

1981

Significant Recent Legislative Developments for the Air Law Practitioner

Nicholas Gilman

Recommended Citation

Nicholas Gilman, *Significant Recent Legislative Developments for the Air Law Practitioner*, 46 J. AIR L. & COM. 877 (1981)

<https://scholar.smu.edu/jalc/vol46/iss4/2>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SIGNIFICANT RECENT LEGISLATIVE DEVELOPMENTS FOR THE AIR LAW PRACTITIONER

NICHOLAS GILMAN*

I. INTRODUCTION

THE CHALLENGE of investigating, culling and recording significant, recent legislative developments for presentation to the air law practitioner requires the balancing of the personal interest and focus of the writer with the wider scope of truly significant developments in the spectrum of air law practice. Only a clairvoyant could accurately predict the recent developments of true significance, and this writer is not so gifted. Nevertheless, the legislative developments presented should furnish the majority of air law practitioners with a brief synopsis of potentially important, recent legislation.

II. PRODUCT LIABILITY LEGISLATION

The Risk Retention Act bill presented before the last session of Congress was not enacted.¹ Had it passed, the Act would have made it possible for manufacturers to form risk retention groups to self-insure against product liability claims or to bargain collectively for better rates with commercial insurers.

*Nicholas Gilman is a partner in the Washington, D.C. law firm of Smiley, Olson & Gilman. He holds degrees from Stanford University (B.A.), Columbia University (M.A.) and George Washington University (J.D.). Previously he clerked for Judge John Biggs, Jr. of the United States Court of Appeals for the Third Circuit and served as an Assistant United States Attorney for the District of Columbia and an aviation trial attorney in the Civil Division of the United States Department of Justice. He is presently a member of the Pennsylvania and District of Columbia bars and the Lawyer-Pilots and American Bar Associations.

¹H.R. 6152, 96th Cong., 1st Sess. (1979). This bill would have permitted the formation of risk retention groups to assist manufacturers in obtaining product liability coverage.

The number of enacted state product liability laws dropped from 53 new laws in 1979 to five in 1980.² This sharp drop may have been due to the spate of tort law revisions in the previous three years and a stabilization of the product liability insurance market.³

A. Idaho⁴

Effective July 1, 1980, Idaho has enacted a major modification of its product liability law entitled the "Idaho Product Liability Reform Act."⁵ Idaho's comprehensive revision was the only major, state product liability law revision in 1980. This Idaho Act defines a product's useful safe life and creates a rebuttable presumption that after ten years, the useful safe life of a product has expired, if it is not expressly warranted for a longer period, or other specifically enumerated conditions occur to limit this statute of repose.⁶ A statute of limitations bars a claim made more than two years after the cause of action accrues.⁷ Comparative fault applies in product liability actions and permits comparative recovery if the injured party is less responsible than the person or entity against whom recovery is sought.⁸

Idaho has written into its Reform Act certain risk-assuming defenses, such as use of a known defect or misuse and alteration or modification of the product, which act in mitigation of damages.⁹ "Subsequent remedial measures" such as evidence of changes in the product's design, warnings or instructions, technological feasibility, "state of the art" or changes in the custom of the product sellers' industry or business are not admissible under the Act to prove a defective product, except by leave of court under especially specified conditions.¹⁰

Sellers who are not manufacturers are not liable to injured parties if the manufacturers knew of the product defect and unless

² FEDERAL STATE REPORTS, *Product Liability Situation Report 1* (Jan. 1981).

³ *Id.*

⁴ IDAHO CODE §§ 6-1401 through 6-1409 (Supp. 1980).

⁵ *Id.* § 6-1409.

⁶ *Id.* § 6-1403.

⁷ *Id.* IDAHO CODE § 5-219 (1979) defines when the cause of action accrues.

⁸ IDAHO CODE § 6-1404 (Supp. 1980).

⁹ *Id.* § 6-1405.

¹⁰ *Id.* § 6-1406.

such sellers had (1) an opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defect, (2) altered, modified or installed the product and these actions were the proximate cause of the injuries, (3) provided specifications which were a substantial cause of the product's defect, or (4) the expiration date of the product assigned to it by the manufacturer had expired prior to sale.¹¹ Where the manufacturer is not subject to service or is judgment-proof,¹² sellers are still liable even though they are not manufacturers and are not guilty of the above specified acts or omissions. Sellers are liable even if the manufacturers knew of the product defect.

B. Other States

Illinois¹³ and South Dakota¹⁴ have both adopted significant product liability legislation which, although enacted in 1979, became effective in 1980. These statutes have been discussed in a previous article.¹⁵

III. ADOPTION OF COMPARATIVE NEGLIGENCE STANDARD

Two more states have joined the substantial majority of American jurisdictions adopting some form of comparative negligence. These states did so by detailed legislative enactments.

A. Ohio

The Ohio legislature has enacted a well-defined comparative negligence statute¹⁶ which prevents contributory negligence from barring recovery when the claimant's negligence is "no greater than the combined negligence of all others from whom recovery is sought."¹⁷ Any mitigation of damages through a claim of contributory negligence must be based on specific findings of fact in a trial by the court or on specific interrogatories from the jury. The finder

¹¹ *Id.* § 6-1407; FEDERAL STATE REPORTS, *Product Liability Situation Report* 8 (Jan. 1981)

¹² IDAHO CODE § 6-1407 (Supp. 1980).

¹³ ILL. ANN. STAT. ch. 83 § 22.2 (Smith-Hurd. Supp. 1980).

¹⁴ S.D. CODIFIED LAWS ANN. §§ 20-9-9, 20-9-10 (1979).

¹⁵ Dubuc & Jones, *Significant Legislative Developments in 1979 in the Field of Aviation Law*, 45 J. AIR L. & COM. 921, 935-36, 938-39 (1980).

¹⁶ OHIO REV. CODE ANN. § 2315.19 (Page Supp. 1980).

¹⁷ *Id.* § 2315.19(A)(1) & (C).

of fact must designate the total amount of damages found recoverable by the complainant, but for his contributory negligence, and the percentage of negligence attributable to each party.¹⁸ If necessary, the court then calculates any recoverable damages using the percentages determined by the finder of fact.¹⁹ Such a calculation is determined by the following formula, described in the new statute:²⁰

$$\frac{\text{The Portion of Damages Allocated from Each Defendant} = \text{The Total Amount of Damages Determined} \times \text{Defendant's Percentage of Negligence} \div \text{Total Percentage of Negligence of All Defendants}^{21}}$$

The Ohio legislature acknowledged implicitly that lawyers (and judges) are not usually mathematicians when it meticulously devised that formula, leaving "nothing to chance." Application of this new standard appears intended to be prospective since its effective date is June 20, 1980.²²

B. Louisiana

Phraseology in Louisiana's Civil Law statutes may require the Common Law practitioner to refer to a legal dictionary. Recent results of legislative action,²³ however, make Louisiana one of approximately nine states to adopt a familiar "pure comparative" rule. This rule provides that when two or more parties are jointly liable, they are liable in proportion to their individual fault,²⁴ and contributory negligence is a mitigation, not a complete bar, to recovery.²⁵ If all the potentially negligent defendants are not in the lawsuit, any party-defendant may implead third parties to enforce contribution, regardless of whether the impleader admitted liability.²⁶ This rule became effective on August 1, 1980, and is not

¹⁸ *Id.* § 2315.19(B)(1) & (2).

¹⁹ *Id.* § 2315.19(C).

²⁰ *Id.* § 2315.19(A)(2).

²¹ *Id.*

²² *Baab v. Shockling*, 61 Ohio St. 2d 55, 399 N.E.2d 87 (1980); *Humphrey v. Dent*, 62 Ohio St. 2d 273, 405 N.E.2d 284 (1980).

²³ LA. CIV. CODE ANN. art. 2103 (West 1981).

²⁴ *Id.*

²⁵ LA. CIV. CODE ANN. art. 2323 (West 1981).

²⁶ LA. CIV. CODE ANN. art. 2103 (West 1981).

retroactive, applying only to claims arising from events that occurred on or after August 1, 1980.²⁷

In conjunction with its adoption of "pure comparative" fault, Louisiana added new requirements for jury interrogatories in cases involving damage demands for injury, death or loss.²⁸ The required jury interrogatories include a comprehensive list of written questions concerning such issues as the proximate cause of the injury, death or loss, the relative fault or faults of the parties and the total amount of the damages sustained.²⁹ Similar findings in writing are required for the same types of claims in nonjury cases.³⁰ Louisiana has also determined legislatively that those persons whose concurring fault has caused injury, death or loss are jointly and severally liable only to the extent of their proportionate fault.³¹ All parties retain their rights of indemnity and contribution.³²

IV. RECENTLY ENACTED FEDERAL LEGISLATION

The 96th Congress may have had extremely productive legislative sessions, but the air law practitioner would find little evidence of Congressional legislation in recent years which has specific application to his specialties. A few pertinent enactments, however, do appear.

A. *International Civil Aircraft Trade Agreement*

As part of the Trade Agreements Act of 1979,³³ the United States became a signatory to an agreement concerning duty-free trade in civil aircraft.³⁴ "The primary function of the Agreement is to enable the aerospace industry in each signatory nation³⁵ to compete

²⁷ *Id.*

²⁸ LA. CODE CIV. PRO. ANN. art. 1811(B) (West 1979).

²⁹ *Id.*

³⁰ LA. CODE CIV. PRO. ANN. art. 1917 (West 1979).

³¹ LA. CIV. CODE ANN. art. 2324 (West 1979). Solvent defendants, jointly and severally liable with impecunious defendants, are only liable to the extent of their own proportionate fault. *Daniel v. Conn*, 378 So. 2d 451 (La App. 1979), *aff'd*, 382 So. 2d 945 (La. 1980).

³² LA. CIV. CODE ANN. art. 2324 (West 1979).

³³ 19 U.S.C. §§ 2501-2582 (Supp. III 1979).

³⁴ *Id.* § 2518(C).

³⁵ The signatories include the nine European Common Market Countries plus the United States, Canada, Sweden, Japan, Norway and Switzerland. *Neville, In-*

freely with its counterparts, and not with foreign governments with which foreign manufacturers are often integrated."³⁶ United States' aerospace industries, including labor, should benefit from the "free" competition, due to the United States' present lead in aerospace technology even though its percentage share of the aerospace market is decreasing.³⁷ United States' airlines should also benefit from duty-free access to the "best" product, wherever it is made.³⁸

Just as important as elimination of tariff barriers, the signatory states have eliminated certain jingoistic restrictions to "free" trade in civil aircraft trade.³⁹ For example, the President may now waive any "Buy American Act"⁴⁰ requirements in order to implement the new law.⁴¹ This law, which took effect on January 1, 1980,⁴² should continue to assist the United States in its international balance of payments through a successful pursuit of future, civilian aerospace exports.

B. *Equal Access to Justice Act*

In a reaction to "too much government regulation," Congress appended to the Small Business Act amendments of 1980⁴³ the "Equal Access to Justice Act."⁴⁴ The stated purpose of this Act is to assist individuals, partnerships, small corporations, labor and other modestly financed organizations to create a more equal adjudication or civil action when the United States and its agencies engage in "unreasonable governmental action."⁴⁵ The Act has created a significant exception to the "American Rule" against the awarding of attorney's fees. This Act permits such awards to citizens who

ternational Trade in Civil Aircraft, 14 THE INT'L LAW. 275 n.4 (1980) [hereinafter cited as Neville].

³⁶ *Id.* at 276.

³⁷ *Id.* at 279.

³⁸ *Id.* at 280.

³⁹ *Id.* at 276.

⁴⁰ Buy American Act—Supply and Service Contracts, 41 C.F.R. §§ 1-6.100-.105 (1980).

⁴¹ 19 U.S.C. § 2513 (Supp. III 1979).

⁴² Neville, *supra* note 34, at 278.

⁴³ 5 U.S.C.A. § 504 (Supp. 1981).

⁴⁴ Equal Access to Judgment Act, Pub. L. No. 96-481, § 201, 94 Stat. 2325 (1980).

⁴⁵ *Id.* See also 28 U.S.C.A. § 2412(c)(2) (Supp. 1981) (a bad faith finding against an agency will require that the judgment be taxed against that agency specifically).

prevail in litigation.⁴⁶ To further equalize the battle, it allows the prevailing party to recover potentially onerous expert witness fees, necessary test data analyses, and other litigation costs incurred during suit against the United States and its agencies.⁴⁷

The fact that this Act was attached to a Small Business Act amendment is an indication that Congress was convinced of the inherently unfair advantage the United States has held against small businesses and organizations and ordinary citizens.⁴⁸ To be eligible under the Act, the net worth of an individual must not exceed \$1,000,000 and that of a business entity or association must not exceed \$5,000,000 at the time the adjudication is initiated.⁴⁹ *Tort actions against the United States are specifically excluded from the Act.*⁵⁰

This new law takes effect on October 1, 1981, and will apply to any adjudication or civil action as defined under 5 U.S.C. §504(b)(1)(C) or permitted under 28 U.S.C. §2412 "which is pending on or commenced on or after" October 1, 1981.⁵¹ It appears from the stated Congressional purpose and the wording of the Act itself that practitioners who seek relief for their clients from Federal Aviation Administration or other federal agency action will benefit from this Act. At least it will encourage and assist inadequately financed challenges to government action where the likelihood of success exists. The Equal Access to Justice Act, however, was instituted as an experiment, and terms within the Act cause its automatic repeal on October 1, 1984, although any action pending on that date will continue to be covered by the Act.⁵²

C. Sanctions Against the Vexatious Lawyer

It has been said that one cannot legislate against immoral conduct or bad manners. Legislatures, however, have consistently ignored that aphorism. The 96th Congress may be no exception.

⁴⁶ 5 U.S.C.A. § 504 (Supp. 1981).

⁴⁷ *Id.* §§ 504(a)(1) & (b)(1); 28 U.S.C.A. § 2412(d)(2) (Supp. 1981).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 28 U.S.C.A. § 2412(d)(1)(A) (Supp. 1981).

⁵¹ Equal Access to Judgment Act. Pub. L. No. 96-481, § 208, 94 Stat. 2325 (1980).

⁵² *Id.* §§ 203(c), 204(c), 94 Stat. 2327 (1980).

Buried in the Antitrust Procedural Improvements Act of 1980,⁵³ but adopted generally for federal courts, is a sanction against attorneys and others who delay litigation vexatiously and unreasonably.⁵⁴ This new statute reads as follows:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorney's fees reasonably incurred because of such conduct.⁵⁵

This new sanction may not encourage good manners, but it may discourage harassment or other unreasonable conduct which is clearly undertaken to delay the proceedings.

D. *Liability of Civil Air Patrol While Fulfilling Air Force Missions*

The Civil Air Patrol has traditionally fulfilled adjunct duties in support of the Department of the Air Force. Such duties have included search and rescue missions of the Civil Air Patrol (CAP) under the direction of the Air Force. In recent years, a number of aircraft accidents and incidents have occurred resulting in deaths, injuries and financial loss both to those involved in such search and rescue missions and to others.⁵⁶ Difficult determinations as to the status of CAP employees and their conduct while operating Air Force supported missions has stirred Congress to clarify the role and responsibility of the CAP as an instrumentality of the Air Force and the United States.

Attached to the Department of Defense Authorization Act of 1981⁵⁷ is a section concerning the role of the Air Force in support of the CAP and the status of the CAP as an adjunct governmental entity.⁵⁸ Of special interest to the air law practitioner is language from the amended statute concerning civil liability of the CAP, which reads:

⁵³ 15 U.S.C.A. §§ 1311-1314 (Supp. 1981).

⁵⁴ 28 U.S.C.A. § 1927 (Supp. 1981).

⁵⁵ *Id.*

⁵⁶ *See, e.g.,* Eskhoff v. CAP, No. 79-A-1789 (D. Colo., filed Feb. 8, 1979); Kiker v. Estep, 444 F. Supp. 563 (N.D. Ga. 1978).

⁵⁷ Pub. L. No. 96-342, 94 Stat. 1077 (1980).

⁵⁸ 10 U.S.C.A. § 9441 (Supp. 1981).

The Secretary may use the services of the Civil Air Patrol in fulfilling the noncombat missions of the Department of the Air Force, and for purposes of determining the civil liability of the Civil Air Patrol (or any member thereof) with respect to any act or omission committed by the Civil Air Patrol (or any member thereof) in fulfilling such mission, the Civil Air Patrol shall be deemed to be an instrumentality of the United States.⁵⁹

The Civil Air Patrol, when fulfilling Air Force sponsored missions, is an instrumentality of the United States and therefore its liability is determined under the Federal Tort Claims Act.⁶⁰ The United States Treasury can now be tapped to pay damages awarded in claims against the CAP arising from its operations in support of the Air Force. Concomitantly, however, all the jurisdictional⁶¹ and purely governmental (i.e., non-private) exclusions⁶² and governmental immunities⁶³ also exist to prevent recovery. The results turn out to be "a mixed blessing."

E. *Foreign Sovereign Immunities Act of 1976*

Although the Foreign Sovereign Immunities Act of 1976⁶⁴ was enacted to take effect prior to 1980, this Act has in its short history already provided a jurisdictional basis in numerous aviation tort cases against foreign, government-owned air carriers.⁶⁵ The Act's present and future relevance to air law should not be doubted. The express purpose of this Act is "to provide when and how parties⁶⁶ can maintain a lawsuit against a foreign state or its entities in the

⁵⁹ *Id.*

⁶⁰ 28 U.S.C. §§ 2671-2680 (1976 & Supp. III 1979).

⁶¹ *Id.* § 2680(a)-(h).

⁶² See *Feres v. United States*, 340 U.S. 135 (1950).

⁶³ See, e.g., *Butz v. Economou*, 438 U.S. 478 (1978); *Barr v. Matteo*, 360 U.S. 564 (1959); cf. *Doe v. McMillan*, 412 U.S. 306 (1973) (absolute immunity for congressional committee members under the Speech or Debate Clause insofar as they engaged in legislative action).

⁶⁴ 28 U.S.C. §§ 1602-1611 (1976).

⁶⁵ See e.g., *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.* 607 F.2d 494 (1979); *Icenogle v. Olympic Airways S.A.*, 82 F.R.D. 36 (D.D.C. 1979); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d. Cir. 1980).

⁶⁶ "Parties" has been interpreted to include both United States' citizens and foreign nationals. See *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1291-93 (S.D.N.Y. 1980); 1 MOORE'S FEDERAL PRACTICE § 0.66 [4] (2d ed. 1980).

courts of the United States⁶⁷ and to provide when a foreign state is entitled to sovereign immunity.⁶⁸

The basic assumption set forth in this Act is that a foreign sovereign is immune from the jurisdiction of United States' courts unless subject to one of the stated exceptions.⁶⁹ Those exceptions, other than the ones embodied in specific agreements among nations to which the United States is a party,⁷⁰ are enumerated in the general exceptions⁷¹ and counterclaims⁷² sections. Jurisdiction over the foreign state or its commercial entity still requires the necessary minimum contacts and adequate notice.⁷³ A foreign, government-owned commercial entity is treated under the Act like a foreign state or any political subdivision of a foreign state,⁷⁴ except for the method of service⁷⁵ and liability for punitive damages.⁷⁶

One of the purposes of the Act was the elimination of attachments of a foreign sovereign's property in order to create jurisdiction, a long existing cause of significant friction in the foreign relations of the United States.⁷⁷ The second important assumption under the Act is that property of a foreign sovereign is immune from attachment and execution.⁷⁸ The Act, however, then sets out significant exceptions to this immunity.⁷⁹ It appears reasonable to assume, as a general principle, that if jurisdiction can be had under the Act, execution of a judgment, including attachment, is probably feasible. The Act even provides for attachment to secure a judgment "that has been or may ultimately be entered against

⁶⁷ "[C]ourts of the United States" includes both federal and state courts. See 28 U.S.C. §§ 1602, 1605 (1976). Federal venue is defined under 28 U.S.C. § 1391 (1976).

⁶⁸ H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. CODE CONG. & ADMIN. NEWS 6604 [hereinafter cited as HOUSE REPORT]; See also 28 U.S.C. § 1602 (1976).

⁶⁹ 28 U.S.C. § 1604 (1976).

⁷⁰ *Id.*

⁷¹ 28 U.S.C. § 1605 (1976); HOUSE REPORT, *supra* note 68, at 18-22.

⁷² 28 U.S.C. § 1607 (1976); HOUSE REPORT, *supra* note 68, at 23.

⁷³ 28 U.S.C. § 1330 (1976); HOUSE REPORT, *supra* note 68, at 13-14.

⁷⁴ 28 U.S.C. § 1603 (1976).

⁷⁵ 28 U.S.C. § 1608 (1976).

⁷⁶ 28 U.S.C. § 1606 (1976).

⁷⁷ HOUSE REPORT, *supra* note 68, at 26-27.

⁷⁸ 28 U.S.C. §§ 1609, 1611 (1976).

⁷⁹ 28 U.S.C. § 1610 (1976).

the foreign state."⁸⁰ Attachment merely to obtain jurisdiction is expressly prohibited.⁸¹

V. PROPOSED FEDERAL LEGISLATION

A. *Federal Tort Claims Act Amendments*

Individual employees of the United States⁸² have theoretically been subject to personal liability in tort, as has the United States itself since the passage of the Federal Tort Claims Act.⁸³ Most federal employees do not carry liability insurance, however, and none has the financial assets of his employer. In the last several decades, Congress has awakened to the obvious, potentially disastrous liability of government officers and employees acting within the scope of their office or employment. A line of special legislation has been enacted protecting the assets of specific types of government officers and employees by substituting the employer, the United States, for the individual, making the remedy one exclusively against the United States.⁸⁴ At present, however, the general body of federal officials and employees is unprotected from personal liability incurred while acting within the scope of federal employment.

In recent years, Congress has been considering legislation to amend the Federal Tort Claims Act to provide for a generally exclusive remedy against the United States for all government employees.⁸⁵ Should such a bill be enacted, government employees

⁸⁰ 28 U.S.C. § 1610(d)(2) (1976).

⁸¹ *Id.*

⁸² A government employee has been defined to include "officers and employees of any federal agency" but excludes "any contractor with the United States." 28 U.S.C. § 267 (1976), *See United States v. Orleans*, 425 U.S. 807, 814 (1976).

⁸³ 28 U.S.C. §§ 2671-2680 (1976 & Supp. III 1979).

⁸⁴ *See e.g.*, 10 U.S.C. § 1089(a) (1976) (remedy against Central Intelligence Agency and Department of Defense medical personnel); 22 U.S.C. § 817(a) (1976) (remedy against Department of State and Agency for International Development medical personnel); 28 U.S.C. § 2679(b) (1976) (remedy against drivers of government vehicles); 38 U.S.C. § 4116(a) (1976) (remedy against Veterans Administration medical personnel); 42 U.S.C. § 233(a) (1976) (remedy against Public Health Service personnel); 42 U.S.C. § 2476(k)(3)(B) (1976) (exclusive remedy under Swine Flu Act); 42 U.S.C. § 2458a(a) (1976) (remedy against NASA medical personnel).

⁸⁵ H.R. 24, 96th Cong., 1st Sess. (1979); H.R. 2659, 96th Cong., 1st Sess. (1979).

involved in activities related to aviation and space would no longer be subject to personal suit in tort while acting within the scope of their employment. Practitioners could no longer sue government employees personally in a state court, after "blowing" the statute of limitations under the Federal Tort Claims Act,⁸⁶ nor could they join individual employees with the United States for perceived tactical advantages.⁸⁷ This bill would, however, fail to underwrite completely certain federal employees for the commission of constitutional torts (Fourth Amendment violations),⁸⁸ but such claims are not of significance to the average air law practitioner anyway.

Another proposed amendment to the Federal Tort Claims Act is the specific inclusion of the Army and Air National Guards as employees of the United States while they are engaged in training or on duty.⁸⁹ Included are malpractice actions against National Guard medical personnel, while Guardsmen are serving pursuant to specific sections of Title 32 of the United States Code⁹⁰ or pursuant to Title 37 under which a Guardsman is entitled to or has waived pay.⁹¹ This bill would appear to include within the Federal Tort Claims Act any liability incurred during a legitimate National Guard aviation activity conducted in the line of duty.

B. *Abolition of Diversity of Citizenship as a Basis of Federal Jurisdiction and Elimination of the Amount in Federal Question Jurisdiction*

Perhaps the most controversial judicial bill recently introduced into Congress is that which seeks to abolish diversity of citizenship

⁸⁶ "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b) (1976).

⁸⁷ See *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197, 1201 (4th Cir. 1978).

⁸⁸ H.R. 24, 96th Cong., 1st Sess. (1979).

⁸⁹ S. 1858, 96th Cong., 2d Sess. (1980); H.R. 7475, 96th Cong., 2d Sess. (1980).

⁹⁰ 32 U.S.C. §§ 316, 502-505 (1976). These sections cover civilian arms training by Guard instructors as well as participating in periodic drills, field exercises, military schools and small arms competitions.

⁹¹ 37 U.S.C. §§ 204, 1002 (1976).

as a basis of federal jurisdiction.⁹² "Alienage" would be substituted for "diversity of citizenship,"⁹³ eliminating diversity of state citizenship as a basis for federal jurisdiction.⁹⁴ These bills would also eliminate the present jurisdictional amount-in-controversy requirement in federal question jurisdiction cases⁹⁵ and would have prospective application.⁹⁶

The obvious purpose of these bills is to lighten the case load in the federal courts, and undoubtedly diversity cases add a significant workload to the federal district courts. The abolition of diversity jurisdiction, however, could be extremely burdensome for the air law practitioner, particularly in major air crash litigation. The majority of such cases are brought into federal courts for the convenience of the parties, including the benefit of common discovery where the multiple parties are from multiple jurisdictions.⁹⁷ Further complications could arise if some defendants, such as the United States⁹⁸ or a foreign, government-owned airline,⁹⁹ are removed or have original jurisdiction in a federal court, while no such removal or original jurisdiction is available to private defendants such as airlines or manufacturers without diversity of citizenship. Perhaps a reasonable compromise would be to raise the jurisdictional amount in diversity cases instead of eliminating such jurisdiction, but Congress appears to have rejected that solution in favor of more drastic measures.

C. *Federal Cause of Action for Aviation Activity*

In at least the last three Congressional sessions, similar aviation bills have been introduced which create a federal cause of action

⁹² S. 679, 96th Cong., 1st Sess., (1979); H.R. 2202, 96th Cong., 1st Sess. (1979).

⁹³ S. 679, 96th Cong., 1st Sess. § 4(e) (1979); H.R. 2202, 96th Cong., 1st Sess. § 1(c) (1979).

⁹⁴ This would eliminate 28 U.S.C. § 1332(a)(1) (1976) (diversity of citizenship statute).

⁹⁵ S. 679, 96th Cong., 1st Sess. § 2(b) (1979); H.R. 2202, 96th Cong., 1st Sess. § 2 (1979); S. REP. NO. 1461, 96th Cong., 1st Sess. § 3(a) (1979).

⁹⁶ S. 679, 96th Cong., 1st Sess. § 9 (1979); H.R. 2202, 96th Cong., 1st Sess. § 4 (1979).

⁹⁷ 28 U.S.C. § 1407 (1976 & Supp. III 1979).

⁹⁸ *Id.* §§ 1346(b), 1441(a) (1976).

⁹⁹ *Id.* § 1441(d) (1976).

with accompanying federal procedures for aviation activity.¹⁰⁰ The entirely new chapter 174 of Title 28, United States Code, devoted entirely to aviation activity, is comprised of these bills.¹⁰¹ New legal definitions are given for common aviation activities such as "take-off" and "landing."¹⁰² Furthermore, the bill creates, from no perceivable source, an exclusive and "uniform body of United States law governing aviation activity out of which or in the course of which arises any injury to or loss of property or any personal injury or death."¹⁰³ It adopts as a duty the standard of the highest degree of care which a common carrier owes its passengers.¹⁰⁴

The rule of pure comparative fault is adopted as federal law¹⁰⁵ despite the fact that, at present, an overwhelming majority of states do not permit recovery unless the party seeking it has at least been no more negligent than the other party or parties. Damage recovery is to be determined by the law of the state of domicile at death or, for domiciliaries of no state of the United States, in proportion to the loss suffered by reason of death of the decedent.¹⁰⁶ Recompense for the loss of care, comfort and society is included, but no recovery is available in a survival action for pain, suffering or disfigurement.¹⁰⁷ The bill has a two-year statute of limitation with a less definite period of limitation for claims of contribution and indemnity.¹⁰⁸

The bill provides for a jury trial where the right to one has already been established under the United States Constitution.¹⁰⁹ Contrary to present law, however, the bill permits a trial by jury in actions against the United States, to the same extent as permitted against non-governmental parties.¹¹⁰ An action for wrongful death

¹⁰⁰ Similar bills to S. 679 and H.R. 2202 in the 96th Congress are awaiting introduction in the 97th Congress. See note 96 *supra*.

¹⁰¹ H.R. 1027, 97th Cong., 1st Sess. (1981); H.R. 231, 96th Cong., 1st Sess. (1979); H.R. 10917, 95th Cong., 2nd Sess. (1978).

¹⁰² H.R. 1027, 97th Cong., 1st Sess. (1981).

¹⁰³ *Id.* § 2751.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 2752(a)(1)(A).

¹⁰⁶ *Id.* § 2752(c).

¹⁰⁷ *Id.* § 2752(d).

¹⁰⁸ *Id.* § 2753.

¹⁰⁹ *Id.* § 2761.

¹¹⁰ *Id.* § 2761(3).

and a survival action may be brought on behalf of all the beneficiaries by one or more such beneficiaries or by the personal representative of the estate, and all claims must be brought in one action.¹¹¹ The district court may appoint a personal representative if one has not been otherwise properly appointed, and a personal representative is qualified to serve in any district.¹¹²

Although the bill does not suggest that aviation tort litigation lends itself to class action treatment, it does provide for the notification through court order of the pendency of a court action "to persons who there is reason to believe have or may have claims arising out of the same transaction or occurrence."¹¹³ Service of process is nationwide, as is the subpoena power for *subpoenae ad testificandum* with a court order.¹¹⁴

Concurrent jurisdiction of the federal district courts and state courts exists for more serious aviation accidents.¹¹⁵ This concurrent jurisdiction is provided for accidents arising out of aviation activity by (a) large aircraft, (b) high performance aircraft, (c) public aircraft, or (d) common carrier aircraft or for accidents arising out of an occurrence which results in the death of five or more persons.¹¹⁶ State courts also have concurrent jurisdiction in suits against the United States under this bill.¹¹⁷

Despite the fact that the bill already contains numerous changes and radical departures from present law and procedures, it has an entire section devoted to aviation actions in multidistrict litigation¹¹⁸ which substantially changes the existing multidistrict procedures under section 1407 of Title 28, United States Code. The salient features of this new multidistrict procedure are as follows:

1. The creation of new venues such as the situs of the takeoff or landing out of which or in the course of which the claim arose or the first landing made at the end of the flight out of which the claim arose.

¹¹¹ *Id.* § 2762(a).

¹¹² *Id.* § 2762(b).

¹¹³ *Id.* § 2763(2)(c).

¹¹⁴ *Id.* § 2764.

¹¹⁵ *Id.* § 1364.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 1408

2. Transfer under 28 U.S.C. § 1407 will be not only for discovery and pretrial proceedings but for any or all purposes.
3. The power in the transferee court to make any orders and decisions concerning any matters pertaining to any action in the said litigation in the interests of "efficient administration of justice."¹¹⁹

In tort actions against the United States, the bill provides for venues in addition to those available presently under the Federal Tort Claims Act.¹²⁰ These additional venues, added to those already existing in the residence of the plaintiff and the situs of the act or omission complained of, lie in the District of Columbia, the judicial district in which occurs the takeoff or landing out of which or in the course of which the claim arose, or the judicial district in which the first landing was made at the end of the flight out of which the claim arose.¹²¹ In theory, venue could be proper in any of six federal judicial districts.

Another significant change involves new criteria and procedures for removal to federal district courts.¹²² Any party may petition for removal within thirty days in the case of non-defendant parties, and no bond is required.¹²³ In addition, the commencement of time in which to petition for removal is restarted if the Judicial Panel on Multidistrict Litigation orders coordinated or consolidated proceedings under the old section 1407 of Title 28, United States Code, or under the new multidistrict procedures contained in the bill itself.¹²⁴

Finally, although the proposed Act does not, as a general proposition, become effective until the date and time of its enactment,¹²⁵ several retrospective applications do occur. Where new original jurisdiction is created in state and federal courts, the application of that jurisdiction is retroactive, and regardless of any repeal or limitation of jurisdiction in the proposed Act, no court is deprived of jurisdiction over any matter pending before it at the time of the

¹¹⁹ *Id.*

¹²⁰ H.R. 1027, 97th Cong., 1st Sess. § 10 (1981).

¹²¹ *Id.*

¹²² H.R. 1027, 97th Cong., 1st Sess. § 13 (1981).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ H.R. 1027, 97th Cong., 1st Sess. § 14 (1981).

enactment.¹²⁶ The proposed Act does not overrule the “law of the case” in pending actions if to do so “would not be feasible or would work injustice.”¹²⁷

There is no doubt that our system of aviation tort litigation needs improvement, yet the radical changes in H.R. 1027 or its direct antecedents make foreseeable some problems greater than those intended to be solved. For example, experienced aviation plaintiff’s counsel can remove state cases which are not his own and then transfer them to the venue of his choice. The “uniform body of United States law governing aviation activity” called on to prevail is not really uniform, and no extensive “body” of federal aviation tort law presently exists. The Federal Tort Claims Act decisions in aviation tort cases are all based on the substantive laws of the several states, which are selectively chosen or ignored in order to conform to the specifically articulated requirement of that Act. Before any such radical aviation bill can be touted as the ultimate cure, it should be fully studied by practitioners, scholars and the government. Such study does not appear to have been given to this bill and serious questions exist as to its ultimate utility as it is drafted.

D. Federal Court Improvement

One aspect of the attempts of the last Congress to “improve” the Federal Courts was the introduction of a bill intended to create an appellate forum capable of exercising jurisdiction throughout the United States where Congress determines that there exists a special need for national uniformity.¹²⁸ The obvious national forum would combine the Court of Claims and the Court of Customs and Patent Appeals, both located in Washington, D.C. Sponsors of that bill and its predecessors¹²⁹ considered including exclusive review of Civil Aeronautics Board (CAB) and Federal Aviation Administration (FAA) appeals in this proposed “national” intermediate federal appellate court. Along with Interstate Commerce Commis-

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ S. 1477, 96th Cong., 1st Sess. (1979).

¹²⁹ S. 677, 96th Cong., 1st Sess. (1979) and S. 678, 96th Cong., 1st Sess. (1979).

sion appeals, exclusive review of CAB and FAA appeals would give the court a certain transportation expertise, but such a specialized expertise might give no better results than the present system of review in the federal circuit courts.