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Legislative Developments Affecting the Aviation Industry 1981-1982

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HERE HAVE BEEN three major developments in the last year which have the potential to affect aviation insurance practices as well as aviation litigation in the future. The passage of the Product Liability Risk Retention Act of 1981 ("Risk Retention Act") may affect the insurance formats of some of the manufacturers of aircraft and component parts. The Senate Foreign Relations Committee recommended that the Senate give its advice and consent to the Montreal (Guatemala) Protocols, ("Montreal Protocols" or "Protocols") which are the proposed amendments to the international treaties governing procedures and limitations of liability. Although the Protocols did not reach a floor vote in the Senate during the closing days of the 97th Congress, Protocols Three and Four have once again been reported out by the Foreign

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Relations Committee ("Committee") in the 98th Congress.\(^3\) However, after several hours of debate in a floor vote on March 8th 1983, the United States Senate failed to approve the Protocols by the necessary two thirds majority; The vote was 50 for to 42 against with one "present" vote and seven absent.\(^4\) Although a motion to reconsider was made,\(^5\) the current thinking is that renegotiation of the limitation will probably precede any such vote. The Civil Aeronautics Board ("CAB") adopted new rules that increase the insurance coverage required for U.S. and foreign carriers operating air transportation, to and from the United States, thereby affecting the cost and sources of insurance coverage for the airline industry.\(^6\)

Several other bills of potential significance to the aviation industry were also introduced in the 97th Congress, the most notable of which are the various uniform product liability bills, including (i) the Uniform Product Liability Act (the "Kasten Bill")\(^7\), which was introduced in the United States Senate and would adopt a form of uniform product liability while restricting jurisdiction to the state courts and (ii) the Danielson Bill\(^8\), a holdover bill, which would create a federal cause of action for aviation disasters. Both of these bills will probably be considered in the 98th Congress. The Kasten Bill has already been reintroduced, and the Danielson Bill, although not yet introduced in the 98th Congress, has been the subject of hearings chaired by Representative Sam B. Hall, who succeeded Mr. Danielson as chairman of the subcommit-

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\(^5\) Id.
\(^6\) Id.
\(^8\) H.R. 1027, 97th Cong., 1st Sess. (1981). Although this legislation has not been reintroduced as yet in the 98th Congress, the House Judiciary Committee's Subcommittee on Administrative Law and Governmental Relations, under the leadership of Rep. Sam B. Hall (D.Tex.), held hearings on the general subject on February 9, 1983.
At least one other proposal of significance to aviation, the so-called Air Travel Protection Act,9 (ATPA) was circulated in draft, and may be introduced in the 98th Congress.

Also, developments in case law, particularly the decision of the United States Court of Appeals for the Second Circuit, *Franklin Mint Corp. v. Trans World Airlines, Inc.*10 and the decision of the United States Court of Appeals for the Ninth Circuit, *In re Aircrash in Bali, Indonesia,*11 provide some grist for comment and perhaps insight into the future problems that might be engendered by some of the proposed legislation, particularly in view of the Senate rejection of the Montreal Protocols and the possible introduction of the ATPA. Several other pending measures are relevant to the issues raised by the Montreal Protocols and ATPA, and will be discussed in that context.

I. PRODUCT LIABILITY RISK RETENTION ACT OF 1981

The Risk Retention Act allows the formation of risk retention groups under the law of any State of the United States, Bermuda or the Cayman Islands for the purpose of permitting product manufacturers to purchase insurance at more favorable group rates or to form self-insurance cooperatives, thus, theoretically reducing the cost of product liability insurance.12 In order to qualify under the Risk Retention Act, groups formed in Bermuda or the Cayman Islands must be chartered prior to January 1, 1985, and must meet the capitalization requirements of at least one State.13 The Risk Reten-

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11 *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301 (9th Cir. 1982), discussed infra at note 45.
12 15 U.S.C. § 3901(a)(4). (Supp. 1981) defines risk retention group as “any corporation or other limited liability association taxable as a corporation, or as an insurance company, formed under the laws of any State, Bermuda, or the Cayman Islands ....”
13 *Id.*
tion Act exempts such associations from the operation of State law to the extent that any law, rule, regulation or order of a State would make unlawful or would regulate the operation of a risk retention group. The State in which the group would be chartered, however, could require it to:

(A) comply with the unfair claim settlement practices law of the State;
(B) pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the State;
(C) participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of product liability or completed operations liability insurance losses and expenses incurred on policies written through such mechanism;
(D) submit to the appropriate authority reports and other information required of licensed insurers under the laws of a State relating solely to product liability or completed operations liability insurance losses and expenses;
(E) register with and designate the State insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process.

The licensing State may also require risk retention groups to submit to examinations as to their financial condition, and to comply with lawful orders issued in a delinquency proceeding. Exemptions from State law requirements enable product liability risk retention groups (i) to participate in insurance insolvency guaranty associations, (ii) to obtain countersignature of policies by an agent or broker residing in the State, and (iii) to avoid any discriminatory provision of state law.

The key provision of the Risk Retention Act appears to permit risk retention groups, like insurance companies licensed

15 Id.
16 Id.
by various States, to apportion losses.\textsuperscript{18} Liberally translated, the provision suggests that “accrued”, but unpaid losses may be treated as business expenses. This concept is not clear on the face of the legislation, however, and may require implementing state regulations in order to confirm such interpretation.

The legislative history of section three of the Risk Retention Act relating to the apportionment of losses by risk retention groups states that the law was intended “to require a risk retention group to bear a portion of the total exposure of the risks insured through the mechanism, rather than accept outright assignment of an individual risk”.\textsuperscript{19} This leaves unanswered the question of whether accrued losses can be expensed. The ambiguity will undoubtedly be tested by any new groups formed under the law, or may be resolved by State regulation. The implementation of the Risk Retention Act, along with tax relief available under the loss carry-back provisions of the Internal Revenue Code,\textsuperscript{20} may result in a change in the industry’s insurance structure by making such concepts practically viable, whereas prior proposals lacking this function were economically unattractive.

To date, only Vermont has enacted enabling legislation for the Risk Retention Act.\textsuperscript{21} The National Association of Insurance Commissioners, however, adopted a draft Model State Act at its December, 1982 meeting.\textsuperscript{22}

\textsuperscript{20} Dubuc, supra note 7, at 2-3.
\textsuperscript{21} VT. STAT. ANN. tit. 8 § 6001 (1981).
\textsuperscript{22} Model Product Liability Risk Retention Group Act (“Model Act”). The Model Act provides for the chartering of risk retention groups as insurers under the State’s insurance laws (§ 3), and the registration of risk retention groups chartered in other States, Bermuda or the Cayman Islands with the State insurance commission (§ 4). Agents, brokers and other persons servicing risk retention groups would also be required to register with the State insurance commissioner (§ 5). It would appear that by treating risk retention groups in the same manner as other insurers chartered or registered under state law, the Model Act may allow for the expensing of accrued losses. However, the Model Act also apparently subjects risk retention groups to all state insurance regulations other than those specifically prohibited by the terms of the Risk Retention Act. This may have a chilling effect on the formation of such groups for precisely the reasons the Risk Retention Act was promulgated, namely the need to conform to th laws of multiple jurisdictions in order to do business.
II. MONTREAL (GUATEMALA) PROTOCOLS

The Senate Foreign Relations Committee recommended that the Senate ratify the Montreal Protocols,\(^2\) the most controversial of which is Number Three, which would have amended the Warsaw Convention ("Convention")\(^3\) to increase the limitation of liability for injury to or death of passengers of an airline performing international air transportation.\(^4\) Number Three, however, in a vote of the full Senate on March 8th, 1983 failed to obtain the two-thirds vote necessary for approval.\(^5\) Thus the existing Warsaw Convention ("Convention") remains the law of the land. Under the provisions of the Montreal Protocols the original Convention limitation of approximately $8,300, which was increased in 1966 to $75,000,\(^6\) would have been increased to approximately $120,000 for personal injury or death claims regardless of fault.\(^7\) These limits, however, would have been absolute and would have abrogated Article 25 of the Convention.\(^8\) Article 25 presently permits the limitation to be avoided by proof of willful misconduct by the airline.\(^9\) Montreal Protocol Number Three also would have limited passenger baggage claims to approximately 1,000 Special Drawing Rights (SDRs).\(^10\)

\(^6\) The $75,000 limitation was established by the Montreal Agreement, CAB Agreement 18900, approved by C.A.B. Order E-23880 (May 13, 1966), by which air carriers waived the lower liability limitations of the Warsaw Convention.
\(^7\) Montreal Protocol No. 3, Exec. Rep. No. 97-45, 97th Cong. 1st Sess. 11 (Dec. 16, 1981) provides for a limitation for passenger death or injury of 100,000 Special Drawing Rights, which, when converted into United States dollars, amounted to approximately $107,466 on October 8, 1982. A Special Drawing Right is a unit of account established by the International Monetary Fund for the purpose of allowing a free and stable unit of conversion among the world's currencies.
\(^9\) Article 25(1) of the Convention provides: "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct . . . ."
cargo liability would have been changed to 17 SDRs per kilogram.\textsuperscript{32}

In addition to increasing the limitation for personal injury and death under the Convention, proposed Montreal Protocol Number Three would amend the Convention to permit each signatory country to establish a Supplemental Compensation Plan for passenger liability.\textsuperscript{33} In 1977, the CAB approved a Supplemental Compensation Plan which would provide approximately $200,000 for each present United States resident or other passenger who purchased a ticket and paid a surcharge in the United States.\textsuperscript{34} Another provision of the Montreal Protocols would have amended Article 28 of the Convention to permit lawsuits in the United States against any international airline which has an "establishment" in this country if the passenger has his domicile or permanent residence in the United States. Thus, the number of available court forums would have been expanded, presumably permitting more passengers, regardless of their ticketing or nationality, to seek redress in United States courts. The existing Convention, however, limits the forums.\textsuperscript{35}

The Committee reported favorably on the Montreal Protocols to the Senate, recommending that the President be given the power to adhere to them. This recommendation was qualified, however as to Protocols Three and Four. The Committee believed that before Protocols Three and Four came into force, the President should determine that a satisfactory Supplemental Compensation Plan was in effect. Thereafter the President would have given notice of denunciation of these Protocols if, at any time, a satisfactory Supplemental Com-

\textsuperscript{32} Id. This limitation equaled approximately $18.17 in United States dollars per kilogram on October 8, 1982.

\textsuperscript{33} Id. This new provision would be added as Art. 35A to the Convention. Id.

\textsuperscript{34} Order 77-7-85 (July 20, 1977).

\textsuperscript{35} Article 28 of the Convention currently limits jurisdiction to the carrier's domicile, the carrier's principal place of business, the country through which the contract of carriage was made, or the place of destination. Montreal Protocol Number Three, Article 28 expands the jurisdiction to include the passenger's domicile or permanent residence if the carrier has an establishment there. Exec. Rep. No. 97-45, 97th Cong., 1st Sess. 28 (Dec. 16, 1981).
pensation Plan is not available in the United States. The purpose of this language was to assure that the Plan remains adequate under an assumed inflationary economy. The remaining three Montreal Protocols were recommended to the Senate by the Foreign Relations Committee without qualification by the 97th Congress, but have not been considered in the 98th Congress. While the Administration strongly supported the Montreal Protocols, the controversial nature of Protocols Three and Four and the opposition of the trial bar to the perceived "low" absolute limitation of liability apparently deterred affirmative votes by many members of the Senate. As noted above, opinions by two prestigious courts, the Second and Ninth Circuit Courts of Appeal, may provide some judicial insight into the problems and solutions addressed in the Montreal Protocols. In Franklin Mint Corp. v. Trans World Airlines, Inc. a case arising out of a lost cargo

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58 For example, in 1977 the House of Delegates of the American Bar Association ("ABA"), after an active dialogue between different sections of the Association, favorably endorsed the ratification of the Montreal Protocols. In August, 1982, the argument was rekindled by sections of the ABA seeking retraction of the original endorsement. Nevertheless, the ABA affirmed its original endorsement. The rationale of the ABA vote was based substantially on reluctance to change the original position, and not on substantive considerations.
claim in which the Convention limitation of liability was a defense, the Second Circuit held that the conversion of gold into United States dollars at the last official price of gold would govern the limitation of liability. The court, however, went beyond the precise issue presented and held that the present Convention provisions limiting carrier liability for loss of cargo would be unenforceable in the future because of (i) the confusion engendered by the repeal of United States law setting the official price of gold, (ii) the unratified proposal for use of SDRs as the measure of the limitation in the Montreal Protocols and, (iii) the lack of uniformity developing in other world courts as to the question of the limitation and conversion into local currency. In light of the perceived need to allow carriers time to amend their tariffs the court held that its decision would not take effect for sixty days from the date of the mandate.

Other jurisdictions possibly may adopt the logic of the Second Circuit decision with respect not only to cargo loss, but also with respect to baggage loss, personal injury and death. Of course, if this happens, there is no way to predict what surgery those jurisdictions will perform on limitations of liability under the existing Convention.

claims are governed presently by the Montreal Agreement, which sets a limitation of $75,000 (substantially above the Convention limitation) and is filed with and approved by the CAB. See, In Re Aircrash at Kimpo International Airport, Korea on November 18, 1980, M.D.L.-482, slip op. (D.Cal. Feb. 15, 1983), in which the court held that the Montreal Agreement limiting liability for personal injury or death was not enforceable in the case at bar.

40 Franklin Mint, 690 F.2d 303, 306 (2d Cir. 1982), reh'g denied (Dec. 1, 1982), petition for cert. filed, Jan. 17, 1983 (No.82-116).

41 The court apparently assumes that such amendments could be made.

42 The Second Circuit granted a stay until March 2, 1983 to allow petitions for certiorari to be filed. Defendant TWA filed a petition on January 17, 1983. The IATA, on its own behalf and on behalf of forty-three of its members, filed a motion for leave to intervene and petition for certiorari on January 20, 1983. The Air Transport Association has filed an amicus brief. A cross-petition for certiorari has been filed on behalf of Franklin Mint.

43 Indeed, the issue of how to convert the Convention gold limitations was decided differently in Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 531 F.Supp. 344 (S.D.Tex. 1981), appeal filed, No. 81-2519 (5th Cir. Feb. 1, 1982). In that case the court used the free market price of gold in excess of $400 per ounce rather than defendant's tariff as the basis for converting the Convention's French gold francs into local currency. If the Fifth Circuit Court of Appeals affirms,
Reference to the *Franklin Mint* case was used to attempt to convince the Senate that ratification of the Montreal Protocols would solve some of the problems that may be created for the airlines and the international transportation system as a result of that decision. Alternatively, opponents of the Montreal Protocols noted contrary arguments, and that dictum in *Franklin Mint* suggested that the SDR limitation contained in the Montreal Protocols may have some elements of indefiniteness. This dictum fosters prompt speculation of a future court decision challenging that limitation. Also, in view of the Senate's rejection of the Montreal Protocols, the need for review of *Franklin Mint* by the Supreme Court of the United States has been heightened.

The legal atmosphere has been further complicated by the Ninth Circuit Court of Appeals in a passenger death case, *In re Aircrash in Bali, Indonesia*. In that case, the plaintiff sought to avoid the Convention limitation of liability, that had been pleaded as a defense, by proving the willful misconduct of the defendant. The court remanded the case for a determination of whether there was willful misconduct on the part of Pan American, thus avoiding an opportunity to interpret the viability of the Convention limitations of liability for death or personal injury. Although no retrial of the damage issue was contemplated by the court, the opinion indicated that in the event the lower court found that there had been no willful misconduct by the carrier, it would not necessarily en-

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44 In *Franklin Mint*, Judge Winter remarked that even SDRs were dependent upon the continuation of the International Monetary Fund and acceptance by the countries belonging to the Fund of the SDR market basket concept. The court noted that the basket of currencies through which the value of the SDR is calculated has been changed once already, and that while the SDR is relatively stable in relation to the free market price of gold, there is no guarantee that the SDR will remain a stable method of converting the world's currencies. *Franklin Mint*, 690 F.2d 303, 310-11 (2d Cir. 1982) *reh'g denied* Dec. 1, 1982, *petition for cert. filed*, Jan. 17, 1983 (No.82-1186).

45 684 F.2d 1301 (9th Cir. 1982).

46 *Id.*

47 *Id.* at 1313.
force the Convention limits. If a retrial of the willful misconduct issue produces a finding that no willful misconduct has occurred, and the court subsequently enforces the Convention/Montreal Agreement limitations, then the plaintiffs, pursuant to a unique theory postulated by the Ninth Circuit, would have a residual cause of action against the United States Government under the Fifth Amendment, for a "taking" of the survivors' rights to assert a wrongful death claim against the tortfeasor. The court suggests that such a claim might be filed in the Court of Claims and also suggests gra-

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* Id. at 1316.
* The court stated:
  
  No party to this litigation has argued that the Warsaw Convention limitation constitutes a "taking" that entitles plaintiffs to compensation by the United States under the just compensation clause of the fifth amendment. We raised this issue *sua sponte* and requested supplemental briefs from the parties for the reason that, if compensation is available under the Tucker Act, 28 U.S.C. § 1491, we do not reach the question of whether the Warsaw Convention is unconstitutional.

  We first note that the "treaty exception" to the jurisdiction of the Court of Claims under the Tucker Act, 28 U.S.C. § 1502 (1976), is not a bar to suit by these plaintiffs in the Court of Claims. The exception is applicable only where the right asserted is created by or depends for its existence upon some treaty provision. That limitation has been narrowly construed. The right asserted by the plaintiffs here arises under California law, not treaty. The Court of Claims would therefore have jurisdiction over any claim of "taking" of that right.

  We next look to whether plaintiffs' wrongful death claims are "property" within the meaning of the just compensation clause of the fifth amendment. Plaintiffs have a right under California law to recover damages caused by the wrongful death of their decedents. There is no question that claims for compensation are property interests that cannot be taken for public use without compensation. We can see no reason why these plaintiffs' claims are any different, for fifth amendment purposes, from the claims of various creditors against the government of Iran.

  Of course, whether or not a particular limitation amounts to a taking is a difficult question. "Takings" cases frequently turn on questions of degree. We need not decide now whether the Warsaw Convention may effect a taking, because the issue may not arise in this case. The question is properly one for the Court of Claims, when and if the Warsaw Convention limitation is applied to these plaintiffs. [footnotes and citations omitted].

* Id at 14-16.
* This question is strikingly similar to an argument recently adopted by the CAB in its supplementary statement with respect to the elimination of one provision of the
tuitously that the statute of limitations in the Court of Claims tolled in the meantime. Although the *Bali* decision is complex, it is relevant because another Circuit Court of Appeals has questioned the viability of the Convention limitations and perhaps has resurrected periodically argued historical questions concerning efforts to avoid limitations of liability. The decision also opens the United States government to residual liability indirectly in cases where limitations on liability are imposed. These unforeseen legal developments suggest that new issues may be raised in connection with the Warsaw Convention and perhaps additional tinkering will be forthcoming to preserve the limitations of liability contained therein in order to survive anticipated future challenges.

These two decisions highlight some of the difficulties facing carriers today given the lack of an officially recognized price of gold other than the free market price, and the problems created by the Senate's rejection of the Montreal Protocols. For

Denied Boarding Compensation Rules. The provision previously allowed a carrier to deny a passenger space on an overbooked aircraft if the government requisitioned the seat. The CAB stated that the compensation provision was not so much to punish the carrier for bumping the passenger, but to make the passenger whole for his inconvenience. The CAB went on to suggest that the carrier would have recourse to the government to recoup the entire cost of requisitioning the seat; in other words, the price of the ticket sold to the government plus the price of the denied boarding compensation paid to the unlucky passenger. The CAB did not address the question of seeking compensation from foreign governments which requisition space on fully booked flights. CAB Dockets 39932, 36294, 39504: Draft Reg. 13 (Oct. 7, 1982).


example, although the Montreal Protocols would have established a higher single absolute limitation of liability through the CAB Supplemental Compensation Plan, the issues addressed in *Franklin Mint* and *Bali* must still be resolved. Assuming that the SDR measure of limitation is viable, then potential litigation against the United States in the U.S. Claims Court possibly is precursed by the *Bali* court decision. The proceedings in the Supreme Court should be interesting and informative.

### III Air Travel Protection Act

Although it was not introduced in the 97th Congress, a draft version of the ATPA was circulated. The ATPA would provide no-fault compensation for injuries or death arising out of domestic aircraft accidents to accident victims who are residents of the United States. The ATPA governs the liability of airlines, aircraft manufacturers and component manufacturers. Although there is no limitation on the amount of liability, the criteria for assessment of damages is quite definite, including “economic detriment consisting of and limited to the present value of” (i) medical services including vocational rehabilitation, (ii) loss of income by an individual, (iii) cost of replacement services, (iv) projected loss of income which a decedent probably would have contributed to a survivor, (v) expenses incurred by a survivor resulting from the loss of the benefit of the decedent’s services and (vi) expenses directly

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82 See *supra* notes 39 and 43.  
84 In the same context, the questions raised by these two circuit courts may also affect the introduction of the ATPA which, as discussed *infra* at note 55, is intended to integrate manufacturers into the limited liability status of the airlines for international transportation. If, as the Second Circuit and particularly the Ninth Circuit seem to indicate, there is a question as to whether the carriers can be protected by a limitation of liability incorporated in a treaty without preserving a claim against the government that enters into the treaty, will legislation provide adequate protection for aircraft manufacturers which do not have the force of traditional concepts of limitation of liability behind them? Indeed, even if the ATPA becomes law, now doubtful, the problems created by these two circuit court decisions may be exacerbated by the plaintiffs’ bar in future challenges to the constitutionality of the Convention. It is assumed that the Congress will integrate enough safeguards into the proposed legislation to make it viable against such challenges.  
85 ATPA Draft, *supra* note 9, § 1402(a).
related to the decedent's funeral.56 "Governmental payments" made under state or federal social security schemes or worker's compensation plans and any "income tax saving" would be deducted from the damage award.57 The ATPA would apply where the accident involved an aircraft of a United States air carrier "during or arising out of the course of domestic air commerce" and resulted in the death or hospitalization of five or more persons.58 Although there is no apparent limitation on recoveries within the parameters of the ATPA, it appears that a "cap" on total recovery is included in Section 1402(b) wherein the aggregate limit of liability of all persons shall be the amount of financial protection (insurance) provided by, or required to be provided by, the domestic air carrier which operates the aircraft involved in the acci-

54 ATPA Draft, supra note 9, § 1401(d).
55 ATPA Draft, supra note 9, § 1401(d)(5).
56 ATPA Draft, supra note 9, § 1401(a)(1). The definition of a "cognizable accident" as one which involves the death or injury of five or more persons is similar to the definition in the Danielson bill, which proposes to establish a federal cause of action for aviation activity. See H.R. 1027, 97th Cong. 1st Sess., § 1364(a)(2) (1981).
57 ATPA Draft, supra note 9 at § 1401(d). Any damages awards in excess of the aggregate liability of the parties would be absorbed by the Surcharges Advances Facility established pursuant to ATPA § 1402(d).

The Surcharges Advances Facility (SAF) is similar to the Supplemental Compensation Plan concept of the Montreal Protocols, discussed supra at note 34. The SAF will be funded by a charge, in an amount to be determined by the Secretary, imposed on each passenger ticket or air waybill in domestic air commerce. The Secretary will be given the option of imposing the ticket surcharge prior to an aircraft accident, thus creating a slush fund, or after an accident for which the Secretary determined the aggregate liability of the insured parties might exceed the financial protection required to be provided by them. In the latter case, the Secretary would presumably have a better idea of how much money to collect to compensate the victims of the accident. The SAF would also be used to satisfy claims of victims of terrorist incidents in domestic air commerce, which would not otherwise be cognizable against an air carrier under the ATPA pursuant to § 1402(c).
dent.\textsuperscript{69} That amount is to be determined by the Secretary of Transportation, pursuant to Section 1402(c)(1). Additional amounts of recovery provided by the Surcharge Advances Facility, also are to be determined by the Secretary of Transportation.\textsuperscript{60}

Considering the \textit{Franklin Mint}\textsuperscript{61} case, some legal questions may have to be resolved on this issue. A no-fault action could be brought in either a state or a federal court at any time within two years of the date of the accident. A claimant would have an absolute right to a jury trial\textsuperscript{62} by virtue of the ATPA’s preemption provision, § 1401(c).\textsuperscript{63}

The ATPA would supersede all state laws, inconsistent provisions of any Federal law and the law of any place not subject to the jurisdiction of the United States.\textsuperscript{64} Claims could be asserted against the United States government, any state or local governmental entity or any foreign state or instrumentality thereof.\textsuperscript{65} The ATPA, however, would not apply to claims arising out of military hostilities, claims for apportionment of damages, claims with respect to persons or property being carried in international air commerce at the time of the

\textsuperscript{60} ATPA Draft, \textit{supra} note 9, § 1402(b).
\textsuperscript{61} ATPA Draft, \textit{supra} note 9, § 1402(c)(1).
\textsuperscript{62} 690 F.2d 303 (2d Cir. 1982), \textit{reh'g denied}, (Dec. 1, 1982), \textit{petition for cert. filed}, Jan. 17, 1983 (No. 82-1186).
\textsuperscript{64} ATPA Draft, \textit{supra} note 9, § 1401(c). These exclusions would therefore make the ATPA inapplicable to, among others, major military accidents, hijacking claims, and foreign accidents where the air carrier cannot be or is not served in the United States.
\textsuperscript{65} ATPA Draft, \textit{supra} note 9, § 1403(g)(1).
\textsuperscript{66} ATPA Draft, \textit{supra} note 9, § 1404(b)(1)(A) and § 1404(b)(1)(c).
accident, claims resulting from decreases in flight operations by any aircraft not involved in the incident, claims for worker's compensation benefits or claims under life, accident or other insurance policies. Persons who had made payments under such laws or policies could assert claims for indemnification. Claims for punitive and exemplary damages would also be barred.

Recovery under the ATPA would not include compensation for a decedent's pain and suffering or for any other non-economic detriment. Claims for pain and suffering by an injured person would not be permitted unless that person sustained serious and permanent disfigurement, other serious and permanent injury or was totally disabled for a period of more than ninety days. The treatment of claims for an injured person's pain and suffering in cases where the plaintiff dies from his injuries after the commencement of the action is unclear in the draft version of the ATPA.

Both United States and foreign citizens would be entitled to interim assistance payments, consisting of periodic payments made for economic detriment resulting from the incident plus out-of-pocket expenses incurred. Payments under the ATPA would be the joint and several responsibility of the air carrier or carriers and the airplane manufacturer or manufacturers until such time as the contributing parties are designated by the court in an apportionment action. Ultimate liability for both interim assistance payments and damage awards would be determined by means of a contribution agreement similar to the Tenerife agreement between or among domestic air carriers.

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68 ATPA Draft, supra note 9, § 1401(c)(3).
67 ATPA Draft, supra note 9, § 1401(c)(3)(F).
66 ATPA Draft, supra note 9, § 1401(d).
65 ATPA Draft, supra note 9, § 1401(c)(3).
70 ATPA Draft, supra note 9, § 1401(c).
71 ATPA Draft, supra note 9, § 1401(f) and § 1401(g).
78 ATPA Draft, supra note 9, § 1401(f)(2).
79 The Tenerife model arose out of the collision at Tenerife between a Pan American World Airways jet and a KLM Royal Dutch Airlines jet and involved an agreement between the carriers to contribute to claims settlements in advance of a determination of liability and comparative fault. Thus, the potential defendants in the actions were able to settle the vast majority of cases without resorting to litigation.
carriers and manufacturers or, if such an agreement could not be reached, by the institution of an apportionment action. No provision is made for the commencement of an apportionment action by a foreign air carrier. Foreign carriers, however, are subject to process under the ATPA and are deemed to have submitted to the jurisdiction of the United States courts by virtue of their foreign air carrier permit. Additionally, the ATPA will vest United States district courts with jurisdiction over any person, without regard to citizenship, who was a "substantial factor" in producing or contributing to a claimant's injuries. Recovery by persons who were not citizens or residents of the United States at the time of an accident will be governed by the rules relating to damages for injury or death prevailing in the jurisdiction of the claimant's residence at the time of the incident, but cannot exceed damages recoverable by United States citizens or residents under the ATPA.

The defeat of the Montreal Protocols bodes ill for the ATPA because they were apparently designed to be implemented in tandem. The no-fault provision of the ATPA, while continuing the Warsaw/Guatemala scheme currently applicable to international claimants, apparently will make both United States and foreign carriers engaged in international air commerce strictly liable to domestic claimants where the underlying incident involved two aircraft, one of which was en-

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74 ATPA Draft, supra note 9, § 1404(c)(2). To date some courts have refused to apply this jurisdictional extension. See, e.g., Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), aff'd, 607 F.2d 494 (D.C. Cir. 1979). As a practical matter, damages awarded in the United States courts are probably higher than those awarded in most other countries, but some legal attack by the plaintiff's bar should be anticipated. Claimants may agree that the ATPA distinction between citizens and non-citizens raises questions under the Equal Protection Clause of the United States Constitution and in certain instances, may violate the provisions of various treaties of friendship, commerce and navigation between the United States and other nations.

75 ATPA Draft, supra note 9, § 1404(c)(1).

76 ATPA Draft, supra note 9, § 1401(e). This provision would presumably eliminate any action for punitive damages by a non-citizen or non-resident even though punitive damages are available in his home jurisdiction. As a practical matter, punitive damages are not usually awarded in most other countries, but again some legal attack by the plaintiff's bar should be anticipated.

77 See supra notes 60 and 72.
gaged in domestic air transportation, and the other of which was engaged in international air commerce.\textsuperscript{76}

As well as providing compensation for claimants, the ATPA establishes an apportionment action to allocate responsibility among joint tortfeasors.\textsuperscript{79} Pursuant to the ATPA, an apportionment action will be tried without a jury, will be tried only in a federal district court, and will be consolidated with other apportionment actions arising out of the same incident.\textsuperscript{80} An apportionment action can be commenced no sooner than thirty days after the occurrence and not later than three years after the date of the incident.\textsuperscript{81}

Venue of the apportionment action will be determined by the situs of the incident or, if the incident occurred outside the territorial jurisdiction of the United States, by the domestic point of departure or point of destination of the aircraft.\textsuperscript{82} Any party to the apportionment action will be entitled to petition the Judicial Panel on Multidistrict Litigation for transfer of the action based on the convenience of the parties or witnesses, or in the interest of justice.\textsuperscript{83} If such transfer were ordered, all aspects of the action, including trial, will proceed in the district court to which the action is transferred.\textsuperscript{84}

The plaintiff in an apportionment action will be required to petition the court for a temporary apportionment order giving effect to the terms of any provisional contribution agreement, or if no such agreement existed, for an order designating the contributing parties and assigning the proportionate responsibility of each contributor.\textsuperscript{85} A special master will make findings of fact and conclusions of law related to any motion for a temporary apportionment order within 115 days of a refer-

\textsuperscript{76} ATPA Draft, supra note 9, § 1401(d), which provides that "[r]ecovery for injury or death in respect of any citizen or resident of the United States shall provide compensation for economic detriment . . . ." (emphasis added). See discussion of damages supra note 52 with respect for which the ATPA provides compensation.

\textsuperscript{79} ATPA Draft, supra note 9, § 1403(a).

\textsuperscript{80} ATPA Draft, supra note 9, § 1402(b)(2)-4(c).

\textsuperscript{81} ATPA Draft, supra note 9, § 1403(d).

\textsuperscript{82} ATPA Draft, supra note 9, § 1403(d).

\textsuperscript{83} ATPA Draft, supra note 9, § 1403(d).

\textsuperscript{84} ATPA Draft, supra note 9, § 1403(d).

\textsuperscript{85} ATPA Draft, supra note 9, § 1403(e)(1).
Public disclosure of the terms of a provisional contribution agreement will not be permitted except upon a finding of good cause by the court. Rule 14 of the Federal Rules of Civil Procedure governing third party practice will apply, but only as to parties originally served with a petition for a temporary apportionment order. Any party to the action will be allowed to seek court review of the special master's order, which can be amended by the court or recommitted to the special master if the court finds the special master made "clear and substantial errors of fact or law" that will cause "manifest injustice" to the parties. The temporary apportionment order will be interlocutory in character and will have no precedential effect on the apportionment action. As additional evidence regarding liability becomes available, the order can be modified by the court on petition of any party.

Both temporary and final apportionment of liability will be based on the comparative responsibility of each party. The nature and quality of the conduct of each party and the extent of the causal relation between each party and the injury, will be determined "as a matter of Federal common law relying on the consensus of decisions of courts of competent jurisdiction." This provision is similar to the language used in the proposed Danielson Bill that would create a federal cause of action for aviation activity. At a preliminary hearing, the reliance of H.R. 1027 on the language, a "consensus of deci-

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86 ATPA Draft, supra note 9, § 1403(e)(3)(B).
87 ATPA Draft, supra note 9, § 1402(2).
88 ATPA Draft, supra note 9, § 1402(e)(3)(B).
89 ATPA Draft, supra note 9, § 1402(e)(3)(C).
90 ATPA Draft, supra note 9, § 1403(e)(3)(D).
91 ATPA Draft, supra note 9, § 1403(e)(3)(D).
92 ATPA Draft, supra note 9, § 1403(e)(3)(E).
sions of courts of competent jurisdiction,"95 was criticized by Daniel Meador, a professor of law at the University of Virginia School of Law.96 Professor Meador recommended that any legislation include standards of liability and remedies for damages incurred. He attacked the "consensus" language as vague to the point of being potentially burdensome on the federal court system.

To eliminate the "consensus" reference, the Senate Commerce, Science and Transportation Committee adopted a more definite standard in the proposed Kasten Bill.97 If enacted, this bill will specify standards for imposing liability on product manufacturers and sellers while placing on the claimant the burden of proof of breach of the standards "by a preponderance of the evidence".98 The comparative rule standards are adopted for apportionment of damage awards among joint tortfeasors,99 and there is no reliance on a "consensus of opinion." The companion Products Liability Act of 1982,100 the Shumway Bill, adopted a similar approach. The Shumway Bill, unlike the Kasten Bill, however, did include an affirmative defense for manufacturers that have complied with either applicable government safety standards or mandatory governmentally-imposed contract specifications.101 Yet another House bill, the LaFalce Bill, would have established standards for state-enacted product liability legislation.102 Although all three bills seek uniformity of result and predictability, their provisions are inconsistent with one another and in many instances inconsistent with the approach of the ATPA and the Danielson Bill.103 Therefore, it may be necessary for conference committees to resolve these differences before enactment in order to avoid legal challenges thereafter.

95 Id. § 2751(a).
96 Testimony of Daniel J. Meador before the House Subcommittee on Administrative Law and Governmental Relations, December 10, 1981.
98 Id. § 4(a)(1).
99 Id. § 9(a).
101 Id. § 7.
103 See supra notes 95-99 and accompanying text.
IV. INSURANCE REQUIREMENTS FOR UNITED STATES AND FOREIGN AIR CARRIERS

The CAB has adopted a new Part 205 for its economic regulations which became effective February 23, 1982, and requires all United States and foreign air carriers to maintain certain minimum aircraft accident liability insurance in order to continue to engage in air transportation in, to or from the United States. New Part 205 requires all United States and foreign air carriers to evidence their ability to pay damages equal to at least $300,000 per passenger and $300,000 times 75 percent of the aircraft seating capacity for passengers per occurrence, as well as in third party damages for all operations in, to and from the United States up to $20 million per occurrence. Although there are less stringent requirements for aircraft with a capacity of not more than 60 seats or 18,000 pounds maximum payload, the minimum required coverage for these aircraft has been increased to $300,000 times 75 percent of aircraft seating capacity for passengers and $2,000,000 per occurrence for third party liability coverage. Air taxi operators registered under Part 294 of the CAB Regulations are excluded from the new rule. A new rule, however, requires that Canadian cross-border air taxi operators satisfy the same insurance standards imposed upon as Part 294 carriers. The insurance requirement may be satisfied by purchase of commercial insurance policies, by self-insurance, or by any combination thereof. All risks may be covered by a single policy.

Under the terms of new Part 205, carriers must file a certificate of insurance, signed by an authorized officer, agent or representative of its insurer or insurance broker, on CAB

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106 Id.
108 Aircraft Accident Liability Insurance, 14 C.F.R. § 205.6(f) (1982).
110 Id. The CAB originally proposed a requirement that the insurance be written by United States carriers. The final rule, however, allows for coverage by foreign insurers duly licensed in their own countries.
Form 205-A. United States carriers must submit their certificate of insurance to the CAB's Special Authorities Division, Bureau of Domestic Aviation, while foreign carriers must submit their proof to the Regulatory Affairs Division, Bureau of International Aviation. Insurance coverage may be purchased from any United States licensed insurer or surplus line insurer as well as from any insurer licensed by a foreign government. If part of the coverage is provided by self-insurance a summary of the self-insurance plan must be provided to the appropriate office, and the carrier must file its complete self-insurance plan with the Bureau of Carrier Accounts and Audits. The certificate of insurance may list all aircraft by aircraft registration number or may provide for fleet coverage. Any changes in the carrier's insurance coverage must be reported to the CAB at least 10 days before the effective date of the changes. Implementation of war risk exclusions, however, may be activated by the insurer on shorter notice in accordance with the terms of the policy, provided the CAB is notified of the insurer's actions immediately.

The new regulation also provides that an insurer may not condition the liability coverage required by the terms of Part 205 (i) upon compliance with the terms of the insurance policy by the carrier, (ii) airline adherence to safety-related requirements or (iii) assumption by the carrier of an agreement to raise the liability limitations of the Convention. The CAB will, however, allow the insurer to recover from the carrier for payments made to beneficiaries under these provisions. The CAB believes this will protect the passenger's ability to collect damages from the carrier while allowing the airline and its insurer to reach an agreement regarding the as-

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14 C.F.R. § 205.3(d) (1982).
121 14 C.F.R. § 205.6 (1982).
122 Id.
sumption of risk as between themselves.\textsuperscript{119}

The regulation requires a carrier to keep available for inspection by the CAB's staff, at the carrier's principal place of business, the carrier's currently effective policy of insurance or self-insurance.\textsuperscript{120} The carrier's current certificate of insurance or summary of self-insurance, as filed with the CAB, must also be available for public inspection at the carrier's principal place of business.\textsuperscript{121} These requirements may conflict with the provisions of certain "blocking" statutes enacted in various foreign jurisdictions which typically prohibit the release of commercial information by a citizen of that jurisdiction to foreign interests without approval of the government of the enacting jurisdiction.\textsuperscript{122}

While there was some initial confusion regarding exactly what aspects of carrier liability policies new Part 205 regulates, the CAB has since stated that the carriers may negotiate any and all other aspects of insurance with their insurers as long as the minimum liability limits are maintained and the policy cannot be voided by the insurer due to carrier misconduct.\textsuperscript{123}

\begin{footnotesize}
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\item ER-1253, Feb. 23, 1982, p.7.
\item 14 C.F.R. § 205.3 (1982).
\item Id.
\item A "blocking statute" typically prohibits a citizen or resident of the country enacting the law from providing information for use in litigation outside the home country without permission from an internal review body. Such laws have been enacted by the United Kingdom, New Zealand, Germany and France among others.
\item Letter from David M. Kirstein, CAB General Counsel to Robert M. Kelly (Jan. 18, 1982).
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