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Carroll E. Dubuc

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SIGNIFICANT LEGISLATIVE DEVELOPMENTS IN THE FIELD OF AVIATION LAW

CARROLL E. DUBUC*

I. LEGISLATIVE ACTIVITY INVOLVING PRODUCTS LIABILITY

THE PERIOD beginning March 1, 1978 was one of substantial activity in Congress in the field of products liability legislation. Numerous bills were introduced in the House of Representatives and the Senate dealing with one or more aspects of the products liability problem. Several of these focused particularly on the products liability problem as it relates specifically to the aviation industry. As will be more fully discussed below, none of these bills seeking to create a federal law of products liability were enacted in the Ninety-Fifth Congress and, therefore, the only positive accomplishment of that Congress in the field of products liability came about as the result of a new section added to the Internal Revenue Code.1 Furthermore, with the changes in Congress as a result of the November elections, the potential for the enactment of some of the proposed bills may be difficult to assess.

Much of the legislative effort was engendered by the Final Report of the Interagency Task Force on Products Liability, issued on November 1, 1977.2 This report represented the culmination of approximately eighteen months of investigation of the products liability dilemma facing American manufacturers and insurers. Among the suggested causes of the dilemma were liability insurance rate-making procedures, manufacturing practices, and un-

* Resident Partner, Haight, Gardner, Poor & Havens, Washington, D.C. The assistance of my associates, Temple L. Ratcliffe and John J. Connors, in the preparation of this paper is gratefully acknowledged.


certainties in the tort-litigation system. This third underlying cause, uncertainties in the tort-litigation system, was the subject of much of the Task Force's Report. The Report was used by the Carter administration in proposing the sole bill which was enacted into law by the Ninety-Fifth Congress in the area of product liability.

A. Internal Revenue Code Amendment

Following the release of the Task Force's Final Report, a total of twenty-nine separate bills were introduced in the House. The thrust of each of these bills was to provide for a tax deduction for amounts set aside in a trust fund to meet product liability losses. Although the bills differed in some technical aspects, the primary thrust of each was to create a tax free trust fund to be used to pay product liability losses. In addition, each bill contained a definition of "product liability loss." None of these twenty-nine bills were ever passed, although a similar concept was engrafted into the Internal Revenue Code in the following manner.

On October 9, 1978, during the consideration of H.R. 13511, the "Revenue Act of 1978," an amendment was considered and adopted to permit an additional carry-back period of seven years for excessive operating losses attributable to product liability losses. In simplistic terms, the new section permits a product liability loss to be carried back up to ten years preceding the date on which the loss is incurred. Product liability loss is defined as a loss attributable to:

[L]iability for damages on account of physical injury or emotional harm to individuals, or damage to or loss of use of property, on account of the manufacture, importation, distribution, lease or sale by the taxpayer of any product if such liability arises after

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8 Id. at xxxix-lvi. This Report also led to the publication of a Model Uniform Products Liability Law, discussed at notes 113-144 infra.

4 H.R. 7711, 95th Cong., 2d Sess. (1978) (identical bills, H.R. 8023, 8024, 8339, 8537, 8885, 8918, 9790, 10649, 11502, 12607, and 13764); H.R. 8064 (identical and similar bills, H.R. 8876, 8877, 9156, 9394, 10196 and 11336); H.R. 10272 (identical and similar bills, H.R. 10675, 11378, 11788, 12471, 12474, 13210 and 13212); and H.R. 12429 (identical bill, H.R. 13260).


the taxpayer has completed or terminated operations with respect to, or has relinquished possession of, such product.\footnote{H.R. 13511, 95th Cong., 2d Sess., 124 CONG. REC. S17,771 (daily ed. Oct. 9, 1978).}

Therefore, this relief would not apply to medical malpractice or other "service" related losses. The amendment was adopted by the House-Senate Conference Committee and became Section 371 of Public Law 95-600.\footnote{Revenue Act of 1978, Pub. L. No. 95-600, § 371, 92 Stat. 2859 (amending I.R.C. § 371).} The loss carry-back amendment does not become effective until taxable years beginning after September 30, 1979.\footnote{Id., 92 Stat. at 2860.} This legislation and other proposed legislation dealing with favorable tax treatment to manufacturers for product liability reserves may have a profound effect on the pattern of product liability insurance in the future.

B. Product Liability "Reform" Legislation

(1) Legislation Proposed at the Federal level.

Of the bills considered at the federal level, all were introduced prior to March 1, 1978, the date which was to be the beginning for the period covered by this article. However, all were considered during this period. Although none of these bills were enacted, they are nonetheless important because they reflect a growing concern among the members of the Congress with the general problem of products liability.

The first bill is S. 403, entitled the "National Product Liability Insurance Act."\footnote{S. 403, 95th Cong., 1st Sess., 123 CONG. REC. S1,185 (daily ed. Jan. 24, 1977) (introduced by Sen. James B. Pearson, (R-Kan.)).} The bill would have created a National Product Liability Insurance Administration to administer a joint underwriting authority to provide product liability reinsurance to manufacturers, issue federal charters to captive insurance companies, and review federal and state product liability arbitration established under other provisions of the Act.\footnote{Id. tit. II, 123 CONG. REC. at S1,197.} A captive insurance company was defined as one which is organized to provide insurance or reinsurance limited to the potential liabilities of the member organizations of the association or parent, its subsidiaries and associated or
affiliated companies. The Administrator of the National Product Liability Insurance Administration would have been authorized to contractually agree to provide reinsurance for product liability coverage based on the payment of certain premiums and/or fees. Additionally, the Administrator would have been empowered to disseminate information to the public concerning product liability insurance and other product liability information. The National Product Arbitration Program which would have been established under the Act would have created a product liability arbitration panel in each judicial district of the United States. Each panel would have arbitrated all product liability actions in that District and would have been composed of an attorney with at least two years' experience, a physician, and a third non-attorney, non-physician member. The arbitration would have been binding, but a party could, within ten days after the service of the last pleading, file a demand for a trial by jury, and the matter would not have been arbitrated. States were to be encouraged to set up a similar arbitration plan and, in addition, to comply with the national standards for product liability arbitration programs. These standards would have included the following: the defense of compliance with all federal and state laws concerning the manufacture of the product; the defense of compliance with the "state of the art," defined as conforming to the highest recognized and prevailing standard practices technically and economically feasible in existence within the relevant industry at the time of manufacture; the defense of misuse or modification of the product; only arbitration was available if an action was commenced after the tenth year from which the date on which the product was placed in commerce; and finally, no damages could be recovered if the injuries were sustained after the reasonable, ordinary useful life of the product. Finally, the bill would have established a Federal

15 Id. § 302(4), 123 CONG. REC. at S1,198.
16 Id. § 301(a), 123 CONG. REC. at S1,198.
17 Id. § 307, 123 CONG. REC. at S1,199.
18 Id. §§ 401-402, 123 CONG. REC. at S1,198.
19 Id. § 403, 123 CONG. REC. at S1,198.
20 Id. § 405(b)-(c), 123 CONG. REC. at S1,198.
21 Id. tit. V.
22 Id. tit. VI, 123 CONG. REC. at S1,200.
Liability Compensation Fund to be administered in the Department of the Treasury and used to satisfy any judgment which the manufacturer/seller could not, without undue hardship, fully satisfy within six months after the date of its rendering. The bill provided for periodic compensation payments from the liable party.

The second Senate bill, S. 1706, was titled the "Emergency Product Liability Act" and was not nearly as sweeping in scope as S. 403. The short-term solution proposed was to provide for a two-year statute of limitations from the date of injury with a seven-year outside period based on the date when the product was first purchased. Secondly, the bill provided for an absolute defense to an action based on a products liability theory if a substantial cause of the injury was an alteration or modification to the product, made subsequent to the manufacturer's sale of the product or misuse of the product. Finally, the bill provided its own "state of the art" defense based on the generally recognized prevailing state of the art applicable or relevant to the product on the date it was manufactured. Compliance with a generally accepted practice could not have been used as a defense if it failed to comply with any federal or state law prescribing relevant standards applicable to the product. The Act would not have applied to any claim based on alleged breach of warranty but would have included those based on negligence or strict liability in tort. The bill would have preempted any provision of state law which was inconsistent with the foregoing defenses. Any state law providing for less exposure to liability than the foregoing defenses would not, however, have been preempted. Any state could have removed itself from the preemption provisions by passing similar defenses and obtaining certification from the Secretary of

20 Id. § 606(a)-(b), 123 Cong. Rec. at S1,200.
21 Id. § 606(c), 123 Cong. Rec. at S1,200.
23 Id. § 201(a), 123 Cong. Rec. at S10,030.
24 Id. § 202.
25 Id. § 203(a)-(b).
26 Id. § 203(b).
27 Id. § 204(a).
28 Id. § 301.
Once such an exemption had been granted, the Act would have had no further applicability to the state so exempted regardless of whether that state subsequently modified or repealed the state statutes on which the exemption was premised.\textsuperscript{29}

In the House of Representatives, three bills were introduced, two of which dealt specifically with the problem of aviation accidents. The first of these was H.R. 7298, entitled the "Air Travel Protection Act of 1977."\textsuperscript{30} The bill would have amended the Federal Aviation Act of 1958,\textsuperscript{31} and essentially created a no-fault insurance system which would pay benefits to the survivors of persons killed, or persons injured, in major airline accidents.\textsuperscript{32} The bill coined the term "extraordinary aircraft occurrence" and defined it as any aircraft accident which results in the death or hospitalization of five or more persons or will probably result in $2,500,000 or more in damages to any one person, $5,000,000 in damages in the aggregate, or $5,000 or more as to each of fifty or more persons (provided there is $1,000,000 or more of such damages in the aggregate).\textsuperscript{33} The bill would have given the Secretary of Transportation the authority to require air carriers to carry insurance and would have provided that the Secretary could pay any amount in excess of insurance coverage.\textsuperscript{34} The Secretary would have been empowered to direct the air carriers to collect a surcharge on tickets to provide the funds to pay for the excess liability coverage.\textsuperscript{35} The bill provided that immediate assistance payments could be made which would not constitute an admission of liability but would operate as a satisfaction, to the extent thereof, to any final settlement or judgment.\textsuperscript{36}

The bill went on to provide that any defense based on the conduct of a passenger or the fault of the air carriers would be waived, as well as any defense based on charitable or governmental immu-

\textsuperscript{29} Id. § 302.
\textsuperscript{30} 95th Cong., 1st Sess., 123 CONG. REC. H4,705 (daily ed. May 18, 1977) (introduced by Rep. Glenn M. Anderson (D-Cal.)).
\textsuperscript{33} Id. tit. XIV, § 1401(4).
\textsuperscript{34} Id. § 1402(a)-(d).
\textsuperscript{35} Id. § 1402(e).
\textsuperscript{36} Id. § 1403(c).
nity, including the immunity of the Federal Government, and a
two-year statute of limitations would have been created.\textsuperscript{37} Defenses
based on failure to take reasonable steps to mitigate damages and
intentional damages sustained by a claimant were provided.\textsuperscript{38} Fed-
eral district courts were to be given original jurisdiction without
regard to diversity and venue was created in any district where
the occurrence took place, where the defendant resided or trans-
acted business, or where the plaintiff resided if the defendant was
not a resident of or did not transact business in the United States.\textsuperscript{39}
Automatic consideration by the Judicial Panel on Multidistrict
Litigation was provided.\textsuperscript{40} The exclusive rules of recovery created
were fair and just compensation for economic detriment, consisting of and limited to expenses, loss of income, replacement services,
and survivors’ losses. Each of these terms was further defined and
the definition of each included a provision for the reduction of a
recovery to reflect other income and/or expenses.\textsuperscript{41}

The bill further provided that any recovery for economic loss
should be diminished by the amount of social security, workmen’s
compensation, and all other benefits available from any govern-
ment because of the injury, unless the law creating the benefits
specifically made them excess or secondary to recovery under this
proposal. Additionally, any income tax savings attributable to
loss of earnings based on recoveries which were not taxable, to a
maximum of fifteen percent of lost income, would have been de-
ducted and any death recovery could not have included any non-
economic elements.\textsuperscript{42} Finally, there would have been no recovery
for exemplary or punitive damages.\textsuperscript{43}

If the case were tried to a jury, there would have been a special
verdict itemizing each of the elements set forth above.\textsuperscript{44} Any judg-
ment could have been ordered to be paid in periodic payments.\textsuperscript{45}
Additionally, any person who recovered could have also recovered

\textsuperscript{37} Id. § 1404(a).
\textsuperscript{38} Id.
\textsuperscript{39} Id. § 1404(b)(1).
\textsuperscript{40} Id. § 1404(b)(2).
\textsuperscript{41} Id. § 1404(c)(1)(A)-(D).
\textsuperscript{42} Id. § 1404(c)(2)(A)-(B).
\textsuperscript{43} Id. § 1404(c)(4).
\textsuperscript{44} Id. § 1404(d).
\textsuperscript{45} Id. § 1404(e)(1).
costs and expenses including reasonable attorney's fees, although written notice as to the intention to claim such payments would have been required. Finally, the indemnitee would have had a right of recourse for indemnity or contribution to the extent that the air carrier would have had such a right. This right would have been tried separately from any claim as to injury or loss as a result of the accident. There would be no right of contribution for indemnity against the United States, the Federal Aviation Administration itself or any of its employees.

The second bill dealing specifically with aviation incidents was H.R. 10917, which was intended to amend Title 28 of the United States Code and create a federal cause of action for, and federal court procedures with respect to, aviation accidents. The bill would have created an exclusive federal remedy for damages arising out of an aviation accident. The bill included several specific rules of law, which will be discussed below, but as to those topics not addressed, the rule was to be the consensus of courts of competent jurisdiction. The federal common law of aviation accidents was specifically to include the duty of highest degree of care by a common carrier for the safety of its passengers.

The bill would have adopted the rule of comparative fault and provided for a right of contribution between all parties who, if sued separately, would have been liable for damages. This right of contribution did not preclude the existence of a right of indemnity if otherwise proper. Damages for the death of another were to be for the exclusive benefit of the decedent's surviving spouse, children, parents or dependent relatives. Recovery was to be appor tioned in accordance with the law of the place of the decedent's domicile. Damages for wrongful death specifically excluded pain and suffering and specifically included pecuniary loss, defined as

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46 Id. § 1404(f).
47 Id. § 1405(a)-(b).
49 Id. § 2751(a).
50 Id.
51 Id. § 2751(b).
52 Id. § 2752(a)(1)(A)-(B).
53 Id. § 2752(b).
54 Id. § 2752(c).
including the loss of care, comfort and society. The cause of action would have been subject to a two-year statute of limitations as would the claims for contribution and indemnity, with a ninety day period of grace following the service of process. Concerning workmen’s compensation claims, the bill would have been inapplicable to the extent that it was inconsistent with workmen’s compensation laws but it attempted to provide for a remedy by a third party against the employer, a situation not now generally practicable. The bill went on to provide in detail for the mechanics of a trial and service of process.

Another bill, H.R. 11788, was among the twenty-nine bills noted above as providing for some form of relief from product liability losses by amendments to the Internal Revenue Code. The bill, however, also provided for the establishment of a Federal Insurance Commission to regulate all insurance companies doing business in “commerce.” It also contained a title captioned “Standards for State Product Liability Tort Litigation Act.” This was an attempt to have the Congress prescribe standards to be adopted by the various state legislatures in product liability matters. The bill further provided for a panel to review various state laws and certify them as being in compliance with this Act. If the commission were to determine that a state did not have an “approved plan”, the bill provided for an alternative plan which would automatically be placed into effect in that state. This plan would have carried with it most of the provisions of the suggested plan to be followed by the states except that it would be broader in that it would not be limited to bodily injuries. The alternative “no-fault plans” would have continued in effect in a state until such time as it enacted a qualified, approved plan.

55 Id. § 2752(d).
56 Id. § 2753(b).
57 Id. § 2754.
58 Id. §§ 2761-2764.
60 Id. tit. I.
61 Id. tit. II.
62 Id. tit. II, subtit. C.
63 Id. § 202.
64 Id. tit. II, subtit. B.
65 Id. § 203.
66 Id. § 204.
Three other bills tangentially related to the area of products liability were considered by the Ninety-Fifth Congress. All were intended to significantly alter the traditional diversity of citizenship jurisdiction in the federal district courts, and two would have abolished it. The first of these, H.R. 9622, would have amended the United States Code to abolish diversity of citizenship as a basis for federal court jurisdiction. This would leave the federal courts solely to serve the function of resolving "federal questions" under the Constitution or laws of the United States. H.R. 9622 passed the House of Representatives on February 28, 1978. The bill as passed also raised the jurisdictional amount in the federal district courts to $25,000. Subsequently, the Senate Subcommittee on the Improvement in Judicial Machinery considered S. 2389, which is identical to H.R. 9622 passed by the House, and S. 2094, which would not have abolished diversity jurisdiction, but would have prohibited a plaintiff from bringing an action in a federal district court in the state in which he was a citizen. Neither of these bills were ever reported out by the Subcommittee. The question is obviously important to the aviation community, particularly as it might impact on the ability to manage litigation arising out of a large air disaster properly.

(2) Activity in the State Legislatures

Several states have enacted laws dealing with the question of products liability generally since March 1, 1978. The highlights of these laws will be set forth below grouped by the area of the law which was affected.

Statute of Limitations

Effective September 15, 1978, Arizona has a limitation period

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71 Several other states had previously modified their statutes of limitations as follows: Florida, twelve years from date of delivery, Fla. Stat. Ann. § 95.031(2) (West Supp. 1979); Idaho, two years from the date of occurrence, Idaho Code § 5-219(4) (1979); Kansas, two years from date of injury, or if not readily ascertainable, not more than ten years from the date of the act, Kan. Stat. § 60-513(b) (1976); North Carolina, injury deemed to have occurred when discovered, but not more than ten years after last act, N.C. Gen. Stat. § 1-15(b) (1975);
of two years after the cause of action arises,\textsuperscript{72} except that no product liability action may be commenced later than twelve years after the product was first sold for use or consumption. This twelve-year outside limitation does not apply to actions based on negligence or breach of an express warranty.\textsuperscript{73} A Georgia law, effective July 1, 1978, provides that no action may be commenced later than ten years from the date of the sale of the product.\textsuperscript{74} On June 1, 1978, Indiana put into force a two-year statute of limitations from the date of the accrual of the cause of action with an absolute period of ten years, measured from the date of the sale.\textsuperscript{75} Kentucky, on June 17, 1978, although not dealing directly with an absolute prohibition on the commencement of an action, created a statutory rebuttable presumption that the product was not defective if the injury occurred either more than five years after the date of the sale of the product or more than eight years after the date of the manufacture of the product.\textsuperscript{76} On August 1, 1978, the statute of limitations in Minnesota for actions based on strict liability became four years. Additionally, notice of a possible claim must be given to all persons against whom the claim is likely within six months after the injured party enters into an attorney-client relationship concerning the claim.\textsuperscript{77} Effective July 1, 1978, the statute of limitations in Nebraska is four years from the date of the injury with an outside period of ten years from the date of the sale of the product. The statute does not apply to the Uniform Commercial Code implied warranty provisions.\textsuperscript{78} South Dakota, effective July 1, 1978, has one of the shorter absolute periods which is six years after the date of delivery to first purchaser or lessee.\textsuperscript{79} A Tennessee law, effective the same date, made products liability actions sub-

\textsuperscript{72} ARIZ. REV. STAT. ANN. § 12-542 (1978).
\textsuperscript{73} ARIZ. REV. STAT. ANN. § 12-551 (1978).
\textsuperscript{74} GA. CODE ANN. §§ 105-106(2) (1978).
\textsuperscript{75} IND. CODE ANN. § 33-1-1.5-5 (Burns 1978).
\textsuperscript{76} KY. REV. STAT. § 411.310 (1978).
\textsuperscript{77} 1978 Minn. Sess. Law Serv. ch. 738 (West). (Note: All unofficial citations hereinafter provided are from material provided by the American Insurance Association, New York, New York.)
\textsuperscript{78} Neb. L.B. 665 (1978).
\textsuperscript{79} S.D. H.B. 1116 (1978).
ject to a six-year statute of limitations from the date of the injury and ten years from the date of the first sale or one year following the anticipated life of the product.\textsuperscript{60}

\textit{Defenses and Presumptions}\textsuperscript{61}

Arizona has created three affirmative defenses in the products liability field, effective September 15, 1978. The first affirmative defense is that the product as manufactured conformed to the "state of the art" if the defect is alleged to be the result of improper design or fabrication.\textsuperscript{62} The second affirmative defense is that the proximate cause of the injury was a modification by a third party.\textsuperscript{63} The third affirmative defense is that the injury was caused by the unforeseeable misuse of the product.\textsuperscript{64} A Georgia law, effective July 1, 1978, has statutorily created an affirmative defense based on substantial alteration of the product after its sale, if such alteration was the proximate cause of the injury.\textsuperscript{65} Effective June 1, 1978, defenses for products liability actions based on strict liability in tort in Indiana include assumption of the risk, non-foreseeable misuse, non-foreseeable modifications and, for design defect cases only, that the product was manufactured in compliance with the state of the art at the time of manufacture.\textsuperscript{66} The defendant manufacturer or seller has the burden of proof of these defenses.\textsuperscript{67} Kentucky has adopted statutes, effective June 17, 1978, which provide that a manufacturer is liable only for damage which would have occurred had the product been used in its original unmodified condition. Failure to provide routine maintenance is considered to be a modification but these revisions do not apply to modifications made in accordance with manufacturers' instructions. If the unauthorized modification or failure to exercise ordinary care was a substantial cause of the

\textsuperscript{60} TENN. CODE ANN. § 23-3703 (Supp. 1978).
\textsuperscript{61} Oregon has adopted the defense of unforeseeable alteration and a rebuttable presumption that products are safe as manufactured and sold. OR. REV. STAT. §§ 30.910, 30.915 (1977).
\textsuperscript{62} ARIZ. REV. STAT. ANN. § 12-683(1) (1978).
\textsuperscript{63} Id. § 12-683(2).
\textsuperscript{64} Id. § 12-683(3).
\textsuperscript{65} GA. CODE ANN. §§ 105-106(b)(1) (1978).
\textsuperscript{66} IND. CODE ANN. § 33-1-1.5-4 (Burns 1978).
\textsuperscript{67} Id.
occurrence, there is no liability even if the product is otherwise
defective. The rebuttable presumption is created that no defect
exists if the product conforms to generally recognized standards
or the state of the art but the presumption may be rebutted by a
preponderance of evidence to the contrary. A Minnesota law,
effective August 1, 1978, has adopted the ordinary useful life of
the product as the time limit within which a claim may be
brought. The manufacturer has an absolute defense if the claim
is brought based on an injury sustained following expiration of
the ordinary useful life. The ordinary useful life is the period dur-
during which the product should be useful with reasonable safety to
the user. Additionally, Minnesota adopted the doctrine of com-
parative negligence and applied it to strict tort liability. A Ne-
braska law, effective July 21, 1978, likewise adopted the doctrine
of comparative negligence and applies it to strict tort liability with
the modification that where the defendant's negligence is gross in
comparison to the plaintiff's, the plaintiff's negligence shall be
considered merely in mitigation of damages. Additionally, Ne-
braska has adopted a defense based on the state of the art which
is defined as the best technology reasonably available at the time.
Effective July 1, 1978, Tennessee joined the states providing for
a defense in products liability actions based on product alterations
which make the product unreasonably dangerous if it was not so
at the time it leaves the seller's control. Tennessee does not re-
quire the manufacturer to warn of a danger or hazard apparent
to the ordinary user and adopts a rebuttable presumption that the
product was not defective if the manufacturer complied with gov-
ernmental standards. The state of the art at the time the product
was placed on the market is a consideration in determining whether
the product was defective at that time.

Definition of Products Liability Action

Effective September 15, 1978, an Arizona statute has defined a
products liability action as any action for damages brought against
a manufacturer or seller of a product for bodily injury, death or property damage allegedly caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, sale, use or consumption of any product. This includes the failure to warn or to protect against the danger or hazard which caused the injury and the failure to provide proper instructions for the use or consumption of the product. An Indiana law, effective June 1, 1978, adopted a broader definition which includes all actions for injury caused by any of the factors involved in the manufacture or distribution of a product. A similarly broad definition was adopted by Kentucky on June 17, 1978. The Nebraska statute, effective July 21, 1978, adopted a definition of products liability actions substantially similar to that adopted by Arizona. A Tennessee statute, effective July 1, 1978, has adopted a definition which defines the terms "defective condition" and "unreasonably dangerous." A products liability action is defined in terms of the factors involved in the production and distribution of a product and the various legal theories, such as negligence, warning, failure to warn of an obvious defect, upon which a cause of action to recover for injuries might be based.

Applicability and Limitations on a Doctrine of Strict Liability in Tort

The thrust of the Arizona statute is to place the liability on the manufacturer rather than the seller. This is accomplished by providing that a manufacturer who refuses to accept a tender of defense from a seller shall indemnify the seller and reimburse him for costs and attorney's fees for any judgment against the seller, unless the seller had knowledge of the defect or the seller altered or installed the product, which was a substantial cause of the injury, not authorized by the manufacturer, and not performed in compliance with the directions or specifications of the manufacturer. If the seller, however, provides plans or specifications, the

94 IND. CODE ANN. § 33-1-1.5-4 (Burns 1978).
seller must then indemnify the manufacturer for any judgment against it unless the manufacturer had or should have had knowledge of the defect at the time of the sale of the product." A Georgia law, effective July 1, 1978, eliminated the requirement of privity in actions for tort and holds manufacturers of personal property sold as new property liable in tort for injury caused by the sale of unmerchantable property, when the unmerchantable defect was the proximate cause of the injury. Effective June 1, 1978, Indiana codified Section 402(A) of the Restatement (Second) of Torts. Kentucky, effective June 17, 1978, exempts a seller from liability if the manufacturer is identified and subject to jurisdiction in Kentucky provided the product was sold in its original manufactured condition or package. The only instance in which the seller can be liable is if he knew or should have known that the product was in an unreasonably dangerous and defective condition at the time of the sale. After July 21, 1978, Nebraska sellers are strictly liable in tort only where they are also the manufacturer. Tennessee has adopted a provision, effective July 1, 1978, similar to that of Kentucky, in that the seller is not liable if he sells a product in a sealed container or where he has no reasonable opportunity to inspect the product. Additionally, he is not strictly liable in tort unless he is either also the manufacturer or the manufacturer is not subject to jurisdiction in Tennessee.

Admissibility of Evidence

Arizona has adopted an evidentiary rule in products liability actions, effective September 15, 1978, which precludes the admission of evidence of changes or advances in the state of the art or any change in the design or method of manufacturing similar products subsequent to the time the product was designed, for any purpose. A Kentucky law, effective June 17, 1978, has made evidence of subsequent design changes or improvements admissible

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98 Id. § 12-684(C).
100 GA. CODE ANN. §§ 105-106(a), 106(b)(1) (1978).
101 IND. CODE ANN. § 33-1-1.5-4 (Burns 1978).
only after a determination of relevancy and materiality by the

court without a jury.\textsuperscript{106} Nebraska has adopted the rule that
evidence of remedial measures is admissible only for purposes such
as proof of ownership, control, or feasibility of precautionary mea-
sures, effective July 21, 1978.\textsuperscript{107}

\textit{Ad Damnum Clause}

Both Arizona and Minnesota have eliminated the ad damnum
clause in products liability litigation. In Arizona, effective Sep-
tember 15, 1978, no dollar amount may be included in the com-
plaint. A mere statement that the jurisdictional amount is satisfied
must be included.\textsuperscript{108} In Minnesota, a dollar amount may be in-
cluded in the complaint only if the amount claimed is less than
$50,000. If it is greater than $50,000 the complaint shall so
state.\textsuperscript{109}

\textit{Miscellaneous Changes}

Minnesota has adopted three other provisions, effective August
1, 1978, in the area of products liability. The first of these is that
the award of punitive damages requires clear and convincing proof
that the defendant acted with wilful indifference to the rights and
safety of others. Recovery of punitive damages against the master
or principal is limited and any award must be measured by those
factors which would ordinarily bear on the purpose of punitive
damages. Additionally, Minnesota has provided for contribution
in proportion to percentage of fault, but, if all or part of a
party's equitable share is uncollectible from that party, the amount
so uncollectible shall be reallocated. Finally, costs, disbursements
and reasonable attorney's fees may be awarded to the prevailing
party if the other party and/or his attorney is found to have acted
in bad faith.\textsuperscript{110}

\textit{Insurance Regulations}

Five states have enacted statutes requiring products liability
insurers to file reports with the state government. Effective Jan-

\textsuperscript{107} Neb. L.B. 665 (1978).
\textsuperscript{108} \textit{ARIZ. REV. STAT. ANN.} § 12-685 (1978).
\textsuperscript{109} 1978 Minn. Sess. Law Serv. ch. 738 (West).
\textsuperscript{110} \textit{Id.}
January 1, 1979, Arizona requires that such an insurer write a report including product liability claims against its insureds, located in the state, which were closed, either by payment or some other action, during the preceding year. Georgia, Kansas, Minnesota, Nebraska and Florida have adopted similar statutes.

(3) Model Products Liability Law

On Friday, January 12, 1979, the Department of Commerce published in the Federal Register the "Draft Uniform Product Liability Law." This draft represents the culmination of the efforts begun by the Products Liability Task Force which led to the report discussed previously, issued in November of 1977. The Model Act defines its coverage as creating a claim for either personal injury, death or property damage caused by a defective product to any person harmed and imposes liability on the product seller which includes the manufacturer. The claim created by the Model Act supersedes any action based on strict liability in tort, breach of warranty, or any other substantive legal theory in tort or contract. The Act further creates three basic standards of responsibility. The first is that the product was defective because not made in accordance with the product seller’s own design and manufacturing standards. The second is that the product was defective in design because the manufacturer should have used an alternative design which was, among other considerations, technologically feasible and which would have prevented the harm suffered by the claimant. The third basic standard of responsibility involves a product which was defective because it did not contain adequate warnings. The standards for adequate warnings are similar to those for defect in design. If some aspect of the product is unavoidably unsafe, the product seller is not subject to

114 Id. at 2,997-98.
115 Id. at 2,998, § 102(2).
116 Id. § 104(A).
117 Id. § 104(B).
118 Id. § 104(C).
liability for harm caused by that aspect of the product.\textsuperscript{119}

The term "state of the art" is defined as relevant knowledge in existence and reasonably feasible for use at the time of manufacture.\textsuperscript{120} Evidence of changes in the state of the art subsequent to manufacture are inadmissible generally and certain criteria may be the basis for a motion for summary judgment.\textsuperscript{121} Similar standards are created for a defense based on compliance with legislative or administrative standards.\textsuperscript{122}

One novel aspect of the Model Act is that it requires any attorney who enters into an attorney-client relationship with a potential claimant to notify the product seller within six months of the date of the beginning of that relationship.\textsuperscript{123} The product seller is then required to advise the attorney of all other sellers and manufacturers in the chain of manufacture and distribution.\textsuperscript{124} If the failure of either the attorney or the product seller to comply with the requirements of this section leads to monetary loss, the non-complying party is liable for damages, costs and reasonable attorney's fees.\textsuperscript{125}

The Model Act also defines the term "useful safe life" to be the reasonably expected safe use of the product. This includes normal deterioration as well as any modification or alteration of the product by a third party.\textsuperscript{126} It provides that the product seller shall not be liable for injury caused by the product after its useful safe life.\textsuperscript{127} A similar concept is the "statutes of repose." These deal both with traditional workmen's compensation cases as well as non-work related injuries. In the case of a work-place injury, a claimant otherwise entitled to workmen's compensation, may bring a claim under the Model Act for injury occurring within ten years after the delivery of the completed product to the first purchaser.\textsuperscript{128} If the ten year period has expired but the worker can otherwise prove

\textsuperscript{119} Id. § 105(c).
\textsuperscript{120} Id. § 106(a).
\textsuperscript{121} Id. § 106.
\textsuperscript{122} Id. at 2,999, § 107.
\textsuperscript{123} Id. § 108(a)-(b).
\textsuperscript{124} Id. § 108(c).
\textsuperscript{125} Id. § 108(d)-(e).
\textsuperscript{126} Id. § 108(a)-(b).
\textsuperscript{127} Id. § 109(A)(1).
\textsuperscript{128} Id. § 109(A)(2).
\textsuperscript{129} Id. § 109(B)(1)(a).
that the product was unsafe, he may increase his claim in work-
men's compensation to cover wages which would otherwise not
be compensated. This also includes wrongful death cases. An
employer who is subject to liability under these provisions may
seek contribution from the product seller which shall be limited
to the seller's comparative fault. For non-work place injuries, or
injuries occurring after ten years from the date the product is
first sold, there is a presumption that the product has exceeded
its useful life. Additionally, all claims under the Act must be
brought within three years of the time of discovery or when dis-
covery should have occurred of the facts giving rise to the claim.
The Act creates an additional defense of third-party alteration and
modification and adopts the standard of comparative conduct
and provides that damages are to be apportioned accordingly.
The defense of knowingly using a defective product is an absolute
defense. The Model Act further provides for contribution and
implied indemnity among multiple defendants and the standard is
the comparative standard used as to all parties. In conjunction
with the section on workmen's compensation statutes, this may
assist the product manufacturer who is now the target defendant
in a workmen's compensation case.

It is uncertain, however, whether this will have any impact on
the manufacturers of military products who are now target defend-
ants if a serviceman is injured or killed. This is particularly true
in light of the decision by the Supreme Court in Stencel Aero
Engineering Corp. v. United States, which prohibited a third-
party action by the manufacturer against the United States
where the suit was initiated by a serviceman. This is an extension
of the doctrine of immunity for the United States from suits by
servicemen created by the same Court twenty-seven years earlier

128 Id. § 109(B)(1)(b).
129 Id. § 109(B)(1)(c).
130 Id. § 109(B)(1)(d).
131 Id. at 3,000, § 109(B)(2).
132 Id. § 109(C).
133 Id. § 110.
134 Id. § 111.
135 Id. § 111(c).
136 Id. § 112.
in *Feres v. United States*. This position was recently reaffirmed when a petition for certiorari was denied in *Textron Inc. v. United States and the Commonwealth of Virginia*, where an attempt was made to obtain contribution when the deaths of two National Guardsmen had occurred in an accident involving a ten-year-old Army helicopter. Certainly, if a Model Act is to be adopted, it should be redrafted to cover this situation.

Finally, the Model Act provides for arbitration of any products liability claim where the amount in dispute is less than $30,000. The Act provides for a limitation on "pain and suffering" to $25,000 in cases where there is no permanent serious disfigurement, impairment of bodily function or mental illness as a result of the injury. Additionally, any recovery is to be diminished by compensation received from a public source. Punitive damages may be awarded if reckless disregard is shown; among other items to be considered, however, is the possibility of other punitive damages awards to persons similarly situated.

Of all of the proposed legislation purporting to establish a body of law in the products liability field, it is submitted that this proposed "Model Act" has the greatest probability of ultimate enactment since it is being sponsored by the Department of Commerce, and consequently is not vulnerable to change of sponsorship as are some of the other bills. Furthermore, in view of the impact of product liability litigation on the aircraft industry, one of the few remaining areas which contributes positively to the United States' balance of payments through the export of commercial and military aircraft, it is probable that legislation of this kind will receive favorable attention from Congress. There are some areas not adequately covered by this proposal, however, which should be the subject of comment by members of the industry and the bar. Furthermore, considering the time it took to finally obtain universal acceptance of other model acts such as

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142 Id. at 3,002, § 118.
143 Id. § 119.
144 Id. § 120.
the Uniform Commercial Code, it may be some time before such a comprehensive product liability act is adopted by all the states.

II. AIRLINE DEREGULATION ACT OF 1978

The Airline Deregulation Act of 1978 not only amends, but virtually replaces the economic regulation provisions of the Federal Aviation Act of 1958 in what is surely the most comprehensive overhaul of a government regulatory scheme in history. The preamble states that the purpose of the Act is to foster an air transportation system which relies on minimally restricted competition to determine the quality, variety and cost of air services. In fact, the Act is intended to remove to the greatest extent possible the government control of air carriers. To this end, it moves affirmatively to establish procedures intended to create a system of permissive entry into and exit from air routes, flexibility in the establishment of fares and services, and the gradual phasing out of the controlling agency and most of that agency's currently constituted authority. These affirmative steps are cautiously restrained through specific directives to prevent industry concentration and preserve, where possible, essential air service to small communities. To facilitate this basic change in treatment of the air transportation industry, the Act reorients policy guidelines, creates various presumptions intended to favor its new policies, and shifts burdens of proof and persuasion which formerly served as bulwarks of industry protection.

Section 3 of the Act sets out ten policy considerations which the Civil Aeronautics Board is to apply with regard to decisions affecting interstate and overseas air transportation. The Act

145 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (amending 49 U.S.C. §§ 1301 et seq. (1976)) [hereinafter referred to as "the Act"]. There are understandable exceptions and exemptions created throughout the Act for air transportation in Alaska and Hawaii. Because of the nature of this article there will generally be no attempt to address these specific provisions.


147 92 Stat. 1705-07 (1978) (to be codified in 49 U.S.C. § 1302(a)).

148 The Civil Aeronautics Board is referred to alternatively as the "CAB" or the "Board".

149 The Act was not intended to substantially affect foreign air transportation and Congress specifically did not consider this aspect of the air transportation industry when it amended the policy section of the old legislation. See S. REP. No. 631, 95th Cong., 2d Sess. 51-52 (1978).
states that safety is to have the highest priority in air commerce and recites numerous other goals, including low priced services and prompt administrative decisions. It is clear, however, that the overriding theme of both the policy declarations and the Act as a whole is the fostering of competition among the air carriers. The Act rejects policies under the old regulatory scheme which were intended to protect the industry and generally endorses the recent policies of the CAB directed at encouraging free competition qualified only by the political constraints of small town interests and the always present fear of a too successful competitor. Its clear preoccupation with competition can best be seen by examining how Congress sought to implement this new policy.

A. Entry and Exit

The sunset provisions of the Act will result in a totally unregulated route structure by 1981. Until then, however, the most significant change from past policy is the creation of a new standard to be applied to applicants seeking route authority. In Section 8, and throughout the Act, the "public convenience and necessity" test is softened. The formerly rigorously applied standard, which necessitated a finding that the proposed service was "required," is now a more liberal policy under which the CAB may grant such authority where the service is merely "consistent with" the public convenience and necessity. To facilitate this finding, the Act creates a presumption of consistency and places upon those who would oppose the new service the burden of proof in rebutting that presumption. Lest the old protectionist attitudes of the CAB

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152 In fact, Congressional interest in safety matters appears to have been confined primarily to extending insurance requirements and the application of existing regulations to commuter and non-certified carriers, and calling for various studies as to the effects of the Act. The Act, §§ 5, 20, 32-33, 92 Stat. 1709-10 1721-23, 1732-40 (to be codified in 49 U.S.C. §§ 1371(q)(1), 1386(b)(4), 1389(c)(3) and 1307(b), respectively), see also H.R. REP. No. 1779, 95th Cong., 2d Sess. 87, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 3799-800.


154 See notes 136-137, supra, and accompanying text.


re-emerge, the Act further establishes that the opponents must meet this burden with a preponderance of the evidence. The net effect of these changes is that any applicant who can meet its burden by demonstrating that it is "fit, willing and able" to provide the service proposed may be certificated by the Board.

In order to allow the carriers to adopt their market structures gradually to the eventual total deregulation of the industry, the Act establishes three programs to facilitate the award of certificates. Section 12 of the Act establishes the automatic entry program which allows Board certificated passenger carriers and major interstate carriers to apply for non-stop route authority between any one pair of points during each of the next three years. Established carriers are permitted to similarly protect one route per year during this period and the CAB has authority to step in and take appropriate measures to prevent major market dislocations from causing substantial public harm to the transportation system as a whole or a substantial reduction in air service to smaller communities in any region of the country. The most significant aspect of this program is that there is no public convenience and necessity test for applications filed under it. Moreover, the Board's recently adopted multiple permissive entry policy, under which more than one carrier may receive authority for the same route, has been specifically endorsed by Congress and insures that economic forces rather than government largess will determine route services.

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157 Id.
158 Id.
160 Major interstate carriers are state certificated carriers which have operated more than 100,000,000 available seat miles during the preceding year.
161 The years are 1979, 1980 and 1981. 92 Stat. 1716 (1978) (to be codified in 49 U.S.C. § 1371(d)(7)(A)). The Act also provides for a second round of applications for those carriers which were not certificated because the Board determined they did not meet the fitness requirements for the particular route or where more than one carrier applied for the same route. If the carrier is successful in its application in the second round, it loses any authority granted in the first series of applications. 92 Stat. 1717 (1978) (to be codified in 49 U.S.C. § 1371(d)(7)(B)).
163 For industry reaction to this program, see AV. WEEK & SPACE TECH., September 4, 1978, at 53-54.
The second innovative program relates to unused or dormant authority not exercised sufficiently to satisfy the minimum standard created by Section 10 of the new Act. Although the actual procedures vary depending on the number of carriers, if any, serving the route on which the authority is dormant, their overall effect is to encourage the exercise of the authority granted to either the old or new carrier. The public convenience and necessity standard applies to routes served by more than one carrier, but the Act creates a rebuttable presumption that an application to replace a dormant carrier is consistent with the public convenience and necessity and requires the CAB to issue a certificate to the first applicant to apply after the route becomes dormant. As further encouragement, the CAB has discretion to suspend the holder of a dormant authority on a route not otherwise served during the start-up period for the new applicant. Although the Act permits the holder of a dormant authority to protect itself by giving notice of its intention to reactivate service, it further ensures that the dormancy will not be prolonged or repeated by requiring that the service be recommenced within a minimum amount of time and that such notice of intention to reactivate can only be filed once for any particular market. The Board retains leverage over the replacement carrier to provide the service it has requested authority for because it does not have to suspend

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105 Excepting specific seasonal authority and breaks in service due to labor disputes, the minimum service required is five round trips per week for at least thirteen weeks during any twenty-six week period. 92 Stat. 1713 (1978) (to be codified in 49 U.S.C. § 1371(d)(5)(A)). Determination of which routes are actually dormant has proved to be no easy task for either the airlines or the CAB. See Av. Week & Space Tech., December 18, 1978, at 23.

106 The Board must authorize the new service within either fifteen or sixty days from the date of the application depending upon whether the route is served by fewer or more than two carriers. Compare The Act § 10, 92 Stat. 1714 (1978) (to be codified in 49 U.S.C. § 1371(d)(5)(C)) with The Act § 10, 92 Stat. 1715 (1978) (to be codified in 49 U.S.C. § 1371(d)(5)(F)).

107 See Av. Week & Space Tech., note 165 supra.

108 Unless it finds that the suspension is unnecessary to encourage the new applicant, the Board must suspend the incumbent for up to twenty-six weeks. The Act § 10, 92 Stat. 1716 (1978) (to be codified in 49 U.S.C. § 1371(d)(5)(J)).

109 The minimum time is thirty days. The Act § 10, 92 Stat. 1715 (1978) (to be codified in 49 U.S.C. 1371(d)(5)(G)).

110 Id.
the dormant incumbent unless it finds that such suspension is necessary to encourage the service by the newly authorized carrier.

Section 13\(^{171}\) of the Act authorizes the Board to issue certificates in order to test or assess experimental services which would provide innovative or low-priced air transportation. Other liberalities afforded by the Act include new fill-up rights which allow a carrier operating an overseas flight with more than one pick-up point in the United States a limited right to carry domestic passengers between those interstate points.\(^{172}\) Similarly, the Act voids closed-door restrictions in existing certificates and prohibits their application in future grants of authority.\(^{173}\) The Act calls for the CAB to establish simplified procedures for making its determinations.\(^{174}\) In this same regard, it establishes new deadlines for CAB determinations which ensure that except for delays caused by the applicant, no case may take longer than one year to decide. Under the sunset provisions, the CAB will no longer concern itself after 1981 with applying the public convenience and necessity test but will, until its scheduled disestablishment in 1985, continue to determine the fitness of individual applicants.\(^{175}\)

B. Fares

In keeping with its general goal of increased competition, the Act provides a statutory endorsement of recent policies of the CAB intended to increase flexibility in fare structures and service by the air carriers. Section 37\(^{176}\) defines a "standard industry fare level\(^{177}\) around which it establishes a zone within which the CAB

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\(^{173}\) The Act § 16, 92 Stat. 1719-20 (1978) (to be codified in 49 U.S.C. § 1371(e)(7)). In addition to a blanket exemption for points in Hawaii, closed-door restrictions resulting from a sale, exchange or transfer of authority between air carriers are exempt from this section. Id.


\(^{175}\) See note 151 supra.

\(^{176}\) The Act § 37, 92 Stat. 1741-43 (1978) (to be codified in 49 U.S.C. § 1482(d)).

\(^{177}\) "Standard Industry Fare Level" means the fare in effect on July 1, 1977, as adjusted by the Board, or on new services, the initial fare. The Act § 37, 92 Stat. 1741-42 (1978) (to be codified in 49 U.S.C. § 1482(d)(6)(A)).
may not find a fare unjust or unreasonable unless it pertains to a market clearly dominated by a single carrier. The zone protects fare adjustments up to five percent above and fifty percent below the standard industry fare level. The Board is authorized to expand the zone downward through the rulemaking process and is required to adjust the industry fare level at least twice a year. There is no presumption that rate changes which fall outside the established zone are unjust or unreasonable but such findings would, of course, enable the Board to suspend or replace them with lawful fares. The party opposing a fare as too low bears the burden of proof on this issue. Within the zone, only those fares found to be predatory may be suspended.

The fare zone created by the Act is similar in its effect to the criteria recently applied by the CAB under the Domestic Passenger Fare Investigation (DPFI) standards. Under the DPFI, the Board could still find a fare unjust or unreasonable even though it fell within the DPFI's nominally suspension-free zone. Where the suspension-free zone and the new zone overlap, that vestige of power will now be restricted. The suspension-free zone had been based on "normal" fares prescribed by the CAB while the zone established by the Act has a more realistic base in the form of the standard industry fare level which relies on actual costs. The CAB's new authority with regard to fares would not appear to be any less flexible than under the DPFI, since as previously mentioned, the Act also permits the Board to expand the zone (at least downward) through the rulemaking process.

The criteria laid down by the Act with regard to the CAB's rate regulation indicates a clear congressional policy favoring low fares and the encouragement of pricing and service options. The Board is specifically required to expand the availability of

179 A dominating carrier is one which carries seventy percent or more of the certificated carrier passenger traffic in that market, The Act § 37, 92 Stat. 1741 (1978) (to be codified in 49 U.S.C. § 1482(d)(4)(A)).

170 Id. The upper limit of the zone became effective July 1, 1979.

171 The adjustments are to reflect the percentage change in the industry's average actual operating cost per available seat-mile for both interstate and overseas transportation. The Board is specifically prohibited from artificially adjusting these costs, The Act § 37, 92 Stat. 1742 (1978) (to be codified in 49 U.S.C. § 1482(d)(6)(B)).

180 43 Fed. Reg. 39,522 (1978) [hereinafter referred to as the DPFI].

181 See note 180, supra, and accompanying text.
off-peak fares which were obviously a particular favorite of the Congress. Although the carrier is to be allowed to determine prices in response to its own costs and the market conditions in the areas which it serves, complaints by affected civic authorities are provided for and accorded expedited handling. In the area of commuter traffic, the Act requires certified carriers to extend joint fares to commuter carriers and requires the CAB to extend any uniform formula which it might develop for such joint fares to the commuter carriers as well. Needless to say, if the congressional intent is realized, all of these provisions will terminate on January 1, 1985, when the Board is tentatively scheduled to go out of existence under the sunset provisions of the Act.

C. Anti-trust

The liberalizing aspects of the Act are least noticeable in the anti-trust area and, in fact, it provides more stringent standards in some cases. If any relaxation of regulation in this area is to be found in the Act, it is section 26, which narrows the class of transactions which must be approved by the CAB. Where formerly any consolidation, merger or acquisition involving a person engaged in “any phase of aeronautics” was prohibited unless approved by the Board after notice and hearing, the new Act replaces this broadly interpreted phrase with a narrower class of “persons substantially engaged in the business of aeronautics.” Similarly, acquisitions of air carriers by persons with no other aviation interests have been removed from the CAB’s jurisdiction. In all of these cases, however, the transactions will of course be subject to the anti-trust laws administered by other agencies.

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184 The Board must grant, deny or dismiss such complaints within ninety days, The Act § 37, 92 Stat. 1742 (1978) (to be codified in 49 U.S.C. § 1482(d)(8)).
185 The old Act required only that the joint fares be extended to other certificated carriers. 49 U.S.C. § 1374(a)(1) (1976).
186 See note 151, supra, and accompanying text.
187 There was also an abortive attempt to bring international air transportation into the anti-trust framework, but the pro-competitive proposal was lost in the flurry of activity which surrounded the Congress’ preoccupation with the Act. S. 3363, 95th Cong., 2d Sess. (1978).
Although the Act continues the prohibition against approving any transaction that would result in a monopoly, it provides some additional guidance as to the new and tougher "public interest" standard to be applied by the CAB under the new legislation. This new public interest test would not be satisfied where the effect of approving the transaction would result in substantially lessened competition in any region unless the CAB finds both (1) that the negative effects are outweighed by the probable satisfaction of significant transportation needs, and (2) no reasonably available and less harmful alternative is available. Opponents of the transaction have the burden of proving its negative impact while proponents must negate the availability of any less anti-competitive alternatives. The prohibition against interlocking relationships between and among carriers has been liberalized by narrowing the class of persons affected to the new standard of those "substantially engaged in the business of aeronautics."

While under the former regulatory scheme agreements between air carriers affecting domestic air transportation had to be filed with the CAB, such filings are now only voluntary. The new Act requires the Board to apply a more stringent public interest test, however, in that an agreement which has a negative impact upon competition may no longer be approved simply by demonstrating that it satisfies a serious transportation need or secures important public benefits. It must now also be shown that the same ends are not attainable by reasonably available and less anti-competitive means. The burdens which must be met are slightly different from those which apply to the merger transactions, however, in that the proponents of the agreement must still satisfy the old test while the opponents must prove the availability of the less restrictive alternatives.

Guidance under the old Act was virtually non-existent. See 49 U.S.C. § 1378 (1976).


By filing, however, the carrier may obtain the somewhat narrower anti-trust immunity which CAB approval now carries. See note 197 infra.

The standard is the "local cartage" test. Local Cartage Agreement Case, 15 CAB 850 (1952). See also CAB Order No. 78-8-150 (August 25, 1978).

Findings to this effect must be reflected in the Board's order approving
The anti-trust immunity conferred by CAB approval is now more restrictive in that it applies only to the anti-trust laws and then only to the extent necessary to permit the transactions specifically approved or contemplated by the CAB.\footnote{The Act § 28, 92 Stat. 1730 (1978) (to be codified in 49 U.S.C. § 1382(c)(2)(C)).} Of equal importance, however, is the fact that such immunity no longer automatically accompanies CAB approval but lies within the CAB's discretion. The exercise of such discretion is restricted by the public interest test.\footnote{The Act § 30, 92 Stat. 1731 (1978) (to be codified in 49 U.S.C. § 1384). Formerly, Board approval carried with it immunity from both the antitrust and other laws which would otherwise restrict the transaction or relationship. 49 U.S.C. § 1384 (1976).} In keeping with its tougher anti-trust policy, the Act renders ineffective all current mutual aid agreements and narrowly proscribes any future pacts.\footnote{The Act § 29, 92 Stat. 1730-31 (1978) (to be codified in 49 U.S.C. § 1382). For at least one airline's opinion of the current agreements, see AV. WEEK & SPACE TECH., July 24, 1978, at 34.} If all proceeds as scheduled, the remaining anti-trust authority and responsibility of the Board will be transferred to the Department of Justice on January 1, 1985.\footnote{See note 151 supra. Authority over domestic mergers and interlocking relationships will be transferred to the Department of Justice on January 1, 1983. The Act, tit. XVI (to be codified in 49 U.S.C. § 1551(a)(3)).} Considering the pro-competitive emphasis of the Act itself, this change in responsibility can hardly be viewed as an improvement by the airlines in view of the tougher anti-trust position usually adopted by the Department of Justice and may partially explain the current merger rush now sweeping the industry.\footnote{See AV. WEEK & SPACE TECH., September 4, 1978, at 36-37.} Indeed, increased anti-trust activity in the aviation industry can be projected particularly if the increased competition with reduced fares contemplated by the Act does not materialize.

D. Small Community Service

The Act does away with the thirty-year-old fiction of subsidizing air carriers through compensation for the carriage of mail and replaces it with a realistic system of subsidies intended to sustain service to small communities in the face of real world economies now unleashed by the drive for competition. To avoid market dis-
locations, Section 33 provides for a phasing out of the current subsidy program in favor of the new structure which for ten years will guarantee essential air service. The new program is self-limiting in that the CAB may not provide a subsidy in excess of that which is needed to maintain the essential services.

The current subsidy program, although nominally compensating for mail service, has been aimed at sustaining small local carriers rather than at providing necessary services to small communities. In reorienting its policy away from the subsidy of carriers and to small community assistance, the Act correspondingly does away, for a four-year period, with the current profit sharing formula employed by the CAB. Under this formula, profits from non-subsidized portions of the carriers' operations were used to offset the subsidies paid to it. Since the carriers' profit or economic viability is no longer the object of the subsidy, this formula is now no longer appropriate. During the phase-out period, the Act requires that subsidies be kept at such a level as to maintain services at their 1977 levels. Should a local carrier stop serving a particular point, it cannot have the old subsidy or that applicable during the phase-out period resumed for that point. It can, however, apply for a subsidy under the new program.

The new subsidy program requires the CAB to guarantee for ten years "essential air service" to the smaller American communities presently appearing on the certificate of an air carrier, whether or not service is currently being provided, and those which have been removed from certificates during the last ten years. Depending upon the number of carriers serving a particular "eligible point," the CAB must determine what constitutes "essential air transportation" for that point and review these determi-

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293 Although slightly different determinations must be made with regard to communities currently certificated as opposed to those which have been removed from certificates since July 1, 1968, the subsidy programs are virtually identical for both groups with the exception that the CAB may not require a carrier to continue service to a city within the latter category. Compare The Act § 33, adding § 419(a), 92 Stat. 1732-33 (1978) (to be codified in 49 U.S.C. § 1389(a)) with The Act § 33, adding § 419(b), 92 Stat. 1736 (1978) (to be codified in 49 U.S.C. § 1371).

294 "Essential air transportation" is defined as reasonable access to the national air transportation system and not less than the 1977 service or two daily round trips, five days a week, whichever is less. The Act § 33, 92 Stat. 1739 (1978) (to be codified in 49 U.S.C. § 1371(f)).
nations periodically.\textsuperscript{205} If the Board finds that a community will not receive essential air transportation without compensation, it is required to invite applications for the performance of subsidized service.\textsuperscript{206} Where volunteers are not forthcoming, the CAB must require a carrier, including non-certificated carriers, to continue service while the CAB uses "every effort" to find a replacement.\textsuperscript{207} Such forced service can be required for an indefinite series of thirty-day periods. The carrier during this period would, of course, be entitled to subsidy either at the rate then currently received or an amount equal to its losses. The CAB is required to report to Congress on the feasibility and appropriateness of devising formulas by which the local civic recipients of the benefits of these subsidy programs could contribute or share the cost of such subsidies\textsuperscript{208} and, of course, civic input into the entire subsidy process is considerable.

In keeping with its primary emphasis, the Act provides that starting in 1983 a carrier subsidized under the old or outgoing program may be replaced by an applicant who can show that it can improve service \textit{and} reduce the subsidy at a particular point. Similarly, a subsidized carrier under the new program may be replaced after two years where the applicant can show that it can improve service \textit{or} operate in such a way as to reduce the subsidy. In the interest of safety, commuter services under the new program are brought under tighter control by requiring the CAB to apply its "fit, willing and able" test to all such subsidized carriers. Such commuters are similarly required to comply with all new FAA standards and particularly satisfy the insurance requirements of the Act. The CAB is further directed to establish by rulemaking procedures realistic subsidy computation guidelines which must include expense elements based upon representative


\textsuperscript{206} The desirability of a linear system and the applicant's experience are factors which the CAB must consider in granting the subsidy to a particular applicant. The Act § 33, adding § 419(a)(4), 92 Stat. 1733-34 (1978), and § 419(b)(5), 92 Stat. 1737 (1978) (to be codified in 49 U.S.C. §§1371 & 1376 and §§ 1389(a)(4) & (b)(5), respectively).

\textsuperscript{207} See note 199 supra.

costs of carriers operating aircraft of a type appropriate to the essential air transportation as defined for any particular point. The Department of Transportation will assume responsibility for administering the subsidy program on January 1, 1985, when the Board is tentatively scheduled to go out of existence. 309

E. Miscellaneous

(1) Charters

In addressing the problems of the expanding field of low-cost air transportation, the Act endorses recent CAB policies in the area of charter fares regarded by many as overly liberal and at the same time specifically proscribes certain activities which a zealous panel might see as the next logical step in liberalization. Section 20 310 not only endorses the Public Charter rule by providing that the CAB may not restrict the normal commercial decisions of charter operators, except to the extent required by the public interest, but also prohibits the Board from backsliding into more restrictive regulations than were in effect at the time Congress was considering the deregulation legislation. 311 The Act also specifically prohibits the commingling of chartered and scheduled passengers as well as the marketing of inclusive tours by charter air carriers. The legislative history, however, indicates that this last prohibition is not carved in granite but may be subject to CAB exemptions intended to test the advantages of such packages. 312

(2) Federal Prerogatives

Lest there be any doubt, the Act now specifically provides for federal preemption of the field of the regulation of carriers certified for interstate service. 313 Moreover, Section 4 provides that in any case where the federal and state jurisdictions overlap a particular carrier, the federal authority is deemed to adopt the state

309 See note 151 supra.
310 The Act § 20, 92 Stat. 1721 (1978) (to be codified in 49 U.S.C. § 1371(n)).
311 That date was October 1, 1978. The Act § 20, 92 Stat. 1721 (1978) (to be codified in 49 U.S.C. § 1371(n)(2)).
authority until otherwise passed upon by the CAB. This leaves to state regulation only those air carriers which provide services completely within the state's territory. The Act similarly preempts a former presidential prerogative by narrowing the review of CAB international route decisions by the Chief Executive.\footnote{The Act § 34, 92 Stat. 1740 (1978) (to be codified in 49 U.S.C. § 1461(a)).} The President may no longer bequeath international routes but is limited to disapproving CAB decisions and then solely upon the basis of foreign relations or national defense considerations. Moreover, Section 34 specifically prohibits the President from exercising even his right of disapproval on the basis of economic or carrier selection considerations.

Section 31\footnote{The Act § 31, 92 Stat. 1731 (1978) (to be codified in 49 U.S.C. § 1386(b)(1)).} of the Act continues to provide the Board with authority to exempt carriers from its economic regulations but expands upon previous authority. It eliminates all restrictions on the category of persons which might receive an exemption and also removes the narrow and negative standard of the previous legislation and replaces it with the new Act's liberalized standard of consistency with the public interest. Section 20\footnote{The Act § 20, 92 Stat. 1721 (1978) (to be codified in 49 U.S.C. § 1371(q)).} extends to all carriers the CAB's authority to require insurance protection and Section 39\footnote{The Act § 39, 92 Stat. 1743 (1978) (to be codified in 49 U.S.C. § 1551(c)).} restricts disclosure of information by the government in matters relating to international negotiations where the competitive position of American carriers might be adversely affected. Section 43\footnote{The Act § 43, 92 Stat. 1750 (1978) (to be codified in 49 U.S.C. § 1552).} throws a mantle of protection around certain eligible air carrier employees who might be adversely affected by the increased competition caused by the Act. Finally, the Act provides for a plethora of reports and studies\footnote{The Act § 40(c), 92 Stat. 1745 (1978) (to be codified in 49 U.S.C. § 1551(c)).} which are geared to examining the effects of and anticipating the sunset provisions of the legislation, which if successful, will result in the disappearance of both the CAB and most of its current authority and the

\footnote{Most important of these is the report the Board must send to Congress by January 1, 1984, reviewing its implementation of the Act and recommending whether it should be allowed to go out of existence on January 1, 1985. Id.}
transfer of those vestiges of power which remain to the Departments of Transportation, Justice and the Postal Service as of January 1, 1985.

III. OTHER PROPOSED LEGISLATION

A. Airport and Aircraft Noise Reduction Bill

A number of bills aimed at assisting aircraft and airport operators meet recent noise standards were introduced during the Ninety-Fifth Congress. Although the proposals were generally similar in approach, at least one issue, financial assistance for retrofit and replacement of older aircraft, caused considerable headaches for its proponents. This controversy, however, was overshadowed, along with virtually all other aviation matters, by congressional preoccupation with the Airline Deregulation Act of 1978, and never seriously approached resolution. As this article is being written, at least one congressional subcommittee is preparing a new version of this legislation which will be introduced early in the Ninety-Sixth Congress. Available information indicates that the provision for financial assistance for retrofit and replacement of aircraft has been deleted. Other than this change, the bill under preparation is expected to follow previous proposals relating to recent noise standards, as well as safety matters.

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222 See note 145 supra. See also AV. WEEK & SPACE TECH., October 23, 1978, at 29-30.

223 Since this article was originally drafted, both Houses have prepared new versions of this legislation which were introduced early in the 96th Congress. Although substantially similar, the House version, H.R. 2458, 96th Cong., 1st Sess. (1979), does not provide financial assistance to the aircraft operators while the Senate bill, S. 413, 96th Cong., 1st Sess. (1979), authorizes the imposition of both a "Domestic" and "International Noise Abatement Charge," the proceeds of which may only be utilized to bring an operator's fleet into compliance with federal noise abatement. Both bills would require compliance with such regulations by both domestic and foreign operators. The more lenient version was approved by the Senate in early May, but formal action by the House and the certain need for Conference Committee resolution will no doubt delay final enactment until later in the first session. See AV. WEEK & SPACE TECH., May 7, 1979, at 27.
Although several bills were introduced, the earlier proposed H.R. 8729 is representative and serves to illustrate the general scheme the Ninety-Sixth Congress is likely to consider. The major provision of H.R. 8729 which is likely to survive or be revived during the next session is a new program to reduce existing non-compatible land uses and prevent such future compatibility problems around airports. Efforts in this area are directed at assisting airport operators and the surrounding communities. The bill would require establishment by regulation of uniform systems for measuring noise levels in and around airports, a determination of the impact of such noise on individuals, and the identification of land uses compatible with various levels of airport noise. The airport operators are supposedly encouraged to participate openly and honestly in this program by precluding the introduction of any list of compatible uses or noise maps as evidence in any court in the United States. This provision would also preclude an action for damages attributable to such noise for property acquired after the bill's enactment unless, in addition to other elements of a *prima facie* damage action, the plaintiff could demonstrate a significant change in airport operations occurring after the date of acquisition.

H.R. 8729 or its successor would also increase funding under the Airport and Airway Development Act of 1970 as well as provide for federal grants to assist airport operators and local governments in implementing programs approved by the Secretary of Transportation which are directed at improving airport noise compatibility with land uses in the surrounding impacted areas. Additional funds would also be provided for research and development activity in this area. Depending on the mood of Congress, it is not inconceivable that we might see resurrected the proposal to assist aircraft operators in meeting reduced noise standards by

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224 See note 220 supra. See also AV. WEEK & SPACE TECH., June 5, 1978, at 35.


226 This protection is merely illusory since the wording of section 106 of the proposed bill would not prevent discovery of such studies under the Federal Rules of Civil Procedure, but merely prevent their use as evidence. Once the items were produced pursuant to a Request to Produce under FED. R. CIV. P. 34, the cat would be out of the bag and usable evidence easily developed.

creating a fund through a series of surcharges on the flying public from which the operator could draw in order to retrofit or replace present equipment. This provision, however, which was present in several proposed bills introduced during the last session, has become highly politicized and most probably will become a victim of the compromise needed to keep the basic assistance program alive."

B. Bill to Combat International Terrorism

International, as opposed to domestic, terrorism is one of those subjects generally beyond the power of any one nation to affect, but upon which most legislatures, especially our own, feel compelled to act. H.R. 13387 was one of the most recent such proposals and was favorably reported out of the House Committee on Public Works and Transportation late in the second session of the Ninety-Fifth Congress. As was the case with virtually every other piece of comprehensive legislation affecting the aviation industry proposed during the last session, it was overshadowed by the Airline Deregulation Act of 1978.

The purpose of H.R. 13387 was to provide a method through which the United States could more effectively influence other countries to improve anti-terrorist measures at their own airports and hence better protect United States citizens traveling abroad. To this end, it would have required the President to make semi-annual reports to Congress on terrorist activities with special reports on any such incidents which involved United States citizens or property. The anti-terrorism bill would also have required the President to send Congress a list of all states which demonstrated a pattern of support for international terrorists. Appearing on the list would trigger automatic economic sanctions, primarily

228 Aside from such basic questions as who should finance or bear the burden of new equipment needed to muffle the airliners, even some of the bill's supporters questioned this provision in view of the fact that it would have assisted the European A-300B airbus, which at present has no comparably quiet domestic competitor, in penetrating the American market. H.R. REP. No. 836, 95th Cong., 1st Sess. 39-40 (additional views of Sen. Goldwater to H.R. 8729 (1978)). See also note 221 supra.

229 95th Cong., 2d Sess. (1978) [hereinafter referred to alternatively as "H.R. 13387" or the "anti-terrorism bill"].

230 See note 145 supra. See also AV. WEEK & SPACE TECH., October 23, 1978, at 29-30.
intended to deny such countries our military and technical assistance, as well as foreign aid.\footnote{221}

In addition to this psychological and economic pressure on the aiders and abettors of international terrorism, H.R. 13387 would have required the Secretary of Transportation to assess security measures at foreign airports\footnote{223} serving points in the United States and publish in the Federal Register the names of airports which fail to correct noted deficiencies. The Secretary would be similarly required to take the more effective and embarrassing action of posting the names of the delinquents in all United States airports. Certain permissive authority was also included which would have allowed the Secretary to effect the operating authority of air carriers operating between the deficient airport and the United States but only with the concurrence of the Secretary of State. The carrot accompanying this stick would be additional authority for the Secretary of Transportation to provide assistance, beyond that now provided by the Federal Aviation Administration, to foreign governments to promote international aviation security.

The legislative history of H.R. 13387\footnote{223} reviews briefly the existing international conventions addressing the terrorist problem, including the Hague Hijacking\footnote{224} and the Montreal Sabotage Conventions,\footnote{225} and takes special note of the Anti-hijacking Declaration reached at the Bonn Summit Conference on July 17, 1978.\footnote{226} In addition to the expected call for intensified action to combat international terrorism and a request for other governments to join them in this effort, the Bonn declarants resolved to take immediate action to terminate all flights between their respective

\footnote{221}{The President could suspend such sanctions for national security reasons which must, however, be explained in a written report to Congress. See note 229 supra.}

\footnote{223}{This is considerably broader than requirements laid on individual carriers serving the United States market.}


\footnote{225}{The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aircraft, 24 U.S.T. 546, T.I.A.S. 7570.}

\footnote{226}{H.R. REP. No. 1801, 95th Cong., 2d Sess. (1978). The seven countries which joined in the declaration (Canada, Federal Republic of Germany, France, Italy, Japan, United Kingdom and United States) account for more than fifty percent of the free world aircraft operations. Id.}
countries and any state which refused to extradite or prosecute hijackers and return the hijacked aircraft. The House Report takes pleasure in noting that implementing legislation is not needed to satisfy this resolve since the President was vested with such authority as early as the Anti-hijacking Act of 1974.\textsuperscript{237}

IV. THE GUATEMALA PROTOCOL

In a similar vein, Congress' preoccupation with the Panama Canal Treaties and more recently the Strategic Arms Limitation Talks (SALT) has resulted in what appears to be an almost indefinite postponement in its consideration of the amendments to the Warsaw Convention\textsuperscript{238} embodied in the Guatemala City Protocol of 1971\textsuperscript{239} as now incorporated in the Montreal Protocols of 1975.\textsuperscript{240} The Protocols, which were submitted to the Senate for advice and consent in January of 1977, would increase the liability limitations of the present convention in exchange for elimination of all rights of action against an international air carrier, including claims based upon wilful misconduct. To sweeten the proposal for the Senate, the Air Traffic Association of America proposed a supplemental compensation plan which would provide additional compensation for United States passengers or passengers purchasing their tickets in the United States. This plan was approved by the CAB in July of 1977, but is now again under 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.

Although the Panama Canal debate would probably have precluded consideration in any event, serious questions were raised in the Senate regarding the acceptability of the economic trade-offs embodied in the Protocols, their effect on, or abrogation of, traditional common-law tort principles and the appropriateness of approving them at a time when the supplemental compensation plan, which the Senate viewed as inextricably tied to the Protocols, was being challenged by consumer and other interested and affected

\textsuperscript{238} T.S. No. 876, 49 Stat. 3000.
\textsuperscript{239} ICAO DOCUMENT No. 8932/2 (2d ed., authenticated text in the Russian language as approved by Council, 1975).
\textsuperscript{240} ICAO DOCUMENT Nos. 9145-9148 (1975).
In view of the fact that the Senate will soon be taking up such "page one" issues as the change in our China policy and the new SALT agreement, it is doubtful that the Protocols will be considered for some time.

[^34]: See letter from Senators Richard Stone (D-Fla.) and James Pearson (R-Kan.) to Honorable John J. Sparkman (D-Ala.), Chairman, Senate Foreign Relations Committee, Mar. 6, 1978.