Senate approved a House bill by which the Federal Aviation Administration's rule requiring mandatory retirement of commercial airline pilots at age sixty, will not be changed until the National Institute of Health (NIH) conducts and completes a study on pilot aging. The Senate deleted authorization of $600,000 in funds to conduct the study. The House, on December 19, 1979, approved that deletion. The lack

149 Id. § 2(8).
150 Id. §§ 4(b), 5(a), (c), (d).
151 Id. § 17(c).
154 Id.
of funds authorization was not expected to delay the study since NIH can use existing funds to begin the study. Passage of this bill arose out of previous bills which would have allowed pilots to fly until age 61 1/2 while NIH was conducting a study of pilot aging. The “Age 60” bill was signed into law by the President on December 29, 1979.

On November 30, 1979, the Department of Transportation’s appropriation bill for fiscal year 1980 was enacted into law. One major effect of that bill on aviation was to limit aircraft loan-guarantee funds to 650 million dollars. The President also signed into law on December 29, 1979, a bill extending through June 1, 1981, the ban on taxation of fringe benefits such as airline employee travel passes. In addition, the United States Department of Energy proposed in January, 1979, to remove the then existing price and allocation restrictions on aviation fuel. Final rules were published in February, 1979, and, pursuant to authorizing legislation, the proposal became effective on February 26, 1979.

B. Proposed Federal Legislation

Over one hundred bills directly related to aviation were introduced in Congress in 1979. No major aviation legislation became law during that first session of the Ninety-sixth Congress, but that session saw the emergence of an aircraft noise bill and an international aviation bill which were both approved by House

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and Senate Conferences in December, 1979. Those bills were passed by Congress in January and February, 1980, and were signed into law by President Carter on February 18 and February 15, 1980, respectively.168

1. International Air Transportation Competition Act of 1979

Any discussion of the International Air Transportation Competition Act of 1979169 (International Act) is best begun by enunciation of the "Goals for International Aviation Policy" contained in section 17 of the Act. Similar to the revolutionary amendments to the Federal Aviation Act wrought by the Airline Deregulation Act of 1978 (ADA),170 section 17 proclaims Congress' intent that the relevant agencies and departments of the United States "develop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international transportation system."171 The further purposes and goals of the International Act include:

(1) the strengthening of the competitive positions of United States air carriers to assure at least equality with foreign air carriers, including the attainment of opportunities for United States air carriers to maintain and increase their profitability, in foreign transportation; (2) freedom of air carriers and foreign air carriers to offer fares and rates which correspond to consumer demand; (3) the fewest possible restrictions on charter air transportation; (4) the maximum degree of multiple and permissive international authority for United States air carriers so that they will be able to respond quickly to shifts in market demand; (5) the elimination of operational restrictions to the greatest extent possible; (6) the integration of domestic and international air transportation; (7) an increase in the number of nonstop United States gateway cities; (8) opportunities for carriers of foreign countries to increase their access to United States points if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given way; (9) the elimination of discrimination and unfair competition practices faced by United States airlines in

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168 Noise Act, supra note 141, 94 Stat. 60; 16 WEEKLY COMP. OF PRES. DOC. 332-33 (Feb. 15, 1980).
169 International Act, supra note 142.
171 International Act, supra note 142, at § 17.
foreign air transportation, including excessive landing user fees, unreasonable ground handling requirements, undue restrictions on operations, prohibitions against change of gauge, and similar restrictive practices; and (10) the promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry.\textsuperscript{173}

The success of the International Act depends upon the effectiveness of the CAB, and subsequently the Department of Transportation, in utilizing its regulatory authority to persuade foreign carriers and their sovereigns to accept route and fare competition. The success of the International Act will also depend on the effectiveness of the Department of State in negotiating bilateral international agreements. It is hoped that these bilateral agreements, among other things, will open up international routes to United States flag carriers at truly competitive fares and without unfair and discriminatory landing, user and other operational restrictions.

Section 2\textsuperscript{177} of the International Act amends section 102 of the Federal Aviation Act by repealing subsection (c),\textsuperscript{174} pertaining to “Factors for Foreign Air Transportation,” and adding language to subsection (a), “Factors for Interstate and Overseas Transportation.” The amendments to subsection (a) reflect Congress’ intent to introduce into international air transportation maximum reliance on competitive market forces and on actual and potential competition, taking account, nevertheless, of material differences, if any, which may exist between international and overseas transportation, on the one hand, and foreign air transportation, on the other and “the strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers.”\textsuperscript{175}

Not surprisingly, the mechanisms brought to bear upon international air carrier markets by the International Act will produce forces which are similar, and in some cases identical, to those brought to bear on the domestic market by the ADA.\textsuperscript{176} In deciding

\textsuperscript{173} Id.
\textsuperscript{172} Id. § 2.
\textsuperscript{174} Id. (amending 49 U.S.C. § 1302(c) (1976)).
\textsuperscript{175} Id. (amending 49 U.S.C. § 1302(a)(4) (1976)).
whether to grant a permit to a foreign air carrier,\textsuperscript{177} to issue a certificate of public convenience or necessity,\textsuperscript{178} or to suspend a tariff,\textsuperscript{179} the consideration of "public interest" has taken a back seat to the establishment or enhancement of competition in all available markets. As the ADA did with interstate and overseas transportation, the International Act replaces a necessary finding that a certificate is "required by public convenience and necessity,"\textsuperscript{180} with a necessary finding that the issuance of the certificate is "consistent with public convenience and necessity."\textsuperscript{181} The same applies to applications by foreign air carriers for certificates to engage in temporary air transportation\textsuperscript{182} and charter air transportation.\textsuperscript{183} Also, certificate authority may now be granted without terminal and intermediate rights,\textsuperscript{184} in order to bring such authority in line with the authority granted under most bilateral air transport agreements.\textsuperscript{185}

Section 6 of the Act adds a new section to the Federal Aviation Act which permits the CAB to suspend or revoke authority contained in a United States carrier's certificate, subject to the carrier's right to an oral hearing if the carrier has served notice that it proposes to suspend all services to the point in question, or if it has not in fact provided regularly scheduled service to a point for a ninety-day period.\textsuperscript{186} Also, under the International Act the CAB may issue a permit to a foreign air carrier to engage in foreign air transportation if the "fit, willing and able" requirements are met and "either the applicant is qualified, and has been designated by its government, to perform such foreign air transportation under the terms of an agreement with the United

\textsuperscript{177} 49 U.S.C. § 1372(b) (1976).
\textsuperscript{178} Id. § 1371(d).
\textsuperscript{179} Id. § 1482(j).
\textsuperscript{180} Id. § 1371(d)(1)(B).
\textsuperscript{181} International Act, supra note 142, at § 4 (amending 49 U.S.C. § 1371(d)(1) (1976)).
\textsuperscript{182} Id. (amending 49 U.S.C. § 1371(d)(2) (1976)).
\textsuperscript{183} Id.
\textsuperscript{184} Id. § 5 (amending 49 U.S.C. § 1371(e)(2) (1976)).
\textsuperscript{185} S. REP. No. 329, 96th Cong., 1st Sess. 3 (1979).
\textsuperscript{186} International Act, supra note 142, at § 6 (amending 49 U.S.C. § 1371(g) (1976)).
States" or fulfills the "public interest" standard previously in effect.

**Standard Foreign Fare Level**

The procedural provisions for "Suspension and Rejection of Rates in Foreign Air Transportation" are changed very little by the International Act. The Act does, however, introduce the concept of a "standard foreign fare level" (SFFL), which is similar to the "standard industry fare level" (SIFL) found in the ADA for interstate and overseas transportation. Under this concept, the CAB could not find any fare unjust or unreasonable because such fare was too high or too low if: with respect to any proposed increase filed with the Board on or after the date of enactment of the International Act and before the 180th day after such enactment, such proposed fare may be not more than the SFFL for the same or similar class service; with respect to any proposed increase filed with the CAB after the 180th day after enactment of the International Act, such proposed fare may not be more than five percent higher than the SFFL for the same or essentially similar class of service; and, with respect to a proposed decrease filed after the date of enactment of the International Act, the fare may not be more than fifty percent lower than the SFFL for the same or essentially similar class of service, except that such provision does not apply to any proposed decrease in any fare if the CAB determines that such proposed fare is predatory or discriminatory. The term "standard foreign fare level" is defined as a fare level filed for and permitted by the CAB to go into effect on or after October 1, 1979 (with feasible adjust-

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187 Id. § 7 (amending 49 U.S.C. § 1372(b) (1976)).
188 Id.
189 Section 37 of the ADA, 92 Stat. 1741-43 (1978) (codified at 49 U.S.C.A. § 1482(d) (Supp. 1979)) enacted a "standard industry fare level" around which it established a zone within which the CAB may not find a fare unjust or unreasonable unless it pertains to a market clearly dominated by a single carrier. "Standard industry fare level" means the fare in effect on July 1, 1977, as adjusted by the CAB, or on new services, the initial fare. Id. § 37, 92 Stat. 1741-42 (1978) (codified at 49 U.S.C.A. § 1482(d)(6)(A) (Supp. 1979)). A dominating carrier is one which carries seventy percent or more of the certificated carrier passenger traffic in that market. Id., 92 Stat. 1741 (1978) (codified at 49 U.S.C.A. § 1482(d)(4)(A) (Supp. 1979)).
190 International Act, supra note 142, at § 24.
ments), or the fare level determined by the CAB in any case in which it determines that the fare level in effect on October 1, 1979, was unjust or unreasonable, under procedures completed on the 180th day after the date of enactment of the International Act.191 The CAB does not have authority under the Act, to establish SFFLs for points between which passengers carried by United States carriers and foreign air transportation are in the aggregate more than twenty-five percent of the total passengers carried by United States carriers in foreign air transportation.192 The CAB is required to adjust SFFLs for cost changes thirty days after the date of enactment of the International Act.193 Thereafter, the CAB shall adjust the fare level for changes in fuel costs not less than every 60 days and, for all other costs, not less than every 180 days.194

In addition to the establishment of a SFFL, section 1002(j) of the Federal Aviation Act is amended by section 14 of the International Act to provide for suspension of a newly filed or existing foreign air transportation tariff solely on the grounds of “public interest” if the tariff was filed by a foreign air carrier.195 In the instance of suspension, revocation or cancellation of a newly filed effective or provisionally effective foreign air transportation tariff, the affected carrier will be required to maintain the rates of the tariff in effect immediately prior to the filing of the new tariff or such other rates as may be provided for under an applicable intergovernmental agreement or understanding.196 If the suspended, revoked or cancelled tariff is an initial tariff, the affected carrier may, pending effectiveness of a new tariff, abide by a tariff currently in effect for any air carrier engaged in the same foreign air transportation.197

Sanctions Against Foreign Carriers

The International Act provides several significant sanctions to

191 Id.
192 Id.
193 Id.
194 Id.
196 Id. § 14 (amending 49 U.S.C. § 1482(j)(1) (1976)).
197 Id.
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protect United States air carriers' interests against any anticompetitive action by foreign governments. Section 9 of the Act provides for summary suspension of a foreign air carrier's permit where there is impairment by that carrier's government of the operating rights of United States carriers.\(^{199}\) This is an expansion upon a procedure developed by the CAB under Part 213\(^{199}\) that allowed the CAB to limit foreign air carrier schedules subject to the disapproval of the President in the event of foreign government impairment of United States operating rights over the objections of the United States government.

Section 23 of the Act\(^{200}\) amends section 2 of the Fair Competitive Practices Act of 1974, which gives the CAB broad powers to devise effective retaliatory measures against unfair discriminatory or restrictive practices of foreign governments and carriers. Under these provisions of the Act, United States carriers and government agencies may file complaints with the CAB, or the CAB could act on its own initiative in applying remedial measures. The CAB is required to act on any complaint within sixty days and is required to consult with the Departments of State and Transportation before taking final action. Such action is subject to Presidential review under section 801 of the Federal Aviation Act.\(^{201}\)

United States Carrier Leases of Foreign Aircraft and Emergency Foreign Air Carrier Operations in Interstate and Overseas Air Transportation

Section 1108(b) of the Federal Aviation Act\(^{202}\) precludes a United States air carrier from operating foreign-registered aircraft between two points in the United States even where the only foreign involvement was the United States carrier's lease of the hull of the aircraft. Section 402(a)\(^{203}\) of the Federal Aviation Act imposes a limitation upon the lease of foreign aircraft and

\(^{199}\) Id. § 9 (amending 49 U.S.C. § 1372(f) (1976)).

\(^{199}\) 14 C.F.R. § 213.3 (1979).

\(^{200}\) International Act, supra note 142, at § 23 (amending International Air Transportation Fair Competitive Practices Act of 1974, § 2, 49 U.S.C. § 1159b (1976)).

\(^{201}\) Id.


\(^{203}\) Id. § 1372(a).
their crews by United States carriers for domestic air transportation operations. The addition of section 13 of the International Act gives the Secretary of Transportation authority in an emergency situation, and where all possible efforts have been made to accommodate traffic on United States carriers, to exempt a foreign air carrier from the requirements and limitations of the Federal Aviation Act, including section 1108(b) and 402(a). The exemption would be granted to the extent necessary to authorize a foreign air carrier to lease or charter aircraft without crew to a United States direct-air carrier for the performance of services by or on its behalf, in interstate or overseas transportation, as well as in foreign transportation, pursuant to an agreement approved by the CAB under section 412 of the Federal Aviation Act of 1958.

Filing of Reports

Section 10 of the International Act amends section 407(a) of the Federal Aviation Act to empower the CAB to require reports from foreign air carriers to the same extent that it may now require them from United States carriers under section 407(a).

Agreements Affecting Foreign Air Transportation

The International Act eliminates the requirements of filing pooling or apportioning agreements among air carriers with the CAB. Antitrust laws remain fully applicable to any agreement not specifically approved by the CAB and not specifically granted immunity under section 414 of the Federal Aviation Act. The Act also amends section 414 of the Federal Aviation Act to provide for the granting of an antitrust exemption, as part of any order approving any contract, agreement, or request, or any modification or cancellation thereof, to the extent necessary to enable such person to proceed with the transaction. The Joint Explanatory Statement of the House-Senate Conference

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204 International Act, supra note 142, at § 13 (amending 49 U.S.C. § 1386 (1976)).


206 International Act, supra note 142, at § 10.

207 Id. §§ 11, 12.


209 International Act, supra note 142, at § 27.
mittee on the Act notes that the conferees expect the CAB to apply the modified Bank Merger Act agreements test,210 in a manner which would result in immunity from United States antitrust laws and does not discriminate between United States and foreign air carriers.211

Withholding Information From Public Disclosure

The International Act amends the second sentence of section 1104 of the Federal Aviation Act212 by replacing the word “and” with “or” in the phrase “and adversely affect the competitive position of any carrier in foreign air transportation.”213 This change makes “adverse effect on the competitive position of U.S. carriers” along with “prejudice of the U.S. position in international negotiations”214 an alternative ground on which to withhold disclosure of information.

The “Fly America” Program

The Act amends section 1117 of the Federal Aviation Act215 to allow use of foreign carriers by passengers transported with United States government funds if United States flag carrier services are not reasonably available between two foreign points.216 The United States government is also authorized by this section to negotiate with foreign governments the right to carry government financed passenger traffic in return for liberal bilateral agreements benefiting the traveling public and United States air carriers.217

210 As interpreted by the House Committee on Public Works and Transportation in its Report on H.R. 548, which was merged into the International Aviation House-Senate Conference Bill, the so-called modified Bank Merger Act test provides that before agreements otherwise violating the antitrust laws can be approved, the CAB must find that the agreement is necessary to meet a serious transportation need or secure important public benefits, and that such needs or benefits cannot be secured by reasonably available alternative means which are materially less anticompetitive. H.R. REP. No. 602, 96th Cong., 1st Sess. 5 (1979).
211 S. REP. No. 531, 96th Cong., 1st Sess. 23 (1979).
213 International Act, supra note 142, at § 19.
215 Id. § 1517.
216 International Act, supra note 142, at § 21.
217 Id.
"Part Charters"

Section 26 of the International Act amends the Federal Aviation Act to preclude "part charters" by foreign air carriers, which are presently precluded with respect to interstate and overseas air carriers. It is the House-Senate Conference Committee's intent that the only exception to the preclusion of "part charters" would occur when authorization of "part charters" is required to meet United States obligations under existing agreements with foreign countries. The authority of the CAB to preclude "part charters" by foreign, interstate or overseas carriers shall cease on December 31, 1981.

Collection of Fees Outside the United States

The International Act amends section 45 of the ADA to clarify that the Secretary of Transportation and the Federal Aviation Administration may collect a fee, charge or price for any test, authorization, certificate, permit, or rating, administered or issued outside the United States, relating to any airman or repair station.

Resolution of the Love Field Dispute

Section 29 of the International Act contains provisions resolving the long-raging dispute over interstate flights into and out of Love Field, Dallas, Texas. This provision is identical to one contained in the Aviation Safety and Noise Abatement Act of 1979.

Transfer of Authority and Sunset Provisions

Section 1601 of the Federal Aviation Act, as amended by the
ADA, contains all necessary provisions for transfer of authority regarding foreign air transportation from the CAB to other agencies and departments. It also provides for a comprehensive review and report by the CAB to Congress by January 1, 1984, which is to include information as to whether the changes wrought by deregulation have improved or harmed the nation's domestic air transportation system and the foreign air transportation system served by United States flag carriers.

2. Aviation Safety and Noise Abatement Act of 1979

After years of negotiations, compromises and changes, House and Senate conferees approved, on December 18, 1979, a compromise noise bill acceptable to the Secretary of Transportation and to President Carter. The Aviation Safety and Noise Abatement Act of 1979 (Noise Act) contains funds to carry out both noise compatibility planning and the implementation of noise compatibility programs.

Title I

Under the provisions of Title I, the Secretary of Transportation must establish, within twelve months after enactment of the Noise Act, a single noise measuring system "for which there is a highly reliable relationship between projected noise exposure and surveyed reactions of people to noise," and he must "identify land uses which are normally compatible with various exposures of individuals to noise." In promulgating regulations for measuring noise and identifying land uses, the Secretary of Transporta-
tion must consult with the Environmental Protection Agency.233 After these regulations are promulgated, any airport operator may submit a noise exposure map to the Secretary which has been prepared in consultation with any public agencies and planning agencies in the area around such airport. The map must set forth the noncompatible uses in each area of the map, a description of the projected aircraft operations at such airport during 1985 and the ways, if any, in which such operations will affect the map.234 After submission of any such map, the Secretary of Transportation may make a grant of funds for airport noise compatibility planning to sponsors of air carrier airports whose projects for airport development are eligible for terminal development costs235 under section 20(b) of the Airport and Airway Development Act of 1970.236

After submitting a noise exposure map and related information, and after consultation with appropriate federal officials,237 any airport operator may submit a noise compatibility program to the Secretary of Transportation. The program must set forth the measures which the operator has taken or proposes to take for the reduction of existing noncompatible uses and for the prevention of the introduction of additional noncompatible uses within the area covered by the noise exposure map.238

The Secretary of Transportation shall be deemed to have approved the program if he has not disapproved it within 180 days after submission.239 The Secretary of Transportation is required to approve a noise compatibility program that is submitted if the measures to be undertaken do not create an undue burden on interstate or foreign commerce and are reasonably consistent with the goal of reducing existing noncompatible uses and of preventing the introduction of additional noncompatible uses.240 With

233 Id.
234 Id. § 103(a).
235 Id. § 103(b) (amending Airport and Airway Development Act of 1970, § 11, 49 U.S.C. § 1711 (1976)).
237 Noise Act, supra note 141, at § 103(b)(2) (amending Airport and Airway Development Act of 1970, § 13(b), 49 U.S.C. § 1713(b) (1976)).
238 Noise Act, supra note 141, at § 104(a).
239 Id. § 104(b).
240 Id.
respect to any part of the program pertaining to flight procedures, the Secretary shall provide that part of such program to the Administrator of the Federal Aviation Administration who shall either approve or disapprove such part of the program. The Noise Act provides that the United States shall not be liable for damages resulting from aviation noise by reason of any action taken by the Secretary of Transportation or the Administrator of the Federal Aviation Administration under the section providing for grants to carry out compatibility programs. Under the Noise Act, the Secretary of Transportation is to obligate not less than twenty-five million dollars for fiscal year 1980 from funds available for expenditure under section 14(a)(3) of the Airport and Airway Development Act of 1970.

Within one year after enactment of the Noise Act, the Secretary of Transportation is to publish noise compatibility maps and programs for National and Dulles Airports. Moreover, under section 106 of the Noise Act, no part of any noise exposure map, or related information described in section 103(a) of the Act, submitted to or prepared by the Secretary, and no part of the list of land uses identified by the Secretary as land uses which are normally compatible with various exposures of individuals to noise, shall be admitted as evidence or used for any other purpose in any suit or action seeking damages or other relief for the noise that results from the operation of an airport. Under the Noise Act, no persons who acquire an interest in property after the date of enactment of the Noise Act in an area surrounding an airport covered by a noise exposure map shall be entitled to recover damages with respect to noise attributable to such airport if that person had actual or constructive knowledge of the existence of such noise exposure map. The foregoing rule will not apply,
however, if in addition to any other elements for recovery of damages, that person can show a significant change in the type or frequency of aircraft operations or in flight patterns, or a significant increase in nighttime operations after the date of acquisition of such property, and that the damages have resulted from such change or increase.249 By January 1, 1981, the Secretary of Transportation must submit to Congress a study of the airport noise compatibility program.250

**Title II**

Title II of the Noise Act amends the Airport and Airway Development Act of 1970 to increase airport funding by forty-four million dollars for fiscal year 1980.251 The Airport and Airway Development Act of 1970 is also amended to provide for ninety percent federal funding of allowable project costs for small airport development grants in fiscal year 1980.252

Under Title II, the Secretary of Transportation may approve certain airport development programs without requiring an environmental impact statement. It must be shown that the completion of the project would allow existing aircraft operations at the airport involving aircraft that do not comply with the noise standards prescribed for Stage Two aircraft253 to be replaced by aircraft operations involving aircraft that do comply with such standards. The project must also comply with all other statutory and administrative requirements proposed under the Noise Act, unless those projects involve location of an airport or a runway or extension of a runway.254

"constructive knowledge" to a person for this purpose means (1) publication of the existence of a noise exposure map for the area surrounding the airport in question in a newspaper of general circulation in the county in which such property is located prior to the person's acquisition of the property or (2) providing to such person at the time of acquisition a copy of such noise exposure map.

249 Noise Act, *supra* note 141, at § 107(a).
250 Id. § 108.
Title III

Title III of the Noise Act primarily provides waivers of the FAR 36 noise compliance requirements in effect on January 1, 1977. Two-engine aircraft with one hundred seats or less may be flown without complying with FAR 36 until January 1, 1988. Two-engine noncomplying aircraft with greater than one hundred seats may be operated until January 1, 1985, or until January 1, 1986, if the operator has a plan for the replacement of such aircraft which is approved by the Secretary of Transportation. The operator must also have entered into a binding contract by January 1, 1983, for delivery prior to January 1, 1986, of a replacement aircraft which meets the noise standards for new types of certified aircraft set forth in Federal Aviation Administration (FAA) regulations issued by the Secretary of Transportation.

Three-engine aircraft which do not comply with FAR 36 as in effect on January 1, 1977, may be flown until January 1, 1985, if the operator has a plan for replacement of the aircraft approved by the Secretary of Transportation, and the operator has entered into a binding contract by January 1, 1985, for delivery prior to January 1, 1985, of a replacement aircraft which meets the FAA's noise standards regulations.

The Noise Act contains no waiver provisions for compliance with FAR 36 for four-engine aircraft. The Conference Report, however, explicitly provides that the FAA should give consideration to hardship situations involving smaller carriers where the carrier is making a good faith effort to comply, but needed technology is either delayed or unavailable, and rigid adherence to compliance deadlines could work financial havoc and deprive the public of valuable airline service. For foreign aircraft in use in the United States, the FAA must promulgate noise regulations for such aircraft if the International Civil Aviation Organization has not reached an agreement by January 1, 1980 to comply with

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256 Noise Act, supra note 141, at § 304(b)(2).
257 Id. § 303(b).
259 Noise Act, supra note 141, at § 303(a).
noise standards comparable to those applicable to United States carriers. 261

**Title IV**

This Title requires the Secretary of Transportation to submit reports to Congress on the development of a collision avoidance system within ninety days after the enactment of the Noise Act and to submit and report each January 31 thereafter until implementation of collision avoidance systems in the national air traffic control system. 262 Title IV also provides that air carrier employees who work in more than one state are to be taxed only in the state of residence and any other state in which the employees earn more than fifty percent of their total income. 263

**Title V**

The Noise Act requires the FAA to issue rules regulating access to public airport areas by individuals who are used by religious and nonprofit organizations for the purpose of soliciting funds or distributing materials. 264 Title V also provides for up to $1,000 fine or imprisonment for not more than one year for carriage of loaded firearms in baggage checked on an aircraft. 265 Title V also contains provisions identical to those in the International Act limiting interstate service to Love Field in Dallas, Texas. 266

3. **Other Proposed Federal Legislation**

Numerous bills were introduced in the first session of the Ninety-sixth Congress pertaining both to the Airport Development Aid Program (ADAP), 267 and to taxation and/or funding for such a program. 268 S. 1648, substantially modified in form and content since introduced on August 2, 1979, combines many of the as-

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262 *Id.* § 401.
263 *Id.* § 402.
264 *Id.* § 501 (amending 49 U.S.C. § 1512 (1976)).
265 *Id.* § 502.
266 *Id.* § 503.
pects of development and revenue authority and allocation contained in the bills previously cited. The bill passed the Senate on February 5, 1980. Its counterpart, H.R. 3599, is pending before the House Public Works and Transportation Committee, and a long and laborious path is anticipated before the bill reaches the House floor. S. 1648, known as the ADAP Bill, would discontinue federal aid for airport development after September 30, 1981, for any airport that enplanes more than .5% of the total number of passengers enplaned annually at all commercial service airports. The bill also discontinues such federal aid, after September 30, 1982, at any airport that enplanes more than 2.5% of the total number of passengers enplaned annually at all commercial service airports.

The ADAP Bill would change the current classification of airports from air carrier, commuter, general aviation and reliever airports to commercial service airports, primary airports, primary hubs, public airports, public use airports, and reliever airports. The ADAP Bill also defines "project" in such a way as to allow separate projects at an airport to be combined for the purpose of project application. S. 1648, as passed by the Senate, contains other significant changes from the existing funding program which expires at the end of fiscal year 1980. The Bill would make changes in the apportionment of funds, the National Air-

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271 S. 1648, supra note 269, at § 23(a), 126 Cong. Rec. at S950. Section 3(8) of S. 1648 defines "commercial service airport" as a public airport which is determined by the Secretary of Transportation either to enplane annually 2,500 or more passengers and receive scheduled passenger service of aircraft, or to enplane annually 10,000 or more passengers. 126 Cong. Rec. at S945.
272 S. 1648, supra note 269, at § 23(a), 126 Cong. Rec. at S950.
274 S. 1648, supra note 269, at § 3, 126 Cong. Rec. at S944-50.
275 Id. § 3(16). See section 11 pertaining to the submission and approval of project grant applications. 126 Cong. Rec. at S947.
port System Plan, and the United States' share of project costs. A separate revenue bill, S. 1649, would reduce the current eight percent domestic ticket tax to two percent, and change the general aviation fuel tax to six percent. An amendment to S. 1648, added late in its progress to the Senate floor, will require the General Accounting Office to present to Congress a yearly assessment of airports' abilities to meet expenses without ADAP funds.

Last year it was reported that congressional preoccupation with front-page international political issues had resulted in an apparent indefinite postponement of consideration of the amendment to the Warsaw Convention embodied in the Guatemala City Protocol of 1971 and incorporated in the Montreal Protocols of 1971. The Protocols would increase liability limitations in exchange for the elimination of all rights of action against the international air carrier. This proposal, as supplemented by an additional compensation plan for United States passengers or those purchasing their tickets in the United States, was approved by the CAB in mid-1977 but was returned for further staff review following a petition for reconsideration filed by the Aviation Consumer Action Project and joined in by the Association of Trial Lawyers of America. Needless to say, with the international scene in even greater turmoil, the Protocols have slipped even further down the priority list and no new action can be reported.

Various other bills introduced during the first session of the Ninety-sixth Congress touch the aviation industry. Numerous bills

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281 S. 1648, supra note 269; see Av. Daily, Feb. 7, 1980, at 213.
282 Dubuc, supra note 17, at 38-39.
286 See Dubuc, supra note 17, at 38-39, for a further discussion of the problems encountered by the Protocols' assault on our traditional common law tort concepts.
dealing with proposals regarding synthetic fuel have been incorporated into, or pushed aside by, consideration of S. 932, which would establish a synthetic fuel corporation. S. 932 passed the Senate on November 8, 1979, and is now in a Conference Committee with the House. Proposals which would have reduced certain taxes on aviation fuel and transportation and the rates of certain excise taxes, and a bill which would have affected the manner in which the tax on transportation is required to be shown on airline tickets, remain pending before the appropriate congressional committees, with no action foreseeable at this time.

Hearings were held in June and July, 1979, on a proposal to require the Secretary of Transportation to assure development of a collision avoidance system for use on all civil and military aircraft. In March, 1979, hearings were also held on duplicate bills limiting the Secretary's rulemaking authority regarding civil aircrafts' use of navigable airspace and onboard navigation aids by requiring an explanatory hearing before Congress prior to the promulgation of rules and requiring not less than 120 days for public comments on such rules. A bill to amend the Federal Aviation Act to provide or continue "essential air transportation" to smaller markets until the end of 1981 is pending but no action is now scheduled. As reported last year, the Act to Combat International Terrorism came up short on the congressional priority lists but it was reintroduced in 1979 as H.R. 2441. Although this bill was reported out of subcommittee in 1978, it has been sent back again for further study and is again pending at that level with no action scheduled.


Dubuc, supra note 17, at 36.


Other proposed legislation of interest includes bills to require the Secretary of Transportation to designate experts in the field of aeronautics and aviation safety to participate in the aircraft type certification process, to prohibit the Secretary of Transportation and the Administrator of the Federal Aviation Administration from issuing any rule, regulation, or order relating to certain aspects of the control of navigable airspace, and to amend section 404(b) of the Federal Aviation Act of 1958 to provide that no physically handicapped individual shall be denied air transportation solely because of such physical handicap.

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